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**Private enforcement of EU competition law: recent  
developments, problems and prospects**

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## List of abbreviations:

AC	Appeal Cases
BB	Betriebs-Berater
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
CAT	Competition Appeal Tribunal
CDC	Cartel Damages Claims
CMLR	Common Market Law Review
Competition L. Int'l	Competition Law International
E.L.Rev.	European Law Review
E.P.L.Rev	European Private Law Review
EBLR	European Business Law Review
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports (EU case law)
EPS	Europejski Przegląd Sądowy
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
GWB	Gesetz gegen Wettbewerbsbeschränkungen
KG	Kammergericht
NCA	National Competition Authority
OFT	Office of Fair Trading
OLG	Oberlandesgericht
PUG	Przegląd Ustawodawstwa Gospodarczego
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
U. Pa. J. Int'l L	University of Pennsylvania Journal of International Law
UK	United Kingdom
US	United States of America
ZPO	Zivilprozessordnung

## **Introduction**

Private enforcement has been a very familiar subject in the United States. This was not the case in Europe until recently. In private litigation, Articles 101 and 102 TFEU have regularly been invoked as a defence (“shield”), mainly in contractual disputes, but they were almost never used proactively (as a “sword”) to claim damages and injunctions. In the light of the fact that national courts are bound to apply the EU competition laws and provide real and effective judicial protection to the rights derived from them, this raises the question why long years after the European Court of Justice has made this clear, the victims of EU antitrust infringements still very rarely obtain redress in national courts.

This thesis examines the subject of EU private antitrust enforcement - one of the most fundamental and difficult problems of competition law enforcement in the European Union. It is aimed to identify the factors which initially contributed to the dearth of antitrust litigation in Europe and outline the reasons for the current interest in private enforcement at both EU and national level of EU Member States. Furthermore, it is intended to show the EU initiatives in the field of private antitrust actions and to compare them with recent national developments in EU countries, the United Kingdom and Germany in particular. Finally, the thesis purports to explore the prospects for an increased level of private antitrust litigation in Europe and to consider possible directions for reform.

The main legal method applied throughout the work is the dogmatic legal method, however elements of the comparative method are also used in the third chapter. The thesis is based on legislative material from EU and EU Member States, jurisprudence of European and national courts, documents published on the Commission’s DG Competition website and, above all, European antitrust legal doctrine. Since in Poland the literature on the subject concerned is scarce, the majority of the material used is derived from foreign sources. They are European legal journals, external reports prepared for the European Commission as well as monographs published on EU competition law and specifically on EU private antitrust enforcement. The law is stated as of 1 August 2011. The work is divided into three chapters.

The first chapter attempts a definition and delimitation of private enforcement. The advantages of private enforcement and the relevance of EU competition law’s enforcement objectives are examined. A related question about the interplay between the protection of the public and private interests is addressed. Finally, the interrelationship between private and public enforcement is also subject to analysis.

The second chapter examines the application of the EU competition rules by national courts in a historical perspective. It describes the foundational public enforcement system of EU competition law under the “old” Regulation 17/1962 and then looks at the position of national courts in the new decentralized system of EU antitrust enforcement under Regulation 1/2003. The chapter subsequently proceeds to examine the basic substantive and procedural aspects of EU private antitrust enforcement. It starts with a description of the basic EU law principles that govern the enforcement of EU law by national courts and then analyses the two ground-breaking rulings of the European Court of Justice, which fully explore the complexities of EU private antitrust litigation. Finally, the chapter investigates the initiatives of the European Commission aimed to strengthen the remedial actions of private individuals in the field of EU competition law. In this regard, particular attention is devoted to the 2008 White Paper on damages actions for breach of the EC antitrust rules, the legitimacy of its aims as well as the suitability of the measures proposed therein.

The third chapter is devoted to the national developments in the field of private antitrust enforcement at the level of EU Member States. This analysis is by no means exhaustive but rather aims to acquaint the reader with the most important changes and trends in national legislations that are the consequence of the European Commission’s initiatives and the ECJ case law. A complete covering of the specific mechanics of the system of private EU antitrust actions in all EU Member States would necessitate an extensive analysis of substantive and procedural rules in 27 jurisdictions and would go beyond the limits of this work. Therefore, solutions from only two European jurisdictions are subject to detailed description. Germany and the United Kingdom are chosen here as case studies. In the European antitrust scholarship these states have been considered to have come the furthest with regards to private enforcement of both EU and national competition law. They hence provide a good platform for comparison with the policy recommendations of the Commission’s White Paper. Moreover, they give a good picture of the problems that need to be tackled through legislative reform in other EU Member States, if a more lively private enforcement culture in Europe is to develop in the upcoming years.

The thesis ends with a short conclusion, which encapsulates the main findings of the work as well as gives an outlook for the development of private antitrust enforcement in Europe in the near future.

## I. Fundamentals of private antitrust enforcement

### 1. Private enforcement: definition and purpose

A definition of private antitrust enforcement is called for at the outset.<sup>1</sup> According to Assimakis Komninos, the term can be seen from two different perspectives.<sup>2</sup> If it were to be given a broad meaning, i.e. if it meant enforcement of competition law through initiative of private parties, than one could argue that such definition seemed to cover administrative complaints to the European Commission or national competition authorities (NCAs) requesting to take action against antitrust violations.<sup>3</sup> This has been described in the literature as “privately triggered public enforcement”.<sup>4</sup> If the criterion were so general, than indeed, one could conclude that there is already a developed system of private enforcement at the central level of EU competition law enforcement, i.e. the Commission, as well as in most of the EU Member States.<sup>5</sup> However, this is not how private enforcement should be understood.

There is broad consensus in the literature that what is meant by private antitrust enforcement is litigation, in which private parties (entrepreneurs and/or consumers) advance independent civil claims or counterclaims based on competition provisions before a national

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<sup>1</sup> The expressions competition law and antitrust law are used interchangeably.

<sup>2</sup> A.P. Komninos, *EC private antitrust enforcement. Decentralised Application of EC Competition Law by National Courts*, Oxford/Portland 2008, p. 1.

<sup>3</sup> Under Article 7 of Regulation No. 1/2003 any natural or legal person who can show a legitimate interest can lodge a complaint requesting the Commission to take action against violations of Articles 101 and 102 TFEU. According to the judgment of the General Court (former Court of First Instance), if the Commission does not intend to act upon a complaint, it must state the reasons in its decision rejecting the complaint, which can be subjected to judicial review of the General Court.

Council Regulation (EC) No. 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1; this regulation is applicable from 1 May 2004; Judgment of the Court of First Instance of 18 September 1992 in Case T-24/90, *Automec II*, [1992] ECR II-2250, para. 81.

<sup>4</sup> F. G. Jacobs, T. Deisenhofer, “Procedural Aspects of the Effective Private Antitrust Enforcement of EC Competition Rules: A Community Perspective” in: C. Ehlermann, C. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland 2003, p.197.

<sup>5</sup> See Sec. 54(1) of the German Act Against Restraints of Competition (GWB) which stipulates that the cartel authority acts on its own initiative or upon request. Act Against Restraints of Competition in the version published on 15 July 2005 (BGBl. I p. 2114; 2009 p. 3850 as last amended by Article 3 of the Act of 22 December 2010 (BGBl. I p.2262). English translation available at: [http://www.gesetze-im-internet.de/englisch\\_gwb/act\\_against\\_restraints\\_of\\_competition.pdf](http://www.gesetze-im-internet.de/englisch_gwb/act_against_restraints_of_competition.pdf) (accessed on 1 July 2011).

The current Polish Competition Act introduces a purely public enforcement model. Antitrust proceedings before the President of the Office for the Protection of Competition and Consumers (UOKiK) can be initiated only *ex officio* (Art. 49). Individuals are not allowed to lodge a claim on infringements of the prohibition of cartels or abuse of dominant position, which would oblige the President of the UOKiK to initiate proceedings. They may however submit a notification of an infringement, which is non-binding to the competition authority (Art. 86).

Act of 16 July 2007 on Competition and Consumer Protection (Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, Dz.U. 2007 Nr 50, poz. 331 ze zm.).

court.<sup>6</sup> What is characteristic to this mode of enforcement is that it leads to some sort of civil sanction against the infringer of competition law such as damages, injunctive relieves, nullity of a contract etc.<sup>7</sup> Therefore, cases in which private parties participate in on-going litigation between an administrative body and a defendant, e.g. a third party intervention at the level of EU courts,<sup>8</sup> or at the national level depending on the procedural rules, e.g. third party intervention in review proceedings following a decision of an NCA, are not covered by the definition.<sup>9</sup> The courts responsible for administering the civil claims based on EU or national competition law are the national courts of the Member States. There is no court at the EU level competent to hear actions brought by private parties for breach of EU antitrust rules.<sup>10</sup>

## 2. The modalities of private antitrust enforcement

### A. Sword - shield litigation

Before proceeding to further characteristics of private antitrust enforcement, it is important to analyze the ways in which competition rules can be used in civil litigation. The literature mainly describes two application modes and differentiates between:

- cases in which the competition rules are used proactively as a “sword”, that is as a basis for claiming something from the other side (e.g. claims for damages, injunction, interim measures, supply, admission to a distribution system) in order to compensate and /or to put an end to the harm caused by the infringement of the competition law;
- those cases in which competition rules are pleaded defensively as a “shield” against actual or potential claims by the other side, which may be based on a contract but also on other

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<sup>6</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 2; R. Whish, *Competition Law*, 6th edition, Oxford 2008, p.290; D. Woods, A. Sinclair, D. Ashton, “Private enforcement of Community competition law: modernization and the road ahead”, *Competition Policy Newsletter*, No. 2/2004, p.31; A. Jurkowska, “Private Enforcement of the Community Competition Law”, *Zeszyty Centrum Europejskiego Natolin*, No. 19/2004, p. 43; A. Jurkowska, “Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej”, *PUG*, No. 1/2008, p.22; M. Sieradzka, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa 2010, p. 91.

<sup>7</sup> Commission’s MEMO/05/489, *European Commission Green Paper on damages actions for breach of EC Treaty anti-trust rules – frequently asked questions*, 20 December 2005.

<sup>8</sup> Art. 40 (2) of the Statute of the European Court of Justice of the European Union.

<sup>9</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 1.

<sup>10</sup> Commission’s Staff Working Paper, SEC(2005) 1732, *Annex to the Green Paper. Damages actions for breach of the EC antitrust rules*, 19 December 2005, p. 6.

rules (e.g. nullity defence in contractual claims for performance or for damages because of non-performance).<sup>11</sup>

The use of Article 101 TFEU as a shield in contractual disputes has its basis directly in the Treaty on the Functioning of the European Union.<sup>12</sup> Article 101 (2) TFEU provides that “any agreements [...] prohibited pursuant to this article shall be automatically void”. Article 102 TFEU contains no such declaration of nullity. This omission, however, is not surprising since Article 102 TFEU does not explicitly prohibit agreements but focuses on a wider range of conduct. Nevertheless, it is commonly assumed that this Article prohibits many contracts and contractual terms and the effect in relation to the sanctioned agreements is similar to that of Article 101 (the offending provisions are void).<sup>13</sup> In *BRT v. SABAM*, on a preliminary reference from a national court before which Article 102 TFEU was raised in an intellectual property infringement case, the Court of Justice considered that “as the prohibitions of Articles 101 (1) and 102 TFEU tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard”.<sup>14</sup>

In Europe, competition law provisions seem to be used mainly as a shield and only rarely as a sword.<sup>15</sup> In the literature, however, such state of affairs is a cause for almost unanimous disappointment.<sup>16</sup> Various authors, as opposed to the European Commission,<sup>17</sup> contend that the “shield litigation” cannot directly be classified as private enforcement. They stress that cases where competition law is pleaded as a defence have minimal contribution towards the development of a more effective system of private enforcement.<sup>18</sup> According to

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<sup>11</sup> A. Komninos, „Introduction” in: C. Ehlermann, C. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland 2003, p. xxvii; U. Boge, K. Ost, “Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives”, *ECLR*, 27(4), 2006, p. 197; F. G. Jacobs, T. Deisenhofer, “Procedural Aspects of...”, p.189.

<sup>12</sup> The Treaty on the Functioning of the European Union (consolidated version), [2008] OJ C 115/47, 09.05.2008.

<sup>13</sup> R. Whish, *Competition Law*, p.316; A. Jones, B. Sufrin, *EU Competition Law. Text Cases and Materials*, 4<sup>th</sup> edition, Oxford 2011, p. 1200.

<sup>14</sup> Judgment of 30 January 1974 in Case 127/73, *BRT v. SABAM*, [1973] ECR 51, para. 16.

<sup>15</sup> W. Wils, “Should Private Enforcement Be Encouraged in Europe?”, *World Competition*, 26(3), 2003, p. 475.

<sup>16</sup> F. G. Jacobs, T. Deisenhofer, “Procedural Aspects of...”, p.189; C.A. Jones, *Private enforcement of Antitrust Law in the EU, UK and USA*, Oxford 1999, p.86.

<sup>17</sup> In the view of the Commission, actions aimed at the annulment of an agreement on the ground of its incompatibility with competition law can be classified as private enforcement. European Commission, *Report on competition policy 2004*, Luxembourg 2005, p.56, available at: [http://ec.europa.eu/competition/publications/annual\\_report/index.html](http://ec.europa.eu/competition/publications/annual_report/index.html) (accessed on 3 July 2011).

<sup>18</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 3 ; J. Basedow, “Panel one Discussion; Substantive Remedies”, in: C. Ehlermann, C. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland 2003, p. 32.

F.G. Jacobs and T. Deisenhofer, in such cases (e.g. in contractual proceedings) the competition provisions:

- are frequently not invoked by victims of a restraint, but by participants therein;
- are mostly pleaded incidentally, when the defendant might be attacked in court, and not because competition is endangered;
- are often applied when competition has already been harmed;
- do not fulfill the compensatory function;
- act as a deterrent only in cases where contractual stability is important (e.g. distribution systems); however they have no deterrent effect with regard to *ad-hoc* anti-competitive conduct directed against third parties (such as boycotts, predatory pricing or price discrimination);
- have no impact on serious infringements of the competition rules (such as the operation of cartels, market sharing) because potential plaintiffs are normally not interested in enforcing the sanctions in the State courts, but are invoked on more innocent agreements where the harm to competition is much less obvious.<sup>19</sup>

Both authors conclude that the passive use of competition provisions does not normally contribute to a better understanding or a clarification of the rules on serious infringements.<sup>20</sup> The sanction of voidness and its use as a defence certainly has its role in persuading undertakings to obey the law, however from the private enforcement perspective, cases where antitrust rules are pleaded proactively are unquestionably more significant. Where Articles 101 and 102 TFEU are used as a sword (e.g. in the form of damages claim) the proceedings may, by contrast:

- lead to compensation for the harm caused by the infringement of the competition rules;
- have a preventive deterrent effect on the undertakings involved, and if made public, also on other undertakings;
- prevent or stop anti-competitive conduct at an early stage through injunctions or interim measures;
- lead, if publicized, to a better understanding and clarification of competition law, particularly with regard to serious infringements, in which civil actions are most likely to be brought.<sup>21</sup>

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<sup>19</sup> R. Whish, *Competition Law*, pp. 309-310.

<sup>20</sup> F. G. Jacobs, T. Deisenhofer, "Procedural Aspects of...", p.190.

<sup>21</sup> *Ibid.*, p.190.

As to the use of Articles 101 and 102 TFEU as a sword, the Treaty contains no specific provision governing private rights of action for damages or injunctions following an infringement of the EU antitrust rules,<sup>22</sup> it is however established that private proceedings in the national courts are possible by virtue of the fact that Articles 101 and 102 have direct effect.<sup>23</sup> Regulation No. 1/2003 in its Article 6 provides that “national courts shall have the power to apply Articles 101 and 102 of the Treaty”. What follows from recital 7 of the Regulation, according to which “national courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of the infringements”, is that the national court proceedings cover both the use of competition provisions as a shield and as a sword. The possibility of actions for injunctions as well as damages for breach of competition rules before national courts was also confirmed by the European Court of Justice.<sup>24</sup>

While injunctions (usually of a temporary nature) have been granted relatively often by EU Member States’ courts, damages awards have been rare in Europe as opposed to the US. Yet, damages claims are considered to be the most important pillar of private antitrust enforcement.<sup>25</sup> The reasons for this state of affairs in Europe can be attributed to a variety of factors and they will be analyzed in the next chapters of this work.

## **B. Administrative-public enforcement – civil-private litigation**

The next categorisation is made on the basis of the agents entrusted with the enforcement of competition law and the remedial outcomes. Public and private enforcement are submitted to be the two pillars of enforcement of EU antitrust rules. The common feature of both models is that they are based on infringements of competition law provisions.<sup>26</sup>

Administrative enforcement is undertaken by specifically entrusted authorities (the Commission at the EU level and the NCAs at the Member States level), which investigate

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<sup>22</sup> Contrast the position in the US, see Clayton Act 1914, ss. 4 and 16.

<sup>23</sup> A. Jones, B. Sufrin, *EU Competition Law...*, p.1185; for a detailed analysis of the principle of direct effect, see M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, Warszawa 2008, pp. 39-103.

<sup>24</sup> The ECJ held that a national court must ensure that interim measures are available where necessary to protect EU rights. Judgment of 19 June 1990 in Case 213/89, *The Queen v. Secretary of State for Transport, ex parte Factortame*, [1990] ECR I-2474, para. 21. The possibility of action for damages for violation of Article 101 TFEU was confirmed in *Courage v. Crehan* case, which is discussed below.

<sup>25</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 3.

<sup>26</sup> K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów: komentarz*, Warszawa 2008, p. 51.

suspected violations of competition law, address their decisions to private individuals and impose administrative measures and sanctions such as fines on infringing undertakings. Fines are paid into the public budget and the activities of public enforcers are financed by the state. The characteristic feature of administrative-public enforcement is the verticality of the dispute, which remains one between the state and private individuals.

Private enforcement, on the other hand, takes place horizontally, between individuals within a framework of a civil process. The sanctions imposed are of private nature and essentially function as remedies for the victim of the anti-competitive behaviour, who can make up for his losses only before a civil court, as public enforcement cannot have any direct bearing here.<sup>27</sup> The functions of the remedies in the context of private enforcement are ambiguous in the literature. Without doubt, they serve primarily the private interest in that they aim at compensating and protecting the victim of an anti-competitive practice, however, according to some authors, they “also reflexively serve the public interest in maintaining effective competition in the market”.<sup>28</sup> Private enforcement actions are paid for by the individual who brings the action to court but that individual may recover the money paid out as part of the award of compensation, if his action is successful in court.<sup>29</sup>

### **C. Standalone – follow-on litigation**

The final classification, which is of great significance and also pertains to the relationship between private and public enforcement, is between “standalone” and “follow-on” litigation of civil antitrust claims.

A standalone action is one where the plaintiff must prove an infringement of the competition rules without the benefit of a prior decision to that effect by the Commission or an NCA.<sup>30</sup> It is important to note that a previous interference by a public authority does not condition the right to sue the perpetrators of an anti-competitive act and claim damages or injunction in the national court, as public enforcement does not take priority over private litigation. In standalone actions, however, the plaintiff’s position is much more difficult, as he

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<sup>27</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 9 ; For similar conclusions on the basis of the Polish Act on Competition and Consumer Protection see K. Kohutek, M. Sieradzka, *Ustawa o ochronie...*, p. 422.

<sup>28</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 9

<sup>29</sup> R. Zäch, R.A. Heizmann, „Durchsetzung des Wettbewerbsrechts durch Private – Vorschläge zur Erleichterung der Prozessführung“, in: A. Nowicka (ed.), *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Poznań 2005, p. 1062.

<sup>30</sup> R. Whish, *Competition Law*, p. 300.

has the dire task to prove that the infringement of competition law has indeed taken place.<sup>31</sup> According to Komninos, raising a competition law point by way of defence or counterclaim to a breach of contract also qualifies as stand-alone litigation, if there has been no intervention of public authority. In this case, again the party that raises the competition law problem has to prove the infringement.<sup>32</sup>

The follow-on litigation, on the other hand, takes place when the Commission or an NCA has previously issued a decision establishing a breach of competition law.<sup>33</sup> Proving an infringement in the court will, of course, generally be easier in such a situation. While, in principle, private enforcement remains independent of public enforcement, it may well be that the existence of a public decision eases the burden of proof imposed on the plaintiff or is even binding for the court as to its findings. The latter rule is stipulated expressly by EU law with regard to Commission's decisions.

Whenever the Commission finds a breach of Article 101 and 102 TFEU, victims of the infringement can, by virtue of Article 16 (1) of Regulation 1/2003, rely on this decision as binding proof in civil proceedings. Article 16 (1) of Regulation 1/2003 states that, where national courts rule on a matter which has already been the subject of a Commission decision under Article 101 or 102 TFEU, they cannot reach conclusions running counter to that of the Commission.<sup>34</sup> The first sentence of Article 16 (1) gives expression to the ECJ's judgement in *Masterfoods*,<sup>35</sup> in which the court held that the duty of cooperation set out in EU law requires a national court to follow a Commission decision dealing with the same parties and the same agreement in the same Member State.<sup>36</sup> If the Commission's decision is on appeal to the General Court or the ECJ pursuant to Article 263 TFEU, the national court should stay its proceedings pending a final judgement on the matter by EU courts.<sup>37</sup> Finally, if a national court considers that a Commission decision is wrong, it must not declare it invalid, but is obliged to refer a question to the ECJ for preliminary ruling (Art. 267 TFEU).<sup>38</sup>

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<sup>31</sup> For examples of standalone actions in UK courts, in which the plaintiffs failed to establish a breach of competition law, see A. Jones, B. Sufrin, *EU Competition Law...*, pp. 1216-1217.

<sup>32</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 7.

<sup>33</sup> For examples of follow-on actions in UK courts, see R. Whish, *Competition Law*, p. 307.

<sup>34</sup> The Regulation does not state specifically that an appellate court in a Member State would be bound by a Commission decision even where a lower court had reached a contrary conclusion prior to Commission's decision, nonetheless this point was established in *Masterfoods*.

<sup>35</sup> Judgment of 14 December 2000 in Case 344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, [2000] ECR I-11369, para. 16.

<sup>36</sup> For the principle of cooperation, see Article 4(3) TEU. Treaty on the European Union, [2010] OJ C 83.

<sup>37</sup> Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/54, para. 13.

<sup>38</sup> *Ibid.*, para 13.

With regard to decisions by NCAs only several national competition laws in the EU Member States, notably UK and German law, state explicitly that the civil courts in follow-on proceedings are bound by the NCAs decisions.<sup>39</sup> There are, though, legal systems where the existence of an infringement decision by a public authority does not confer any benefit upon the follow-on civil plaintiff. The Commission's White Paper on damages actions aims at changing this situation in the EU,<sup>40</sup> so that final infringement decisions taken by a public authority as well as final review judgements by a court upholding the NCA decision can be made binding as to the finding of the infringement on the follow-on actions for damages. A rule of this effect, according to the Commission, would ensure a more consistent application of Articles 101 and 102 TFEU by different national bodies and ensure legal certainty. It would also considerably increase the effectiveness and procedural efficiency of actions for antitrust damages, since the duplication of factual and legal analysis of the case in administrative-public proceedings and civil-private litigation would be avoided. Last but not least, the existence of such a rule would substantially improve the position of the plaintiffs in subsequent follow-on suits in national courts, as they would not have to produce all the evidence once again.

### **3. The interrelationship between public and private antitrust enforcement: independence as principle**

As mentioned above, potential plaintiffs do not need to wait for a condemnation of anti-competitive practice in a public enforcement action before seizing civil courts. That means that in principle there is no hierarchical relationship between public and private enforcement and the two models remain institutionally independent of each other. Nevertheless, the act of making prior public authority decisions binding upon civil courts may

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<sup>39</sup> See, for instance, Sections 18 and 20 of the UK Enterprise Act 2002, inserted as sections 47A and 58A into the UK Competition Act 1998, which specifically allow follow-on claims to be brought before the Competition Appeal Tribunal where a breach of Article 101 or 102 TFEU (or the UK domestic equivalent) has previously been established by the Commission or the UK's Office of Fair Trading. The Act does not provide for follow-on action on the basis of other NCAs decisions. UK Enterprise Act 2002 available at: <http://www.legislation.gov.uk/ukpga/2002/40/contents> (accessed on 5 July 2011).

In Germany, section 33(4) of the German Competition Act confers binding effect on all Commission, Bundeskartellamt, and even other NCA's decisions in follow-on civil litigation. Another example can be found in Article 88/B(6) of the Hungarian Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices), according to which the decision of the Hungarian Competition Authority is binding upon the court hearing the follow-on lawsuit. English translation available at: <http://www.gvh.hu/domain2/files/modules/module25/151308A2868BD0C90.pdf> (accessed on 5 July 2011).

<sup>40</sup> European Commission, *White Paper on damages actions for breach of the EC antitrust rules*, COM (2008) 165 final, 02.04.2008, p. 6. The Commission's White Paper is discussed in detail in chapter 2.

raise questions as to the equal standing of the two models of enforcement. In addition, it can be seen as problematic when considered in the light of the principle of separation of powers as well as judicial independence.<sup>41</sup>

It is argued in the literature, that where the binding decisions emanate from the Commission, this can be justified by reference to the unique features of EU law, especially the principle of supremacy of EU law.<sup>42</sup> The fact that the Commission is entrusted with a primacy over national proceedings and courts, does not mean that public enforcement is hierarchically superior to private enforcement. This primacy is not one of the Commission, as competition authority, over civil courts, but rather of the Commission, as supranational EU organ, over national courts.<sup>43</sup> Such reasoning is sound, also when one takes into account that it is the ECJ and not the national courts that rules on the validity of the Commission decisions.

More problematic is the issue of making the decisions of NCAs binding on national courts. The proposals of the Commission in the White Paper create an impression of public enforcement “primacy” and institutional dependency of the public and private antitrust enforcement. In reality, however, the proposals do not aspire to give decisions by public enforcement agencies binding effect over all kinds of parallel civil proceedings.<sup>44</sup> If one reads the White Paper carefully, it is clear that the NCAs decisions should bind only those national courts which have to rule in actions for antitrust damages.<sup>45</sup> It is not proposed that findings of national competition authorities should have a bearing on civil litigation when, for instance, the litigants raise the nullity of a contract or when the parties seek remedies other than damages. If the binding effect of the NCA’s decisions were to be extended to such cases, then indeed, one could speak of a principle of primacy of public over private antitrust enforcement. The courts would be entirely deprived of the possibility to apply the substantive competition law norms and the involvement of judges in antitrust enforcement in Europe would be impaired.<sup>46</sup>

The analysis of the UK and German competition acts, which have recently been amended and confer a binding effect on final NCAs decisions declaring an antitrust

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<sup>41</sup> A. Komninos, “Public and Private Antitrust Enforcement in Europe: Complement? Overlap”, *CompLRev*, 3(1), 2006, p. 16.

<sup>42</sup> D. Waelbroeck, “Private Enforcement: Current Situation and Methods of Improvement”, in: I. Lianos, I. Kokkoris (eds), *The Reform of EC Competition Law: New Challenges*, Aalphen ann den Rijn 2010, p. 24.

<sup>43</sup> A. Komninos, “Public and Private Antitrust...”, p.16.

<sup>44</sup> *Ibid.*, p. 19.

<sup>45</sup> According to the Commission, the NCA decision and a final judgment by a review court upholding the NCA decision or itself finding an infringement, should be accepted in every Member State “as irrebuttable proof of the infringement in subsequent civil antitrust damages cases”(emphasis added). European Commission, *White Paper on damages actions...*, p. 6.

<sup>46</sup> A. Komninos, “Public and Private Antitrust...”, p.19.

infringement, leads to the same conclusions. Section 58A of the UK Competition Act clearly specifies that the binding effect of decisions “applies to proceedings before the court in which damages or any other sum of money is claimed in respect of an infringement”. Thus, “there is no general principle of law that makes findings by the public authority binding on all kinds of civil proceedings.”<sup>47</sup> Section 58A of the UK Act refers uniquely to follow-on civil actions for damages, and the objective of this provision is similar to the goals of the White Paper – to encourage actions for damages and facilitate the civil proceedings from an evidentiary point of view.

Likewise, under Section 33(4) of the recently amended German Competition Act (7. GWB-Novelle), the binding effect of competition authorities’ findings is limited to claims for damages. Thus, binding effects cannot be invoked by defendants if they are sued for performance or in actions for injunctions. However, this does not apply to findings of the European Commission; rather, it follows from Article 16(1) of Regulation 1/2003 that national courts are at all times prevented from ruling against the decisions of the Commission. As regards the authority’s findings stating that the objected behaviour does not infringe competition law, the binding effect is unclear. However, in the light of Article 16(1) of Regulation 1/2003 it appears that such declarations are binding if issued by the European Commission.<sup>48</sup>

With reference to the independence of private enforcement vis-à-vis public enforcement, the situation in Germany is also clear. The Higher Regional Court Tribunal in Düsseldorf confirmed in one of its recent cement cartel rulings<sup>49</sup> that Section 33(4) of the German Competition Act does not entail a duty for the civil courts to stay proceedings and await the adoption of an infringement decision by a competition authority or the decision becoming final. According to the court, the wording of the provision is clear as to the fact that administrative proceedings leading to fines have no priority over concurrent civil proceedings. Thus, when there has been no final infringement decision, the civil court has the power to adjudicate on the merits of the case, since it enjoys parallel competence to deal with an action for damages based on the competition law violation. This ruling is fully compatible with the principle of independence of private enforcement.<sup>50</sup>

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<sup>47</sup> Ibid., p. 19.

<sup>48</sup> M. Dietrich, W. Gruber, M. Hartmann-Rüppel, “Germany”, in: I. Knable – Gotts (ed.), *The Private Competition Enforcement Review*, London 2010, pp. 84-85.

<sup>49</sup> OLG Düsseldorf, Resolution of 3 May 2006 in case VI-W (Kart) 6/06, para. 19, available at: <http://openjur.de/u/119124.html> (accessed on 7 July 2011).

<sup>50</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 19.

This principle, on the other hand, is not taken into account in private enforcement procedure in Hungary, where superiority of public enforcement is rather clear. Under the Hungarian Competition Act, the civil court is obliged to notify the Hungarian Competition Authority about lawsuits to be assessed under the competition law provisions. In such a situation, the Hungarian Competition Authority may act as *amicus curiae* until the end of the trial, it may, though, as well initiate competition supervision proceedings in the case concerned, which oblige the court to stay its proceedings until the decision of the authority or the review judgement becomes legally binding. The court is bound both by the statement on the existence or the absence of the infringement.<sup>51</sup>

With regard to the situation in Poland, there is no explicit provision in the Polish Act on Competition and Consumer Protection of 2007 concerning the prejudicial nature of the decisions of the President of UOKiK. This issue, however, was dealt with by the Polish Supreme Court several times. Although its position on the matter was inconsistent over the years,<sup>52</sup> the current case law strands reflect the jurisprudence of the ECJ and other EU national courts. In a Resolution of the Supreme Court panel of 23 July 2008 the Supreme Court held that the civil court may make its own findings on the abuse of dominant position if this is a prerequisite for the nullity of the contract and there is no prior final decision of the President of the UOKiK finding the abuse of dominant position.<sup>53</sup> Thus, the Supreme Court confirmed that a pre-existing decision of the Polish Competition Authority finding an antitrust infringement has a binding authority for civil courts.<sup>54</sup> On the one hand, the court stressed the independence of the two pillars (public and private) of antitrust law enforcement and their different objectives, on the other hand, however, it did not limit the binding effect of competition authority decisions to claims for damages, as it is done in Germany or the UK and proposed by the European Commission. The Supreme Court rather accepted the primacy of the public enforcer regardless of the procedural setting in the civil court (i.e. the litigants raise the nullity of a contract due to competition law infringements or seek a remedy other than damages) and noted that such position is in accordance with the general principle that civil courts are bound by final administrative decisions. The Supreme Court further held that if the European Commission or the President of the UOKiK have not yet ruled in a case, a

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<sup>51</sup> Section 88B(6) of the Hungarian Act on the Prohibition of Unfair and Restrictive Market Practices.

<sup>52</sup> For detailed description of the previous Polish Supreme Court's judgments, see A. Jurkowska, "Antitrust Private Enforcement – Case of Poland", *Yearbook of Antitrust and Regulatory Studies*, 1(1), 2008, pp. 70 – 74.

<sup>53</sup> The Resolution of the Supreme Court panel of 23 July 2008, III CZP 52/08.

<sup>54</sup> The prejudicial nature of the decision adopted by the President of the UOKiK is accepted in Polish legal doctrine. See: M. Sieradzka, *Ustawa o dochodzeniu roszczeń...*, p. 104; A. Jurkowska, "Antitrust Private...", p. 73; A. Jurkowska, D. Miąsik, T. Skoczny, M. Szydło, „Nowa uokik z 2007 r. – kolejny krok w kierunku doskonalenia publicznoprawnej ochrony konkurencji w Polsce”, *PUG*, No. 4/2007, pp. 13-21.

civil court is free to make its own findings and decide for the sake of its plaintiff. However, in order to avoid the inconsistent application of competition law provisions by the President of UOKiK and the civil court, the court should consider staying its proceedings on the basis of Article 177 § 1 Point 3 of the Polish Code of Civil Procedure when the Polish Competition Authority is simultaneously investigating a case.<sup>55</sup> Thus, the Polish Supreme Court does not go as far as the Hungarian legislator. It even concludes that the stay of the proceedings must not lead to stripping the civil court of its essential competence to protect the individual interests of the private litigants.

#### **4. Public and private antitrust enforcement and the goals of competition law enforcement**

##### **A. Antitrust enforcement objectives**

The pairing of public and private enforcement of legal rules is not distinctive for antitrust rules. It undoubtedly precedes those laws and expresses more fundamental concepts about the relationship between the state and private individuals and their respective roles in the implementation of the law.<sup>56</sup>

The antitrust scholarship identifies several goals of competition law enforcement, which are substantively interconnected. The primary goal of antitrust enforcement is to ensure that antitrust prohibitions are not violated and that the anticompetitive effects which the prohibitions aim to counteract are avoided. This is done principally through deterrence, i.e. by creating a credible threat of sanctions such as administrative penalties or private damages in order to alter the potential violator's cost/benefit calculation and thus make him refrain from infringing practices.<sup>57</sup> According to W. Wils, deterrence is probably particularly effective in the area of antitrust, because antitrust infringements generally result from business decisions which disregard the law in pursuit of corporate gain.<sup>58</sup> The second objective pursued by antitrust enforcement is injunctive and aims to bring the infringement to an end, when the violation of competition law prohibitions has already taken place.<sup>59</sup> A possible third goal of

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<sup>55</sup> Resolution of the Supreme Court Panel of 23 July 2008, III CZP 52/08.

The Polish Code of Civil Procedure (Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz.U. 1964 Nr 43, poz. 296 ze zm.).

<sup>56</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 7.

<sup>57</sup> W. Wils, "Should Private Enforcement Be Encouraged...", p. 478.

<sup>58</sup> *Ibid.*, p. 478.

<sup>59</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 7.

antitrust enforcement is the pursuit of corrective justice through compensation. The idea behind the compensatory or restorative objective is not to prevent antitrust violations from happening – though compensation awards can also have a deterrent function – but to correct for the consequences when an infringement has already occurred, by making the party which committed the violation compensate the other parties for the injury they innocently suffered. The fourth goal aims to punish the perpetrator of the illegal acts and also to deter him and others from future transgressions. The fifth goal aims to restore competition in the market, thereby protecting consumers interests and ensuring an allocation of resources.

Ideally, all these objectives can be pursued inside an enforcement system that combines public and private elements. It emerges clearly that public enforcement is superior to public enforcement in achieving corrective justice. Although sanctions imposed by public authorities can be reallocated to the society as whole, or potentially result in alleviation of tax burdens for citizens, “direct damage awards can serve the goal of *restitution in integrum*, i.e. putting victims of antitrust injury in the same condition in which they would have been, had the antitrust violation not occurred. In this respect, private enforcement can be seen as a reflection of antitrust injury as a tort law matter.”<sup>60</sup> Also, Komninos observes that the public competition authorities may pursue the compensatory objective in an informal way. He notes that „there are cases where the public agency enforcing the competition rules may take into account the injury to specific victims of an anti-competitive practice and impose on the perpetrator the obligation to compensate those persons. [...] The public agency may pursue this informally, for example through an informal settlement.”<sup>61</sup> In terms of comparative institutional competence, there is no reason to think that competition authorities are particularly well suited to award civil damages and decide such issues as causation or the amount of harm.<sup>62</sup> Awarding damages to compensate for harm caused by antitrust violations, at least in follow on litigation, is not fundamentally different from what courts regularly do

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<sup>60</sup> Report for the European Commission, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, 2007, p. 58, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/impact\\_study.pdf#page=441](http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441) (accessed on 12 July 2011).

<sup>61</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 8.

<sup>62</sup> For a proposal to confer powers on antitrust authorities to award civil damages to victims of anti-competitive behaviour, see: I. Arregui, “Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Spain”, LIDC Questions 2001/2002, p. 5, cited after: A.P. Komninos, *EC private antitrust enforcement...*, p. 8.

when rendering judgments in other areas of tort law.<sup>63</sup> Therefore, the pursuit of corrective justice should remain their task.

As regards the punitive aspect, public enforcement is undoubtedly predominant. In the majority of European countries, the view is and has always been, that damages are only meant as compensation for injury suffered and have no punitive goal. The plaintiff will receive no more but also not less than the damage actually suffered. This allows for full compensation of the plaintiff and prevents unjust enrichment.<sup>64</sup> By contrast, in the United States, punishment and deterrence are accepted as elements of civil remedies. This is the case of punitive antitrust damages, which are awarded to a plaintiff in a civil lawsuit, but have mainly a retributive and deterrent function. Many forms of punitive damages exist, for instance treble damages for certain infringements of antitrust law (§4 Clayton Act), where the amount of compensatory damages is simply tripled. In Europe, however, where it is agreed that the state has the monopoly to punish, such damages awards are generally considered incompatible with the public policy (*ordre public*).<sup>65</sup> In addition, it is held that the award of punitive damages following a fining decision of a competition authority breaches the fundamental principle of *ne bis in idem*.<sup>66</sup>

## **B. Complementarity between public and private antitrust enforcement**

It is sometimes argued, especially by public enforcement officials, that the paucity of private enforcement in Europe is a desirable situation, as private actions cannot as such make a substantial contribution to the effectiveness of competition law enforcement.<sup>67</sup> Additionally, it has been observed that private enforcement of laws is a characteristic feature of US law, because of the lack of specialised public agencies to the same extent as in Europe and the possibility of private actions to bridge the antitrust enforcement gap. Finally, it has been noted

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<sup>63</sup> W. Wils, “The relationship between Public Antitrust Enforcement and Private Actions for Damages”, *World Competition*, 32(1), 2009, p. 12.

<sup>64</sup> M. Hazelhorst, „Private enforcement of EU Competition Law: Why Punitive Damages are a Step Too Far?“, *European Review of Private Law*, 4, 2010, p. 767.

<sup>65</sup> For the situation in Germany, see for instance, R. A. Schütze, “The Recognition and Enforcement of American Civil Judgments Containing Punitive Damages in the Federal Republic of Germany”, *U. Pa. J. Int'l L.*, 11(3), 1989, p. 600. In France, the French *Court de Cassation* in one of its recent rulings dated December 1<sup>st</sup>, 2010, held that foreign judgments awarding punitive damages are not in principle contrary to the public policy. However, they violate the public policy, if they are not proportionate to the harm sustained. *Court de Cassation*, Arrêt n° 1090 du 1 décembre 2010 (09-13.303), available at: [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/1090\\_1\\_18234.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1090_1_18234.html) (accessed on 12 July 2011).

<sup>66</sup> W. Wils, “The relationship between...”, p. 20.

<sup>67</sup> W. Wils, “Should Private Enforcement Be Encouraged...”, p. 488.

that, if an adequate level of sanctions and the adequate number and variety of public investigations can be ensured, there is no need to stimulate private actions.<sup>68</sup>

Despite this opinions, the majority of the antitrust scholarship argues that the optimal antitrust enforcement model should combine both public and private elements.<sup>69</sup> The two systems aim at different aspects of the same phenomenon and are not meant to substitute each other. They are no alternatives, but rather complementary elements, both essential for the successful competition law enforcement.<sup>70</sup>

The European Commission also acknowledged the role of private enforcement in complementing public enforcement and has therefore recently embarked upon a project to strengthen private antitrust enforcement in Europe. There is no doubt that it would have a significant impact on the application of the EU competition rules. The path towards achieving the goal of effective private actions in Europe must, however, be approached with caution, in order to secure the potential advantages of creating the “second pillar” of competition law enforcement, without copying the drawbacks of badly designed private actions, especially from the United States. Those supporting more private actions in Europe above all warn against unleashing an excessive “litigation culture”,<sup>71</sup> bearing in mind the excesses of the US private enforcement system.<sup>72</sup>

Notwithstanding potential abuses, private enforcement can serve a number of positive goals and help support the efforts of public enforcers. Its advantages have long been stressed in the United States, where studies estimate the ratio of private to public antitrust suits at approximately 9 to 1.<sup>73</sup> Various authors give different arguments in favour of enhanced private enforcement. Potential benefits of making private actions more effective in Europe will now be discussed below.

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<sup>68</sup> Ibid., p. 488; A.P. Komninos, *EC private antitrust enforcement...*, pp. 8-9.

<sup>69</sup> S. W. Waller, “Towards a Constructive Public-Private Partnership to Enforce Competition Law”, *World Competition*, 29(3), 2006, p. 367; A.P. Komninos, *EC private antitrust enforcement...*, p. 9; C.A. Jones, “Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check”, *World Competition*, 27(1), 2004, p. 13; P. Collins, “What are the problems with EC Antitrust Damages Actions in Europe? Does the Private Pillar Require Reinforcement?”, *Competition L. Int’l*, October 2007, p. 53.

<sup>70</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 9.

<sup>71</sup> D. Wilsher, “The Public Aspects of Private Enforcement in EC Law: some Constitutional and Administrative Challenges of a Damages Culture”, *CompLRev*, 3(1), 2006, p. 39; Freshfields, Bruckhaus, Deringer, “*Response to the Commission’s Green Paper on damages actions for breach of the EC antitrust rules*”, p. 7, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_green\\_paper\\_comments/freshfields\\_bruckhaus\\_deringer.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/freshfields_bruckhaus_deringer.pdf) (accessed on 12 July 2011).

<sup>72</sup> According to A. Jones and B. Sufrin, “in the US, there has been considerable concern that private litigation, motivated by private profit rather than public interest considerations, may sometimes deter enforcement (in particular by deterring leniency applications) and can be wasteful, encouraging unmeritorious or ‘anemic’ claims to be brought and settled in order to avoid protracted and expensive litigation”. A. Jones, B. Sufrin, *EU Competition Law...*, p.1189.

<sup>73</sup> Report for the European Commission, *Making antitrust damages actions more effective...*, p. 9.

## C. Advantages of private antitrust enforcement

### a. Increased corrective justice

As mentioned above, private enforcement mainly fulfils a compensatory function. The plaintiff resorts to private action to assert his rights as an individual accorded to him by the legal system.<sup>74</sup> He is able to defend these before the civil courts on his own initiative and according to his own priorities and demand compensation for the losses he suffered. Moreover, the victim of an anti-competitive practice can claim damages only before a civil court, as public antitrust agencies have no competence in this area.<sup>75</sup>

Existing empirical studies confirm that *ex post* private enforcement enables the (at least partial) recovery of injury suffered – depending on the calculation of damages.<sup>76</sup> Corrective justice achieved through private actions is, though, not perfect, since identifying the real victims of anticompetitive practices and the true extent of their loss is a very difficult task. The losses from antitrust violations are widely dispersed and, for many reasons, not everyone who sustained an economic injury can be compensated. Therefore, some authors support the view that there should not be any private actions for the purpose of compensation.<sup>77</sup> The reasoning, however, that no victims should receive any compensation because all victims will not receive perfect compensation, is unsustainable. Instead of denying relief to all damages parties, one can simply attempt to improve the reach of corrective justice where it is feasible to do so.<sup>78</sup> The same argument applies to the calculation of damages. Factually determining how much an overcharge has been passed on, is indeed a difficult task, yet it should not undermine private actions in general. Finally, the view that the strive for corrective justice is not needed as citizens of Europe, outside the narrow circle of antitrust professionals, are not seriously disturbed by the current absence of compensation for antitrust damages,<sup>79</sup> is unacceptable as well. The fact that people in Europe do not make use of their

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<sup>74</sup> Bundeskartellamt, „*Private Kartellrechtsdurchsetzung: Stand, Probleme, Perspektiven*“, p. 2, available at: [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/05\\_Proftag.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/05_Proftag.pdf) (accessed on 12 July 2011).

<sup>75</sup> The victims, may, however seize the public enforcer, if they are only interested in an injunctive relief.

<sup>76</sup> Report for the European Commission, *Making antitrust damages actions more effective...*, p. 9.

<sup>77</sup> W. Wils, for instance, argues that the victims most deserving of compensation are those who would have purchased the cartel product at a competitive price, but due to the anticompetitive behaviour do not buy the product at all. These victims are denied standing in court in the United States. In Europe, their claim would depend on the extent to which they can prove causation, but the chance to succeed is minimal. W. Wils, “Should Private Enforcement Be Encouraged...”, p. 487.

<sup>78</sup> C.A. Jones, “Private Antitrust Enforcement in Europe...”, p. 23.

<sup>79</sup> W. Wils, “Should Private Enforcement Be Encouraged...”, p. 487.

right not to be harmed by anticompetitive practices, does not mean that they attach little or no value to corrective justice. Rather, their right to look for redress in court is meaningless, since they are unaware of it or, even more importantly, lack effective legal instruments to claim compensation for the injuries suffered.

## **b. Enhanced deterrence**

Apart from its compensatory function, private enforcement furthers the overall deterrent effect of competition law. According to a recent study prepared for the European Commission, this can be done in at least three ways: by increasing the detection rate, by increasing the prospective penalty after detection and by ensuring more accurate fact-finding.<sup>80</sup>

In private antitrust enforcement the economic agents themselves become instrumental in implementing the regulatory policy on competition. Owing to the superior information they hold, they can contribute to a higher detection rate through issuing of legal proceedings, and, correspondingly, further the deterrent effect. As Clifford A. Jones remarks, “more effective enforcement results when more enforcers are active, as this increases compensation and tends to deter more violations. Historically, in Europe, if an undertaking or cartel could avoid the notice of the Commission or a national competition authority, it was ‘home free.’ This is not so when consumers, competitors, and other victims are also enrolled as enforcers. It is also worth remembering that the last thing undertakings in Europe want is more enforcers of competition rules. [...] When objections to private-enforcement facilitating rules are lodged by undertakings or their industrial groups, many of which have been found to infringe EC competition rules in the past, it is well to recall their motivation. Such stakeholders do not just oppose private enforcement, they oppose all enforcement, and especially more enforcement”.<sup>81</sup> This is because they fear the higher detection rate.

In addition, an effective private actions system increases the incentives of businesses to comply with competition law due to higher prospective penalties. In a system of combined private and public enforcement the financial and litigation risks are higher for infringing undertakings, since the likelihood and magnitude of any financial liability to a competition authority and/or plaintiff is raised. As the financial and litigation risks increase, so does the

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<sup>80</sup> Report for the European Commission, *Making antitrust damages actions more effective...*, p. 70.

<sup>81</sup> C. A. Jones, “Private Antitrust in the Global Market: An Essay on «Swimming without getting wet»”, in: M. Monti, Prince N. von Lichtenstein, B. Vesterdorf, J. Westbrook, L. Wildhaber (eds.), *Economic Law and Justice in Times of Globalization: Festschrift for Carl Baudenbacher*, Baden Baden 2007, p. 443.

interest of those responsible for the governance of the business (the supervisory boards and board members) or for supporting the business (i.e. investors) to treat compliance as an important aspect of risk management and internal audit.<sup>82</sup>

Although the majority of antitrust scholarship agrees that higher levels of sanctions strengthen deterrence of anti-competitive conduct and that private actions serve as a useful instrument in this regard,<sup>83</sup> single authors criticise additional sanctions in the form of private damages.<sup>84</sup> Wouter Wils, for instance, points out that greater deterrence can only be achieved through adding individual penalties, in particular imprisonment.<sup>85</sup> According to his estimates, “the minimum level of fines required generally to deter price cartels and other antitrust offences of comparable profitability and ease the concealment would be in the order of 150 percent of the annual turnover in the products concerned by the violation”.<sup>86</sup> Raising the general level of fines to such a high level, however, would be impossible or unacceptable, since such high fines would breach the statutory ceilings on the amount of fines which can legally be imposed<sup>87</sup> and would often exceed the companies’ ability to pay.<sup>88</sup> This problem, Wils argues, exists just as much for damages as for fines, as well as combination of the two. Therefore, adding private actions for damages against companies to fines on companies does not bring any additional advantage.<sup>89</sup> In the author’s view, evidence from the United States shows, that the threat of criminal prosecution is by far the most expressive sanction (especially in business circles) and provides for the best deterrence,<sup>90</sup> in particular, if

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<sup>82</sup> Office of Fair Trading, “*Private Actions in Competition Law: effective redress for consumers and business*”, November 2007, p. 10, available at: [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft916resp.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf) (accessed on 14 July 2011).

<sup>83</sup> E. Paulis, “Policy Issues in the Private Enforcement of EC Competition Law”, in: J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn, 2007, p. 16; A. Jones, B. Sufrin, *EU Competition Law...*, p. 1189; Bundeskartellamt, “*Private Kartellrechtsdurchsetzung...*”, p. 4; P. Collins, “What are the problems with...”, p. 54; A.P. Komninos, *EC private antitrust enforcement...*, p. 9; Report for the International Competition Network, “*Interaction of Public and Private Enforcement in Cartel Cases*”, Moscow, May 2007, p. 33, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf> (accessed on 14 July 2011).

<sup>84</sup> W. Wils, “Should Private Enforcement Be Encouraged...”, p. 484.

<sup>85</sup> W. Wils, “Is Criminalization of EU Competition Law the Answer”, *World Competition*, 28(2), 2005, pp. 117 – 159.

<sup>86</sup> *Ibid.*, p. 138.

<sup>87</sup> As to the fines imposed by the European Commission, the statutory ceiling is set in Article 23(2) of Regulation 1/2003 and amounts to 10% of the concerned undertaking’s turnover. A suggestion of the OECD Competition Law and Policy Division to raise this ceiling, made in response to the Commission’s White Paper preceding the proposal for Regulation 1/2003, was rejected by the European Commission. W. Wils, “Should Private Enforcement Be Encouraged...”, p. 484, at footnote 66.

<sup>88</sup> However, it is worth noting that the “150 per cent of the annual turnover *in the products concerned* by the violation”(emphasis added) may not always breach the statutory ceilings on the amount of fines (10 % of the concerned undertaking’s turnover). This will be the case if the concerned undertaking derives its turnover from the sale of various goods and infringes the competition law only with regard to selected products.

<sup>89</sup> W. Wils, “Is Criminalization of EU Competition Law...”, p. 148.

<sup>90</sup> *Ibid.*, p. 145.

combined with administrative fines and director disqualification for all types of antitrust violations.<sup>91</sup>

In fact, other empirical studies from the United States, not mentioned by W. Wils, show that damage awards remarkably contribute to the deterrent effect. A recent report by Robert A. Lande and Joshua P. Davies from the American Antitrust Institute, shows that private litigation provides more than four times the deterrence of the criminal fines imposed by the Antitrust Division of the US Department of Justice.<sup>92</sup> The authors also compare the deterrence effects of private antitrust enforcement and prosecutions resulting in prison sentences and conclude that, to their surprise, private enforcement is significantly more effective at deterring illegal behaviour than DOJ criminal antitrust suits.<sup>93</sup> The findings of Lande and Davies correspond with the conclusions of John M. Connor, who is cited in the report prepared for the European Commission. This author points out that, in the United States, private actions represent the lion's share of *ex post* punishment (according to his estimates, damage awards account for 90% of the penalties) and have a significant deterrent effect.<sup>94</sup>

To keep things in perspective, one has to remember that in the US antitrust private plaintiffs are awarded treble damages, which are not likely to be introduced in Europe. The overall deterrent effect may, hence, not be as high as in the United States. However, the accumulation of fines and claims for damages will certainly enhance prevention of anti-competitive practices and raise compliance with the law.

### **c. Closing gaps in the enforcement system**

A further advantage of private enforcement is that the weakness of public enforcement, i.e. the enforcement gap generated by the inability of public enforcement to deal with all attention-worthy cases, is counter-balanced. As noted by the scholarship, public authorities cannot be expected to do all or even most of the necessary enforcing for various reasons including: budgetary constraints, undue fear of losing cases, or lack of awareness of

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<sup>91</sup> Ibid., p. 152.

<sup>92</sup> R. H. Lande, J. P. Davies, "Benefits from Private Antitrust Enforcement: an Analysis of Forty Cases", *University of San Francisco Law Review*, Vol. 42, 2008, p. 894; available at SSRN: <http://ssrn.com/abstract=1090661> (accessed on 14 July 2011).

<sup>93</sup> For detailed analysis, see: Ibid., p. 897; R. H. Lande, J.P. Davies, "Comparative Deterrence From Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws", *University of San Francisco Law Research Paper*, No. 17/2010, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1565693](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693) (accessed on 14 July 2011).

<sup>94</sup> Report for the European Commission, *Making antitrust damages actions more effective...*, p. 74.

industry conditions.<sup>95</sup> The insufficiency of public scrutiny of anti-competitive conduct can be remedied by private actions, which fulfil a relief function. Public authorities can concentrate their relatively limited resources on cases which are of general significance for competition. Some of these can be of secondary importance for competition authorities whereas they might be so significant for an undertaking that it would be willing to take the case to court. In this way public enforcement and private actions are complementary. Public enforcement is a fundamental pillar of the system, but it has to be focused and make the optimum use of the resources that are made available from the public purse.<sup>96</sup> Meanwhile, “private attorneys general”,<sup>97</sup> motivated by their self-interest, can remedy the public authorities inaction and provide that potential harm to consumers and businesses does not go unchecked.

In this way civil actions can not only make a significant contribution to the general enforcement of competition law but also fulfil an indicator function and improve the accuracy of administrative enforcement. The competition authorities often do not realize what is happening in the market,<sup>98</sup> whereas victims of anticompetitive practices, especially competitors, have the knowledge of the industry and are often more informed on the exact length and nature of the infringing conduct. Owing to civil lawsuits in the area of antitrust, public enforcers can acquire knowledge from civil courts regarding the frequency of competition problems in certain areas and launch investigations. In this respect, private actions can help to define focal areas of general antitrust enforcement.<sup>99</sup>

#### **d. Bringing competition law closer to the citizen**

Another benefit of increased private enforcement may be that it can raise awareness of potential antitrust infringements on the sides of businesses and consumers. By having the opportunity to directly enforce their rights in the field of competition, the citizens can be

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<sup>95</sup> Ibid., p. 56.

<sup>96</sup> Office of Fair Trading, *Private Actions in Competition Law...*, p. 10.

<sup>97</sup> The concept of “private attorney general” is a specific of US antitrust system. In general usage, the term “attorney general” refers to public prosecutor. Here, however, it refers to the use of private litigation as a means of bringing potential antitrust infringements to court and therefore assisting public authorities in their enforcement role. See: D.J. Gerber, “Private enforcement of competition law: a comparative perspective”, in: *The Enforcement of Competition Law in Europe*, T. Möllers, A. Heinemann (eds.), Cambridge 2007, p. 437.

<sup>98</sup> A major premise of administrative enforcement, including leniency programs, is that the participants in the market will complain or seek a reduction in fines, thus bringing to the attention of public authorities infringing conduct they do not know about.

<sup>99</sup> Report for the International Competition Network, *Interaction of Public...*, p. 33.

brought closer to competition rules and be more actively involved in the enforcement of law.<sup>100</sup>

#### **e. Strengthening the competition culture**

Seen in a broader perspective, private actions can also help to strengthen the competition principle or competition culture. Successful civil lawsuits show market participants, including consumers, that competition rules have to be observed and violations can be stopped on their own initiative.<sup>101</sup>

#### **f. Macroeconomic benefits**

Apart from direct impacts on corrective justice and deterrence private enforcement may bring significant advantages in macroeconomic terms and contribute to social welfare, by ensuring greater allocative efficiency and an impact on productivity and growth.<sup>102</sup> Properly functioning markets in which there is vigorous competition drive productivity and maximise consumer welfare, which has been acknowledged to be an important an overriding objective of European competition law in recent years.<sup>103</sup> Effective competition, often described as the lifeblood of strong economy, provides incentives for companies to operate efficiently, contributes to a more effective use of resources, promotes flexibility and encourages businesses to innovate. It also forces firms to deliver benefits to consumers in terms of price, quality and variety of goods and services. As such, it is the main driver behind economic growth, and in the end, the standard of living of citizens.

Private antitrust enforcement provides for open and competitive markets.<sup>104</sup> Private litigants not only support the public authorities in their mission, but they also help to achieve the total welfare benefits described above.

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<sup>100</sup> Commission's Staff Working Paper, SEC(2005) 1732, p. 7.

<sup>101</sup> Report for the International Competition Network, *Interaction of Public...*, p. 33.

<sup>102</sup> Report for the European Commission, *Making antitrust damages actions more effective...*, p. 89.

<sup>103</sup> N. Kroes, European Commissioner for Competition Policy, Opening address at conference: "Competition and Consumers in the 21<sup>st</sup> century", Brussels, 21<sup>st</sup> October 2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/486&format=HTML&aged=0&language=EN> (accessed on 14 July 2011).

<sup>104</sup> P. Collins, "What are the problems with...", p. 53.

#### **D. Interests protected by public and private antitrust enforcement**

One of the frequently heard criticisms of private enforcement is that plaintiffs bring actions to court in their self-interest only and that the only consideration that drives private actions is the private cost/benefit calculation. The competition authorities, on the other hand, try to decide on case selection and priority setting with a view to the public interest.

In the context of the goals of EU competition law, such a distinction does not do justice to the private plaintiffs and civil courts when they enforce competition law. In the antitrust scholarship, the dominant view is that EU competition law aims primarily at conditions of effective competition (protecting the institution of competition – *Institutionsschutztheorie*), whereas economic freedom (protection of private rights – *Individualschutztheorie*) is but a reflexive and subsidiary aim of protecting competition.<sup>105</sup> Thus, “the existence of private actions, in particular the availability of damages to victims of anti-competitive conduct, is perfectly consistent with the public interest that is inherent in competition norms”.<sup>106</sup> As noted by the European Court of Justice, the existence of the right to damages “strengthens the working of the Community competition rules and discourages agreements or practices, [...] which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.” In other words, the private interest, which is the dominant motivation behind a private suit, is not in conflict with the public interest; rather, it contributes to its protection by maintaining free and undistorted competition.

The fact that the private interest of the civil litigant may sometimes be incompatible with the public interest, as is the case when unmeritorious private actions are brought by competitors against their rivals,<sup>107</sup> does not affect the reasoning. It is the role of the court to decide whether a competitor is seeking illegitimate goals using competition law. If his civil action is indeed unmeritorious, he will likely suffer the consequences in terms of litigation and defendants costs.

In brief, private enforcement can never contradict the public interest and should not be thought of as antagonistic to the public enforcement model. On the contrary, these two

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<sup>105</sup> A. Komminos, “Public and Private Antitrust...”, p.14.

<sup>106</sup> *Ibid.*, p. 15.

<sup>107</sup> According to W. Wils „the problem of unmeritorious actions results primarily from the difficulty of drawing the borderline between anti-competitive and pro-competitive behaviour, especially in cases of alleged exclusionary practices, combined with the fact that competitor plaintiffs have as strong or arguably even stronger an incentive to bring actions against strong legitimate competition by their rivals as against anticompetitive behaviour”. W. Wils, “Should Private Enforcement Be Encouraged...”, p. 483.

models can work together and serve the same aim: to help to sustain a competitive economy with all its benefits for the society and the market.<sup>108</sup>

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<sup>108</sup> A. Komninos, “Public and Private Antitrust...”, p.16.

## **II. Private enforcement of EU competition law – developments at EU level**

### **1. Legal aspects of EU private antitrust enforcement**

#### **A. The absence of express provision for private enforcement in the Treaty on the Functioning of the European Union**

The “founding fathers” of the European Community, who drew up the Treaty of Rome, did not address the concept of private enforcement when setting out the two limbs of EU competition policy, i.e.: the prohibition of anti-competitive agreements, subject to exemption for those with demonstrable outweighing benefits (Art. 101 TFEU) and the prohibition of abuse of a dominant market position (Art. 102 TFEU).<sup>109</sup> The possibility of private antitrust enforcement was not precluded in the Treaty either, however it was not particularly appreciated, since the provisions of the EC Treaty concerning the protection of competition were considered to fall within the area of public law.<sup>110</sup> The ambiguity in the EC Treaty had important consequences. The absence of express provision for private enforcement created an unnecessary atmosphere of uncertainty that depressed private actions in Europe and caused private litigation in the EU to be almost “totally underdeveloped”.<sup>111</sup> The uncertainty, which has persisted for decades, related to such basic points as to whether private right of action existed at all and how it was to be pleaded in national courts. It was gradually overcome by the European Court of Justice in its rulings, however the lack of clarity made it extremely difficult for private actions to gain a significant foothold in the European Union.<sup>112</sup>

#### **B. The “foundational” public enforcement system**

Another major factor in the slow development of private litigation in Europe was the centralized enforcement model based on Regulation No. 17 of 1962 where “the Commission

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<sup>109</sup> K. Holmes, “Public enforcement or private enforcement? Enforcement of competition law in the EC and UK”, *ECLR*, 25(1), 2004, p. 25.

<sup>110</sup> In Europe, competition law was originally conceived as an administrative tool, a means for the state to intervene in market in order to achieve public goals. For detailed description, see: D. Gerber, “Private enforcement of competition law: a comparative...”, p. 442.

<sup>111</sup> Ashurst, “Study on the conditions of claims for damages in case in case of infringement of EC competition rules”, Comparative Report prepared for the European Commission, August 2004, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf) (accessed on 14 July 2011).

<sup>112</sup> C.A. Jones, *Private enforcement of Antitrust Law in the EU, UK and USA*, p. 85.

enjoyed a de facto and in some instances, notably the granting of individual exemptions under Article 101(3) TFEU, a de iure enforcement monopoly, while [...] the role of national legal systems and courts was marginalized.”<sup>113</sup> Pursuant to Regulation 17/1962,<sup>114</sup> which remained in force until May 2004, competition authorities in the Member States (both administrative authorities and courts) were empowered to take decision only under Article 101(1) (prohibition of cartels) and Article 102 (prohibition of an abuse of a dominant position) of the TFEU, whereas they were not competent to apply Article 101(3) (exemption from the prohibition of cartels).<sup>115</sup> This split in competences created a rather complicated state of affairs.<sup>116</sup> The Commission’s exclusive right to grant exemptions under Article 101(3) TFEU gave it a tight control over enforcement and served as a bottleneck inhibiting the broader application of competition law in national courts.<sup>117</sup>

According to various authors, in 1962 when Regulation 17 was enacted, “centralisation was a conscious choice with a view to constructing a European competition law enforcement system”.<sup>118</sup> “At that time, competition law was little known or understood in Europe, and it seemed natural that the complex issues raised by Article 81(3) should be decided upon ‘at the centre’ rather than in the member states themselves”.<sup>119</sup> The centralized system performed in a sense a ‘pedagogical’ function.<sup>120</sup> The Commission was the basic public enforcement authority for EU competition law purposes and for many years showed a willingness to handle complaints, even in fairly trivial matters. Its wide investigatory powers under Regulation 17/1962 as well as the apparent cheapness of involving its services (the procedure before the Commission entailed no costs for a complainant) all seemed to

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<sup>113</sup> A. Komninos, “Public and Private Antitrust...”, p. 1.

<sup>114</sup> Council Regulation No. 17 of 6 February 1962 – First Regulation Implementing Articles 85 and 86 of the Treaty, [1962] OJ L13/204.

<sup>115</sup> A. Jurkowska, “Private Enforcement of the Community...”, p. 49.

<sup>116</sup> On many occasions where A sued B claiming that an agreement infringed Article 101(1) TFEU B notified the agreement to the Commission in order to seek an individual exemption: at that point B argued that the domestic case was to be stayed pending the outcome of the Commission’s investigation, since only the Commission was able to grant an exemption and since, as the ECJ held in *Delimitis v. Henninger Bräu*, the national court was prohibited to reach a conclusion that would be inconsistent with the Commission’s finding. This entailed a substantial delay in proceedings. Judgment of 28 February 1991 in Case 234/89, *Stergios Delimitis v. Henninger Bräu AG*, [1991] ECR I-00935. For detailed description of the problem, see: R. Wish, “The Enforceability of Agreements under E.C. and U.K. Competition Law”, in: F. D. Rose (ed.), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, London 2000, pp. 302-304; R. Whish, “The Enforcement of EC Competition Law in the Domestic Courts of Member States”, in: J. Lonbay (ed.), *Frontiers of Competition Law*, London 1994, pp. 98-99; A.P. Komninos, *EC private antitrust enforcement...*, pp. 25-34.

<sup>117</sup> The Commission itself admitted that in the White Paper on Modernisation of the rules implementing Articles 101 and 102. European Commission, *White Paper of 28 April 1999 on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No. 99/027, COM(1999) 101 final, [1999] OJ C132/1, Section 100 et seq.

<sup>118</sup> A. Komninos, “Public and Private Antitrust...”, p. 6.

<sup>119</sup> R. Wish, “The Enforceability of Agreements under...”, p. 302.

<sup>120</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 26.

undertakings and their lawyers good reasons for approaching the Commission rather than instituting litigation in national courts.<sup>121</sup> Yet, as a result, the Commission was soon overwhelmed with notifications, individual exemptions were practically unavailable and competition law enforcement by courts was essentially non-existent. In addition, the Commission was unable to devote much time to the most serious offences.<sup>122</sup>

When the dominant enforcement role acquired by the Commission started to be more of a burden for it, the Commission expressly began to encourage private enforcement. The first step in this direction was the 15th Report on competition policy (1985), where the Commission stated that one of its objectives was to ‘restore the role’ played by national courts in the implementation of the then Articles 81 and 82 of the EC Treaty. The Commission acknowledged that among the reasons in favour of private enforcement of the EU competition law was the fact that more frequent application of the law at the national level would increase competition awareness among the EU’s citizens and result in infringements being terminated earlier, whereas the Commission would be able to handle serious infringements.<sup>123</sup>

Following the ECJ and General Court’s judgments, which explicitly confirmed that national courts were competent to apply Articles 101(1) and 102 TFEU (*BRT v SABAM* in 1974, *Ahmed Saeed* in 1989 and *Delimitis v Henninger Bräu* in 1991)<sup>124</sup> and that the Commission was free to give different priorities to cases in the light of the degree of “Community interest” (*Automec II* in 1992)<sup>125</sup>, the Commission issued the first Notice on Co-operation with National Courts. The Notice laid down basic rules to govern the process, including rules for a removal of discrepancies between decisions issued by the Commission and judgments delivered by national courts, mode of proceeding in a situation where a national court decided that a particular agreement might be the subject of an exemption pursuant to Article 101(3) TFEU, or the rules for consulting the Commission by national courts.<sup>126</sup> The Notice on cooperation is regarded as the “First Devolution” of EU competition

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<sup>121</sup> D. G. Goyder, J. Goyder, A. Albers-Llorens, *Goyder’s EC Competition Law*, 5<sup>th</sup> edition, Oxford 2009, p. 531.

<sup>122</sup> C. A. Jones, „After The Green Paper: The Third Devolution in European Competition Law and Private Enforcement”, *CompLRev*, 3(1), 2006, p. 1.

<sup>123</sup> A. Jurkowska, “Private Enforcement of the Community...”, p. 50.

<sup>124</sup> Judgment of 30 January 1974 in Case 127/73, *BRT v. SABAM*, [1973] ECR 51; Judgment of 11 April 1989 in Case 66/86, *Ahmed Saeed Flugreisen und Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989] ECR 803; Judgment of 28 February 1991 in Case 234/89, *Stergios Delimitis v. Henninger Bräu AG*, [1991] ECR I-00935.

<sup>125</sup> Judgment of the Court of First Instance of 18 September 1992 in Case T-24/90, *Automec II*, [1992] ECR II-2250. The Commission was given further guidance on its rights in case T-114/92 *BEMIM v. Commission*, [1995] ECR II-147 and in case T-5/93 *Tremblay v. Commission* [1995] ECR II-185 by the Court of First Instance, upheld in the latter case by the European Court of Justice, Case C-91/95P [1996] ECR I-05547.

<sup>126</sup> Commission Notice on the cooperation between national courts and the Commission in the application of Articles 85 and 86 of the EC Treaty, OJ 1993, C 39/1.

law, in which the Commission encouraged undertakings to resort to national courts and later NCAs<sup>127</sup> with their competition complaints. However, after this policy generally failed to have the desired effect, it was clear that stronger measures were needed. The approaching enlargement to 25 and soon 27 Member States undoubtedly raised the spectre of another avalanche of notifications.<sup>128</sup> Thus, at the end of April 1999, the Commission embarked on its most important policy change in EU competition law enforcement for the last 40 years by publishing its White Paper on the modernisation of the EU competition law procedural framework. This was the first step which was meant to lead to a “legal and cultural” revolution in the EU antitrust law.<sup>129</sup> The White Paper set out to propose a system of competition law enforcement in the EU for the twenty-first century and its basic parameters were the abolition of notification and exemption procedures, as well as the decentralisation of EU antitrust enforcement by making Article 101(3) TFEU directly applicable by national competition authorities and national courts. Such decentralization was intended to enlarge the group of enforcers of EU competition law, while relieving the Commission of most of the bureaucracy involved in the “old” system and allowing it to concentrate on the most serious infringements of Articles 101 and 102 TFEU.<sup>130</sup>

### **C. Decentralized system of EU competition law enforcement under Regulation 1/2003**

Following the White Paper and the official Commission proposal,<sup>131</sup> on 16 December 2002, the Council adopted the new Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, which became Regulation 1/2003.<sup>132</sup> The new regulation repealed Regulation 17/1962 and entered into force on 1 May 2004. It was accompanied by the “Modernisation Package” with notices and guidelines

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<sup>127</sup> Commission Notice on Co-operation between National Competition Authorities and the Commission, OJ 1997, C313/03.

<sup>128</sup> C. A. Jones, „After The Green Paper: The Third Devolution...”, p.

<sup>129</sup> C. Ehlermann, “The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution”, *CMLR*, 37, 2000, p. 537 et seq.

<sup>130</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 40.

<sup>131</sup> Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) 1017/68, (EEC) 2988/74, (EEC) 4056/86 and (EEC) 3975/87, COM(2000) 582 final [2000] OJ C365E/284.

<sup>132</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

further specifying the duties of cooperation between the Commission, NCAs and national courts.<sup>133</sup>

The new instrument was hailed by most actors in the EU competition enforcement as a breakthrough since it placed “national competition authorities and courts in the driving seat for much of competition law enforcement”.<sup>134</sup> A key objective of the modernization programme was to decentralize the enforcement of EU competition law, stimulate national courts’ activity in the enforcement of EU competition rules and to strengthen the possibility for individuals to seek and obtain relief before national courts.<sup>135</sup> In pursuit of this objective Regulation 1/2003 provides:

- that national courts have an essential part to play in applying the Community competition rules; when deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements (Recital 7 of the Preamble);
- that national courts shall have the power to apply Articles 101 and 102 TFEU (Article 6);
- that national courts shall apply Articles 101 and 102 TFEU to an agreement or abusive conduct which affects trade between Member States and to which they are applying national competition law (Article 3);
- for cooperation between the Commission and the national courts (Article 15);<sup>136</sup> and
- for the uniform application of EU competition law (Article 16).<sup>137</sup>

Despite these steps, though, Regulation 1/2003 and the new decentralized system of enforcement did not raise disproportionately high hopes of a significant improvement in application of competition law by national courts and a US-like system of private enforcement. The majority of the scholarship took the view that the abolition of Commission exemption monopoly, which to some extent undoubtedly was an obstacle to more private

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<sup>133</sup> See especially Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/54.

<sup>134</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 62.

<sup>135</sup> A. Jones, B. Sufrin, *EU Competition Law...*, p.1193.

<sup>136</sup> Article 15 of the Regulation 1/2003 provides, *inter alia*, that Member States must forward to the Commission a copy of any written judgment of national courts deciding on the application of Articles 101 and 102 TFEU. The Commission publishes these judgments on its website according to the Member State of origin. See the National Court Cases Database: <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/> (accessed on 15 July 2011).

<sup>137</sup> For detailed description of the pillars of the modernized enforcement system under Regulation 1/2003, see A.P. Komninos, *EC private antitrust enforcement...*, pp. 63 – 139; G. McCurdy, “The Impact of Modernisation of the EU competition law system on the courts and private enforcement of the competition laws: a comparative perspective”, *ECLR*, 25(8), 2004, pp. 509-517.

enforcement, would not itself boost the process.<sup>138</sup> In this sense, Regulation 1/2003 was a first necessary but insufficient tool to promote private actions in Europe.<sup>139</sup> The commentators pointed out that in cases involving substantial liability of an infringer of competition law who inflicted harm on someone else Article 101(3) TFEU and thus the possibility of an exemption under the old system rarely come into play. According to Komninos, “harm is more likely to be the result of either very serious anticompetitive practices that were not previously notified and would in any case not benefit from Article [101(3) TFEU], or abuses of a dominant position under Article [102 TFEU], the enforcement of which is not affected by the reforms and which has long been recognised as directly effective and concurrently enforceable by the Commission and national courts. With the possible exception of some minor cases where civil liability may have arisen but the likelihood of a Commission exemption may have blocked civil litigation, the decentralised system of 1 May 2004 did not dramatically change the outlook for more private enforcement.”<sup>140</sup>

Many questions remained unanswered in the modernisation initiative with regard to private actions. The Commission, above all, did not address the weaknesses of the substantive and procedural framework for civil litigation in the EU, which to a great extent is determined by national law and is not particularly well suited for the difficulties of civil antitrust litigation. Furthermore, it did not deal with the role of judges in national courts who, when deciding private antitrust cases, have to undertake a very complex legal and economic analysis relating to whole markets. If even the Commission as specialised institution of considerable resources, experience and investigatory powers, finds it at times extremely difficult to prove certain antitrust infringements, the burden placed on private litigants and courts can be truly insurmountable.<sup>141</sup>

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<sup>138</sup> According to Schmidt, the direct effect of Article 101(3) TFEU will impede rather than strengthen EU private antitrust enforcement. See K. Schmidt, “Procedural Issues in the Private Enforcement of EC Competition Rules: Considerations Related to German Civil Procedures”, in: C. Ehlermann, C. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland 2003, p.253; similar line of argument is presented by T. Eilmansberger, who argues that in grey-area cases the transformation of Article 101(3) into an automatic legal exception equips potential defendants in cartel damages disputes with additional defence, thus creating a further obstacle to private enforcement. T. Eilmansberger, “The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Action”, *CMLR*, 44, 2007, p. 434.

<sup>139</sup> A. Komninos, “Public and Private Antitrust...”, p. 8; M. Brkan, “Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?”, *World Competition*, 28(4), 2005, p. 481.

<sup>140</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 141 .

<sup>141</sup> *Ibid.*, p. 142.

#### **D. EU private antitrust enforcement between national and EU law**

In the centre of private antitrust in Europe lies the relation between EU and national law. At the current stage of European integration, the right which citizens have from the direct effect of EU law are exercised before national courts and with the conditions laid down by national rules.<sup>142</sup> The EU legal order is not a federal one and the European Union acts only within the limits conferred upon it in the Treaties. It is established that EU law is enforced primarily with recourse to administrative and civil law of the Member States and their national courts. There is thus no EU law of contract, unjustified enrichment, or a European Civil Code. Likewise, on the side of procedure, there are no EU courts with full jurisdiction which would apply EU law and decide EU law-based claims. National courts have to safeguard the full effectiveness of EU law and act as the “EU courts” of full jurisdiction.<sup>143</sup>

It is worth noting that in the last 20 years of European integration one could observe “a positive integration drive to unify or harmonise rules on remedies and procedures”.<sup>144</sup> There is now, for instance, secondary EU legislation on substantive and procedural rules in areas of product liability, consumer credits, unfair terms in consumer contracts, public procurement, unfair commercial practices, late payments and enforcement of intellectual property rights, which gives reasons to think that “Europeanization of private law” is under way. However, even given the substantial progress in creating some common rules for specific sectors, it seems quite unrealistic to expect from the European Union any comprehensive harmonization of private law in the next few years. Efforts were already undertaken to harmonize or unify national civil rules of contract and tort, but they had rather modest results and have been widely criticised.<sup>145</sup> With regard to harmonization of procedural law, the developed EU instruments focus on private international law and do not touch upon the national side of procedures.

As a result, in the current situation, civil litigants, who want to base their claims on Article 101 or 102 TFEU, have to rely on national substantive and procedural laws and resort to national courts. This means that the conditions for civil antitrust claims may vary in EU-

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<sup>142</sup> N. Półtorak, “The impact of the jurisprudence of the European Court of Justice on national remedies”, *Zeszyty Centrum Europejskiego Natolin*, No. 22/2005, p. 42.

<sup>143</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 142.

<sup>144</sup> *Ibid.*, p. 142.

<sup>145</sup> For discussion of the key critical trends see: S. Weatherill, “Why Object to the Harmonization of Private Law by the EC?”, *E.P.L.Rev*, 12(5), 2004, p. 633 et seq.; P. Legrand, “Against a European Civil Code”, *Modern Law Review*, 60(1), 1997, p. 44 et seq.; W. Van Gerven, “Harmonization of Private Law: Do We Need It?”, *CMLR*, 41, 2004, p. 505 et seq.

Member States depending on which national law applies and which national court decides the case.<sup>146</sup>

### **E. The principle of national procedural and remedial autonomy**

The principle of national procedural autonomy of the Member States to identify the remedies, courts and procedures that are necessary to enforce directly effective provisions of EU law can be derived from the ECJ's judgments in *Rewe Zentralfinanz* and *Comet* rendered in 1976.<sup>147</sup> In these cases, the Court relating to the methods of enforcement, stated that:

“in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of rights which citizens have from the direct effect of Community law...”<sup>148</sup>

This appears, at first sight, to mean that the effectiveness of protection given to the EU rights will differ between Member States, depending on the national rules applicable in the relevant case. However, two important limitations have been imposed on the national procedural autonomy. The ECJ held that national rules:

- (1) must not be less favourable than those relating to similar claims of a domestic nature (the principle of equivalence);
- (2) must not make it virtually impossible or excessively difficult to exercise the right that the national courts are obliged to protect (the principle of effectiveness). Thus, if the application of national rules would mean that it was virtually impossible to enforce an EU right, the Member State would be obliged to disapply the rule.<sup>149</sup>

The principle of effectiveness, particularly, provides for an important safeguard on the free application of the national rules. Paired with the duty of sincere cooperation imposed on

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<sup>146</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 145.

<sup>147</sup> According to A. Komninos, the term „procedural autonomy” creates the incorrect impression that it refers only to national rules of civil, administrative or criminal procedure. In fact its scope is much larger and covers all substantive or procedural mechanisms at national level that can be used for the enforcement of EU law. Therefore the term “procedural/remedial” autonomy is preferable. A.P. Komninos, *EC private antitrust enforcement...*, p. 147.

<sup>148</sup> Judgment of 16 December 1976 in Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, [1976] ECR 01989, para 5; Judgment of 16 December 1976 in case 45/76, *Comet BV v Produktschap voor Siergewassen*, [1976] ECR 02043, para 13.

<sup>149</sup> *Ibid.*

Member States in Article 4(3) TEU<sup>150</sup>, it requires that remedies granted by national courts must be adequate and must guarantee real and effective judicial protection for EU-derived rights.

In the following section, it will be considered, whether and in what circumstances the principle of effectiveness requires that a right to damages as a result of breach of EU competition rules should be granted and what is the basis of such right.

## **2. ECJ judgments in the field of EU private antitrust enforcement**

### **A. Is there an EU right to damages as a result of the breach of Articles 101 and 102 TFEU?**

Unlike the US antitrust law,<sup>151</sup> the Treaty on the Functioning of the European Union does not expressly provide a right to damages for loss suffered as a result of antitrust infringement. In 1974 the ECJ ruled that Articles 101 and 102 TFEU are directly applicable and give rise and obligations which national courts have a duty to safeguard and enforce.<sup>152</sup> However, until 2001 there had not been a judgment of the Court dealing specifically with the question of whether Member States are under an obligation, as a matter of EU law, to provide a remedy in damages to compensate harm that has been inflicted as a result of an infringement of EU competition rules. The right to damages was not immediately obvious, since the only remedy explicitly foreseen in the Treaty is the nullity of any contract that violates Article 101(1) TFEU.<sup>153</sup> Yet, the resolution of this uncertainty was of particular importance for private antitrust enforcement, given the fact that damages actions have personified this process, particularly if one studies the oldest and most developed antitrust system of the world.<sup>154</sup> Moreover, as shown above, the Commission has no power to award damages, although it may be able to encourage a defendant to compensate its victims in return for a reduction in its fine.<sup>155</sup>

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<sup>150</sup> Article 4(3) TEU provides that that the Union and the Member States are to assist each other in carrying out tasks flowing from the Treaties and that “Member States” shall take any appropriate measure [...] to ensure fulfillment of the obligations...” and “shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.”

<sup>151</sup> See Section 7 of the original Sherman Act 1890, superseded by Section 4 of the Clayton Act 1914.

<sup>152</sup> Judgment of 30 January 1974 in Case 127/73, *BRT v. SABAM*, [1973] ECR 51, para. 16.

<sup>153</sup> D. Waelbroeck, “Private Enforcement: Current Situation and...”, p. 19.

<sup>154</sup> A. Komninos, “New prospects for private enforcement of EC competition law: *Courage v. Crehan* and the Community right to damages”, *CMLR*, 39, 2002, p. 458.

<sup>155</sup> R. Whish, *Competition Law*, p. 292; Nintendo Commission Decision of 30 October 2002, OJ [2003] L 255/33, paras 440-441.

Prior to the judgment in 2001, it was unclear whether the right to damages in cases of EU competition law infringements was to be derived from EU law or was purely a question of national law. The “traditionalist” camp in the legal literature, represented primarily by French and German scholars, argued that damages were a matter of national remedial and procedural autonomy, i.e. they were a question of national law subject to the minimum EU law requirements of equivalence and effectiveness. The “integrationists”, on the other hand, have shown a conviction as to the existence of an EU right to damages.<sup>156</sup> Arguments for this opinion were based on the *Francovich* judgment,<sup>157</sup> in which the ECJ introduced the right to (monetary) compensation for the violation of EU law. This right was only enforceable against the State and related to State violations of the EU law. In the literature, though, “it was thought that there was no compelling reason to differentiate between State and individual liability for damage caused by infringement of Community law, since the basis for such liability, which is the principle of [...] effectiveness of Community law, is not affected by the identity of the perpetrator, i.e. whether it is the State or individuals”.<sup>158</sup> A point central to that view was that by extending the *Francovich* principle horizontally, there was a similar EU right to damages where an undertaking has committed a breach of the EU competition rules. Hence, the question of whether or not national law recognized a damages remedy for breach of the competition rules was irrelevant, since national courts had to accept and to enforce the EU right to damages.<sup>159</sup>

The horizontal liability for breaches of EU law was expressly approved by Advocate General van Gerven in his Opinion in *H. J. Banks & Co. Ltd v British Coal Corp.*,<sup>160</sup> in which he considered that the general basis established by the ECJ in *Francovich* also applied to the case of “breach of right which an individual derives from an obligation imposed by Community law on another individual”.<sup>161</sup> Advocate van Gerven observed that:

“The full effect of Community law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held

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<sup>156</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 167.

<sup>157</sup> Judgment of 19 November 1991 in Case 9/90, *Francovich*, [1991] ECR I-5357.

<sup>158</sup> A. Komninos, “New prospects for private enforcement ...”, p. 454.

<sup>159</sup> C.A. Jones, *Private enforcement of Antitrust Law in the EU, UK and USA*, pp. 982-1001; D. Beard, A. Jones, “Co-contractors, damages and Article 81: the ECJ finally speaks”, *ECLR*, 23(5), 2002, p. 249.

<sup>160</sup> Judgment of 13 April 1994 in Case C-128/92, *H.J. Banks & Co. Ltd v British Coal Corporation*, [1994] ECR I-1209.

<sup>161</sup> Opinion of Mr Advocate General van Gerven delivered 27 October 1993 in case C-128/92, *H.J. Banks & Co. Ltd v British Coal Corporation*, para. 43.

responsible for the breach of Community law - all the more so, evidently, if a directly effective provision of Community law is infringed.”<sup>162</sup>

The arguments raised in the Opinion of Advocate General, were, however, not addressed by the European Court of Justice in the case of *Banks*. The fundamental issue of the EU or national law basis of the right to damages in EU competition law infringements was finally addressed by the ECJ in *Courage* case of 20 September 2001.<sup>163</sup>

## **B. *Courage v. Crehan* case**

### **a. The facts**

The judgment of the European Court of Justice in *Courage Ltd v Crehan* arose from a reference to it by the English Court of Appeal using the Article 267 TFEU procedure. The Court of Appeal requested the ruling in the course of hearing a series of cases that raised the compatibility of “beer ties” with Article 101 TFEU. *Courage Ltd v Crehan* itself concerned two leases of public house (pubs) concluded between Inntrepreneur Estates (“IEL”, a company owned equally by Grand Metropolitan plc and Courage Ltd) and Mr Crehan. Each lease was an Inntrepreneur standard form lease and was concluded for a period of twenty years. One of the terms of the leases stipulated that Mr Crehan agreed to purchase fixed minimum quantities of various beers for resale at the leased premises from IEL, or its nominee, and no other person. The specified nominee was Courage. From 1991 to 1993 Mr Crehan ran the two pubs, but made huge losses. In 1993 he surrendered both leases. Courage, the plaintiff in the main proceedings, brought an action for the recovery of £15,266, alleged to be the price of beers sold and delivered to Mr Crehan. Mr Crehan contested the action on its merits. He argued that Courage sold its beers to independent tenants of pubs at substantially lower prices than those on the price list imposed on IEL tenants subject to a beer tie. Further, he alleged that had he not been required to purchase most of his beers from Courage at full list prices, he could have competed with other local pubs on an equal footing and his business would have been profitable. Finally, he contended that that the beer tie, which made his business fail, was in breach of Article 101 and counterclaimed for damages in

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<sup>162</sup> Ibid.

<sup>163</sup> Judgment of 20 September 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, [2001] ECR I-06297.

respect of excessive prices for his beer under the void beer tie and for loss caused to his business in consequence.

According to the Court of Appeal, which referred a question to the ECJ for a preliminary ruling, English law did not allow a party to an illegal agreement to claim damages from the other party (*in pari delicto potior est conditio defendentis*).<sup>164</sup> Moreover, in the view of the English Court of Appeal, which was expressed in one of its previous judgments, Article 101(1) TFEU was intended to protect third parties, whether competitors or consumers, and not parties to the prohibited agreement, since they were the cause, not the victims, of the restriction of competition.<sup>165</sup> However, referring to the US Supreme Court's opinion in *Perma Life Mufflers Inc v. International Parts Corp.*,<sup>166</sup> the Court of Appeal recognized that there might be sound policy arguments in favour of accepting that where a party to an anticompetitive agreement is in an economically weaker position, he may sue the other contracting party for damages. Further, that a party to a prohibited agreement such as that before it, might have rights by virtue of Article 101 that were protected by EU law. If Mr Crehan was not afforded a remedy by English law, it was possible, accordingly, that the principle of English law denying that right was incompatible with, and superseded by, EU law.<sup>167</sup>

The Court of Appeal thus made a reference to the ECJ requesting a preliminary ruling on four questions, which aimed to establish, whether Articles 101 TFEU conferred rights on a party to a contract concluded in breach of that provision and, if so, whether such an individual, should, in principle be entitled to damages. If damages should be available, the Court asked whether, and if so when, the national court may nevertheless deny the claim on the basis of its illegality? Whether or not the English court had, in denying the Mr Crehan's claim, acted in breach of its EU obligations was therefore dependent on two questions: "first, whether, as a matter of EU law, national courts were required in principle to ensure that an individual could recover in respect of loss caused by another's breach of EU law and; secondly, if they were, whether or not the application of the defence of illegality was compatible with the EU principle of effectiveness".<sup>168</sup>

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<sup>164</sup> "Where both parties are equally wrongful the position of the defendant is stronger". A. Jones, B. Sufrin, *EU Competition Law...*, p.1202.

<sup>165</sup> D. Beard, A. Jones, "Co-contractors, damages and Article 81...", p. 248.

<sup>166</sup> *Perma Life Mufflers Inc v International Parts Corp.* 392 US 134 (1968).

<sup>167</sup> A. Jones, B. Sufrin, *EU Competition Law...*, p.1202.

<sup>168</sup> *Ibid.*, p. 1202.

## b. The judgment of the ECJ

At the outset, the Court of Justice recalled the new legal order created by the Treaty, which is integrated into the legal systems of the Member States and which national courts are bound to apply, as well as the rights the Treaty provisions confer on individuals. It then moved on to stress the centrality of Article 101 TFEU to the European project, since “it constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market”.<sup>169</sup> The Court also reiterated the well established fact that Article 101(1) TFEU had direct effect and did not hesitate in concluding that any individual can rely on breach of Article 101(1) TFEU before a national court, even where he is a party to a prohibited contract. The Court then went on to stress the obligation of national courts to ensure that EU rules took full effect and to protect the rights which those provisions confer on individuals. Further, the Court emphasized that:

“The full effectiveness of Article 101 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 101(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”<sup>170</sup>

The ECJ also highlighted the instrumental character of such liability for the effectiveness of EU in stating that:

“Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”<sup>171</sup>

Finally, the Court concluded that, for these reasons, there should be no absolute bar to a damages claim, even to one brought by a party to the prohibited contract.<sup>172</sup> Insofar as the English principle of “*in pari delicto*” provided an absolute bar to a claim for damages under

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<sup>169</sup> Judgment of 20 September 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, [2001] ECR I-06297, para. 20.

<sup>170</sup> *Ibid.* para. 26.

<sup>171</sup> *Ibid.*, para. 27.

<sup>172</sup> *Ibid.*, para. 28.

Article 101 TFEU it was thus incompatible with EU law.<sup>173</sup> The ECJ stressed that EU law did not prevent national courts from taking steps to ensure that the litigant should not profit from his unlawful conduct, yet in order to deny his right to obtain damages from the other contracting party the ruling court must find that the litigant bears significant responsibility for the distortion of competition.<sup>174</sup> In the ECJ's view, national courts should take into account matters such as the economic and legal context in which the parties find themselves and the respective bargaining power and conduct of the two parties to a contract.<sup>175</sup> Of particular importance would be whether a person in a position of Crehan found himself in a markedly weaker position than a brewer such as Courage, so as to seriously compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent. Also, a contract might prove to be an infringement of Article 101 TFEU for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In those circumstances it would be the party controlling the network, such as Courage, who should bear the significant responsibility for the infringement of the competition rules, not the weaker party who had the terms of the contract imposed upon him.<sup>176</sup>

### **c. The importance of the judgment for EU private antitrust enforcement**

The judgment in *Courage Ltd v Crehan* was a landmark in the private enforcement of Articles 101 and 102 TFEU.<sup>177</sup> It is of significance to all damages claims brought within the sphere of the competition rules, not only those involving co-contractors.<sup>178</sup> The ruling confirmed that the basis for a civil action arising from a breach of the competition provisions is firmly grounded in EU law.<sup>179</sup> The recognition of the right does not, in principle, depend on national law, although Article 101 TFEU is silent on that point.<sup>180</sup> Significant is the fact that the ECJ did not define any specific uniform EU conditions of liability. It delegated the

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<sup>173</sup> D. Beard, A. Jones, "Co-contractors, damages and Article 81...", p. 251.

<sup>174</sup> Judgment of 20 September 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, [2001] ECR I-06297, para. 31.

<sup>175</sup> *Ibid.*, para. 32.

<sup>176</sup> According to R. Whish, "it is interesting to speculate as to what would have happened if a third party had sued Courage and Crehan for harm suffered as a result of the agreement: the ECJ's reasoning would suggest that Courage, but not Crehan, should be liable." R. Whish, *Competition Law*, p. 294.

<sup>177</sup> *Ibid.*, p. 293.

<sup>178</sup> A. Jones, B. Sufrin, *EU Competition Law...*, p.1202.

<sup>179</sup> *Ibid.*, p. 1205; A.P. Komminos, *EC private antitrust enforcement...*, p. 170;

<sup>180</sup> N. Reich, "The Courage doctrine: encouraging or discouraging compensation for antitrust injuries?", *CMLR*, 42, 2005, p. 39.

conditions of the exercise of the right to damages to national law, subject to the principles of equivalence and effectiveness. In the literature, thus, it was argued that *Courage* is a “hybrid” judgment.<sup>181</sup> Also, it was claimed that it was only the first case, which set out the principle of horizontal liability. The Court, however, “left open the future possibility of proceeding in an appropriate way to set out the conditions of the remedy in greater detail”.<sup>182</sup>

Indeed, as foreseen by the commentators, the contours of the new remedy of a right in damages based on Article 101 TFEU were soon further shaped by the Court of Justice in *Manfredi* ruling.

### C. *Manfredi* case

#### a. The facts

In *Manfredi*<sup>183</sup> the Italian Competition Authority (AGCM) imposed sanctions on a cartel between several insurance companies active in the motor-vehicle civil liability insurance market. The cartel consisted of a complex and structured horizontal agreement aimed at the tied selling of separate products and the exchange of strategic commercial information between competing undertakings, including: premium prices, terms and conditions of contracts, discount rates, costs of accidents and distribution costs, etc. The AGCM demonstrated that through this information exchange mechanism, all colluding companies had artificially established (from 1994 to 1999) insurance prices 20% higher than the price in a competitive market. As a result, at the end of 1999 customers in Italy were paying the highest price for civil liability auto insurance premiums within the European Union. The decision of the AGCM, which was challenged by the insurance companies, was essentially upheld on appeal to the Council of State. Customers of the insurance companies, including Mr Manfredi, who alleged that they had suffered overcharge, sued for damages for breaches of both Italian and EU competition law.<sup>184</sup>

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<sup>181</sup> 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.*, 31(6), 2006, p. 854. See also: N. Reich, “Horizontal liability in EC law: hybridization of remedies for compensation in case of breaches of EC rights”, *CMLR*, 44, 2007, pp. 708-709.

<sup>182</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 173.

<sup>183</sup> Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, [2006] ECR I-6619.

<sup>184</sup> For detailed description of the proceedings in Italy and analysis of the judgment in the light of Italian law, see: M. Carpagnano, “Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-298/04 *Manfredi*”, *CompLRev*, 3(1), 2006, pp. 47-72.

Various questions were submitted to the ECJ under Article 267 TFEU by the Italian court (Giudice di pace di Bitonto), partly as to the right to damages under Article 101 TFEU and partly as to specific Italian provisions concerning damages claims and internal Italian law. The questions focused on: the entitlement of third parties (consumers) to damages, the jurisdiction of national courts, national limitation periods and when they begin to run, and the ability of the courts to award punitive damages.

## **b. The judgment of the ECJ**

In confirming its jurisdiction in *Manfredi* case, the Court of Justice emphasized the Italian court's right to refer a question for a preliminary ruling, by stating that: "it should be recalled that Articles 101 and 102 TFEU are a matter of public policy which must be automatically applied by national courts". The Court also indicated that, depending on the specific circumstances of the case at hand, an anticompetitive practice may simultaneously infringe both national and EU competition rules.<sup>185</sup> On the right to damages the ECJ repeated what it said in *Courage* and added that the full effectiveness of Article 101(1) TFEU required that:

"any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU."<sup>186</sup>

According to the commentators, the ECJ created a fundamental distinction between the "existence" of the right to damages and the "exercise" of that right.<sup>187</sup> The Court in *Manfredi* not only confirmed that there is an EU right to damages,<sup>188</sup> but also defined its "constitutive" conditions.<sup>189</sup> The right to damages thus should be open:

(a) to "any individual" as long as there is;

(b) harm;

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<sup>185</sup> Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, [2006] ECR I-6619, paras. 33-52.

<sup>186</sup> *Ibid.*, para. 61

<sup>187</sup> P. Nebbia, E. Szyszczak, "White Paper on Damages Actions for Breach of the EC Antitrust Rules", *EBLR*, 20(5), 2009, p. 639; A.P. Komninos, *EC private antitrust enforcement...*, p. 175.

<sup>188</sup> Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, para. 91, quoting para. 27 of *Courage*: "the *existence* of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition." (emphasis added).

<sup>189</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 175.

- (c) a competition law violation; and
- (d) a “causal relationship” between the harm and the violation.

However, for the “exercise” of the right, in the absence of EU rules, “it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed.”<sup>190</sup>

It is interesting to note that the ECJ did not refer to any requirement of fault over and above the proof of the infringement. There is disagreement in the literature as to the nature of this “omission”. On one hand, it is argued that the individual civil liability for EU competition law violations is strict and that national requirements or conditions of fault are incompatible with EU law and must be set aside by national courts.<sup>191</sup> On the other hand, it is claimed that the issue of fault was not considered by the ECJ in *Manfredi*, and “it cannot be assumed, that the Court implicitly forbade the application of this liability element by failing to include it in the list of obstacles and restrictive elements considered compatible with the principle of effectiveness”.<sup>192</sup> Rather, it is thought, the ruling in *Courage* implies that the Court approves of “the principle of contributory negligence according to which courts may take a ‘significant’ responsibility of the claimant into account”.<sup>193</sup> As a result, the question of whether the list of “constitutive” conditions of the EU right to damages given in *Manfredi* is complete, seems to be unresolved.

With regard to procedural questions, i.e. the executive conditions of the EU right governed by national law that seemed to complicate Italian claimants’ action and were thus referred to the ECJ (rules that allocated jurisdiction in actions for damages based on competition law to a different court than the one that would deal with “normal” damages claims, thereby increasing the cost and length of the litigation or unfavourable limitation periods) the Court, in essence, held that they are compatible with EU law as long as they did not offend the principles of equivalence and effectiveness. The ECJ, for instance, held that

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<sup>190</sup> Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, para. 64.

<sup>191</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 175 and 194 ; E. de Smijter, D. O’Sullivan, “The Manfredi judgment of the ECJ and how it relates to the Commission’s initiative on EC antitrust damages actions”, *Competition Policy Newsletter*, No. 3/2006, p. 25.

<sup>192</sup> T. Eilmansberger, “The Green Paper on Damages Actions...”, p. 458.

<sup>193</sup> *Ibid.*, p. 458; Judgment of 20 September 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, para. 31.

national time-limits can be applied as long as they do not make it “practically impossible or excessively difficult” to bring a claim.<sup>194</sup>

Regarding the possibility of national courts to award punitive damages,<sup>195</sup> greater than the advantage obtained by the infringer, thereby deterring the adoption of agreements or concerted practices prohibited under Article 101 TFEU, the Court ruled that they may be available if they are also available for similar domestic claims.<sup>196</sup> However, they are not specifically required as a head of damage under EU law, since EU law does not prohibit Member States from legislating to prevent unjust enrichment.<sup>197</sup> Finally, the Court held that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.<sup>198</sup> In the court’s view, the total exclusion of loss of profit as a head of damage, for which compensation may be awarded cannot be accepted in the case of breach of EU competition law. Especially in the context of economic or commercial litigation, “such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible”.<sup>199</sup> As to the payment of interest, the Court contended that it is an essential component of compensation.<sup>200</sup>

### **c. The importance of the judgment for EU private antitrust enforcement**

From the perspective of the development of EU private antitrust enforcement, the ECJ’s *Manfredi* decision is to be welcomed. The Court confirmed the judicial origins of private enforcement of antitrust rules in the EU, since neither the Treaty nor Regulation 1/2003 provides explicitly for a legal rule on damages.<sup>201</sup> The ruling, similarly as the judgment in *Crehan*, sends out a clear message that the right to damages has a Treaty law basis and is derived from the principle of effectiveness of EU competition law.

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<sup>194</sup> Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, para. 82.

<sup>195</sup> Currently, a handful of Member States go beyond the compensation model and recognize punitive (Cyprus) or exemplary damages (Cyprus, Ireland, UK). Moreover, the latter are rarely awarded. M. Carpagnano, “Private Enforcement of Competition Law...”, p. 69.

<sup>196</sup> Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, para. 93.

<sup>197</sup> *Ibid.*, para 94.

<sup>198</sup> *Ibid.*, para. 95.

<sup>199</sup> *Ibid.*, para. 96.

<sup>200</sup> *Ibid.*, para. 97.

<sup>201</sup> A. Jurkowska, „Roszczenia z tytułu naruszenia wspólnotowego prawa ochrony konkurencji przez podmioty prywatne. Głosa do wyroku ETS z 13.07.2006 r. w połączonych sprawach: od C-295 do 298/04 *Manfredi*”, *EPS*, Nr 3/2009, p. 45.

In *Manfredi*, the ECJ solved some of the most debated procedural aspects of civil actions based on violations of EU competition rules. It clarified the scope of the civil right to damages for breach of Article 101 TFEU in relation to standing, causation, limitation periods and the extent of damages available. Nevertheless, the ruling in *Manfredi* also revealed where the main “problem” lies with EU private antitrust enforcement. The Court continued to leave some considerable discretion to national courts to apply procedural rules of their domestic judicial systems, as well as the substantive rules of recovery in tort, delict, restitutionary and other actions.<sup>202</sup> These rules, however, vary between Member States and can lead to differing levels of protection in EU countries or even inhibit successful damage claims.<sup>203</sup> It is precisely because of this, and the paucity of damages litigation in the EU, that the Commission set out to identify the “obstacles” to successful antitrust damage actions in the Member States and to consider whether measures can or should be adopted to reduce and eliminate them. Its initiatives in this field are discussed in the following sections of this chapter.

### **3. The post-*Courage* developments in the European Commission - towards a coherent European approach to actions for damages?**

#### **A. The Ashurst report**

The ECJ’s *Courage* ruling provided an impetus for the Commission to adopt a more pro-active stance on the question of private enforcement in Europe and make the remedial right become a reality across the EU. Soon after the European Court of Justice rendered the *Courage* judgment the European Commission ordered an external study which analyzed the conditions for claims for damages in the Member States in the case of infringement of EU competition rules. The results of that study, known as the Ashurst Study were published in 2004 and showed an “astonishing diversity and total underdevelopment” of civil antitrust actions in the Member States”.<sup>204</sup> The study revealed that up to mid-2004 there were 60 judged cases for damages actions (12 on the basis of EU law, around 32 on the basis of national law and 6 on both). Of these judgments 28 had resulted in a damages award being

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<sup>202</sup> R. Whish, *Competition Law*, p. 294.

<sup>203</sup> *Ibid.*, p. 294; S. Drake, “Scope of *Courage*...”, p. 857.

<sup>204</sup> Ashurst, “Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report”, p. 1.

made (8 on the basis of EU competition law, 16 on national law and 4 on both).<sup>205</sup> It is possible that these figures to some extent misinterpret the number of damages actions that have been brought, since many cases are settled out-of-court on the basis of confidentiality,<sup>206</sup> however the Ashurst Report did highlight numerous obstacles to private enforcement of the EU competition rules in national legal orders. Its findings led the Commission to commence efforts to enable private parties to enforce EU competition law. Already in the modernization programme in 1999, the Commission recognized that its public enforcement agenda cannot be achieved by the competition authorities alone and that private enforcement of EU competition rules is a necessary component. Given the fact that it was still in its infancy, or at least not practiced on the scale familiar from other jurisdictions, especially the US,<sup>207</sup> the Commission decided to take a more active stance with regard to private actions and encourage the use of private competition law remedies before the national courts.

## **B. The European Commission's Green Paper on Damages Actions for Breach of the EC antitrust rules**

On 19<sup>th</sup> December 2005 the Commission published a Green Paper, "Damages actions for breach of the EC antitrust rules",<sup>208</sup> the aim of which was to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions and for stand-alone actions. The Commission has been considering whether measures can or should be adopted to harmonize national procedural and substantive rules governing damages claims, for instance on costs, access to evidence, limitation periods, standing, class or representative actions, fault and/or defences, such as passing on defence. Interested parties were invited to comment during a consultation period which ended on 21 April 2006. Following a short description of motives and objectives, the Green Paper listed a number of legislative proposals for improving the enforcement of civil law sanctions for violations of EU

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<sup>205</sup> In contrast, individual plaintiffs in the United States filed 693 antitrust lawsuits in federal courts in the 12 months ending March 31, 2004, <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2004/tables/C02Mar04.pdf> (accessed on 1 August 2011).

<sup>206</sup> See B. Rodger, „Private Enforcement of Competition Law, the Hidden Story: Competition Law Litigation Settlements in the United Kingdom, 2000-2005”, *ECLR*, 29, 2008, p. 96, who draws attention to the many out of court settlements in the UK that occurred.

<sup>207</sup> O. Odudu, "Developing private enforcement in the EU: Lessons from the Roberts Court", *The Antitrust Bulletin*, 53(4), 2008, p. 892.

<sup>208</sup> Commission's Green Paper, *Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final, 19 December 2005; see also Commission's Staff Working Paper, SEC(2005) 1732, *Annex to the Green Paper. Damages actions for breach of the EC antitrust rules*, which contains more elaborate information.

competition law in the Member States. The Commission identified the following obstacles to damages claims that exist in the Member States and key areas for discussion and possible legislative action:

(1) access to evidence

In many Member States (especially those with civil law background) it is difficult to get access to evidence held by the party committing an anti-competitive practice. The Commission in the Green Paper thus invited discussion on issues such as whether special rules should be introduced on disclosure of documentary evidence in civil proceedings for damages under Articles 101 and 102 (and if so, in which form) and whether there should be special rules regarding access to documents held by a competition authority. Further, the Commission proposed to consider whether the claimant's burden of proving the antitrust infringement in damages actions should be alleviated and, if so, how.

(2) the fault requirement

The Commission invited comments on the issue whether, in addition to the necessity to prove the infringement, a damages action for breach of Articles 101 or 102 TFEU should require fault to be proven (a requirement in tortious proceedings in some Member States) or whether the liability should be strict.

(3) damages

With regard to damages, the Commission proposed to discuss how damages should be defined and quantified and whether the Commission should publish guidance on quantification. In addition, the Commission contemplated, whether double damages for horizontal cartels should be introduced. Such awards could be automatic, conditional or at the discretion of the court.

(4) the passing-on defence and indirect purchaser's standing

Another key issue for discussion raised by the Commission referred to rules on the admissibility and operation of passing-on defence and indirect purchasers standing.

(5) defending consumers' interests

The Commission proposed to reflect on how consumers' interests could be defended (especially those with small claims) and whether special procedures should be introduced to

bring collective actions. If so, the Commission suggested to analyze how such procedures could be framed (for instance, whether a cause of action should be available to consumer associations).

#### (6) costs of action

Another area in which obstacles to damages claims were found related to costs. The Commission invited comments whether cost rules operate as incentive or disincentive for bringing an action and whether special rules should be introduced to reduce the cost of risk of the claimant.

#### (7) coordination of private and public enforcement

The Commission also proposed to discuss how public and private enforcement could be coordinated and, in particular, how it can be ensured that damages actions do not impact negatively on the operation of leniency programmes. With regard to impact on leniency programmes, one option put forward by the Commission assumed that conditional rebate could be awarded to a leniency applicant. Alternatively, if participants in hardcore cartels would be liable to double damages, the successful leniency applicant would be at risk only of single damages.<sup>209</sup> The Commission also accepted that leniency applications should not be disclosed in the course of discovery, if it would be introduced.

#### (8) jurisdiction and applicable law

One of the last problems submitted for discussion touched on issues from the area of private international law. The Commission was interested in opinions as to which substantive law should be applicable to antitrust claims and whether the general rule contained in Art. 5 Rome II Regulation was satisfactory.<sup>210</sup>

The Green Paper did, as anticipated, stimulate debate was met with broad interest in the antitrust community: it was discussed on various conferences and stimulated debate at the OECD,<sup>211</sup> the European Parliament and the national parliaments of EU Member States. The Commission received 149 submissions, which were later on published on the website of Directorate-General for Competition. The majority of the respondents were in favour of

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<sup>209</sup> Commission's Staff Working Paper, SEC(2005) 1732, p. 66.

<sup>210</sup> Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40.

<sup>211</sup> See: *OECD Journal: Competition Law and Policy*, Vol. 2/2009, pp. 7 – 104.

enhanced private enforcement and acknowledged its complementary role in the overall enforcement scheme. There was widespread agreement that victims of competition law infringements are entitled to damages and that national rules should provide for effective redress.<sup>212</sup> However, there were also warnings that stronger incentives for private enforcement could foster frivolous claims and, perhaps even more importantly, endanger public enforcement since private actions would interfere with the leniency programmes that have so far contributed to the substantial progress made by the Commission and by national authorities in detecting hard-core cartels.<sup>213</sup> Against this background and the request of the European Parliament to prepare a detailed proposal that would address the obstacles to effective antitrust damages actions,<sup>214</sup> the Commission published a White Paper on Damages Actions accompanied by two Commission staff working papers and a very long impact report submitted by an external team of academics.<sup>215</sup>

### **C. The European Commission's White Paper on Damages Actions for Breach of the EC antitrust rules**

The White Paper on Damages actions for breach of the EC antitrust rules was published on 2<sup>nd</sup> April 2008 and is a response to the public consultation process first triggered by the Green Paper by inviting stakeholders to comment on the questions and proposals put forward by the Commission. It contains a broad range of measures aimed to stimulate damage claims and to ensure compensation to victims. Regarding its legal nature, the document does not have any binding effect.<sup>216</sup> It envisages a combination of measures at EU and national level. On the one hand, it calls Member States to create procedural rules and conditions to make antitrust damages actions more effective and provide for greater legal certainty across the EU.<sup>217</sup> On the other hand, the European Commission argues that such a “soft-law”

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<sup>212</sup> E. de Smijter, D. O’Sullivan, “The Manfredi judgment of the ECJ and how it relates to...”, p. 23.

<sup>213</sup> Editorial comment, “A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules”, *CMLR*, 45(3), 2008, p. 609.

<sup>214</sup> European Parliament Resolution of 25 April 2007 on the Green Paper on damages actions for breach of the EC antitrust rules, available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1> (accessed on 2 August 2011).

<sup>215</sup> European Commission, *White Paper on Damages actions for breach of the EC antitrust rules*, COM (2008) 165 final, 02.04.2008; *Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of EC antitrust rules*, SEC(2008) 404, 02.04.2008; *Commission Staff Working Document – Accompanying document to the White Paper on Damages actions for breach of EC antitrust rules – Impact Assessment*, SEC(2008) 405, 02.04.2008; Report for the European Commission, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, 2007.

<sup>216</sup> However, it is generally assumed that a White Paper can lead to an action programme for the EU in the area concerned, providing that it is favourably received by the Council. EU Glossary, [http://europa.eu/legislation\\_summaries/glossary/white\\_paper\\_en.htm](http://europa.eu/legislation_summaries/glossary/white_paper_en.htm) (accessed on 2 August 2011).

<sup>217</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 2.

instrument may not be sufficient and that a “European legal framework” for an effective antitrust damages regime would be a better solution.<sup>218</sup>

#### **a. The key objectives and underlying principles**

With regard to its primary objective the White Paper states that it is to ensure that all victims of infringements of EU competition law have access to a truly effective mechanisms for obtaining full compensation for the harm they suffered. The need for improvement in this area is explained by the fact that, despite some positive developments in the Member States following the publication of the Green Paper, the victims of the EU antitrust infringements only rarely obtain reparation of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euro each year.<sup>219</sup> Moreover, the majority of the Member States have had no real experience of private antitrust damages actions to date. The ineffectiveness of the right to damages is largely due to various legal and procedural hurdles in the Member States’ rules governing antitrust-related damages claims in national courts. Traditional rules of civil liability and procedure are often inadequate for actions for damages in the field of competition law, due to the specificities of the actions in this field, such as complex factual and economic analysis required, unavailability of crucial evidence and often unfavourable risk/reward balance for claimants.

The general goal of the White Paper is therefore “to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EU antitrust rules”.<sup>220</sup> The proposals in the White Paper are put forward with consideration to three main guiding principles:

- full compensation is to be achieved for all victims. Nevertheless, it is also acknowledged that an enhanced level of actions for damages will also “produce beneficial effects in terms of deterrence of future infringements and greater compliance with EU antitrust rules”,<sup>221</sup>
- the legal framework for more effective antitrust damages actions is to be based on a genuinely European approach that should reflect legal culture and traditions of the Member States;<sup>222</sup>

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<sup>218</sup> *Commission Staff Working Paper*, SEC(2008) 404, paras. 319 and 320.

<sup>219</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 2; *Commission Staff Working Document*, SEC(2008) 405, p. 15.

<sup>220</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 3.

<sup>221</sup> *Ibid.*, p. 3.

<sup>222</sup> After the publication of the Green Paper the Commission was criticized for drawing inspiration from the US antitrust litigation system (e.g. the idea of awarding double damages for horizontal cartels or the US style

- the effective system of private enforcement by means of damages actions is meant to complement, and not to replace or jeopardise public enforcement of Articles 101 and 102 TFEU by the Commission and the competition authorities of the Member States. claimants.

The issues addressed in the White Paper concern all categories of victims (consumers and businesses), all types of breaches of Articles 101 and 102 TFEU and all sectors of the economy.<sup>223</sup> What follows here is a brief review of the proposals made by the Commission in the White Paper:

## **b. Proposed policy measures**

### **i. The scope and calculation of damages**

The ECJ in *Manfredi* confirmed that the principle of effectiveness requires Member States to ensure that victims of antitrust infringements are compensated for the actual loss (which results from the illegal overcharge) and the loss of profit (which results from the drop in demand caused by the price increase). Moreover, the Court emphasized that harm must be compensated at real (rather than nominal) value and it thus required that (pre-judgment) interest shall also be paid.

The White Paper suggests to endorse this broad definition of the harm caused by antitrust infringements and to accept the *acquis communautaire* to serve as a minimum standard in the Member States. In the Staff Working Paper the Commission acknowledges that according to the jurisprudence of the ECJ exemplary or punitive damages, if awarded under national law, are not contrary to the European public order,<sup>224</sup> yet it does not propose any measures of such nature at EU level. By limiting damages to single awards, the Commission favours the compensatory principle over the deterrence principle. In this respect, the “modest” proposal of the Commission is to be welcomed, since it remains in line with the European norms and values.<sup>225</sup>

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discovery system). Therefore, the proposals of the White Paper are more conservative than the recommendations in the earlier Green Paper and it is expressly stated that they are meant to reflect the legal traditions of the EU-Member States and not rely on the US system. B. Vrcek, “Overview of Europe”, in: A. Foer, J. Cuneo (eds.), *International handbook on private enforcement of competition law*, Cheltenham 2010, p. 280.

<sup>223</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 3.

<sup>224</sup> *Commission Staff Working Paper*, SEC(2008) 404, para. 190.

<sup>225</sup> For a more revolutionary approach to the scope of damages, see: J. Drexler, B. Gallego, M. Enchelmaier, M. Mackenrodt, R. Podszun, “Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the White Paper by the Directorate-General for Competition of April 2008 on Damages Actions for

As regards the quantum of damages, the White Paper recognized that even when the scope of damages is clear, the victim of the antitrust infringement may face difficulties in proving the extent of the harm suffered. The calculation of damages, involving a comparison with the economic situation of the victim in the hypothetical scenario of a competitive market, may be a very cumbersome task. Under some circumstances it can become even impossible for the victim to show the exact amount of the loss. The Commission therefore proposed to produce a non-binding guidance on the calculation of damages in antitrust cases in order to provide judges and parties with pragmatic solutions to these often complicated exercises. The guidance was only announced in the White Paper. It was drafted by the DG Competition of the European Commission on the basis of an external study prepared by legal and economic practitioners as well as academics and submitted for public consultation in June 2011.<sup>226</sup>

## ii. Standing: indirect purchasers and the passing-on defence

In *Courage* and *Manfredi* the ECJ stressed that “any individual” who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This principle has given the Commission the mandate to establish a wide basis for legal standing to bring damages claims and to embrace indirect purchasers, i.e. purchasers who had no direct dealings with the infringer, but who nevertheless suffered harm because an illegal overcharge was passed on to them along the supply chain.

The position adopted in the White Paper is in clear contrast to the United States. There the rule at federal level is that damages actions are not allowed where there is only an indirect nexus between the plaintiff and the defendant, for instance, the situation of a consumer who buys the goods from a retailer and not directly from the manufacturer (who is the infringer).<sup>227</sup>

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Breach of the EC Antitrust Rules”, *International Review of Industrial Property and Copyright Law*, 7, 2008, p. 805, who recommend to award a higher amount of actual loss if the action of private plaintiffs has not been preceded by an enforcement action of a public authority. Such award, in the view of the authors, would ensure the skimming off of illegal profits in a single procedure and strengthen private enforcement.

<sup>226</sup> Study prepared for the European Commission, *Quantifying antitrust damages. Towards non-binding guidance for courts*, December 2009, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf) (accessed on 3 August 2011); European Commission, *Draft Guidance Paper. Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, June 2011, available at: [http://ec.europa.eu/competition/consultations/2011\\_actions\\_damages/draft\\_guidance\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf) (accessed on 3 August 2011). The public consultation runs until 30.09.2011.

<sup>227</sup> In the US, the Supreme Court [*Illinois Brick Co v. Illinois*, 431 U.S. 720 (1977)] held that indirect purchasers could not recover damages for violations of antitrust laws under section 4 of the Clayton Act. This followed on from the earlier ruling in *Hanover Shoe & Co v. United Shoe Machinery Corp* [392 U.S. 481 (1968)] which stated that it was not possible for a defendant to use the “passing on” defence to a suit by a direct purchaser. The decision of *Illinois Brick* triggered a heated academic debate. See: S. Parlak, „Passing-On Defence and Indirect Purchaser Standing: Should the Passing-On Defence Be Rejected Now the Indirect Purchaser Has Standing after

This choice is based on concerns about the complexity implied by indirect claims, especially the difficulties in tracing the alleged overcharge through multiple layers of distribution, as well as the assumption that it is more efficient for direct purchasers to bring a private-antitrust claim and that the deterrence objective is better served by letting direct purchasers sue for the full amount of damages.<sup>228</sup> The European Commission's choice, on the other hand, is in line with the guiding principle of the White Paper, i.e. full compensation of all victims. The Commission prefers to adopt a compensation-based approach that allows all the victims (including indirect purchasers) to seek redress, but also to allow the defendants to invoke the passing-on defence. According to the Commission, if ultimately there is no harm suffered, there should also be no compensation.<sup>229</sup> Purchasers of an overcharged product or service who have been able to pass on that overcharge to their own customers should therefore not be entitled to compensation of that overcharge. Nevertheless, the passing-on of the overcharge may well have led to a reduction in sales. Such loss of profits should undoubtedly be compensated by the one who is responsible for the initial overcharge.<sup>230</sup>

In order to avoid unjust enrichment of purchasers who passed on the illegal overcharge as well as multiple compensation of the overcharge, the White Paper allows the infringer to invoke the passing-on defence. The Commission is keen to stress that the standard of proof for the passing-on defence should not be lower than the plaintiff's standard of proof of the damage.<sup>231</sup> The plaintiff, thus, must prove the loss he suffered but the defendant may show that the plaintiff mitigated the loss by passing on the overcharge (or part of it) to the downstream purchasers.

The White Paper also addresses the case where an indirect purchaser invokes the passing-on of overcharges as a basis to show the harm he suffered. The Commission notes that purchasers at, or near the end of the distribution chain are often those most harmed by

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Manfredi and the White Paper of the European Commission?", *World Competition*, 1, 2010, pp. 37-40. In contrast to the federal level, 19 States and the District of Columbia allow indirect purchasers to recover treble damages. D. H. Ginsburg, "Comparing Antitrust Enforcement in the United States and Europe", *Journal of Competition Law and Economics*, 1(3), 2005, p. 431.

<sup>228</sup> *Ibid.*, p. 36; P. Nebbia, E. Szyszczak, "White Paper on Damages Actions...", p. 643; Ashurst, "Study on the conditions of claim for damages in case of infringement of EC competition rules. Analysis of economic models for the calculation of damages", Report prepared for the European Commission, August 2004, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/economic\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf) (accessed on 4 August 2011).

<sup>229</sup> Arguments of enforcement efficiency and deterrence, which play an important role in the US, are thus not accepted as autonomous principles and are only of secondary importance in that they complement the compensatory principle.

<sup>230</sup> R. Becker, N. Bessot, E. de Smijter, "The White Paper on damages actions for breach of the EC antitrust rules", *Competition Policy Newsletter*, No. 2/2008, p. 6.

<sup>231</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 8; *Commission Staff Working Paper*, SEC(2008) 404, para. 214.

antitrust infringements, but given their remoteness from the wrongdoer they find it particularly difficult to prove the existence and the scope of the illegal overcharge that was passed on to their level. In consequence, they are not compensated and the infringer, who may have successfully used the passing-on defence against other plaintiffs upstream, retains the unjust enrichment. To avoid such scenario, the White Paper suggests to lighten the victim's burden of proof and suggests that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.<sup>232</sup> This presumption could be rebutted by the infringer, for example by referring to the fact that he has already paid compensation for the same overcharge to someone higher up in the distribution chain than the plaintiff.<sup>233</sup> According to the Commission, the described presumption would be a very limited, although important, alleviation of the victim's burden of proof, since the plaintiff would still be under a duty to prove the initial infringement, the existence of the initial overcharge and the scope of his damage.<sup>234</sup>

### iii. Collective redress mechanisms

The answer to the passing-on question adopted in the White Paper leads to an enforcement problem. If the overcharge is passed along the distribution chain, the damage is most likely scattered among large groups of customers. If it finally stops with consumers, the individual harm has often such a low value that an individual action does not make any sense. As a result, many such victims currently remain uncompensated. The Commission intends to solve this problem by introducing two complementary mechanisms of collective redress. They offer alternative means of court action for victims such as consumers of SMEs that would otherwise be unwilling to seek compensation given the costs, uncertainties, risks and burdens involved.<sup>235</sup>

- Opt-in collective actions

An opt-in collective action combines in one single action the claims from those victims who expressly decide to combine their individual claims for damages into one action. Such a system improves the situation of the plaintiffs by making the cost/benefit analysis of the litigation more attractive, since it allows them to reduce the litigation costs and share the evidence. There has been much discussion on whether the Commission should suggest an opt-

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<sup>232</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 8.

<sup>233</sup> R. Becker, N. Bessot, E. de Smijter, „The White Paper on damages actions...”. p. 6.

<sup>234</sup> *Commission Staff Working Paper*, SEC(2008) 404, paras. 215 and 220.

<sup>235</sup> R. Becker, N. Bessot, E. de Smijter, „The White Paper on damages actions...”. p. 7.

in mechanism, which is closer to the European legal traditions,<sup>236</sup> or rather a US-style opt-out mechanism, whereby an individual brings an action on behalf of an unidentified class of injured persons and the victims represented are all those who do not expressly declare that they will not participate in an action. Opt-in collective actions are claimed to make the litigation more complex by requiring the identification of the plaintiffs and the specification of the harm allegedly suffered, whereas an opt-out mechanism allows a wider representation of the victims and can thus be seen as more efficient in terms of corrective justice and deterrence.<sup>237</sup> Yet, opt-out actions in the United States, combined with other features,<sup>238</sup> have been perceived to encourage nuisance and lead to excesses. All in all, the Commission considered it more appropriate to suggest opt-in collective actions.

- Representative actions

A representative action for damages is an action brought by a natural or legal person on behalf of two or more individuals or businesses who are not themselves parties to the action. It is aimed at obtaining damages for the individual harm caused to the interests of all those represented (and not to the representative entity).<sup>239</sup> The White Paper suggests the introduction of representative actions, to be brought by qualified bodies, for instance trade associations or consumer associations that may be either officially designated in advance or certified on *an ad hoc* basis by the public authorities of a Member State for a particular antitrust infringement. These qualified entities would need to meet specific criteria set in the law. These criteria, together with the risk that the designation is withdrawn in case of excesses would help prevent abusive litigation. According to the Commission, the damages would be awarded to the representative entity, who is the party bringing the action. Where possible, it is preferable that the damages be used by the entity to directly compensate the harm suffered by all those represented in the action (e.g. the harm suffered by the producers in a given industry). However, the Commission does not exclude the possibility that, exceptionally,

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<sup>236</sup> J. Stuyck, „Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question”, EBLR, 20(4), 2009, p. 483.

<sup>237</sup> R. Becker, N. Bessot, E. de Smijter, „The White Paper on damages actions...”. p. 7.

<sup>238</sup> E.g. jury trial, liberal discovery rules, contingency fee arrangements, the award of costs and attorneys fees to the successful plaintiff, without the corresponding requirement that the unsuccessful plaintiff pay the defendant’s costs and attorneys fees, joint and several liability (without any guarantee of contribution), treble damages. *Commission Staff Working Paper*, SEC(2008) 404, p. 17; A. Jones, B. Sufirin, *EU Competition Law...*, p.1187.

<sup>239</sup> *Commission Staff Working Paper*, SEC(2008) 404, para. 49.

damages be awarded indirectly (e.g. damages attributed to a fund protecting the interests of victims of antitrust infringements in general).<sup>240</sup>

The two above mentioned mechanisms of collective redress are considered complementary in the White Paper. It is assumed that opt-in collective actions are more likely to be used by businesses or victims having suffered a significant individual harms, since they require at the outset a positive action from the victims. Conversely, the representative action mechanism is conceived to target the victim's traditional inertia when the harm suffered individually is of low value. Also, the victims of antitrust infringements retain the right to bring an individual action for damages if they so wish. In the view of the Commission, all these possibilities to bring individual actions constitute a set of solutions that should significantly improve the victim's ability to effectively enforce their right to damages. However, the White Paper also notes that safeguards should be put in place to avoid that the same harm is compensated more than once. The nature of such safeguards is not discussed in the documents prepared by the Commission. The issue of multi-jurisdiction litigation (for instance a situation in which representative and opt-in actions occur more or less simultaneously in multiple countries) is also not being addressed.

It is worth noting that with regard to group litigation, the White Paper proposals are part of the Commission's wider initiative to strengthen collective redress mechanisms in the EU. Following the joint information note by EU Commissioners for Justice, Competition and Consumer Policy, on the need for a coherent approach to collective redress,<sup>241</sup> a public consultation on this topic was held from 4 February to 30 April 2011. Its purpose, among other things, was to identify common legal principles on collective redress in the EU and to examine how such common principles could fit into the EU legal system and into the legal orders of the 27 EU Member States. The Communication on the result of the consultation process has not yet been published.<sup>242</sup> According to the Commission, however, nothing is decided on that point. The final decision on whether new EU legislation is needed will be

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<sup>240</sup> Ibid., para. 56; R. Becker, N. Bessot, E. de Smijter, „The White Paper on damages actions...”. p. 7.

<sup>241</sup> European Commission, *Towards a Coherent European Approach to Collective Redress: Next Steps – Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli*, SEC(2010) 1192, available at: <http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf> (accessed on 5 August 2011).

<sup>242</sup> The numerous replies to the consultation document are available at: [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html) (accessed on 5 August 2011).

based on the consultation's outcome and, if appropriate, a detailed impact assessment study.<sup>243</sup>

#### **iv. Limitation periods**

Taking into account that statutory provisions regarding limitation periods vary among EU Member States,<sup>244</sup> the White Paper suggests to adopt a uniform limitation period to allow for an effective private enforcement of EU competition rules. With regard to stand-alone cases, the Commission proposes that the limitation period should not start to run before a continuous or repeated infringement ceases or before the victim of the infringement can reasonably be expected to have knowledge of the infringement and the harm caused to him. It does not, however, determine a minimum duration of the limitation period. To keep open the possibility of follow-on actions, the Commission puts forward solutions to avoid limitation periods expiring while public enforcement of the competition rules by competition authorities (or the review courts) is still ongoing. In this respect, the Commission suggests that a new limitation period of at least two years should start once the infringement decision on which a follow-on plaintiff relies has become final. The Commission believes that such a rule would not unduly prolong the legal uncertainty for the infringer, while it would enable the plaintiff to bring a damages claim once the illegality of the practice has been finally established.

#### **v. Costs of damages actions**

While it is acknowledged in the White Paper that costs associated with antitrust damages actions and cost allocation rules can be a decisive disincentive to bring an antitrust damages claim, the Commission does not suggest any specific changes on national cost regimes. The White Paper only encourages the Member States to reflect on their cost rules, including the level of court fees, the cost allocation principles and the ways of funding. The Commission also highlights the necessity for Member States to give due consideration to mechanisms fostering early resolution of cases, for instance by settlements. Experience in the US suggests that as private enforcement becomes more prevalent in Europe, nations indeed

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<sup>243</sup> Press Release IP/11/132, *Commission seeks opinions on the future for collective actions in Europe*, 04.02.2011, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/132&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed on 5 August 2011).

<sup>244</sup> Some EU countries use subjective periods which start running on the date the potential plaintiff discovered or should have discovered the damage (e.g. France, Portugal, UK, Finland). A few Member States have objective limitation periods which begin to run irrespective of the knowledge of the plaintiff (Ireland, Luxembourg, Malta, Sweden). Finally, some Member States apply both types of time limit (e.g. Austria, Germany, Poland). Ashurst, "Study on the conditions of claim for damages in case of infringement of EC competition rules. Comparative Report", p. 87.

will have to find ways to facilitate the settlements of claims both within the national context and within a more global context, recognizing that many cartels operate globally.<sup>245</sup> However, in the EU, as long as there is no effective judicial protection of the victim's right to damages for breach of antitrust rules, settlements mechanisms are of secondary importance. They will have a real value once the court alternative becomes credible and this certainly is the primary objective of the White Paper.

**vi. Access to evidence: disclosure *inter partes***

Victims of antitrust infringements find themselves in a dilemma: antitrust damages cases are very fact-intensive since the proof of the infringement, the quantum of damage and the relevant causal links all require an unusually complex assessment of economic interrelations and effects. Much of the needed evidence, however, often lies inaccessibly in the hands of the infringers, who often put much effort into concealing the relevant information. According to the Commission, the current systems of civil procedure in many Member States offer, in practice, no effective means to overcome the information asymmetry that is typical of antitrust cases. In consequence, infringers are able to keep crucial evidence to themselves, which means that victims are discouraged from bringing a claim for compensation, and if they do, judges are not able to decide the case for their sake, since they lack sufficient evidence.<sup>246</sup>

In order to help private plaintiffs to prove the factual basis necessary for a claim under Article 101 or 102 TFEU, the Commission in the White Paper suggests a minimum harmonization of procedural laws through a disclosure mechanism that follows the approach of the Intellectual Property Directive 2004/48/EC.<sup>247</sup> Under this approach, obligations to disclosure arise only once a court has adopted a disclosure order and they are subject to a strict control by this court. According to the White Paper, "conditions for a disclosure order should include that the claimant has:

- presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;
- shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, otherwise to produce the requested evidence;

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<sup>245</sup> B. Vrcek, "Overview of...", p. 293.

<sup>246</sup> R. Becker, N. Bessot, E. de Smijter, „The White Paper on damages actions...". p. 9.

<sup>247</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ [2004] L 157/45.

- specified sufficiently precise categories of evidence to be disclosed; and
- satisfied the court that the envisaged disclosure measure is both relevant to the case necessary and proportionate.<sup>248</sup>

In this way the Commission intends to avoid, on the one hand, unwelcome externalities such as US-style “fishing expeditions”<sup>249</sup> or “discovery blackmail”<sup>250</sup> and, on the other hand, major obstacles to revealing the truth simply because the relevant evidence happens to be under the control of the wrongdoer.<sup>251</sup>

## **vii. Probative value of NCA decisions**

Further important issue addressed in the White Paper relates to the evidential value of the NCA decisions. At present, where a breach of EU antitrust rules has been found in a decision of the European Commission, victims can rely on this decision as binding proof in follow-on civil proceedings for damages (Art. 16(1) of Regulation 1/2003). The Commission found that there is a range of compelling reasons for a similar rule in relation to national competition authorities when they find a breach of Article 101 or 102 TFEU.<sup>252</sup> Therefore, the White Paper suggests that a final decision by an NCA and a final judgment by a review court upholding the NCA decision or itself finding an infringement should be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust proceedings for damages.<sup>253</sup> In the view of the Commission, such a rule would not only increase legal certainty, especially for victims of the infringements, but also enhance the effectiveness of private enforcement of EU competition law by allowing a rational division of labour and allocation of resources between courts and specialised agencies. Moreover, it would also provide for consistency in the application of Articles 101 and 102 TFEU and reduce the difficulties that victims encounter when they have to prove their case.<sup>254</sup>

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<sup>248</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 5.

<sup>249</sup> The term “fishing expedition” describes a strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence for a damages claim might be found.

<sup>250</sup> The term “discovery blackmail” describes a strategy to request very broad discovery measures entailing high costs with the intention to compel the other party to settle rather than to continue the litigation, although the claim or the defence may be rather weak or even unmeritorious. It is a strategy that can be employed by both claimants and defendants.

<sup>251</sup> *Commission Staff Working Paper*, SEC(2008) 404, para. 70.

<sup>252</sup> As was discussed in chapter 1, at present, such a rule exists only in the national law of some Member States, e.g. Germany, UK or Hungary.

<sup>253</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 6. The rule would only apply to positive decisions confirming the infringement. *Commission Staff Working Paper*, SEC(2008) 404, para. 152.

<sup>254</sup> *Commission Staff Working Paper*, SEC(2008) 404, para. 144.

### **viii. Fault requirement**

Another topic that is covered by the White Paper and which is relevant in the context of proving a case relates to the fault requirement. The Commission notes that in some Member States it is sufficient to prove the infringement of the EU competition rules (and obviously the damage it has caused) in order to be awarded damages.<sup>255</sup> However, under the rules of tort law of most of the Member States plaintiffs must usually provide some evidence of the defendant's fault in causing the damage and show intent or negligence.<sup>256</sup> The idea behind this additional requirement is that wrongdoers who did not know that they were breaking the law should not be held liable for the negative consequences of their behaviour. The Commission is of the opinion that the full application of this requirement to breaches of directly applicable EU competition rules cannot be reconciled with the principle of effectiveness of those rules.<sup>257</sup> That is because the burden of proving fault lies with the plaintiff, who is often unlikely to have information that allows him to prove intent or negligence. Accordingly, the White Paper suggests the introduction of a no-fault liability regime, with the possibility of the defendant to escape liability if he can demonstrate that the infringement was the result of an excusable error. The Commission explains that this would occur "if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition".<sup>258</sup>

### **ix. Interaction between leniency programmes and actions for damages**

A final topic that is covered by the White Paper relates to the relation between leniency programmes and actions for damages. The Commission introduced the leniency programme in order to encourage greater detection of cartels.<sup>259</sup> By whistleblowing on a cartel, the cartel member may obtain full or partial immunity from fines. In recent years such forms of detection have influenced the large fines which have been imposed on serious cartels. The Commission acknowledged that the conflict of protecting leniency programmes

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<sup>255</sup> Those countries involve the Czech Republic, Slovakia, Cyprus, UK, Ireland. Ashurst, "Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report", p. 50.

<sup>256</sup> This group of countries includes Austria, Denmark, Estonia, Finland, Germany, Greece, Hungary Poland and Portugal. *Ibid.*, p. 50.

<sup>257</sup> *Commission Staff Working Paper*, SEC(2008) 404, para. 175. See, in this context, the *Manfredi* ruling, in which fault is not mentioned explicitly by the ECJ as a condition of the EU right to damages. However, it is not excluded, either.

<sup>258</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 7. In the literature it is suggested that this exception could only be used to cover certain non-hard core (such as Research and Development) and vertical agreements, which are novel. P. Nebbia, E. Szyzszak, "White Paper on Damages Actions...", p. 646.

<sup>259</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17.

on one hand, and ensuring a fair compensation to the victims of antitrust infringements, on the other hand, needs to be balanced. The protection of leniency is also in the interest of private applicants who wish to bring follow-on damages actions, since they can profit from the decisions of competition authorities based on leniency applications. Therefore, in order to preserve the effectiveness of leniency programmes, the Commission suggested to offer enhanced protection to leniency applicants in private actions for damages. In the White Paper, the Commission proposes not to disclose corporate statements<sup>260</sup> by leniency applicants and thus make an important exception to the disclosure obligations described above. This protection would apply to all applications (successful or not) submitted under EU or national leniency programmes when the enforcement of Article 101 TFEU is at issue.<sup>261</sup> According to the Commission, such protection would avoid placing the leniency applicant in a less favourable condition than its co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even discourage an infringer from applying for leniency altogether.

In the White Paper the Commission also puts forward for further consideration the possibility of limiting civil liability of the successful immunity applicant to claims by his direct and indirect contractual partners. The purpose behind the rule is to make the amount of damages to be paid more predictable and limited, since plaintiff who did not buy goods/services directly or indirectly from the immunity recipient would not have standing to claim damages.

The protection of the leniency programmes as foreseen by the Commission meets some concerns. The Commission's proposal departs from the broad rule on standing recognized by the Court of Justice in *Courage* and *Manfredi* and favours deterrence over compensation. It is also questionable whether it is not overly generous to limit the civil liability of immunity recipients. The general idea of leniency is to grant a rebate in fines to someone who helps to discover the infringement and has to be distinguished from the compensation issue. Linking the two matters amounts to "a contract at the expense of third parties (the victims) between the authority and the wrongdoer".<sup>262</sup> Thus, there is no reason to mitigate the compensation principle. It seems that the Commission's proposal to introduce stricter rules controlling the disclosure of corporate statements is sufficient in order to avoid

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<sup>260</sup> The voluntary presentations by a company of its knowledge of a cartel and role therein which are drawn up specially for submission under the leniency programme. *Ibid.*, point 31.

<sup>261</sup> *White Paper on Damages actions*, COM (2008) 165 final, p. 10.

<sup>262</sup> J. Drexler, B. Gallego, M. Enchelmaier, M. Mackenrodt, R. Podszun, "Comments of the Max Planck Institute...", p. 811.

making the leniency applicants more vulnerable than the co-infringers. Yet, their protection should not go as far as to protect any leniency application, regardless of its success. This may lead to a situation where leniency applications might serve as a shield to disclosure and undermine the effectiveness of this measure.<sup>263</sup>

### c. Reactions to the White Paper

Following the publication of the White Paper, the Commission received numerous comments that were published on its website. The overall reception of the document can, at best, be characterized as lukewarm. Some commentators have expressed their disappointment with the allegedly modest approach adopted in the White Paper. In the editorial of its June 2008 issue, the *Common Market Law Review* commented that “a little more action could be a lot better for the enforcement of competition law”.<sup>264</sup> Yet, with regard to the Member States’ reactions, there was widespread agreement that the Commission should not have gone any further in its efforts to encourage private litigation; on the contrary, resistance against the Commission’s initiatives appears to have grown. Almost all Member States have raised questions as to the Commission’s authority to intervene at the EU level in their national law in order to facilitate antitrust damages claims. Some Member States have expressly opposed the necessity of European legislative measures. In their joint response to the Commission, the German Government and *Bundeskartellamt* conclude that they “cannot discern any convincing reasons for special private law and civil procedural rules for enforcing antitrust law”.<sup>265</sup> In the same line of argument, the Austrian Government objects to the White Paper’s aim of creating a “special law of damage compensation” (“Sonderschadenersatzrecht”).<sup>266</sup>

The Member State’s unenthusiastic attitude to the White Paper was noticed as well in the European Parliament. A report of March 9, 2009 by the European Parliament’s Economic

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<sup>263</sup> Ibid., p. 811.

<sup>264</sup> Editorial comment, “A little more action please...”, p. 615.

<sup>265</sup> “Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the *Bundeskartellamt* on the EU Commission’s White Paper on Damages actions for breach of the EC antitrust rules”, p. 3, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments/bund\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf) (accessed on 10 August 2011).

<sup>266</sup> „Österreichische Stellungnahme zum Weißbuch ‚Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts‘“, p.2, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments/oster\\_de.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/oster_de.pdf) (accessed on 10 August 2011).

and Monetary Affairs Committee (ECON),<sup>267</sup> followed by a Resolution of the European Parliament on March 26, 2009,<sup>268</sup> expressed modest support for the Commission's proposals – in particular those relating to collective redress.<sup>269</sup> In general, however, the report echoed the concerns raised by the Member States and questioned the Commission's competence for its proposals.<sup>270</sup>

In the legal literature the White Paper has also received strong criticism. Besides the argument that there was no basis in the Treaty for the measures proposed by the Commission, it was claimed that the White Paper creates a potential for overcompensation.<sup>271</sup> In particular, the Commission's proposal on "passing on" was argued to entail such risk and heavily criticised. According to some commentators, "if accepted, the Commission's proposed measures regarding the 'passing-on' would put the defendant in the position of having to both prove and disprove the passing on. Vis-à-vis the direct purchaser, the defendant would have to prove that all or part of the alleged overcharge was passed on down the distribution chain. By contrast, vis-à-vis indirect purchasers would have to prove the exact opposite, that is, that the alleged overcharge was *not* passed on to them".<sup>272</sup> If the defendant would be unsuccessful to prove the "passing-on" vis-à-vis the direct purchaser and fail to rebut the presumption invoked by indirect purchasers who would rely on the alleged passing-on, he would face multiple liability for the same overcharge. In reality, it was argued, there are no effective "mechanisms" available to national courts to ensure that claims from different levels of the distribution chain are concentrated in the same court. Therefore, multiple liability would be a likely consequence of the Commission's model.<sup>273</sup> As one author put it, if adopted, the proposal would provide for "jackpot justice".<sup>274</sup>

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<sup>267</sup> K. Lehne (rapporteur), Committee on Economic and Monetary Affairs (ECON), *Report on the White Paper on damages actions for breach of EC antitrust rules* (2008/2154 (INI)), A6-0123/2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:228:0040:0046:EN:PDF> (accessed on 10 August 2011).

<sup>268</sup> European Parliament Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN> (accessed on 10 August 2011).

<sup>269</sup> The European Parliament, however, called for an integrated approach to the issue of collective redress. The resolution showed strong reservations to the idea that private enforcement of competition rights should be favoured and prioritized over other forms of collective redress, leading to an arbitrary and unnecessary fragmentation of national procedural laws. *Ibid.*, points 5-6.

<sup>270</sup> ECON, *Report on the White Paper...*, p. 9.

<sup>271</sup> J. Kortmann, C. Swaak, „The EC White Paper on Antitrust Damages Actions: Why the Member States are (Right to be) Less Than Enthusiastic”, *ECLR*, 30(7), 2009, p. 344.

<sup>272</sup> *Ibid.*, p. 345.

<sup>273</sup> *Ibid.*, p. 345. See also: ECON, *Report on the White Paper...*, p.11.

<sup>274</sup> A comment attributed to Robert Murray, Managing Partner of the London office of Cohen Milstein Hausfeld & Toll. See the Dutch Retail Association's response to the White Paper, p. 4, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments/dutchretail\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/dutchretail_en.pdf) (accessed on 10 August 2011).

Another major concern was the way in which the proposed framework would affect the national systems. The national rules of tort law form an integral part of the private law systems in the Member States. Changes to these rules, even minor ones, would affect the internal coherence of these systems and run counter to the basic principles that inspire the development of a unified private law.<sup>275</sup> Thus, the creation of specific procedures and substantive requirements for competition law damages actions was regarded as undesirable, mainly due to the worry that “the special treatment of competition law cases might have possible unforeseen effects”.<sup>276</sup>

#### **D. The European Commission’s proposal for an EU directive**

Notwithstanding the criticism the White Paper received, in 2009 the Commission prepared a proposal for a Council Directive on rules governing damages actions for infringements of Articles 101 and 102 of the Treaty with the objective of creating an efficient, but balanced, private enforcement system of EU competition rules.<sup>277</sup> The proposal was never officially published, but leaked out before its planned publication.<sup>278</sup> It contained provisions mainly to be effective on follow-on damages actions in hard-core cartel cases, thus its scope was narrowed down in comparison to the White Paper.<sup>279</sup>

The reason why the proposal directive was never officially published is not known but it can be guessed that the Commission felt that it would not be as welcomed as it would have liked. A strong criticism was still to be heard with regard to the EU’s authority to reach so far into national legislative territory and to introduce European tort law through the back door. Moreover, the exact legal basis for the directive could not have been determined before Commissioner Neelie Kroes, a strong proponent of enhanced private enforcement, left office at the beginning of 2010. It now remains to be seen whether and, if so how, Competition

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<sup>275</sup> J. Kortmann, C. Swaak, „The EC White Paper on...”, p. 347; 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, p. 483.

<sup>276</sup> Association of European Competition Law Judges, “Comments on the Commission’s White Paper on damages actions for breach of the EC antitrust rules”, p. 1, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments/judges\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/judges_en.pdf) (accessed on 10 August 2011).

<sup>277</sup> A. Jones, B. Sufrin, *EU Competition Law...*, p.1214.

<sup>278</sup> At the time of writing of this thesis, the leaked document was not publicly available. A detailed report on the draft directive’s content can be found at J. Alfaro, T. Reher, “Towards the Directive on Private Enforcement of EC Competition Law: Is the Time Ripe?”, *The European Antitrust Review*, 2010, available at: [http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/2fd5c796-bc39-4aec-9ca0-3dd29d1501fd/Presentation/PublicationAttachment/b6ba3116-ab73-4d65-8465-3fcf1ec3baca/The\\_European\\_Antitrust\\_Review\\_Jesus\\_Alfaro\\_Competition\\_092009.PDF](http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/2fd5c796-bc39-4aec-9ca0-3dd29d1501fd/Presentation/PublicationAttachment/b6ba3116-ab73-4d65-8465-3fcf1ec3baca/The_European_Antitrust_Review_Jesus_Alfaro_Competition_092009.PDF) (accessed on 12 August 2011).

<sup>279</sup> *Ibid.*, p. 43.

Commissioner Joaquin Almunia will proceed but it seems likely that further consultation on the issue will occur and that a legislative package will not be enacted in the near future.<sup>280</sup> In the meantime, enforcement is left to the national courts applying their own laws, subjects to the limits set out in EU law, i.e. the principle of equivalence and effectiveness.

#### **4. Concluding remarks**

As the above analysis shows the EU model of antitrust regime for many years relied on administrative enforcement by the European Commission to the near exclusion of private enforcement. The EU competition law enforcement was heavily influenced by the Member States' legal traditions, which regarded antitrust law as public law and viewed private enforcement with suspicion, if not outright hostility. In recent years, however, the skepticisms towards private enforcement in Europe seems to have lessened. There seems to be a growing consensus that the pure administrative system is insufficient and that a move towards a more pluralistic vision of antitrust enforcement is necessary. The question, however, how this vision is to be achieved, still remains unanswered.

Several years ago, following the judgments by the Court of Justice, the European Commission launched an initiative to make private enforcement of EU competition law become a reality across the EU. The European Commission chose to take on a very difficult set of issues in its Green and White Paper on damages actions for breach of the EU antitrust rules, highlighting and discussing a few of the most essential elements of damages actions and obstacles to effective private enforcement in national laws of the Member States. This was undeniably a step in the right direction, since it certainly stimulated debate on private enforcement in Europe and increased awareness of the existing EU right to damages. However, it seems that the aim of the European Commission to create a "European legal framework" for antitrust-related damages action was overambitious and went too far.

From the subsidiarity perspective, the intervention in national law of the Member States at the EU level in order to stimulate private enforcement does not seem to be justified. Looking at the details of the White Paper it is apparent that in some respects the proposals of the Commission unnecessarily interfere with coherent legal systems of the Member States. It is true that the variations on substantive and procedural tort rules that currently exist in national laws may have a negative impact on the effectiveness of the EU right to damages,

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<sup>280</sup> N. Tait, "EU competition proposals delayed", *The Financial Times*, 28 March 2010, available at: [http://www.ft.com/cms/s/0/c9fa9712-3a99-11df-b6d5-00144feabdc0,dwp\\_uuid=62398742-53ce-11db-8a2a-0000779e2340.html](http://www.ft.com/cms/s/0/c9fa9712-3a99-11df-b6d5-00144feabdc0,dwp_uuid=62398742-53ce-11db-8a2a-0000779e2340.html) (accessed on 12 August 2011).

this fact however does not provide for a reason to approximate national rules in this area. In pursuit of enhanced private enforcement, the Commission seems to be rushing too much and acting in accordance with the rule that the end justifies the means. It can be argued, that instead of pressing for a “fast-track” tort law and civil procedure regulations’ harmonization, it should rather wait for the bottom-up development of antitrust damages claims at national level. This approach would probably better correspond with the ECJ’s view on antitrust damages, which acknowledged in both *Courage* and *Manfredi* that “it is for the domestic legal system of each Member State [...] to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law”.<sup>281</sup> In the light of this quote it is surprising that the Commission interprets *Courage* and *Manfredi* as inviting harmonization of the procedural aspects of competition law within the EU.<sup>282</sup>

EU Member States are certainly best placed to adapt their national laws in order to facilitate actions for damages. Recent years have shown that some of them (e.g. Germany and Romania) are already amending the relevant legislation in order to overcome the obstacles to private enforcement. The Commission would be well advised to await the practical results of these changes.

In the meantime, the Commission should, firstly, overlook the process, accumulate information and develop practical recommendations to facilitate the changes of national laws across the EU. The non-binding guidance on the quantification of antitrust damages, prepared by the Commission and submitted to public consultation in June 2011 is a step in the right direction. Such initiatives can enhance the cross-fertilization of ideas on private enforcement at EU and national levels. Secondly, the Commission would gain from a close observation of market solutions in the field of private enforcement which also aim to overcome the obstacles to successful damages actions. As the example of the Cartel Damages Claims proves, market solutions may be simpler and more user-friendly than the proposals of the Commission.<sup>283</sup> Thirdly, the debate on the issue itself, triggered by the Commission’s Green and White Paper, resulted in a considerable increase of private antitrust cases in courts across Europe from 60

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<sup>281</sup> Judgment of 20 September 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, [2001] ECR I-06297, para. 29; Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, [2006] ECR I-6619, para. 62.

<sup>282</sup> The White Paper contained no explanation of the basis of the Commission’s proposal, instead it referred to the ECJ’s rulings in *Courage* and *Manfredi*.

<sup>283</sup> In 2008 White Paper, the Commission proposed a very complex and detailed set of rules with regard to collective redress. Yet, already in 2002 a business model evolved according to which companies could buy damages claims from numerous victims of a cartel bundle these and sue for damages in their own name. The Cartel Damages Claims (CDC) was the founder of this model. J. Alfaro, T. Reher, “Towards the Directive...”. p. 43.

cases between 1962 and 2004 to 96 cases in a three-year period of 2004-2007.<sup>284</sup> Although an overall knowledge of the availability of antitrust damages grew, a further enhancement of professionals' and consumers' awareness in this area should remain one of the primary concerns of the Commission.

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<sup>284</sup> The 96 cases found between 2004 and 2007 did not include cases based on national competition law. Had they included such cases, a much higher figure would have resulted. In Germany in 2004, alone, 240 court decisions were reported that addressed antitrust-related damages claims. J. Kortmann, C. Swaak, „The EC White Paper on...”, p. 350.

### III. Private antitrust enforcement at national level – recent developments in selected EU-Member States

#### 1. Overview of the developments in EU-Member States

Despite the actions of the Commission described above, up till now there has been no change to the rules relating to the private antitrust claims at European level. However, the modernization and decentralization of EU competition law enforcement and the related debate on private enforcement triggered by the Green and White Paper, as well as the *Courage* and *Manfredi* rulings by the Court of Justice, led to important developments in national antitrust legislation in several EU-Member States. According to the Ashurst Report, already before 2004 three Member States (Finland, Lithuania, Sweden) had had a specific statutory basis for bringing EU competition law based damages actions and twelve (Cyprus, Estonia, Finland, Germany, Ireland, Italy, Latvia, Lithuania, Slovenia, Spain, Sweden, UK) for national law based claims.<sup>285</sup> Since 2004, the number of countries which have a specific statutory basis for EU competition law based damages actions has grown up to ten (to include: Cyprus, Germany, Hungary, Lithuania, Malta, Romania, Slovenia, Sweden, UK, Finland).<sup>286</sup> There

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<sup>285</sup> Ashurst, “Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report”, pp. 27-28.

<sup>286</sup> As of 1 August 2011. The data comes from an analysis of the 27 competition laws of the EU Member States. See: Austria – Kartellgesetz, <http://www.bwb.gv.at/SiteCollectionDocuments/Kartellgesetz22122010.pdf>; Belgium – Act on the Protection of Economic Competition, [http://economie.fgov.be/en/binaries/apec-new\\_tcm327-56301.pdf](http://economie.fgov.be/en/binaries/apec-new_tcm327-56301.pdf); Bulgaria – Law on Protection of Competition, <http://www.cpc.bg/General/Legislation.aspx>; Cyprus – The Protection of Competition Law, [http://www.competition.gov.cy/competition/competition.nsf/dmlcompetition\\_en/dmlcompetition\\_en?OpenDocument](http://www.competition.gov.cy/competition/competition.nsf/dmlcompetition_en/dmlcompetition_en?OpenDocument); The Czech Republic – Act on the Protection of Competition, [http://www.compet.cz/fileadmin/user\\_upload/Legislativa/HS/CR/Act\\_143\\_2001\\_consolidated.pdf](http://www.compet.cz/fileadmin/user_upload/Legislativa/HS/CR/Act_143_2001_consolidated.pdf); Denmark – The Competition Act, [http://www.kfst.dk/fileadmin/webmasterfiles/konkurrence/Fusionskontrol/Consolidated\\_Act\\_No.\\_1027\\_of\\_21\\_August\\_2007\\_as\\_amended\\_as\\_of\\_1\\_October\\_2010.pdf](http://www.kfst.dk/fileadmin/webmasterfiles/konkurrence/Fusionskontrol/Consolidated_Act_No._1027_of_21_August_2007_as_amended_as_of_1_October_2010.pdf); Estonia – Competition Act, <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50066K7&keel=en&pg=1&ptyyp=RT&tyyp=X&query=konkurentsiseadus>; Finland – Act on Competition Restrictions, <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended>; France – Code de Commerce, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379&dateTexte=20110911>; Germany – Act Against Restraints of Competition, [http://www.gesetze-im-internet.de/englisch\\_gwb/act\\_against\\_restraints\\_of\\_competition.pdf](http://www.gesetze-im-internet.de/englisch_gwb/act_against_restraints_of_competition.pdf); Greece – Law on the Control of Monopolies and Oligopolies and the Protection of Free Competition, <http://www.epant.gr/category.php?Lang=en&id=91>; Hungary – Act on the Prohibition of Unfair and Restrictive Market Practices, <http://www.gvh.hu/domain2/files/modules/module25/151308A2868BD0C90.pdf>; Ireland – Competition Act, [http://www.tca.ie/images/uploaded/documents/Competition\\_Act\\_2002.pdf](http://www.tca.ie/images/uploaded/documents/Competition_Act_2002.pdf); Italy – Competition and Fair Trading Act, <http://www.agcm.it/en/comp/1727-law-no-287-of-october-10th-1990.html>; Latvia – Competition Law, [http://www.kp.gov.lv/uploaded\\_files/ENG/Competition\\_law.pdf](http://www.kp.gov.lv/uploaded_files/ENG/Competition_law.pdf); Lithuania – Law on Competition, [http://www.konkuren.lt/en/index.php?show=antitrust&antitrust\\_doc=law\\_competition](http://www.konkuren.lt/en/index.php?show=antitrust&antitrust_doc=law_competition); Luxembourg – Loi du 17 mai 2004 relative à la concurrence, [http://www.concurrence.public.lu/legislation/nationale/loi/loi\\_du\\_17\\_mai\\_2004\\_relative\\_a\\_la\\_concurrence.pdf](http://www.concurrence.public.lu/legislation/nationale/loi/loi_du_17_mai_2004_relative_a_la_concurrence.pdf); Malta – Competition and Consumer Affairs Authority Act, <https://opm.gov.mt/konsumatur?l=1>; The Netherlands – Competition Act, [http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum\\_11-09-2011](http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum_11-09-2011);

are, on the other hand, already sixteen countries which have an explicit statutory basis for national law based claims (the ten countries mentioned above plus Bulgaria, Estonia, Ireland, Latvia, Slovakia, Italy). Still, as for July 2011 eleven EU countries do not have any specific statutory basis for bringing actions for damages for breach of competition law (Austria, Belgium, Czech Republic, Denmark, France, Greece, Luxembourg, the Netherlands, Poland, Portugal, Spain). In these countries damages might be obtained under general principles of tort.

In addition to the explicit statutory basis, some countries adopted selected proposals from the Green or White Paper and transposed them to national law.<sup>287</sup> Most prominently, those countries chose to implement the solution proposed by the Commission with regard to the probative value of NCA decisions in national court proceedings. However, as the example of Malta shows, some of them went further in coping the Commission proposals. Malta adopted the White Paper proposals with regard to the fault requirement, the pass-on defence and the limitation period.<sup>288</sup> Other countries chose an innovative approach to the Commission's proposals. For instance, Hungary modified the White Paper's recommendation regarding interaction between leniency programmes and actions for damages and proposed that immunity recipients may refuse to pay damages as long as those damages can be recovered from any other member of the cartel.<sup>289</sup> Hungary also chose to introduce some innovative solutions to encourage private damage actions and came up with a mechanism to simplify damage estimation. In its 2009 amended Competition Act, it provided for a rebuttable presumption according to which it is presumed that the hard-core cartel had an effect of 10 percent on the price and 10 percent of the price is now awarded as lump sum damages.<sup>290</sup> The amended Competition Act still requires the claimant to prove the causal link

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Poland – Ustawa o ochronie konkurencji i konsumentów; Portugal – Competition Act, <http://www.concorrencia.pt/Download/descre18ix.pdf>; Romania – Competition Law No. 75/2010, <http://www.consiliulconcurentei.ro/en/official-documents/competition/legislation/competition-geo-75-2010.html>; Slovakia – Act on Protection of Competition, <http://www.antimon.gov.sk/571/act-on-protection-of-competition.axd>; Slovenia – Prevention of the Restriction of Competition Act - [http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOmK-1-consolidated\\_version.pdf](http://www.uvk.gov.si/fileadmin/uvk.gov.si/pageuploads/ZPOmK-1-consolidated_version.pdf); Spain – Competition Act, <http://www.cncompetencia.es/Inicio/Legislacion/NormativaEstatal/tabid/81/Default.aspx>; Sweden – Competition Act, [http://www.kkv.se/upload/Filer/ENG/Publications/compact\\_eng.pdf](http://www.kkv.se/upload/Filer/ENG/Publications/compact_eng.pdf); United Kingdom – UK Competition Act 1998.

<sup>287</sup> As an overview of the EU national laws suggests, these countries include: Bulgaria, Cyprus, Finland, Hungary, Malta, Romania and Slovenia.

<sup>288</sup> Malta Competition and Consumer Affairs Authority Act 2010.

<sup>289</sup> M. Thill-Tayara, E. van den Broucke, M. Giner, "Hungary: Private Enforcement: Hungary's Amended Competition Act Offers Some Innovative Options", July 2009, available at: <http://www.mondaq.com/article.asp?articleid=82598> (accessed on 20 August 2011).

<sup>290</sup> The claimant only has to prove its damage exceeding this lump sum amount. G. Bennett, L. Kelemen, G. Prinz, "Hungary", *The European Antitrust Review*, 2011, available at:

between the infringement and the damage suffered but following the 2009 reform quantification of that damage is rendered much easier.

This short overview shows a significant divergence in the implementation or adoption of private antitrust enforcement regulations among the EU Member States. Some of them follow the recommendations of the EU Commission while others seek to inject some innovation into the European debate on private enforcement and test their own solutions. There also remains a large group of states who have not developed any special solutions in this field. Although there is no apparent trend in the development of private enforcement provisions in EU countries, one may already observe a lively and advanced debate on the issue at national level mirrored by a growing number of private damages actions brought to national courts.<sup>291</sup> Whether these developments indicate increased awareness by plaintiffs or changing judicial attitudes is unclear, but they definitely confirm that the European “wake-up calls” from the ECJ and, above all, the Commission are reaching the Member States.

## **2. Private enforcement in selected EU-countries: the case of Germany and the United Kingdom**

Germany and the United Kingdom are among the most often analyzed jurisdictions in the literature on private enforcement in Europe. These are two of the largest EU Member States which represent two major legal families, the UK being a common law country and Germany a civil law country. Both countries had already had statutory basis for national law based claims before 2004 and, since then, have remained in the avant-garde of the EU in developing incentives to promote private antitrust damages actions. Both have established themselves as popular forums for damages claims due to recent changes in their national laws erasing obstacles to damages claims that previously existed. The UK is increasingly seen as an attractive place in which to litigate antitrust disputes.<sup>292</sup> Where there is a choice of jurisdiction, it is becoming established as the plaintiff’s forum of choice. This is attributable to the features of the English system that make it an attractive place for bringing private claims.<sup>293</sup> Similarly, Germany is seen as a “plaintiff friendly” jurisdiction<sup>294</sup> that has noted a

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<http://www.globalcompetitionreview.com/reviews/28/sections/100/chapters/1110/hungary/> (accessed on 20 August 2011).

<sup>291</sup> Important successful damages claims were reported in the UK, Germany, Austria, France, Denmark, Spain, Sweden and Italy. A.P. Komninos, *EC private antitrust enforcement...*, p. 189.

<sup>292</sup> L. Farrell, S. Ince, „Private enforcement in the UK”, November 2008, available at: <http://www.mondaq.com/article.asp?articleid=67882> (accessed on 20 August 2011).

<sup>293</sup> P. Scott, M. Simpson, „England and Wales”, in: I. Knable – Gotts (ed.), *The Private Competition Enforcement Review*, London 2010, p. 41.

<sup>294</sup> J. Alfaro, T. Reher, “Towards the Directive...” p. 43.

marked progress in competition litigation in recent years.<sup>295</sup> Therefore, Germany and the UK should give a good picture of private enforcement at national level in Europe and provide for a useful platform for comparison with the EU Commission's White Paper.

## **A. The United Kingdom**

### **a. General introduction to the UK legislative framework for private antitrust enforcement**

Long before the *Crehan* judgment, the UK courts accepted that damages could be available for harm caused by infringements of what are now Articles 101 and 102 TFEU. In 1984 in *Garden Cottage Foods Ltd v Milk Marketing Board*<sup>296</sup> the House of Lords ruled that third parties were able to sue for damages for breach of Articles 101 and 102 TFEU. Notwithstanding this fact, the enforcement of competition rules in the UK has until relatively recently been achieved through public enforcement.<sup>297</sup> In 1998, the newly adopted Competition Act introduced two new competition prohibitions into the UK regime, mirroring Articles 101 and 102 TFEU, a prohibition against anti-competitive agreements and a prohibition against an abuse of dominant position. The Act was adopted with the aim to enhance private enforcement of its prohibitions. Yet, it did not contain an express right to damages or any direct reference to civil actions or actions for damages and therefore failed to have the desired effect. This situation was about to change relatively soon. "In 2001 a consultation paper by the Department of Trade and Industry powerfully advocated the desirability of private damages actions as a 'very important limb of an effective competition regime'. Such actions were seen as serving two basic aims: compensation for victims of anti-competitive practices; and drawing private resources into the enforcement process, thus allowing public authorities to pursue the most important cases. The proposals did not stop there, but included collective actions by representative bodies acting on behalf of named and identifiable consumers (representative claims) [...]. These ideas were set in motion with the Enterprise Act 2002."<sup>298</sup>

The Enterprise Act 2002 introduced substantial changes to the Competition Act 1998. The main changes included the creation of the Competition Appeal Tribunal (CAT), a special judicial body that has jurisdiction to hear claims for damages and other monetary claims in

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<sup>295</sup> M. Dietrich, W. Gruber, M. Hartmann-Rüppel, "Germany", p. 74.

<sup>296</sup> *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130.

<sup>297</sup> L. Farrell, S. Ince, „Private enforcement in the UK”.

<sup>298</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 184.

competition cases,<sup>299</sup> as well as the explicit right for third parties to bring claims for damages and other monetary claims before the CAT for loss or damage suffered as a result of an infringement of either UK or EU competition rules.<sup>300</sup> With this amendment the UK became the only EU Member State with specialized courts to deal with competition law based damages actions.<sup>301</sup> The CAT's jurisdiction is limited to follow-on claims. Damages claims before the Tribunal presuppose the establishing by either the Office of Fair Trading (OFT) or the European Commission that an infringement of competition law has occurred. The CAT is bound by the infringement decision of the competition authority after the appeals process has been exhausted or limitations for appeal have expired. Where there is no prior decision of the OFT or the European Commission (stand-alone actions) claims must be filed with the ordinary civil court, the High Court.<sup>302</sup> The Enterprise Act 2002 also inserted a new section to the Competition Act, allowing representative actions on behalf of consumers to be brought before the CAT.<sup>303</sup> With all these amendments, the Act is said to “have transformed the UK system from a purely administrative enforcement system to a hybrid one with private and criminal enforcement limbs far more developed than anywhere else in Europe.”<sup>304</sup> Since the adoption of the Enterprise Act 2002 no further legislative changes have been made to the UK competition law, neither after the publication of the Commission's Green Paper in 2005 nor the White Paper in 2008.<sup>305</sup>

## **b. UK legislation and practice in the areas addressed in the Commission's White Paper**

The UK already has in place all the main elements for proper and effective private enforcement. As was argued above, it is one of the most popular EU jurisdictions among plaintiffs seeking redress in competition law cases. The following paragraphs will give a short overview of the main characteristics of the current UK legislative framework for private

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<sup>299</sup> The right to bring an action before the CAT is without prejudice to the existing right to bring damages claims in an ordinary civil court (i.e. the High Court). As opposed to the High Court, the CAT's jurisdiction is limited in that it can only hear applications for damages but no other forms of relief (e.g. injunctive relief).

<sup>300</sup> N. Davies, L. Farrell, M. Reiss, “United Kingdom: Private Enforcement”, *The European Antitrust Review*, 2011, available at: [http://www.globalcompetitionreview.com/reviews/28/sections/100/chapters/1132/united-kingdom-private-enforcement/#ftn\\_72](http://www.globalcompetitionreview.com/reviews/28/sections/100/chapters/1132/united-kingdom-private-enforcement/#ftn_72) (accessed on 23 August 2011).

<sup>301</sup> Ashurst, “Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report”, p. 35.

<sup>302</sup> P. Scott, M. Simpson, „England and...”, p. 43.

<sup>303</sup> Section 19 of the UK Enterprise Act 2002 inserted as sections 47B into the UK Competition Act 1998.

<sup>304</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 184.

<sup>305</sup> In November 2007, however, the OFT published a number of recommendations on steps that should be taken in order to make private competition law actions even more effective. Up till now, the UK government has not introduced any of these proposals. See: Office of Fair Trading, *Private Actions in Competition Law: effective redress for consumers and business*, November 2007.

enforcement and look for the sources of its success and needs for improvement. Special attention will be paid to areas where the Commission's White Paper identified the obstacles to effective damages actions. It will be seen how the UK legislation and case-law deal with the problems described by the Commission and whether they reflect the White Paper's recommendations or rather follow their own path.

To start with the forms of damages available, in the UK claimants can seek to recover damages for losses suffered as a result of anti-competitive conduct, including lost profits and interest on those losses. This is in line with the Commission's White Paper and the ECJ's statement in *Manfredi* ruling, *Devenish Nutrition v. Sanofi-Aventis*<sup>306</sup> – a follow-on action for damages pursuant to the European Commission's vitamin cartel decision – remains the leading case in the UK to address this issue. It confirmed that the appropriate measure for the calculation of damages in competition law proceedings in the UK should be tort-based compensatory damages (which aim to put the plaintiff in the position it would have been in “but for” the infringement). Importantly, UK courts also have the possibility to award restitutionary damages (in the form of an account of profits made by the defendant) or exemplary damages (i.e. an award of damages to punish the defendant) in exceptional cases.<sup>307</sup> In *Devenish Nutrition*, however, the High Court and the Court of Appeal rejected the claim for these forms of damages in competition law cases. As regards exemplary damages, the High Court noted that a fine imposed by a competition authority for an infringement of competition law served the same punitive and deterrent purpose. Thus, in the view of the *ne bis in idem* principle, an award of exemplary damages in circumstances where the defendant had already been fined (or had fines imposed and then reduced) by the Commission or the NCA of the same unlawful conduct was precluded.<sup>308</sup> The Court of Appeal, on the other hand, ruled explicitly that the claimant was “entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less”.<sup>309</sup>

With regard to the quantification of damages, the English courts prefer a “but for” approach. In *Arkin v. Borchard*<sup>310</sup> the High Court suggested that “any damages should be

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<sup>306</sup> *Devenish Nutrition v. Sanofi Aventis*, [2007] EWHC 2394 ; [2008] EWCA Civ 1086. For case comment, see: A. McDougall, A. Verzariu, “Vitamins litigation: unavailability of exemplary damages, restitutionary damages and account of profits in private competition law claims”, *ECLR*, 29 (3), 2008, pp. 181 – 184.

<sup>307</sup> P. Collins, “What are the problems with...”, p. 55.

<sup>308</sup> Exemplary damages could in principle be awarded in stand-alone actions in the UK, although up till now no such award has been made. P. Scott, M. Simpson, „England and...”, p. 55.

<sup>309</sup> L. Farrell, „Private Damages Actions: A Review of the Developments in Five Member States”, *International Comparative Legal Guide Series*, available at: [http://www.iclg.co.uk/index.php?area=4&show\\_chapter=2993&ifocus=1&kh\\_publications\\_id=109](http://www.iclg.co.uk/index.php?area=4&show_chapter=2993&ifocus=1&kh_publications_id=109) (accessed on 21 August 2011).

<sup>310</sup> *Arkin v. Borchard Line & Ors*, [2003] EWHC 687 (Comm).

assessed by comparing a hypothetical scenario based on the situation immediately prior to the infringement and asking what, ‘as a matter of common sense’ was the loss directly caused by the infringement”.<sup>311</sup> This approach favours a comparison of the market conditions observed during the infringement period with a reconstruction of the market conditions that might have prevailed in the absence of the infringement. However, it is important to note that in the UK most of the competition law cases are settled out of court. Therefore, the methods to compute damages are rarely used by judges and weakly developed.<sup>312</sup>

Moving to the standing of indirect purchasers and the passing-on defence, these are issues that still need clarification in competition law cases under English law.<sup>313</sup> Indirect purchasers have not been explicitly given standing in UK competition legislation and there is no relevant case law in this field. There is also no precedent in the English courts for the availability of the passing on defence.<sup>314</sup> In the view of the compensatory measure of damages, however, it seems that the passing on defence should be available under English law. Claimants in the English courts can only recover damages that represent their actual, unmitigated losses. Thus, if the claimant in fact suffered no loss, as it passed on the effects of the infringement (e.g. an overcharge) to its own customers, the defendant should be entitled to invoke the pass-on defence. In such an event, the defendant should bear the burden of proof to show that the claimant mitigated its loss in the described way.<sup>315</sup> This approach, although not explicitly confirmed in any ruling, would be in line with the Commission’s recommendations from the White Paper. As regards the ability of indirect purchasers to bring claims, one can also assume that, at least as a matter of EU law,<sup>316</sup> they should be given standing in the UK courts. The English law does not know any measures to lighten their burden of proof, similar to those suggested in the White Paper.<sup>317</sup> Indirect purchasers are under an obligation to prove the breach of the competition rules, the causal link as well as the loss complained of (including the extent of the pass-on).

When it comes to collective redress, the recommendations of the White Paper seem already to be fulfilled in the UK. Both stand-alone and follow-on actions can be collective actions in the UK. After the 2002 reform, specified bodies have the right to bring

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<sup>311</sup> P. Scott, M. Simpson, „England and...”, p. 57.

<sup>312</sup> Ibid., p. 56.

<sup>313</sup> R. Whish, *Competition Law*, p. 302.

<sup>314</sup> P. Scott, M. Simpson, „England and...”, p. 66.

<sup>315</sup> Ibid., p. 58.

<sup>316</sup> The ECJ in *Manfredi* held that any person who has suffered actual loss must be entitled to compensation before a national court.

<sup>317</sup> In the White Paper it was suggested that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

representative actions on behalf of consumers that give their consent (opt-in model) where there is already a finding of infringement by the OFT or Commission.<sup>318</sup> Such actions may only be brought in the CAT and the only body which is specified in secondary legislation as being permitted to bring the claim is the UK Consumers' Association known as "Which?". Also, in the High Court, the procedural rules (which are not specific to competition claims) permit claimants to represent a class of persons having the same interest. The claim may be brought by one or more of the parties as representatives of the other parties.<sup>319</sup> The procedure requires that it must be possible to identify at the outset of the proceedings those parties which fall within the group represented.<sup>320</sup> Moreover, the relief sought in the action must be equally beneficial to all group members.<sup>321</sup>

Looking at the limitation periods which are applied to the competition law based claims in the UK, the current legislation as well seems to correspond with the proposals of the White Paper. Proceedings in the High Court are subject to the general rule on limitation that applies to tort claims. This means that actions for breach of the competition provisions must be brought within six years from the date of the loss suffered. However, if the action is based upon fraud of the defendant or concealment, the limitation period will not begin to run until the claimant has discovered or could with reasonable diligence have discovered the concealment. Special limitation rules apply to follow-on claims for damages in the CAT. A claim must be made within a period of two years beginning on the date on which the period to appeal the infringement decision to the courts has lapsed, or the date on which any appeal has been determined, whichever is later.<sup>322</sup> This rule matches exactly the suggestions of the Commission in the White Paper.

The current framework for the cost allocation in the UK, on the other hand, is far from what is being desired by the Commission in the White Paper. In fact, costs are considered probably the greatest impediment to private enforcement in the UK.<sup>323</sup> Even though they are at court's discretion, normally they "follow the event", that is to say, the successful party is awarded its costs from the losing party. This principle often discourages claimants from bringing actions for antitrust damages, since they lack the willingness to bear the risk of a failure in court. Interestingly, little assistance to potential claimants is provided by the

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<sup>318</sup> See Section 19 of the UK Enterprise Act inserted as Section 47B of the Competition Act 1998.

<sup>319</sup> P. Scott, M. Simpson, „England and...”, p. 53.

<sup>320</sup> US-style class actions where a group of plaintiffs purports to bring a claim on behalf of a larger group are thus not accepted in the UK. English courts have resisted attempts to establish such actions. See for example the High Court judgment in *Emerald Supplies v. British Airways* [2009] EWHC 741(Ch).

<sup>321</sup> P. Scott, M. Simpson, „England and...”, p. 53.

<sup>322</sup> N. Davies, L. Farrell, M. Reiss, “United Kingdom...”.

<sup>323</sup> P. Collins, “What are the problems with...”, p. 56.

conditional fee arrangements<sup>324</sup> which are generally available for litigation in the UK system. According to the literature, the incentives for lawyers to take competition cases on a “no win, no fee” basis are currently too low.<sup>325</sup> Also, insurance against paying the defendant’s costs is not sufficiently developed in competition cases, most probably due to the lack of precedents. One important feature of the UK framework, however, is that the settlement procedures are well developed and the parties often resort to them as a way to reduce costs.<sup>326</sup>

A further point discussed in the White Paper relates to minimum level of disclosure that should be available to claimants in antitrust litigation. In the UK, generally, all parties to civil proceedings must give disclosure of those documents relevant to the case.<sup>327</sup> The ability to inspect the defendant’s documents is very attractive to a claimant in proving its case and is one of the features of the UK system that makes England a popular forum for antitrust damages claims in Europe, especially in follow-on actions.<sup>328</sup> Under the Civil Procedure Rules a party is required to disclose documents on which it intends to rely, together with documents which either adversely affect its own case, adversely affect the other party’s case, or support another party’s case. This is referred to as “standard disclosure”.<sup>329</sup> Additionally, in certain circumstances, specific disclosure or inspection of documents can be allowed for by court order. Moreover, the UK also provides for disclosure to be ordered against third parties where this is considered necessary in order to dispose fairly of the claim or save the costs. As regards confidentiality, it is not a bar to disclosure of documents in the UK courts. However, it is relevant to the judge’s discretion in making disclosure orders. In competition cases the English courts are sympathetic of the fact that the parties to the proceedings are often competitors and the disclosure of confidential information might be damaging to the parties’ business interests. Therefore adequate protection is given to such documents.<sup>330</sup> In brief, the existing rules on disclosure in the UK appear to meet the requirements of the White Paper.

Such statement, on the other hand, can only partially be made about the probative value of NCA decisions. At present, UK courts are only bound by the OFT’s and the European Commission’s findings of facts and of infringements in proceedings for antitrust

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<sup>324</sup> A conditional fee arrangement is where counsels agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won.

<sup>325</sup> At present “a lawyer who wins his case is entitled to a 100 per cent uplift of his fees and, as such, will only take a case on if his chance of winning is, on average, greater than 50 per cent. Although this may be sufficient for follow-on actions it may not sufficiently incentivize lawyers to take on well-founded standalone cases.”

P. Collins, “What are the problems with...”, p. 57.

<sup>326</sup> P. Scott, M. Simpson, „England and...”, p. 61.

<sup>327</sup> P. Collins, “What are the problems with...”, p. 54.

<sup>328</sup> P. Scott, M. Simpson, „England and...”, p. 49.

<sup>329</sup> P. Collins, “What are the problems with...”, p. 57.

<sup>330</sup> P. Scott, M. Simpson, „England and...”, p. 51.

damages. They can, though, rule counter to the decisions of the NCAs from other Member States. This policy is incompatible with the White Paper's recommendations. There, it is suggested that final findings of an infringement of any NCA in the European Competition Network should be accepted as undeniable proof of infringement in any other Member State.

With respect to the fault requirement, in the UK it does not form an obstacle to successful antitrust damages claims, since the liability is strict.<sup>331</sup> Once the breach of antitrust rules has been established, the claimant only has to prove the causal link between the breach and the damage he claims to have suffered.<sup>332</sup> Thus, in this area, the UK rules also go in line with the White Paper's recommendations.

Finally, as regards the interaction between leniency programmes and actions for damages, the literature on the UK competition law does not report about the protection for leniency applicants the Commission wishes for in the White Paper.<sup>333</sup> At present corporate statements are not excluded from inspection and use in civil litigation and leniency applicants may be held liable for compensatory damages in civil proceedings. In respect of exemplary damages, the High Court in *Devenish Nutrition* held that their award on a successful leniency applicant would undermine the public policy behind the leniency programme.<sup>334</sup> Therefore, the defendant that has been granted immunity from fines cannot be made liable for exemplary damages for the same conduct.

### **c. Concluding remarks**

The short description of the relevant legislation and practice clearly shows that the UK system has many features which are conducive to the proper and effective private enforcement of competition law. It is thus not surprising that each year more and more antitrust claims are lodged before the English courts. In most of the areas, the UK framework is already in line or close to the recommendations of the Commission from the White Paper. A number of important legal issues, though, still remain to be determined, for instance, the

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<sup>331</sup> P. Collins, "What are the problems with...", p. 55.

<sup>332</sup> A. Jones, B. Sufrin, *EU Competition Law...*, p. 1214.

<sup>333</sup> Creation of a special regime in this area, however, appears to be one of the OFT's priorities. In the recommendations to the UK Government published in 2007 the OFT puts a strong emphasis on ensuring that the attractiveness of the leniency programme is not undermined through disclosure of leniency documents. The OFT proposes to exclude certain categories of leniency documents from use in litigation. Moreover, it recommends the removal of joint and several liability from immunity recipients, so that they are only liable for the harm they caused and not the whole loss caused by the cartel. See: Office of Fair Trading, *Private Actions in Competition Law...*, pp. 38-39.

<sup>334</sup> N. Davies, L. Farrell, M. Reiss, "United Kingdom...".

relationship between leniency and actions for damages or the availability of the passing on defence. The literature reports that in the near future there might be some amendments with regard to costs of civil litigation in the UK.<sup>335</sup> If these are adopted, the growth of private litigation in this country will certainly become even more substantial.

## **B. Germany**

### **a. General introduction to the German legislative framework for private antitrust enforcement**

Similarly as in the UK, private antitrust enforcement is becoming an increasingly hot topic in Germany. In fact, the use of competition law by private parties in court is not a novelty in this country. For the past decades, antitrust provisions have often been used as a defensive tool in civil litigation.<sup>336</sup> The use of competition law in an offensive manner, however, has until recently been a much less successful story. Above all, claims for damages by victims of hardcore cartels have not proven successful.<sup>337</sup> One of the reasons for the lack of such claims was the rather restrictive condition for standing. Prior to 2005, under German law there was no explicit statutory provision for damages claims for the infringement of EU competition law. German courts thus resorted to general tort law, i.e. Sec. 823(2) of the German Civil Code (BGB),<sup>338</sup> which establishes a “protective law requirement”. Under this provision the courts demanded that a “plaintiff be a person or belong to a definable group of persons against whom the infringement has specifically been directed”.<sup>339</sup> As a result, private enforcement in Germany mainly consisted of cases on vertical agreements, actions concerning abusive practices or cases of discrimination against dependent companies by a dominant company.<sup>340</sup> On the other hand, claims for damages by victims of hardcore cartels (neither direct nor indirect purchasers) were non-existent, since in the view of the courts, the actions of

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<sup>335</sup> For details, see: P. Scott, M. Simpson, „England and...”, p. 65.

<sup>336</sup> W. Roth, „Private enforcement of European competition law – Recommendations flowing from the German experience”, in: J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn, 2007, p. 64.

<sup>337</sup> *Ibid.*, p. 67.

<sup>338</sup> German Civil Code (BGB) in the version promulgated on 2 January 2002 (BGBI. I p. 42, 2909; 2003 I p. 738), English translation available at: [http://www.gesetze-im-internet.de/englisch\\_bgb/german\\_civil\\_code.pdf](http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf) (accessed on 25 August 2011).

<sup>339</sup> F. Cengiz, “Passing-On Defence and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US?”, *Center for Competition Policy Working Paper*, No. 07-21, p.33, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1462234](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462234) (accessed on 25 August 2011).

<sup>340</sup> U. Boge, K. Ost, “Up and running...”, p. 197.

a cartel were not specifically directed at them but at generally raising prices in the market.<sup>341</sup> This restrictive reading on standing in Germany was clearly incompatible with EU law, in particular the *Courage* ruling, which accepted no such limitations but conferred standing to all individuals harmed by anti-competitive conduct.<sup>342</sup>

On 1 July 2005 Germany introduced the 7<sup>th</sup> amendment of the German Act Against Restraints of Competition (GWB). This reform was meant to create a more effective system of private antitrust enforcement with a strong emphasis on its deterring effect.<sup>343</sup> It tackled much of the uncertainty surrounding private enforcement claims and in particular expanded the pool of possible claimants.<sup>344</sup> The major points of the reform, as far as private enforcement of competition law is concerned, were the following:

- (1) The 7<sup>th</sup> amendment has introduced provision as to the cooperation between civil courts and the Commission; the civil courts may address the Commission to ask for the conveyance of data and information relevant to the proceedings before the court.<sup>345</sup>
- (2) In order to stimulate private proceedings, rules were put in place to allow the reduction of the court's and attorney's fees that have to be paid by the claimant.<sup>346</sup>
- (3) Associations for the promotion of commercial or independent professional interest have been given standing to ask for an injunction in case when Articles 101 or 102 TFEU have been or are likely to be infringed.<sup>347</sup> In addition, in case of a deliberate infringement of European or German competition law such associations may under certain conditions bring a claim against an infringing undertaking relating to the profits and other economic benefits that have resulted from the infringement. The profits and benefits have to be transferred to the Federal Treasury.<sup>348</sup>
- (4) Claims for damages have been enhanced in a number of ways:
  - The restricted provision on standing was abandoned.<sup>349</sup>
  - An attempt was made to clarify under what circumstances the passing-on defence should be available to defendants.<sup>350</sup>

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<sup>341</sup> For a detailed analysis of the "protective law" requirement, see: Ch. Anderlang, "Damages for the Infringement of Art. 81 EC by Cartel Agreements according to sec. 33(3) GWB: The Changes of Law concerning the "Protective Law" Requirement and the "Passing On" Defence", *World Competition*, 30(4), 2007, p. 575 et seq.

<sup>342</sup> A.P. Komninos, *EC private antitrust enforcement...*, p. 189.

<sup>343</sup> W. Roth, „Private enforcement of European...”, p. 69.

<sup>344</sup> L. Farrell, „Private Damages Actions: A Review of...”.

<sup>345</sup> Sec. 90a GWB.

<sup>346</sup> Sec. 89a GWB.

<sup>347</sup> Sec. 33 (2) GWB.

<sup>348</sup> Sec. 34a (1) GWB.

<sup>349</sup> Sec. 33 (1) GWB.

- The right to claims pre-judgment interest was introduced.<sup>351</sup>
- Rules were adopted to facilitate the calculation of damages suffered by a claimant.<sup>352</sup>
- Follow-on actions were facilitated by making prior infringement decisions binding to the courts.<sup>353</sup>
- Rules on the period for limitation of damage claims in private antitrust proceedings were made more favourable to the claimant.<sup>354</sup>

Today in Germany, private competition actions can be brought before the civil courts seeking injunction, removal of the infringement or damages. These claims can be based on cartel infringements or abusive behaviour by a dominant undertaking under either German<sup>355</sup> or EU competition law. The legal basis for private competition enforcement is Sections 33 et seq. of the Act against Restraints of Competition (GWB). The overall framework for private antitrust litigation will be described in more detail in the following sub-chapter.

## **b. German legislation and practice in the areas addressed in the Commission’s White Paper**

The 7<sup>th</sup> amendment was aimed to strengthen the position of claimants in competition law cases by removing or lowering a number of obstacles to effective private enforcement that were also indentified by the Commission in its 2005 Green Paper. Similarly as in the case of the UK, an overview will now be given on how current legislation in Germany as well as the available case-law reflect the Commission’s best practice framed in the White Paper.

To start with the nature and extent of damages available, the German legislation is fully in line with the ECJ case-law as well as the Commission’s recommendations. Importantly, Germany only allows for compensatory damages. It is an established principle of German civil law that an injured person should not profit from an illegal act. Therefore, the notion of “damage” does not include concepts of “punitive” or “exemplary damages”. The calculation of damages suffered by the claimant is mainly based on Sec. 249 of the BGB. According to this provision damages are quantified on the basis of the difference between the financial position of the claimant at the time of judgment and the financial position that the

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<sup>350</sup> Sec. 33 (3) sentence 2 GWB.

<sup>351</sup> Sec. 33 (3) sentence 4 GWB.

<sup>352</sup> Sec. 33 (3) sentence 3 GWB.

<sup>353</sup> Sec. 33 (4) GWB.

<sup>354</sup> Sec. 33 (5) GWB.

<sup>355</sup> In particular, Section 1 and 19 of the GWB.

claimant would have been in had the loss not occurred.<sup>356</sup> Pursuant to Section 252 of the BGB, the damage to be compensated also comprises lost profits. Moreover, to avoid compensation for the loss incurred being partially devalued, the party in breach of competition provisions is obliged to pay interest on pecuniary damages (Sec. 33 (3) sentence 4 GWB). Interest is calculated from the date the damage occurred.<sup>357</sup>

Concerning the estimation of the damage, the German legislator in the 7<sup>th</sup> amendment acknowledged that it is often very difficult to obtain evidence on exactly the amount of loss suffered by the claimant. To compensate for potential difficulties in this field, an alleviation of proof in Section 33 (3) sentence 3 GWB was thus introduced. In this provision, courts were given discretion to assess the size of damages in the case at hand. Furthermore, it was clarified that, in determining the amount of damages, the courts may take the profit generated by the defendant through the antitrust infringement into account. As a result, it is now sufficient for the claimant to present the basis for the calculation or an estimate of the damages and specify the range of possible damages, usually by indicating the minimum amount.<sup>358</sup>

Moving to the standing of indirect purchasers, as mentioned above, the restrictive standing of individuals in private enforcement was abolished in Germany with the 2005 reform. At present, Section 33 (1) GWB gives standing to “any person affected” by competition law infringements, including “competitors” and “other market participants”. So far no decision on the entitlement of persons indirectly affected by the illegal behaviour (such as end-distributors or consumers) to claim damages has been taken by German courts. In the legal literature, though, it is generally assumed that standing is available to such claimants,<sup>359</sup> yet “it will prove to be rather difficult for an indirect purchaser to claim damages successfully due to the evidential burden, e.g. having to prove that the intermediary has passed on the excessive price”.<sup>360</sup> In view of the fact that representative actions are non-existent in Germany, it is also argued that the practical relevance of the claims by indirect purchasers is

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<sup>356</sup> In its 2005 discussion paper the Bundeskartellamt described three different methods to determine this difference, the “comparable market test”, the “cost test” and the “simulation test”. For detailed information, see: Bundeskartellamt, „*Private Kartellrechtsdurchsetzung...*“, p. 21-23.

<sup>357</sup> The interest rate is dictated by Sec. 33 (3) sentence 5 GWB and Sec. 288 of the BGB (i.e. 5 per cent above the basic interest rate fixed twice a year by the German Central Bank). M. Dietrich, W. Gruber, M. Hartmann-Rüppel, “Germany”, p. 82.

<sup>358</sup> T. Siebert, „Germany: Private antitrust litigation“, *The European Antitrust Review*, 2011, available at: <http://www.globalcompetitionreview.com/reviews/28/sections/100/chapters/1108/germany-private-antitrust-litigation/> (accessed on 26 August 2011).

<sup>359</sup> W. Roth, „Private enforcement of European...“, p. 76; A.P. Komninos, *EC private antitrust enforcement...*, p.192; M. Dietrich, W. Gruber, M. Hartmann-Rüppel, “Germany”, p. 76. For opposing views, see literature cited in: U. Boge, K. Ost, “Up and running...”, p. 201.

<sup>360</sup> M. Dietrich, W. Gruber, M. Hartmann-Rüppel, “Germany”, p. 77.

significantly reduced.<sup>361</sup> In short, the current position of indirect purchasers in Germany is rather unfavourable and clearly at variance with what is wished for by the Commission. However, as the next paragraph will show, courts in Germany take these antitrust victims into account in their rulings and try to come up with solutions to compensate their indirect losses in some way.

As regards the passing-on defence, it is currently unclear and subject to legal debate whether or not such a defence is allowed under German competition law. The 7<sup>th</sup> amendment inserted a new sentence into Sec. 33 (3) of the GWB, according to which “If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service.” At first glance, this section seems to ban the use of the passing-on defence. However, when examined in greater detail, the provision rather seems to introduce a reversed burden of proof, where the defendant, if wanting to use the passing-on defence, has to prove that the purchaser regained its loss by passing-on the overcharge. Unfortunately, the passing-on has not been successfully pleaded after the 2005 reform.<sup>362</sup> Thus, it remains to be seen in which cases and under what circumstances German courts will accept this type of defence.<sup>363</sup> In a recent private damage action brought by a building company against a supplier of ready-mixed concrete, the Higher Regional Court of Berlin held that the passing-on defence was generally not available to cartel members in an action brought by a direct purchaser and consequently rejected the defendant’s argument. Additionally, the court said that indirect purchasers are also entitled to damages. In the opinion of the court direct and indirect purchasers can be joint and several creditors with the effect that one creditor (usually the direct purchaser) can claim the entirety of the loss (i.e. the damage suffered by the direct and indirect purchasers) from the infringer and is then obliged to compensate indirect purchasers.<sup>364</sup>

With regard to collective proceedings or representative actions, that were one of the key objectives of the Commission’s White Paper, these are not available in Germany in respect of antitrust claims.<sup>365</sup> However, despite the lack of such actions, it is possible for the

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<sup>361</sup> Ibid., p. 77.

<sup>362</sup> D. Jüntgen, M. Sura, “Germany“, *The International Comparative Legal Guide to Competition Litigation*, 2011, p. 73, available at: <http://www.iclg.co.uk/khadmin/Publications/pdf/3925.pdf> (accessed on 26 August 2011).

<sup>363</sup> In the literature it is proposed that “the the passing-on defence should be admitted in the damaging party's defence in those rare and exceptional cases where the damage has indeed been passed on, the passing-on did not involve any risk for the damaged party, required only minimal efforts and did not result in a decline in sales”. U. Boge, K. Ost, “Up and running...”, p. 200.

<sup>364</sup> KG Berlin, 1.10.2009, 2 U 10/03 Kart.

<sup>365</sup> The government draft of the 7<sup>th</sup> amendment provided for an active role of consumer organisations in the private enforcement of competition law. However, in the “last minute operation” the standing of consumer

victims of antitrust infringements to submit damages claims via third parties. This possibility is of particular interest for consumers and smaller companies that do not have sufficient financial resources to assert their legal rights. With respect to the cement cartel, in which the Bundeskartellamt imposed fines of approximately 660 million in April 2003, the German Federal Court of Justice (Bundesgerichtshof)<sup>366</sup> has recently upheld an earlier decision of the Higher Regional Court of Düsseldorf<sup>367</sup> and admitted a damages claim which was submitted by Cartel Damages Claims SA (CDC), a company established under Belgian Law. CDC has purchased the cartel-related claims of 28 damaged companies active in the concrete production and manufacturing sector<sup>368</sup> and is now pursuing them on its own behalf. In the event of a successful action in court, it is agreed that a portion of the profits will be distributed to the damages companies - the assignors of the claims. At present, the outcome of the case is still pending, however, it is generally expected that a decision in favour of the CDC will increase the level of private enforcement in Germany.<sup>369</sup>

In respect of the limitation periods, that were also one of the European Commission's concerns in the Green and White Paper, with the last competition law reform in Germany they were adjusted to the needs of antitrust claimants. Pursuant to Sec. 195 BGB the standard limitation period for tort claims is three years, starting at the end of the year in which the claimant gains knowledge of the facts giving rise to the claim.<sup>370</sup> However, according to the new rule in Sec. 33 (5) GWB this period is suspended with the initiation of antitrust proceedings by the Bundeskartellamt, the European Commission or national competition authorities of other EU Member States. The suspension ends six months after the termination of such proceedings.<sup>371</sup> The rule is not fully compatible with the recommendations of the

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organisations was completely deleted from the text of the amending law. W. Roth, „Private enforcement of European...”, p. 71.

<sup>366</sup> BGH, 7.4.2009, KZR 42/08.

<sup>367</sup> OLG Düsseldorf, 14.5.2008, VI-U (Kart) 14/07. For comments on the case, see: F. Immenga, „Für Kartellsünder bricht ein neues Zeitalter an: Nun soll es richtig wehtun!“, *Betriebs-Berater*, 16.04.2007, p.1; G. Weidenbach, „BB-Kommentar“, *Betriebs-Berater*, 16.04.2007, p. 849.

<sup>368</sup> CDC SA has since extended the claim twice after purchasing the cartel-related damage claims of 8 further companies. The antitrust damages claimed now amount to approximately € 176 million (without interest). See: <http://www.carteldamageclaims.com/German%20Cement> (accessed on 27 August 2011).

<sup>369</sup> In fact, CDC has already filed another action for damages before the Regional Court of Dortmund. This time the action is directed against the members of the hydrogen peroxide cartel fined by the European Commission in 2006. The value of the damage claimed is € 430 million (without interest). See: <http://www.carteldamageclaims.com/Hydrogen%20Peroxide.shtml> (accessed on 27 August 2011).

<sup>370</sup> Sec. 199 BGB.

<sup>371</sup> Sec. 204 (2) BGB.

White Paper.<sup>372</sup> The claimants in Germany, though, have enough time to prepare a follow-on claim after an infringement decision has been issued.

Turning to the costs of antitrust damages actions in Germany, the general rule is the same as in the UK, i.e. that the costs follow the events. They have to be paid upfront by the claimant who may recover them from the defendant if his claim is successful. From the perspective of antitrust claims, however, Sec. 89 a (1) GWB is of particular interest. The provision allows for a reduction of the relevant value of the dispute (*Streitwert*) in order to minimize the court's and attorney's fees that have to be paid by an antitrust victim. This possibility puts the cost rules in Germany fairly close to what is suggested by the Commission in the White Paper. Unfortunately, there is no data available as to the relevance of this provision in practice.

Regarding the minimum level of disclosure, that is seen as a necessary component of an effective private antitrust framework in the White Paper, the German Code of Civil Procedure does not provide for pre-trial or any other discovery procedure. The German understanding of fair legal proceedings is that no party should be obliged to provide the opponent with material that will make him win the case, since nobody is under an obligation to act against his own legitimate interests. The plaintiff bears the burden of proving all facts upon which his claim is based. Furthermore, the courts only have limited power to order the submission of evidence that has not been offered by one of the parties.<sup>373</sup> They have no power to compel competition authorities to disclose documents in their position. Parties to the proceedings, on the other hand, may claim access to a competition authorities' files once an investigation has been finished.<sup>374</sup> This is without doubt of substantial help in the follow-on proceedings.

Moving to the probative value of NCA decisions, the legislation in Germany is fully compatible with the Commission's recommendations. After the 7<sup>th</sup> amendment, section 33(4) GWB confers binding effect on all Commission, Bundeskartellamt, and even other NCA's decisions in follow-on civil litigation. The wording of the provision indicates that the courts are only bound by positive findings of an infringement.<sup>375</sup> Sec. 33 (4) GWB relieves the claimant of proving the infringing behaviour, but he still is obliged to prove all additional requirements for a successful damages claim (e.g., causation, extent of harm inflicted). What

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<sup>372</sup> The European Commission prefers a new limitation period of two years starting once public proceedings have been terminated. *White Paper on Damages actions*, COM (2008) 165 final, p. 9.

<sup>373</sup> See Sec. 142 of the German Code of Civil Procedure (ZPO).

<sup>374</sup> Bundeskartellamt, "*Private Kartellrechtsdurchsetzung...*", p. 27.

<sup>375</sup> T. Siebert, „Germany...“.

is unclear at the moment, is “whether the claimant has to prove the cartel member’s bad intention, even if the operative part of a decision already ascertains that the infringement has been committed intentionally”.<sup>376</sup> In this context it is important to stress that German law, contrary to the White Paper recommendations, requires the plaintiff to prove fault of the infringer. Pursuant to Sec. 33 (3) GWB damages are awarded if the claimant can show that the defendant intentionally or negligently committed an infringement of competition law (EU or German), as a result of which the claimant suffered loss.

Lastly, when looking at the interaction between leniency programmes and actions for damages in Germany, there are no special regulations in this area. Neither an unsuccessful nor a successful leniency applicant is given immunity from civil claims. Para. 24 of the leniency notice, issued by the Bundeskartellamt in 2006, explicitly states that: “This notice has no effect on the private enforcement of competition law”.<sup>377</sup> Each member of a cartel is jointly and severally liable for the entire damage the cartel has caused.<sup>378</sup> Moreover, in Germany leniency applications are not formally protected from being revealed in subsequent court proceedings. Although the Bundeskartellamt has announced that it will not disclose corporate statements to potential damage claimants, German courts have not yet decided on the admissibility of this practice. Thus, all evidence held by a leniency applicant in Germany is potentially discoverable.<sup>379</sup> The lack of regulation in this area strongly calls for legislative action and is clearly far from what the Commission suggests in the White Paper.

### **c. Concluding remarks**

As the above description shows, German legislation has in recent years undergone extensive changes in order to facilitate and encourage private enforcement, especially with regard to cartel victims. The effort is now bearing fruits in the form of an increased level of antitrust claims filed with the courts. German solutions are to a great extent in line with many of the European Commission’s recommendations, but much more importantly, they are compatible with the German legal tradition and do not simply copy and paste what exists in other systems, especially the US-system. Some important issues still wait to be addressed by

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<sup>376</sup> M. Dietrich, W. Gruber, M. Hartmann-Rüppel, “Germany”, p. 85.

<sup>377</sup> Notice No. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme, 07.03.2006, p. 4, available at: [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06\\_Bonusregelung\\_e\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf) (accessed on 27 August 2011).

<sup>378</sup> Sec. 830 and 421 BGB.

<sup>379</sup> D. Jüntgen, M. Sura, “Germany“, p. 74.

the German courts, such as the requirements for the passing on defence, indirect purchaser standing or the availability of leniency documents to claimants. The goal, however, to ensure that public and private enforcement effectively work alongside is clearly on the way be achieved in Germany.

## Conclusions

The right of individuals who have suffered loss from infringements of competition rules to bring private claims has long been a mainstay of antitrust enforcement in the United States. In Europe, on the other hand, competition rules have long been considered to be the province of administrative enforcement without paying due regard to the harms of antitrust victims. More than fifty years after the Treaty of Rome, which set out the competition policy of the European Union, this conviction seems to be changing both at EU and national level of the Member States.

The reasons for the increase of viability of private enforcement in the Europe are manifold. First of all, already a decade ago, in the famous *Courage* ruling, the European Court of Justice clearly established the right of individuals to claim damages in national courts for loss caused by violations of Articles 101 and 102 TFEU. Secondly, the new Regulation 1/2003 contains a number of provisions which tend to support private actions in courts, above all the rule that national courts may now apply Article 101 TFEU in its entirety. Thirdly, following the 2004 and 2007 EU-enlargements, the European Commission is interested in drawing additional resources into the competition enforcement mix, since the EU's single market already counts over 502 million consumers.<sup>380</sup> Finally, other countries around the world walk decisively and aggressively into adding private enforcement and tempt the plaintiffs to pursue the claims in their jurisdictions, while in many EU Member States no appropriate redress to antitrust victims is available.

The growing interest and appetite for private enforcement also seems to have more fundamental reasons. It is a sign of the maturity of the competition law system in the EU and a result of the general conviction that the preservation of the competition as a process is beneficial for the free market economy. In particular, however, the interest for private enforcement seems to be rooted in the general recognition that competition law can benefit from more private litigation. Both at EU and national level private antitrust litigation is increasingly perceived as a useful complement to public enforcement. It is acknowledged that private enforcement enlists those closest to antitrust infringements in the enforcement process, relieves enforcement pressure on public authorities, frees their resources for complex cases, raises awareness of competition provisions, ensures compensation for victims of antitrust

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<sup>380</sup> Eurostat, „Total EU population as of 1 January 2011”, available at: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1> (accessed on 31.08.2011).

breaches and finally deters violations of competition rules. Therefore, it contributes to the social welfare and the well-being of the economy.

Notwithstanding the advantages of private enforcement, recent years have shown that the creation of a favourable legal environment for antitrust litigation in the EU is not an easy task. With regard to the competition rules enshrined in the TFEU, the main problem is rooted in the complex relation between EU and national law. The rule of substance, which establishes whether or not there has been an infringement of competition law is common to all EU Member States, since it is to be found in the Treaty. The conditions for liability, however, are the domain of 27 different national laws, as there is no European civil code or code of civil procedure, which would dictate coherent rules for the availability of damages or injunctions. In addition to that private litigation is to a large extent deterred by a number of obstacles, which vary between EU jurisdictions. These barriers include *inter alia*: the uncertainty over who may sue, non-availability of collective redress mechanisms, the need (in damages' claims) to establish a causal link between the loss suffered and the antitrust infringement as well as the need to prove fault, the difficulty of gathering the required evidence, the complex economic analysis which is needed to assess antitrust damages, the uncertainty whether the claimant may rely on public authorities' documents and decisions in national proceedings, finally, the cost and risk of litigation as well as the fact that national courts generally have limited experience with antitrust arguments and may not be equipped with appropriate expertise to deal with antitrust cases.

The European Commission was the first to notice these obstacles and has since made steady efforts to improve the situation of antitrust claimants in the EU. In this thesis, it is argued that the initiatives of the Commission, such as the 2005 Green Paper and 2008 White Paper on damages actions for the breach of EU antitrust rules, had an overall positive effect. They drew attention of the EU countries to the problem of the paucity of antitrust litigation in Europe, stimulated debate in academic circles and national parliaments and, in particular, identified the problems that need to be tackled, if private enforcement is to become a fact of life in the European context.

However, this thesis argues that the activities at EU level at some point went too far. It seems that the European Commission was too ready to launch a legislative proposal which would introduce an EU-wide regime for antitrust liability and thus fix the problem of EU private antitrust enforcement once and for all. If adopted, this proposal would have damaging consequences, since it would lead to a sectoral harmonization of tort law at EU level and

seriously affect the balance and internal coherence within national systems of substantive and procedural law.

Therefore, the argument of this thesis is that any legislative action at EU level at the time given is inappropriate and that the European Commission should first leave the room for the Member States to develop their laws individually. The role of the Commission should be restricted to providing ‘soft law’ instruments in the area of private enforcement and to stimulating debate and exchange of best practices between EU Member States. This approach would mean that the approximation of laws in the EU will certainly take more time, but it will provide for better results. It will enable each Member State to find a different answer to the complex questions related to private antitrust enforcement and to address the issues identified by the Commission at EU level in a way that is compatible with their legal systems, traditions and cultures.

As the research undertaken in chapter three shows, at present there are already strong indications that national laws in Europe as regards private antitrust litigation will naturally evolve without the need for EU harmonizing intervention. Following the case law of the ECJ as well as the intensive debate on the issue at EU level, the majority of EU Member States have provided for an explicit statutory basis for actions for antitrust damages. Some of them have gone further and adopted selected measures from the White Paper. Finally, two EU Member States, i.e. Germany and United Kingdom, developed entire frameworks for private antitrust enforcement and have since become a “hub” for claims of different European plaintiffs.

In the light of these developments, it can be expected that reforms at national level will continue and that we might even see a competition between jurisdictions across Europe with regard to facilitating private enforcement. Regulation 44/2001<sup>381</sup> allows victims of Europe-wide cartels to choose between the courts of the domicile of the defendant or the courts of the place of production of damages. Given this possibility, antitrust claimants have strong incentives to forum shop and to select the forum more convenient for the success of their claims. This may push EU countries towards reform of their competition regimes, make them promote their jurisdictions as “plaintiff friendly” and attract important cases to their courts, thus stimulating the growth of the national legal services industry. This thesis demonstrates that, at least in the most influential EU jurisdictions, this process has clearly started.

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<sup>381</sup> Article 5(3) in relation with 2(1) of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdictions and the recognition and enforcement of judgments in civil and commercial matters , [2001] OJ L12/1.

Moreover, it is likely to continue and give rise to more private actions in the area of competition law before all national courts across the EU.

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- Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40
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