THE HARMONISATION OF THE LAW OF DAMAGES AND ITS PROCEDURAL
RULES FOR BREACH OF EUROPEAN COMPETITION LAW:
A CRITICAL ANALYSIS

by

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Abstract

This dissertation examines the case for harmonising some national rules, relating to the law of damages and civil procedure, which are applied to national proceedings for compensation of losses resulting from breach of Articles 101 and/or 102 TFEU. Before answering whether such rules should be harmonised, the dissertation examines the broad policy rationale behind private enforcement of competition law, its goals and limits. The findings are that private enforcement plays a positive role both to compensate antitrust victims and deter undertakings from breaching competition law. This provides a sound policy for harmonisation of private enforcement rules. Subsequently, the dissertation examines the main arguments against and for harmonisation. It is argued that the case for harmonisation is more convincing than the case against. Then, the arguments for harmonisation are tested in respect of some national rules that play a pivotal role in national competition law proceedings. Although few antitrust actions are brought, it is suggested that some national rules might not comply with the EU principle of effectiveness. In addition, even if such national rules did comply with this principle, the risk of forum shopping and the problem of excessive disparity of the level playing field are likely to materialise. Thus, harmonisation of private enforcement rules is desirable.
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Chapter 1

Introduction

1. Private enforcement of competition law: what and why

In the last decade, European competition law has experienced profound changes that involved both substantive law and its enforcement.¹ This research is concerned with private enforcement of competition law,² and in particular with the law of damages and the relevant procedural rules applicable in national proceedings whose cause of action lies in the breach of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).³ Since such rules are currently governed by domestic law, this dissertation critically evaluates whether they should be harmonised at the European level.

The traditional rationale of private enforcement, when it is concerned with compensation of losses, lies in corrective justice,⁴ that is to say to restore the victim’s position, had the breach of competition law not occurred.⁵ However, the law and economics scholarship challenged this view and proposed deterrence as a competing and exclusive goal of enforcement: the threat of a

² A formal definition of private enforcement of competition law will be given later. Broadly speaking, it refers to civil litigation commenced by a private party. Private enforcement of competition law refers to civil claims whose cause of action lies in the breach of Article 101 and 102 TFEU.
³ Private enforcement of competition law does not include the competition issues of mergers since their control is exclusively based on administrative enforcement. Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L124/1.
⁴ Corrective justice is a fundamental concept in Western legal systems. It has been defined as ‘an obligation on the tortfeasor to compensate his victim for the harm he has done: the victim has a correlative right to recover for his losses.’ In Michael D. A. Freeman, Lloyd’s Introduction to jurisprudence (8th edn, Sweet and Maxwell 2008) 630.
⁵ G Williams 'The Aims of the Law of Tort' (1951) 4 Current Legal Problems 137.
negative consequence, for example compensation, serves the purpose to discourage an undertaking from breaching the law.\(^6\)

A great deal of US antitrust scholarship now accepts this second justification because private enforcement is expensive and full compensation would be socially inefficient.\(^7\) The deterrence rationale provides a methodology that prescribes that a sanction (e.g. compensation) should be imposed by taking into account not only the victim’s loss, but also the offender’s gain as well as the social costs resulting from the infliction of a sanction and the foregone social benefits resulting from prohibiting a certain business conduct.\(^8\)

When the Court of Justice established the right to compensation of losses resulting from breach of competition law (Article 101 and 102 TFEU), it recognised that such a right aims at accomplishing both corrective justice and deterrence.\(^9\) In general, private enforcement of EU competition law may be understood within the general topic of private enforcement of EU law, which developed through the principles of direct effect\(^10\) and effectiveness.\(^11\) In particular, it is consistent with the idea of dual vigilance set out in *Van Gend en Loos*, according to which EU rights are protected by the Commission through the infringement procedures\(^12\) and by individuals

\(^6\) Deterrence as a general goal of both public and private enforcement is widely accepted. See for example, William M Landes and Richard A. Posner, ‘The Private Enforcement of Law’ (1975) 4 The Journal of Legal Studies 1.


\(^8\) The literature on the law and economics development of the theory of deterrence is extensive. A similar way of describing deterrence is by saying that rules should minimise and internalise the costs resulting from wrongdoings. See, Cento G Veljanovski, *Economic Principles of Law* (Cambridge University Press 2007) 183.

\(^9\) Case C-453/99 Courage Limited v Bernard Crehan [2001] ECR I-6297, paras 26 and 27. Para 26 mentions the individual’s right to compensation, while para 27 mentions the fact that this right discourages anti-competitive agreements or practices. In other EU areas, for example, responsibility for non-contractual liability, compensation was grounded in the principle of corrective justice, see Case C-308/87 Alfredo Grifoni v EAEC [1994] ECR I-341, para 40.


\(^12\) Articles 258 and 259 TFEU.
through national courts. Private enforcement of competition law is precisely concerned with this latter route.

This chapter begins by summarising the most significant themes of the debate on private enforcement of competition law. Then, it sets out a historical overview of the Commission’s policy to encourage private enforcement and its proposal to harmonise some procedural rules and law of damages that apply to civil proceedings before the Member States’ courts based on breach of Articles 101 and/or 102 TFEU (hereinafter ‘antitrust litigation’ or ‘competition law’ litigation). This provides the background within which the rationale of the research questions of this dissertation may be fully understood.

2. The case against private enforcement

Although in the US private enforcement of antitrust is predominantly private,\textsuperscript{13} it has been subjected to criticism. The general thrust of the argument is that the costs of private enforcement outweigh the social benefits.\textsuperscript{14} Some criticisms are the following.

First, it fails to produce sufficient benefits in terms of compensation. Often the individual’s loss resulting from breach of the antitrust laws is negligible and therefore victims have no interest in obtaining compensation.

\textsuperscript{13}§4 of the Clayton Act provides: ‘… any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore … and shall recover threefold the damages …’ As of 2010, private parties filed 91.8\% of the antitrust cases made in US District Courts. ‘Sourcebook of criminal justice statistics online’ (2010). <http://www.albany.edu/sourcebook/pdf/t5412010.pdf> accessed 10 July 2013.

In addition, enforcing competition law through courts entails considerable burden on the civil justice system. In fact, so the argument goes, competition law litigation is primarily driven by lawyers whose interest is to receive considerable legal fees. This generates the wrong incentive to bring unmeritorious class actions.

In turn, class actions may discourage entrepreneurs from adopting business conduct that overall is competitive even if it contains some anti-competitive elements. This argument is sometimes referred to as ‘overdeterrence’ and is based on the assumption that a great deal of private economic conduct is beneficial and courts fail to recognise such benefits.

Finally, actions in which private parties rely on previous antitrust agencies’ decisions to make their claim (follow-on actions) do not enhance deterrence. The reason is that once an antitrust violation has been discovered and ascertained by an antitrust agency, victims’ claims no longer constitute a threat that incentivises compliance with the law.

Some of the above criticisms have been echoed in the EU too. Wils, a leading academic and Commission’s official, speaking in his private capacity, argued that public enforcement is superior to the private one and therefore the latter should not be encouraged.

The first reason is that public investigative powers are greater than private ones. Private parties rely on the ordinary rules of evidence. Conversely, public authorities are granted more incisive powers, thus making detection of antitrust violation more effective.

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Secondly, public authorities act in the pursuance of the correct incentive, i.e. the public interest, whereas parties’ private interest consists in compensation or bringing to an end the infringement. The latter interest might not always be conducive to the former.

3. The case for private enforcement

Clearly, private enforcement does provide important benefits.

First, as has been seen, unlike public enforcement, private enforcement pursues corrective justice for the victims of an antitrust violation. While breaches of competition law often result in low value losses, sometimes antitrust losses may be of considerable value for which it is worth making a claim.

Second, it complements public enforcement, whose resources are limited. This is a pragmatic argument although it also poses problems whether and how public and private actions should co-ordinate with each other. This aspect will be discussed when dealing with the relationship between public and private enforcement.

Here, suffice to recall that the Commission’s reform of its system of enforcement was primarily motivated by the pragmatic reason to prioritise its action on the most serious infringements of competition law (cartels), thus leaving minor infringements to national competition authorities and national courts.

Third, some antitrust victims (e.g. suppliers and competitors) may have more and better information about an antitrust violation than public enforcers. Knowledge of markets requires a
great deal of information, which might be more easily available to businesses than public authorities. However, here there are two opposite aspects to be considered.

On the one hand, competitors might bring unmeritorious claims against a dominant undertaking, which is undesirable because it may discourage efficient business practices. On the other hand, businesses might have resources and expertise to recognise whether they are being victims of antitrust violations.16 The quality of information held by suppliers or competitors may enhance courts’ chances to make accurate decisions, which puts the risk of unmeritorious claims into perspective.

4. European private and public enforcement of competition law

Enforcement of competition law has been traditionally divided into public and private. The former refers to the action brought by governmental bodies (either European or national) empowered to enforce competition law; its nature is essentially administrative. The latter refers to the enforcement of the competition rules conducted by courts, whose proceedings are promoted by private individuals who are interested in businesses’ compliance with the competition rules.17

Private parties have a role in both types of enforcement, but since the nature of public and private enforcement differs, private parties’ role differs too. In public enforcement, a party having legitimate interest may lodge a complaint setting out relevant information, but her role is

generally limited to promoting the opening of an investigation.\textsuperscript{18} Clearly, the finding of a competition law infringement brings a number of benefits to individuals (primarily, the ending of anti-competitive conduct). However, public enforcement does not provide compensation.

Conversely, due to the nature of civil litigation, courts are normally better equipped to accommodate private parties’ interests than governmental agencies. Clearly, this does not mean that courts have the power to recreate the market situation antecedent to the infringement of competition law, however their decisions may set-off some of the adverse effects brought about by such infringement.

4.1 Early Commission’s public enforcement: characteristics and problems

Until 2004, the predominant model of competition law enforcement was public and centralistic. The Commission was the only institution empowered to enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The centralistic architecture derived from the influence of the French legal culture on the EC legislation and administration,\textsuperscript{19} which aimed at ensuring uniform laws and enforcement throughout the Member States. This approach was also necessary due to the lack, with the exception of Germany, of national competition laws and of adequate national administrative structures equipped to properly monitor and enforce European competition law.\textsuperscript{20}

\textsuperscript{18} Article 7 of the Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. See also the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/05.


\textsuperscript{20} Claus Dieter Ehlermann, ibid.
At the legal level, such a centralised system was reflected, inter alia, in the monopoly of the Commission in the grant of the exempting conditions set out by Article 101(3) according to which an anti-competitive agreement may be considered lawful if such conditions are met. By this way, the Commission could monitor and exercise its policy on European agreements that simultaneously brought about anti-competitive and competitive effects.

However, the Commission’s exclusivity in granting such exemptions increasingly led to the notification of a great number of requests for exemption, with the consequence that the Commission could not deal with them in due time, and considerable resources were diverted from the pursuance of the most serious infringements of competition law, i.e. cartels, in order to examine notified agreements.

4.2 The premise of private enforcement: decentralisation of enforcement

A first measure to tackle this backlog came from the European Court of Justice, which established that the prohibition of Article 101(1) applied only to cases having an appreciable effect on competition.

21 Article 101 TFEU (formerly 81 EC Treaty) has a bifurcated structure: Article 101(1) forbids agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 101(3) provides that the first paragraph may be declared inapplicable, thus making the agreement, decision or concerted practice lawful, if a number of conditions are met. The previous rules on the enforcement of Articles 101 and 102 were provided for by the Council Regulation No. 17/62 which was repealed by the Regulation 1/2003. In particular, Article 9(1) of Regulation No. 17/62 provided that: ‘Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty.’ This provision meant that the Commission had the exclusive power to exempt an agreement, decision or concerted practice, thus conferring the power to enforce the competition rules to the Commission only.


23 The appreciability of the restriction of competition as a necessary element to infringe Article 101(1) was recognised by the Court of Justice in Case 5-69 Franz Völk v S.P.R.L. Ets J. Vervaeke [1969] ECR 295.
Second, the Commission issued various general notices excluding from the scope of Article 101(1) to vertical and horizontal agreements when such agreements had a limited value, and a number of block exemption regulations whereby an agreement meeting some conditions would be automatically lawful without being formally exempted by a Commission’s decision.

Finally, the Commission issued a number of letters, the so called ‘comfort letters’, whereby it expressed the view that a certain notified agreement either did not restrict competition (according to Article 101(1)) or it met the exempting conditions (according to Article 101(3)). The problem was that ‘comfort letters’ were not legally binding, which made them less attractive to parties wishing to have legal certainty of the agreements they had entered into.

Notwithstanding these measures, the backlog was not reduced. In addition, there was a growing awareness that the Commission’s resources should have been devoted to detecting and punishing


25 Paras 34 and 35 of the White Paper on Modernisation.

cartels. This is the background against which the White Paper on the reform of the enforcement of the EC Treaty competition provisions was adopted. It set out the policy for a decentralised enforcement whereby the Commission, national competition authorities and national courts would all be involved in the enforcement of Articles 101 and 102 of the TFEU.

4.3 The new era of EU competition law enforcement: Regulation No 1/2003

Following the White Paper on Modernisation, Regulation No 1/2003 was enacted. As anticipated, it set out a new structure for the enforcement of European competition law, which relied on the Commission, national competition authorities and national courts. It has been previously mentioned that the Commission’s intention was to concentrate its action against cartels. Thus, in order to avoid wasting resources, the authorisation system whereby agreements between undertakings could be declared lawful by a Commission’s decision was abolished. In legal terms, this change was implemented by making Article 101(3) directly applicable, which means that now such a provision is applicable by national competition authorities and national courts.

It should be remembered that even under the previous rules, private enforcement was permitted. However, the Commission’s exclusive power to apply Article 101(3) prevented national courts from delivering expeditious judgements. The reason was that in national proceedings in which an

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28 Para 45 of the White Paper on Modernisation.


30 Regulation 1/2003. As previously mentioned, this Regulation repealed the previous rules on enforcement provided by Regulation 17/1962 [1962] OJ L13/204.

31 Article 43 of Regulation 1/2003 repealed the authorisation system provided by Council Regulation 17/62.

32 Article 1(1) provides that ‘Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.’ Article 1(2) is the mirror provision of Article 1(1) as it provides that agreements, decisions and concerted practices falling under Article 81(1), but that meet the conditions of Article 81(3) are lawful without a prior decision.

33 Article 6 of the Regulation 1/2003 provides that ‘National courts shall have the power to apply Article 81 [now 101] and 82 [now 102] of the Treaty.’
anti-competitive agreement was relevant, the defendant could notify to the Commission the agreement at issue asking for an exemption. As a result, the court had to stay proceedings until the Commission issued a decision. The exemption system was *de facto* used for dilatory purposes. The abolition of the notification system and direct applicability of Article 101(3) prevented such dilatory strategy, thus creating the conditions to increase private enforcement.

5. The legal background of European private enforcement of competition law

The White Paper on Modernisation, and especially Regulation No 1/2003, are often associated with the emergence of European private enforcement. However, while they both mention the role of national courts in the application of European competition law, they do not set out a general principle whereby private parties are entitled to compensation of losses resulting from breach of competition law.34

In English Law, the right to compensation for breach of EU competition law was recognised in *Cottage.*35 There, it was established that breach of the EU abuse of dominant position was qualified, under English law, as a breach of statutory duty. The English court held that while the purpose of Article 102 TFEU was to promote the internal market, private individuals could also rely on that provision to have their losses compensated.36

34 For example, para 37 of the White Paper on Modernisation, in accordance with the general principles of European Community law, provided that national courts have role in establishing infringements of the Community competition rules. Likewise, para 99 stated that ‘national courts are vital to the effective application of Community law, including competition law.’ Para 100 mentions briefly that the system of direct applicability will enable victims of antitrust infringements to obtain compensation of damages. Regulation No 1/2003 is more explicit: recital 7 provides that national courts ‘protect the subjective rights under Community law, for example by awarding damages to the victims of infringements.’ This is not to say that compensation of damages was excluded by European lawmakers, however, it seems that it played a minor role in the configuration of the new enforcement system.

36 [1984] A.C. 130 [141].
As regards EU law, although the Treaty competition rules were directly effective, the recognition of the right to compensation came only with *Courage and Crehan.* The significance of this case goes beyond its specific recognition of the right to antitrust compensation; in fact it could be seen as the outcome of earlier case law on state liability that started with *Francovich.*

In *Francovich* the Court of Justice introduced the principle of state liability by which a Member State is liable when it breaches Community law that causes loss and damage to individuals. In that case, the Court also held that the conditions for reparation vary according to the nature of the breach of Community law.

In that case, the breach of EU law by Italy consisted in the lack of implementation of a directive that would have granted financial assistance to employees in the event of insolvency of their employers. The Court of Justice set out the conditions to obtain reparation: the directive should entail the grant of rights to individuals, it should make it possible the identification of the content of those rights, and there must be a causal link between the Member State’s breach and the individuals' loss and damage.

*Brasserie du Pêcheur / Factortame III* was another important case on state liability. While in *Francovich* the breach consisted in the lack of implementation of a directive, in *Brasserie du Pêcheur* the issue was whether state liability could arise for acts and omissions of the national legislature that were contrary to Community law. The Court answered in the affirmative. Some Member

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40 Para 32.
41 Para 37.
42 Para 32.
States argued that state liability should not arise when the breached Community law was directly effective because individuals could rely on such provisions, thus making compensation unnecessary.

The Court rejected that argument and held that directly effective provisions were just a minimum guarantee, but not sufficient to ensure the full and complete implementation of the Treaty.43 This point was important because competition law provisions are also directly effective; in fact in *Courage* the direct effectiveness of Articles 101 and 102 TFEU was one of the premises in the Court’s reasoning that lead to the recognition of the right to antitrust compensation.

The last obstacle to the recognition of the right to antitrust compensation was that in the case law on state liability, liability arose only in respect of the Member States breaching EU Community law, not against individuals. The issue was therefore whether private individuals breaching EU competition law could also be held liable. In this respect, it was argued that there was no reason to distinguish between states and individuals breaching EU law.44 Indeed, the direct effects of the Treaty competition law provisions mean that individuals are also subject to the obligations deriving from such provisions. If the breach of such obligations results in damages for individuals, then the latter should be entitled to obtain compensation.

Such a reading could have paved the way for the right to antitrust compensation. This issue was raised in *Banks*45 where the Court of Justice was asked by the English High Court whether the national court could, or even had the obligation to, award damages suffered by individuals arising from violation of the competition provisions of the ECSC Treaty carried out by individuals.

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43 Para 20.
Although Advocate General Van Gerven answered in the affirmative,\textsuperscript{46} the Court held that such provisions did not confer rights directly enforceable by individuals before national courts.\textsuperscript{47}

Despite Banks, it was foreseeable that the Court of Justice would deal again with this issue. In 1996, when commenting Francovich and Brasserie,\textsuperscript{48} in his private capacity, Van Gerven foresaw that the Court would deal with the issue of liability, as a matter of European law, of individuals who breach specific obligations imposed upon them by EU law.\textsuperscript{49}

That prediction was confirmed in Courage and Crehan.\textsuperscript{50} This case was concerned with a vertical agreement containing a clause that obliged a pub tenant, Mr Crehan, to exclusively purchase beer from a brewery company. Mr Crehan failed to pay his debts to the company and in the subsequent proceedings he counterclaimed compensation on the grounds that that exclusivity clause had driven him out of business. Since Mr Crehan was party to the agreement, the referring English court asked whether compensation was precluded by the \textit{in pari delicto} defence.\textsuperscript{51}

The Court of Justice ruled that national law \textit{in pari delicto} was compatible with EU Law provided that the claimant bore significant responsibility for the distortion of competition.\textsuperscript{52} This meant that a contracting party who is in a markedly weaker position in respect of the other party

\textsuperscript{46} Banks, Opinion of AG W. Van Gerven, para 43.  
\textsuperscript{47} Case C-128/92 Banks v British Coal Corporation [1994] ECR I-1209.  
\textsuperscript{48} Joined Cases C-46/93 and 48/93 Brasserie du Pêcheur S.A v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport [1996] ECR I-1029.  
\textsuperscript{49} W Van Gerven, ‘Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie’ (1996) 45 ICLQ 507, 507.  
\textsuperscript{51} Courage Limited v Crehan Intreprenuer Beer Supply Co. Limited v Byrne and Langton Greenalls Management Limited v Smith and Walker Cain v Mullaney [1999] E.C.C. 455. This defence precludes a party to an illegal agreement to claim damages from the other party for losses resulting from the illegal agreement [32].  
\textsuperscript{52} Para 31.
may still claim compensation.\textsuperscript{53} However, the Court of Justice went beyond this specific issue and also established a general principle whereby any individual may claim damages for losses caused by a contract or conduct that restricts competition.\textsuperscript{54}

This last point was expanded in \textit{Manfredi},\textsuperscript{55} a case that arose from a follow-on action before an Italian court that was brought by consumers against some insurance companies. The claim was concerned with damages arising from an anti-competitive agreement through which the insurance companies had exchanged commercially sensitive information, thus altering the price of the insurance premium.

In \textit{Manfredi} the Court held, among other things, that third parties could rely on an agreement contrary to the EU competition rules to claim compensation provided that the harm was causally connected with that agreement.\textsuperscript{56} This granted consumers the right to claim compensation, thus clarifying the scope of \textit{Courage} in which the right to compensation was recognised with respect to the parties to an illegal agreement.

Finally, with regard to the rules enforcing the right to compensation before national courts, in \textit{Courage}\textsuperscript{57} the Court of Justice reiterated the longstanding principle of national procedural autonomy,\textsuperscript{58} according to which the national legal system provides the procedural rules for the enforcement of EU rights. This principle applies provided that the national rules are not less

\textsuperscript{53} Para 33. The solution is markedly similar to US antitrust. In \textit{Perma Life Mufflers v International Parts Comp}. 392 US 134 (1967), the Supreme Court held that the \textit{in pari delicto} principle could not constitute a defence against a private antitrust action. In particular, US antitrust case law also provides that the \textit{in pari delicto} defence is precluded if the antitrust violation contained in the agreement of which he is a party was imposed upon him. \textit{Sullivan v National Football League}, 115 S.Ct. 1952 (1995).

\textsuperscript{54} Para 26.

\textsuperscript{55} Joined Cases C-295/04 to C-298/04 \textit{Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA} [2006] ECR I-6619.

\textsuperscript{56} Para 61

\textsuperscript{57} Para 29.

favourable than those governing similar domestic actions and that they do not make the exercise of such a right impossible or excessively difficult (principle of equivalence and effectiveness, respectively).

6. Private ‘under-enforcement’ and the Commission’s response

Despite the recognition of the right to compensation for losses resulting from breach of Article 101 and 102 TFEU (hereinafter, ‘antitrust compensation’ or ‘right to compensation’), only few antitrust actions have been brought. The Ashurst Report, a study commissioned by the Commission, affirmed that private enforcement was in a state of ‘underdevelopment’.

On that basis, in 2005 the Commission issued a Green Paper setting out the obstacles preventing such actions, and the relevant solutions. It also issued an accompanying Working Paper, which elaborated the issues dealt with in the Green Paper.

The main issues that contributed to such a low number of antitrust cases were access to evidence, fault requirement, damages (e.g. definition/heads of damages and their quantification), the

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59 Until August 2004, 60 cases were brought. See, Denis Waelbroeck, Donald Slater and Gil Even-Shoshan (Ashurst), ‘Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report’ (2004) 1. Hereinafter: ‘Ashurst Report’. <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> accessed 10 July 2013. A more recent research limited to the UK shows that between January 2009 and May 2012 there have been 44 competition law judgements. In relation to that period of time only 17 judgements were substantive judgements on the merits. Of these only three judgements were successful and one partially successful. Although the Author recognises that in the UK there has been a rise of competition law claims than in the past, he concludes that in comparison to the United States, competition litigation culture in the UK is still in a state of infancy. Barry J. Rodger, ‘Competition law litigation in the UK courts: a study of all cases 2009-2012’ (2013) 6 G.C.L.R. 55, 65. In other EU countries, the number of competition law claims brought between January 2009 and May 2012 seems higher. In Italy, the number of final judgements on competition law cases is about 130 cases. In Spain, 323 competition law claims were brought, but with an unsuccessful rate by 73%. In the Netherlands 300 cases were brought, but of these, claims made by consumers were only three. The significant higher number of competition law cases brought in some EU countries should be taken with caution. Many cases involved commercial disputes in which competition law provisions were not the main cause of action. <www.clpecreu.co.uk/default.htm#> accessed 22 July 2013.

60 The Ashurst Report, 1.


passing-on defence and indirect purchaser’s standing, the defence of consumer interests, costs of actions, co-ordination of public and private actions, jurisdictions and applicable law.

In April 2008 the Commission issued a White Paper on damages actions,\(^63\) accompanied by a number of documents.\(^64\) These documents were accompanied by an extensive Final Report commissioned by the Commission and drafted by various academics, which relied on a great deal of law and economics literature.\(^65\)

In 2009, the Commission drafted a directive that summarised some of the issues raised in these documents, however it was withdrawn.\(^66\) Finally, on 11 June 2013, the Commission adopted a proposal for a directive on damages actions for breach of EU competition law.\(^67\)

In these documents, the Commission related the lack of competition law enforcement with procedural rules governing damages actions. In particular, the Commission held that the main obstacle to private antitrust claims was the problem of information asymmetry between claimants and defendants.\(^68\)

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In addition, uncertainty over the litigation outcome means that a would-be claimant might be discouraged from bringing an antitrust damage action due to the high costs and uncertainty of recovery. As the Commission states, ‘The risk/reward balance in antitrust litigation is skewed against bringing actions.’

7. The object of this research: harmonisation of law of damages and procedural rules applicable to national proceedings for breach of Articles 101 or 102 TFEU

The Green Paper and the subsequent documents set out a series of problems concerning procedural rules applicable to antitrust litigation and the relevant options to remedy such problems. The underlying assumption is that diversity of procedural rules jeopardises the effectiveness of the right to compensation and therefore their harmonisation is desirable. Commentators either approved or criticised the Commission’s intention to harmonise such rules.

The subsequent Commission’s documents are more explicit as to desirability of harmonisation of these rules. The Commission’s proposal to encourage private enforcement through the harmonisation of these rules is the object of this dissertation. In particular, this research is concerned with the question whether it is desirable to harmonise some aspects on the law of damages and procedural rules applicable in proceedings before national courts of the Member States whose cause of action lies in the breach of Articles 101 and 102 TFEU.

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72 See, for example, the Commission, ‘White paper on damages actions for breach of the EC antitrust rules’ COM (2008) 165 final. There the Commission proposes a combination of measures at both Community and national levels (at p 2). The Final Report also sets out explicitly the harmonisation options.
Before examining the rationale behind this question, this dissertation deals with two preliminary questions that are concerned with the general justification for private enforcement of competition law. The reason is that harmonisation of the above-mentioned rules assumes that antitrust litigation plays a positive role. This dissertation accepts that this is the case, but rather than taking this assumption for granted, it sets out the terms of the debate concerning antitrust compliance and litigation and attempts to provide a justification for its role in the enforcement of competition law.

7.1 The first research question: the state of compliance with Articles 101 and 102 TFEU

The first question is primarily empirical and asks whether and the extent to which there is significant low compliance \textsuperscript{73} with Articles 101 (prohibition of anti-competitive agreements) and 102 (prohibition of abuse of dominant position) TFEU.\textsuperscript{74} The rationale behind this question is that if such provisions are sufficiently complied with, the need to encourage private enforcement rules is less stringent, or even undesirable given that EU private enforcement rules would force the Member States to change important rules and given that increased antitrust litigation would impose costs on the civil justice system of the Member States.

Of course, even if compliance with competition law were high, this would not necessarily mean that reform of private enforcement should not be carried out. Some violations still occur and if the Member States do not adequately ensure the right to antitrust compensation, antitrust victims

\textsuperscript{73} By compliance is meant formal respect to the law. There is no fixed definition of ‘low compliance’ or when ‘low compliance’ with competition law is unsatisfactory and should be remedied. The next chapter ‘General features of competition law enforcement’ provides a more accurate definition of the meaning of compliance and indicates some factors that suggest that the current degree of compliance with competition law is low and undesirable.

\textsuperscript{74} This dissertation does not deal with control of concentration since its enforcement is based on the Commission’s preventive authorisation, that is to say upon an administrative procedure. The relevant rules are provided in Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.
would find it difficult to obtain redress. It may be argued that this itself justifies of reform. However, a high number of violations of competition law poses the need to design private enforcement rules in such a way as to promote greater compliance.

7.2 The second research question: effectiveness of private enforcement of competition law

If the level of violation of EU competition law is significant, the second question asks whether and the extent to which private enforcement may contribute to a reduction in such a compliance deficit. This is related to the above-mentioned criticisms that private enforcement of competition law fails to achieve its objectives.

As explained above, in the US antitrust private enforcement has been criticised because, *inter alia*, businesses may abuse competition law by challenging some undertakings’ practices that are in fact economically beneficial, and by lawyers who see in private enforcement the opportunity to increase their legal fees awarded in such proceedings.

It has also been questioned whether the threat of an antitrust claim is capable of discouraging an undertaking to breach competition law. The reason is that settlements or duration of antitrust proceedings lower the probability that an undertaking will have to pay compensation.

Empirical evidence from the US shows that private enforcement has been beneficial.\(^\text{75}\) In particular, private suits have increased the detection rate of cartels. This is important because the higher the detection rate, the more undertakings tend to comply with competition law. In the US it has been suggested that the detection rate is 20\%. Conversely, in the EU the detection rate is

even lower: 15% circa. Given that in the EU private enforcement is not as developed as the US, the different detection rate justifies a *prima facie* case for encouraging private enforcement.

While US experience shows that abuses of private antitrust actions occur, such abuses should not justify denial of compensation to antitrust victims. Rather, it is sensible to identify and remedy its flaws in order to minimise its costs and maximise its benefits. Indeed, some empirical evidence shows that private enforcement has deterred more than public enforcement. In general, it seems that the above-mentioned criticisms are based on an ideological bias rather than extensive empirical findings.

7.3 The third research question: harmonisation of some procedural rules and some aspects of the law of damages in competition law proceedings

If low compliance with Articles 101 and 102 TFEU is significant and litigation based on such provisions promotes compliance with competition law, then private enforcement rests on a solid basis. The subsequent question has been previously mentioned and may be framed as follows. It asks whether the EU Member States’ legal systems are adequate to guarantee the objectives of the effectiveness of the right to antitrust compensation and to promote greater compliance with EU competition law. Put differently, it asks whether national legal systems accomplish the goals of corrective justice and deterrence in the field of competition law.

It also investigates whether diversity of national rules creates undesirable effects as a result of which these objectives may be better achieved at the EU level, in particular by

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76 The Final Report at 72.
78 Robert H. Lande and Joshua P. Davis, ‘Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) 42 U.S.F. L. Rev. 880, 905. The Authors claim that in the US private claims deterred more than criminal fines and prison sentences. In the sample of cases they analysed half of them were initiated by a private counsel.
harmonising some procedural and substantive rules governing damages actions based on Articles 101 and 102 TFEU.

As explained above, the starting point is that domestic law provides the rules for the enforcement of the right to compensation for losses flowing from breach of Articles 101 or 102 TFEU. In this respect, it has been mentioned that when such rules make the exercise of the EU right excessively difficult or impossible, such national rules must be set aside. This is an important theme that will be developed in chapter three, when expounding the main terms of the harmonisation versus national autonomy debate.

The problem with this situation is that disapplication of national rules might not necessarily guarantee that the remaining applicable national rules are tailored to the features of competition law. In other words, disapplication of national rules is reactive (i.e., it removes the application of a national rule that restricts the exercise of a EU right), but not proactive (i.e., it does not provide a claimant with rules that would facilitate her claim). In a nutshell, the issue is how best to ensure effectiveness of the right to antitrust compensation.

For example, it has been mentioned that the Commission identified the problem that there is significant information asymmetry between would-be claimants and prospective defendants. In turn, this discourages individuals or businesses to make a claim. As a result, the overall deterrence effect of litigation is undermined. If national law does not address the problem of asymmetry of information, disapplication of national rules contrary to the principle of effectiveness does not necessarily overcome this problem.
A second aspect, which is distinct from the arguments related to the adequacy and effectiveness of national law, is concerned with the level at which enforcement rules should be adopted. One thing is to set such legislation at the national level, another is to set it at the European one. It could be argued that the Member States should be left free to decide their own legislation on private antitrust enforcement, provided that it is adequate to guarantee the right to compensation.

This dissertation explores the case for harmonisation of such rules at the European level. In other words, even if all Member States had in place adequate national legislation for the enforcement of the right to antitrust compensation, the diversity of national legislations may produce some undesirable effects, which may be avoided or attenuated by introducing common EU rules. This means that private enforcement rules should be designed to ease the right to compensation in order to achieve the two above-mentioned goals of corrective justice and deterrence.

7.4 The principle of subsidiarity: the comparative efficiency calculus

The third research question may be also understood in the light of the EU principle of subsidiarity. The principle of subsidiarity requires a comparative analysis of the effectiveness of the action taken at national rather than European level. The TFEU refers to it in terms of ‘objectives of the proposed action that cannot be sufficiently achieved by the Member States’.

The second part of the third research question is whether the objectives of compensation and deterrence can be better achieved at the EU level, in particular by harmonising some procedural and substantive rules governing damages actions based on breach of Articles 101 and 102 TFEU. This is precisely an inquiry concerning the level at which private

79 Article 5(3) TEU.
enforcement rules are more effective in order to facilitate would-be claimants to obtain compensation and to increase spontaneous compliance with competition law.

It will be seen that the application of the principle of subsidiarity is not without problems. The core of this principle is that some objectives cannot be sufficiently achieved at national level. However, there is no formal definition of what is meant by ‘sufficiently achieved’. It simply refers to the fact that a certain objective is achieved less than an optimal level. It may be argued that this is a wide discretionary choice that EU policymakers can make.

Similarly, there is no indication of how to determine the objective to be achieved. For example, it is one thing to set the target of reducing the current violations of competition law by 90%, quite another is to aim at reducing only by 30%. In the first case, private enforcement rules should be designed to provide antitrust claimants with significant advantageous procedural rules (recovery of legal fees, disclosure of evidence, and so forth) that encourage them to make a claim. In the second case, such rules may not need to be unbalanced in favour of the claimant.

These different targets set the framework within which the comparative efficiency calculus is carried out. So far, it seems unlikely that the Court of Justice would interfere with the setting of the objectives to be pursued by EU measures, assessing whether national rules are not sufficiently achieving such objectives, and to judge whether EU action would be more effective. In fact it seems reasonable to leave these evaluations to the political discretion of the European legislature.

To be clear, inadequacy of national law to ensure effectiveness of the right to compensation does not necessarily justify harmonisation of private enforcement rules. For example, it may be argued that even if some Member States do not provide effective enforcement mechanisms, they should
retain the power to regulate such areas. In this respect, a general ‘open-ended’ EU obligation could be introduced, which would compel the Member States to put in place effective private enforcement rules, but would leave them a wider choice on how to achieve it.

To some extent, this is already provided by Article 19(1) second indent of the TEU, which holds that Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Instead of enacting a detailed directive that would modify some crucial aspects of procedural law (ie, collective actions or disclosure of evidence), EU law could limit itself by providing a general duty of the Member States to put in place rules that would ease a compensation claim based on EU competition law.

This solution has the advantage that Member States may give proper consideration to the capability of their civil justice system to cope with this type of litigation and how many resources should be spent. On this view, Member States should have the power to reconcile the different interests at stake when implementing private enforcement policies. In addition, the Member States would retain regulatory power on their civil procedure, a technical area that traditionally has been marginally touched by European harmonisation.

Nonetheless, this approach would create the risk that the Member States might not put in place an effective system of private enforcement because they prefer to pursue different competition policies. Here the problem is that inadequate enforcement adversely affects other Member States. For example, suppose that some specialised industries are present in a Member State A and not in Member States B, C, and D. Let us also suppose that such industries are prone to cartelisation and that the Member State A inadequately enforces competition law. As a result, businesses
located in the Member States B, C, and D that purchase from such industries will pay higher prices with consequent negative effects materialising in such Member States.

Finally, even if national rules were adequate, problems might arise in *cross-border disputes*, which are likely to arise given that EU competition law applies when it affects trade between the Member States. In other words, it is important to ensure not only that national rules are effective, but that they also facilitate cross-border disputes in which thousands of businesses and consumers may be involved. This argument shows that harmonisation of private enforcement rules should not be dismissed so quickly.

8. Selection the Member States’ legal systems

In respect of the jurisdictions that have been selected to assess their rules, it would not be possible to deal with all EU Member States. This dissertation chooses to examine English law because it seems to be more prone and prepared to put in place an effective system of enforcement. It also considers the laws of France, Germany and Italy, on the basis that these countries represent a significant proportion of the EU, in terms of population and gross domestic product, and because that the legal culture of France and Germany played significant influence on EU law. Occasional references to other jurisdictions are made too.

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80 EU Competition law applies precisely when the infringement produces an effect on trade. Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81. Harmful effects on other Member States and the transnational dimension of the problems are aspects that justify EU action. The previous protocol on the application of the principles of subsidiarity and proportionality provided that ‘the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States’ and that ‘Actions by Member States … would otherwise significantly damage Member States’ interests.’ Protocol (No 30) on the application of the principles of subsidiarity and proportionality [2006] OJ C321 E/308. Protocol annexed to the Treaty establishing the European Community. The current protocol does not mention the aspect of transnational effects. Rather, Article 5 provides that the reasons for which a Union objective can be better achieved at Union level shall be substantiated by qualitative and quantitative indicators. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2007] OJ C 306/150.
In addition, US antitrust law will be taken into account since the goal to increase private enforcement has been inspired by this jurisdiction. Its experience in the enforcement of antitrust law may bring some contribution to the EU even though it is acknowledged that EU and US market cultures differ profoundly. The choice among the above-mentioned EU Member States contains some elements of discretion and arbitrariness. However, the purpose of this dissertation is not to describe in detail the legal system of all EU Member States, but to show whether the application of different domestic rules is preventing the development of an effective system of antitrust private enforcement.

9. The case against harmonisation of law of damages and procedural rules applicable in competition law actions

The arguments against and for harmonisation of private enforcement rules will be examined in chapters two and three. This is a brief summary of the arguments against.

A first argument questions the underpinning policy of private enforcement. Harmonised rules applicable in antitrust national proceedings would facilitate antitrust private enforcement thus imitating the US style litigation culture, which encourages unmeritorious claims.81 This would have an adverse impact on the civil justice systems of the Member States and on European companies’ competitiveness.82

A second argument holds that civil procedural systems are extremely complex to be changed and accommodate the proposed harmonised rules. In addition, these rules would introduce legal

81 Legal scholarship often does not define, or defines very broadly, the concept of ‘unmeritorious’ litigation. Its meaning will become apparent in the chapter that deals with collective actions. So far, suffice it to say that it refers to cases supported by little evidence or weak legal arguments that are nonetheless made with the goal of exercising pressure upon the defendants to settle.

values that are extraneous to the legal culture of some Member States. National procedural rules endeavour to strike a balance between claimants and defendants, a balance that would be disrupted by the proposed EU rules that favour claimants.

Thirdly, harmonisation runs counter the theory of regulatory competition where each state competes to provide the most efficient legal system. As productive factors move among jurisdictions to look for the most efficient economic environment, regulatory competition enhances social welfare. It follows that the differences among the Member States should not be removed by uniform legislation.

10. The case for harmonisation of law of damages and procedural rules applicable in competition law actions

A first argument is centred upon the principle of effectiveness. Enforcement of EU rights before national courts relies on the procedural rules of the Member States. However, if such national rules make the exercise of EU rights impossible or excessively difficult, they must be disapplied. This might create a legal vacuum. Harmonisation would prevent this outcome by introducing rules that facilitate the exercise of the right to compensation.

Secondly, harmonisation prevents forum shopping. Undertakings who face the prospect of being sued on grounds of EU competition law might try to transfer an action in those Member States whose legal system would enable them to minimise their liability or frustrate de facto damages actions. This risk is particularly accentuated in competition law the infringement of which causes anti-competitive effects in different Member States. While forum shopping may not be
necessarily negative, in the context of competition law, it has undesirable effects since it may
discourage consumers to make a claim.

Thirdly, and related to the theme of forum shopping, it may happen that some undertakings may
be able to commence proceedings in jurisdictions whose rules make compensation of antitrust
damages difficult, whereas other undertakings might not be able to do so. As a result, the latter
undertakings will be at a competitive disadvantage in respect of the former. Harmonisation
would achieve a minimum degree of *level playing field* among European undertakings, thus
promoting effective competition within the Internal Market, which would not be distorted by
legal differences among Member States.

11. Key-concepts and structure of this research

Since this research is concerned with harmonisation of law of damages and procedural rules
relevant to the enforcement of EU competition law, it is useful to define some key-concepts of
this research: harmonisation, damages, and substantive and procedural rules.

With regard to *harmonisation*, it refers to a process of adoption of a set of uniform rules common
to the states which agreed to introduce such rules. Harmonisation does not necessarily entail the
replacement of the domestic rules with the common ones although this is often the outcome.\(^{85}\)
Rather, it suggests the idea of a convergence of the most important rules while allowing the
Member States to preserve the main characteristics of their law.\(^{86}\)

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\(^{85}\) For example, in the EU context Barnard writes that ‘harmonization involves replacing the multiple and divergent
national rules on a particular subject with a single EU rule.’ Catherine Barnard, *The Substantive Law of the EU* (3rd edn,
OUP 2010), 624.

\(^{86}\) Harmonisation has been defined as ‘a process in which diverse elements are combined or adapted to each other so
as to form a coherent whole while retaining their individuality. In its relative sense, harmonization is the creation of a
relationship between diverse things. Its absolute and most common meaning, however, implies the creation of a
Comp. L. 699, 702.
The EU has put in place different types of harmonisation such as exhaustive harmonisation, where national rules are replaced by EU rules, optional harmonisation, where some product standards are introduced but their adoption is not compulsory, and minimum harmonisation, where a minimum European standard is compulsory, but the Member States may still adopt a higher standard of protection.  

With respect to damages, they refer to a broad area of private law. Intuitively, the concept of damage refers to a negative consequence that an individual suffers as a result of an event. However, from a legal viewpoint it is difficult to provide an accurate definition. From a comparative law perspective, the general concept of damages has been studied by taking into account the sources of damages, functions of tortious liability, or the interest protected by the rules whose breach gives rise to the right to compensation of losses. In the context of the research undertaken for the Draft Common Frame of Reference, a project that underpins the creation of a European Civil Code, damage has been defined as ‘any type of detrimental effect. It includes loss and injury’. While this definition is sensible, it is also broad. In fact, not all adverse consequences suffered by an individual may be compensated.

The reason is that some rules not only determine the criteria when liability arises, but also what detrimental consequences account for damages, which may be compensated, and what detrimental consequences must be borne by the victim. This is particularly relevant in competition law where some economic losses derive from legitimate market transactions. It follows that rather than providing a unitary concept of damage, an analytical approach is

preferable. This means that damages should be referred to as the sum of its elements (the so-called heads of damage). The traditional goal of compensation of damage lies in the principle of corrective justice, which may be summarised by the term *restitutio in integrum*, i.e. restoring the victim’s position had the tort not been committed.

*Substantive* and *procedural* rules are also two interrelated concepts that recur throughout this dissertation. Both their definition and their demarcation is problematic. Broadly speaking substantive law regulates the legal relationships between individuals, legal entities, or their powers. They lay down the conditions under which rights, obligations, duties, the conditions for liability arise. Parties rely on substantive law to regulate their private arrangements. Another important part of substantive law is also concerned with how losses are allocated among the members of the society.

As for procedure, in modern societies they are omnipresent and regulate many fields of human behaviour. The concept of procedure refers to a set of steps that regulate a decision making process. It is not concerned with the content of a decision, rather with how to arrive at any decisions. Procedure exerts profound influence that goes beyond the legal domain. For example, the political theory of procedural justice asserts that if correct and fair procedure has been followed when taking a collective decision, then the resulting state of affairs is fair, regardless of the outcome.90

In general, procedural law provides the legal framework to make a claim, whose cause of action lies in substantive rules. The outcome of a procedure is a judgment establishing (or denying)

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rights, imposing liability, etc. Procedural law has been defined as ‘the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right’.91

The distinction between substantive and procedural law is not always easy to conceptualise or to put into practice.92 Some rules may be difficult to categorise. For example, evidential rules apply in judicial proceedings to ascertain the occurrence of relevant facts. Thus, the rules of evidence may be categorised as procedural. However, such rules may also affect some features of substantive law.

Chapter two deals with the general theories of enforcement of law. This will allow exploring the theoretical debate about the goals assigned to compensation, that is to say corrective justice and deterrence. The significance of this debate should not be underestimated given that the justification of corrective justice and deterrence lies in the philosophical tradition of natural law93 and utilitarianism94 respectively. The terms of this debate will be then applied to the enforcement of competition law.

91 Poyser v Minors [1881] L.R. 7 Q.B.D. 329-333. A similar approach, based on the distinction between substantive and procedural law, defines procedural law as ‘the machinery by which claims in civil matters can be translated from mere assertions into binding determinations’, Neil Andrews, English Civil Procedure: Fundamentals of the New Civil Justice System (OUP 2003) 17. Another definition holds that procedural law is concerned with the right to invoke the jurisdiction of the court, or more generally, with the rules concerning the bringing of an action. J A Jolowicz, On Civil Procedure (Cambridge University Press 2000) 61.

92 Van Gerven calls it a ‘mission impossible’, W Van Gerven, ‘Of rights, remedies and procedures’ (2000) 37 CML Rev. 501. Cappelletti holds that it is impossible to draw a clear line between substantive and procedural law. For example if the criterion depends on the outcome of a legal dispute, then some procedural rules should be meant as substantive rules. On the contrary, if the criterion depends on the way in which a legal claim is made and proved, then many substantive rules should be meant as procedural. Mauro Cappelletti and Bryant Garth, ‘The Impact of Political Ideology’ in ‘Policies, Trends, and Ideas in Civil Procedure’ International Encyclopedia of Comparative Law XVI (1988) 14.

93 John Finnis, Natural Law and Natural Rights (2nd edn, OUP 2011) 178.

94 Posner argues that Bentham was the founder of utilitarianism because of his belief that all humans engage in utility calculations in their decisions. Since deterrence assumes that humans respond to a system of incentive (a reward) and disincentive (a sanction), then the logic of deterrence is founded on utilitarianism. Richard Posner, ‘The law and economics movement: from Bentham to Becker’ in Francesco Parisi and Charles K. Rowley (eds), The Origins of Law and Economics: Essays by the Founding Fathers (Elgar 2005) 328, 341.
Corrective justice is a general value that should be pursued per se because it is intrinsically just to remedy a wrong that has been committed against anyone. However, while it is worth pursuing justice per se, corrective justice does not consider the institutional and enforcement frameworks, which allow corrective justice to be concretely implemented. In other words, it does not take into account the costs and practical implications arising from enforcing the law in order to restore the victim’s status quo ante.

Deterrence aims at discouraging violation of the law by imposing a sanction when the law is violated. According to a utilitarian perspective, deterrence concentrates on the costs and benefits resulting from the enforcement of competition law. Thus, while the deterrent view provides a clear methodology to assess whether a sanction (e.g. compensation to antitrust victims) should be imposed or not and offers measurable criteria to carry out such assessment, it also neglects the appraisal of fairness that the corrective justice view offers.

The right to compensation as recognised in Courage and Crehan acknowledges both rationales. That judgment does not however consider the problem of a possible conflict between these two values. Given the inherent difficulties in supporting the deterrent view with proper empirical findings, and given a certain biased ideological reading of the theory of deterrence, this research accepts the stance taken in Courage and Crehan according to which compensation pursues both objectives.

Chapter two presents some empirical findings concerning the degree of violation of competition law and the relevant welfare losses caused by such infringements. Given that private enforcement is likely to have an impact on the civil justice system of the EU Member States, its facilitation is justified as long as there is an underlying problem of compliance deficit with EU competition
law. The presented findings aim at answering the first research question, such as whether and the extent to which there is significant low compliance with Articles 101 and 102 TFEU.

Chapter two also deals with the problem of enforcing economic regulation through courts. This issue is important because some US legal scholarship has given some sceptical insights about courts’ suitability to deal with economic matters disputed by two or more litigants. Critical evaluation of this debate is desirable to be sure that harmonised antitrust litigation rules rest on a workable policy of private enforcement, which national courts can properly implement.

The purpose of this section is to answer the second research question, such as whether private enforcement contributes to an increase in compliance with competition law.

Finally, chapter two examines the relationship between private and public enforcement. The objective of increasing the role of private enforcement poses the need to reconsider the role of public enforcement. In pragmatic terms, private enforcement may be seen as a complement to public enforcement: the former enables the latter to use its resources in areas where private actions would be difficult to bring.

Chapter three deals with the dichotomy between harmonisation and preservation of national law. It examines the European perspective of harmonisation by considering the principles of effectiveness of EU law, conferral, proportionality and subsidiarity.

Chapter three also examines some general arguments in favour and against harmonisation such as the need to guarantee a level playing field among undertakings and to avoid forum shopping.

These topics provide a general framework against which national rules applicable to antitrust proceedings can be appraised.
Chapters four, five, six and seven test the case for harmonisation by examining a few aspects of domestic law of damages and procedural rules of some Member States. Thus, these chapters aim at answering the third research question such as **whether national legal systems are adequate to guarantee effectiveness of the right to antitrust compensation and to increase compliance with EU competition law, or whether these objectives can be better achieved at the EU level.**

The selected case studies are causation (chapter four), determination of damages (chapter five), evidence (chapter six) and collective actions (chapter seven). These rules have been selected to appraise whether the effectiveness of damages actions for breach of EU competition law is better guaranteed by the application of the proposed EU rules rather than national ones. The reason for selecting some areas is that it would not have been possible to carry out an in-depth analysis if all rules applicable to competition law claims of all the Member States had been examined.

Causation is a central concept in modern legal systems. It performs the crucial function to connect human conduct with harmful event. However, in respect of tortious liability grounded in economic situations, the application of the traditional rules of causation might result in minimisation of liability. On this basis, this dissertation explores the possibility to adopt alternative rules that could ease the claimant’s burden to prove causation.

With regard to exemplary damages, this theme must be seen within the general topic of determination of damage. Here there is a debate as to whether exemplary damages, at least for some types of breach of competition law, should be introduced. The choice of dealing with exemplary damages is motivated by the consideration that they are crucial to increase deterrence,
but at the same time they might result in excessive liability that would discourage some beneficial economic activities.

With respect to evidence, it is commonplace that any successful claim must be substantiated by evidence. In competition law proceedings, evidence presents two particular characteristics. First, some infringements are concealed, which makes their proof difficult. Second, fact-finding requires a large amount of economic data and economic expertise to assess properly such data.

As for collective actions, their treatment is justified by the fact that often consumers or businesses suffer low-value losses. Therefore, in order to overcome their lack of interest in making a claim and to lower the costs of enforcement, a mechanism to aggregate damages claims is advisable. Some Member States have already introduced some forms of collective actions. Again, this dissertation examines whether it is appropriate to have uniform European rules regulating such actions.
Part I

The case for harmonisation: framework of analysis
Chapter 2

General features of private enforcement of competition law
and its relationship with public enforcement

Introduction

This chapter provides some evidence on the level of compliance with Articles 101 and 102 TFEU. Subsequently, it examines the main theories of enforcement, their relationship, and the main features of private enforcement of competition law (part I). To this end, the goals of enforcement will be examined in order to understand how private enforcement should be designed.

In particular, this chapter addresses the following research questions:
- whether there is low compliance with Articles 101 and 102 TFEU;
- whether and the extent to which private enforcement of competition law can give an effective contribution to increasing compliance with competition law.

These two research questions are the premise to answer the main question such as whether harmonisation of the law of damages and relevant procedural rules applicable in competition law proceedings before national courts is desirable.

Given that such harmonisation would facilitate private enforcement of competition law, a rational legislative policy must be premised on its effectiveness. It has been mentioned that private enforcement of competition law is likely to give rise to some problems (e.g. costs on the civil justice system, procedural rules in favour of a claimant, and so forth). Therefore, a policy designed to increase its role is justified provided that there is a significant compliance deficit with
Articles 101 and 102 TFEU. If there is a compliance deficit, then it is also important that the means (private enforcement) is suitable to achieve the end (reduction of infringements of competition law).

An important aspect of this inquiry is whether courts are capable to enforce properly competition law. This theme will be developed by examining the goals of competition law since they are pivotal in the correct interpretation of this type of law. In fact, correct enforcement of competition law is crucial because on the one hand it contributes to reducing violations of competition law and at the same time it does not discourage business conduct that gives rise to pro-competitive effects.

This chapter will also examine the legal framework relating to the relationship between public and private enforcement of competition law (part II). The reason for this analysis is that an increase of the role of private enforcement poses the need to re-examine its relationship with public enforcement. From a deterrence perspective, both public and private enforcement are designed to promote spontaneous compliance with competition law (or law in general). In addition, public enforcement might facilitate antitrust victims’ compensation. Thus, it is important the relevant rules are co-ordinated and work consistently with each other.

**Part I – Private enforcement of competition law: goals, costs and benefits**

**1. Empirical evidence on the breach of EU competition law**

This paragraph aims at providing some empirical evidence on the rate of breach of EU competition law and the relevant welfare losses. It attempts to answer the question whether competition law suffers from low compliance. There is no fixed threshold to indicate when a certain provision suffers from low compliance.
As per the meaning of compliance, scholarship on regulation distinguishes between compliance with the collective goals underpinning a regulatory scheme (i.e. substantive compliance) and compliance with regulatory standards (i.e. rule compliance). This distinction is based on the observation that complying with certain rules does not necessarily achieve the goals that policymakers meant to accomplish when enacting those rules.

Competition law scholarship often points out that in some circumstances some competition rules fail to achieve the goal of creating or preserving competitive markets. This is exemplified by the prohibition of abuse of dominant position, a provision that is criticised because it does not take into account the efficiency gains resulting from some practices of a dominant undertaking.

This dissertation uses the term ‘compliance’ to refer to ‘rule compliance’ also because in many instances formal compliance with the competition rules achieves the goal of creating or preserving competitive markets. For example, when competitors do not enter into agreements about sale price, the goal of maintaining a competitive market for the benefit of consumers is achieved.

With regard to the minimum threshold below which such compliance is considered low, this is an assessment that should be left to the discretion of policy-makers. Given that it is not realistic to prevent any possible breach of competition law, the judgment about ‘low compliance’ is a matter of standard. That said, this chapter provides some economic-based evidence that suggests that the level of compliance is unsatisfactory.

So far, the most accurate study on the magnitude of violations of competition law in the EU is a Final Report on damages actions prepared to support the Commission White Paper on damages actions. At the outset, it must be reminded that estimates on such violations are difficult to make either because some infringements of competition law are kept secret or because often the economic effects of such violations manifest themselves through price increase, which is a phenomenon that may be caused by ordinary economic factors.

With regard to price-fixing agreements, the Final Report attempted to calculate the detection rate. Clearly, the findings are just an estimate since the secrecy of cartels makes it difficult to measure it accurately. Given that in the US antitrust enforcement is more vigorous, and the estimated detection rate is 20%, and since in the EU public and private enforcers’ powers are less than in the US, it has been inferred that in the EU the detection rate is on average 15%, although there are significant divergences on such estimate.

It has been estimated that over the period 2002-2007, on the assumption of a 30% detection rate, cartels caused welfare losses of approximately €44.6 billion (€14.9 billion as deadweight loss and €29.7 billion as monopoly overcharge). Thus, a lower bound estimate yearly impact of EU cartels is €5.95 billion, whereas the estimate upper bound yearly impact of EU cartels is €138.7

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4 The Final Report does not define ‘detection rate’. Broadly speaking, it expresses a percentage of the identified violations of competition law out of the total violations of competition law.
5 Final Report 71-72.
6 See the table of the Final Report 73.
7 Broadly speaking, a deadweight loss is defined as a loss of allocative efficiency. In general it refers to consumers who switch to alternative inferior products following a price increase of the product that they originally intended to buy. A monopoly overcharge refers to a loss of consumer welfare, that is to say the higher price that consumers pay as a result of a violation of competition law. Herbert Hovenkamp, Federal Antitrust Policy (4th edn, West 2011) 83-86.
8 Final Report 95.
billion.\(^9\) In addition, the estimate of yearly welfare losses of cartels operating at national level ranges from €16.8 to €261.22 billion.\(^{10}\)

Another significant finding is the cartel duration, which may vary on average from 5.8 to 7.27 years, even though some cartels may last more than 10 years.\(^{11}\) The average size of the overcharge is 34\% for international cartels, and 20\% for EU cartels. The average size of the deadweight loss (allocative inefficiency) may vary from 10\% to 50\%.\(^{12}\)

With respect to exclusionary practices, their detection rate is higher due to the ability of private parties to detect the existence of anti-competitive conduct.\(^{13}\) Indeed, they have information on the business environment in which they operate (for example costs of inputs commonly used to produce certain products), which enables them to assess whether the dominant undertaking is carrying out exclusionary conduct or not.

Calculation of the welfare losses is problematic in exclusionary conduct.\(^{14}\) Unlike cartels, losses caused by exclusionary conduct (primarily competitors’ lost profits or would-be entrants lost investments) do not correspond to the dominant undertaking’s gains. In addition, some practices may also bear pro-competitive effects.\(^{15}\) Such uncertainty is undesirable given that claims for abuse of dominant position account for the 60\% of the total antitrust claims.\(^{16}\)

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\(^9\) Final Report 95.
\(^{10}\) Final Report 96.
\(^{11}\) Final Report 97.
\(^{12}\) Final Report 99.
\(^{13}\) Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press 2005) and Final Report 125. The Authors of the Report assume that the detection rate is 100\%.
\(^{14}\) Gregory J. Werden, ‘Assessing the Effects of Antitrust Enforcement in the United States’ (2008) 156 De Economist 433. The Author recognises that enforcement of exclusionary conduct is controversial also because of the difficulties to develop hard evidence on the costs and benefits of enforcement. At 442-443 and 448.
\(^{15}\) Final Report 119.
\(^{16}\) Final Report 127.
The data contained in the Final Report has been challenged by Hodges.\textsuperscript{17} The general thrust of the argument seems to be that its estimates are inaccurate due to the problem that cartels are hidden. However, such estimates have been calculated by combining different studies and, in the presence of different findings (for example, different detection rates of a certain breach of competition law), the most conservative one has been chosen in order to make policy recommendation.

Another empirical research found that in Germany the level of private enforcement is significant (368 antitrust proceedings between 2005 and 2007) when compared to the level of public enforcement (438 proceedings were commenced during the same period of time).\textsuperscript{18} On this basis, Peyer challenges the Commission’s concern that EU competition litigation before national courts is underdeveloped.\textsuperscript{19} However, the point is not how many proceedings are started, rather whether their number is adequate in respect of the number of violations of competition law and whether they are suitable to accomplish a deterrent effect. As shown above, this evidence is difficult to estimate.

As mentioned in the first chapter, the Commission reformed the rules of public enforcement (Regulation No. 1/2003) by creating the conditions to involve private parties in the enforcement of EU competition law. The goal was to free the Commission’s resources from breaches of competition law that could be dealt with by private parties. The significant welfare losses caused by cartels confirm that this goal was sensible.

\textsuperscript{17} Christopher Hodges, \textit{The Reform of Class and Representative Actions in European Legal Systems} (Hart 2008) 175-178.


\textsuperscript{19} At 358.
As explained in the first chapter, the number of antitrust claims made before EU national courts is low. Although there might be differences among the EU countries, it seems that private enforcement is still inadequate in relation to the need to reduce the number of infringements of competition law.\(^\text{20}\) Considering the low detection rate relating to cartels and the significant welfare losses caused by breach of competition law, it is reasonable to conclude that additional enforcement of competition law, both public and private, is desirable. It will be seen later that the challenge is to identify a proper co-ordination between public and private enforcement.

2. Defining enforcement

The previous paragraph shows some empirical evidence about low compliance of Articles 101 and 102 TFEU. It has been concluded that more enforcement is needed to reduce such compliance deficit. Given the Commission’s policy is to enhance the role of private enforcement, Part I of this chapter is devoted to explaining the theories of regulation with particular emphasis on private enforcement of the law. The reason for this inquiry is to ensure that private enforcement is suitable to address such compliance deficit.

This inquiry can be seen a ‘classic rationality’ check, that is to say ensuring that private enforcement (the means) is suitable to reduce infringements of competition law (the end). It is not however an abstract inquiry: in the US, antitrust private enforcement has been criticised on the grounds that it fails to achieve the objective to increase compliance with competition law and that it discourages businesses to put in place beneficial economic conduct. Competition law is a

\(^{20}\) For an analysis in the UK see Barry J. Rodger, ‘Competition law litigation in the UK courts: a study of all cases 2009-2012’ (2013) 6 G.C.L.R. 55. Although more evidence on litigation is now available which shows an increase of cases in which competition law provisions are relevant in the dispute, there seems to be fewer cases exclusively based on Articles 101 and 102 TFEU. Reports of the different EU Member States are available at <www.clepecreu.co.uk/default.htm#> accessed 22 July 2013.
form of state intervention in the economy. Civil antitrust litigation fails to achieve the overall goal of maintaining competitive markets.

Before proceeding, it is useful to define ‘enforcement of the law’. In a broad sense, enforcement has been defined as ‘the process by which violations are investigated and a legal sanction applied to the violator’. 21 When rules are not spontaneously observed, the legal system makes available a set of ‘secondary rules’, which are aimed at remedying the lack of spontaneous observance of the law. Such rules refer to the enforcement process. Generally, enforcement has been divided into public and private. The former refers to enforcement mechanisms carried out by government, the latter by private parties who litigate before the courts.

Clearly, law enforcement requires resources. Thus, policymakers make a choice on the amount of resources that should be made available to government agencies to ensure effective enforcement. As per private enforcement, it also entails the use of societal resources (primarily, those relating to the functioning of the courts). The law and economics school made important contributions to the costs of enforcing the law. This refers to the efficiency inquiry, which focuses on the relationship between the costs resulting from the violation of law, the benefits resulting when the law is respected, and the resources used to enforce the law.

In this respect, Posner built a model of enforcement based on a hypothetical equilibrium between enforcement resources and rate of offences. 22 Given a certain offence, a unit of output is represented by apprehension and conviction of the offender. Such an output is determined by two inputs: an aggregate of hired resources and an input of criminal offences. Although the

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economic approach to enforcement takes into account various factors, the underlying idea is based on the optimal use of resources for the detection and punishment of illegal activities.

3. The goals of enforcement

Enforcement operates when the law has not been observed spontaneously. Various theories have been developed to make sense of the goals of law enforcement. With respect to tort law, the central concept of enforcement is compensation, which is normally a sum of money that the tortfeasor has to pay to the victim. The fundamental issue is to identify the purpose of compensation. Two main theories contend for providing a rationale: deterrence and corrective justice. These goals are also relevant to competition law. The accomplishment of corrective justice enhances deterrence, which is desirable given the above-mentioned figures about the compliance deficit of competition law. Thus, private enforcement rules, either national or European, should be designed to accomplish these two goals. This dissertation will often analyse some national rules in the light of their capability to compensate victims and to deter undertakings from breaching competition law.

a) Corrective justice

According to corrective justice, compensation is a means to restore the status quo ante of the victim had the harmful event not occurred. Corrective justice is grounded on the correlation between tortfeasor and victim whereby the tortfeasor has the obligation to compensate the victim for the harm he has caused. Corrective justice theory holds ‘the principle that those who are

24 Glanville Williams, ‘The aims of the Law of Tort’ (1951) 4 Current Legal Problems 137.
responsible for the wrongful losses of others have a duty to repair them’.\textsuperscript{26} Despite different approaches to corrective justice, three features can be identified: human agency, rectification and correlativity.\textsuperscript{27} Human agency indicates that corrective justice is concerned with losses caused by human beings. Rectification refers to the fact that corrective justice is aimed at repairing the loss suffered by the victim. Correlativity requires a normative important relationship between the person responsible for the loss and the victim.

The idea of corrective justice dates back to the thought of Aristotle,\textsuperscript{28} who held that justice requires fairness and equality. The significance of corrective justice is revealed by the fact that the duty to repair losses exists \textit{per se}, regardless of the existence of the political or legal institutions designed to enforce such a duty.\textsuperscript{29} For the present purposes, suffice it to say that corrective justice is a moral value that must be pursued \textit{per se} and cannot be set aside by utilitarian considerations such as the resources to be used to ensure corrective justice, the resulting social costs, or the benefits arising when this value is pursued. Clearly, this latter view conflicts with the law and economics school, which is presented in the next paragraph, which understates the role of corrective justice.\textsuperscript{30}

\begin{footnotes}
\begin{enumerate}
\item ibid 66.
\item Aristotle, \textit{Nicomachean Ethics} (Roger Crisp tr, Cambridge University Press 2000) Book V.
\item Jules J. Coleman, ‘The Practice of Corrective Justice’ (n 26) 69.
\item For example, Posner argues that corrective justice depends on the conditions that make a conduct unlawful: ‘The definition of wrongs is prior to the duty of corrective justice. ... Society is always free, at least as a matter of corrective justice, to alter the definition of wrongful conduct.’ Richard A. Posner, \textit{The Problems of Jurisprudence} (Harvard University Press 1990) 322.
\end{enumerate}
\end{footnotes}
b) Deterrence and its background: law and economics and cost benefit analysis

Traditional legal theory is concerned with the different types of legal reasoning, which are based upon the use of deductive arguments, elaboration of principles and reasoning by analogy.\(^\text{31}\)

The school of law and economics differs from the traditional legal theory as it offers a theory of law whose legal reasoning is based on economic principles. A particular feature of this school is that it examines the process of enforcement from an empirical perspective by studying institutional and individuals’ behaviour when complying with the law and the consequences of such behaviour.

Becker points out that the normative and positive approaches to legislation take the enforcement of laws for granted. Conversely, the economic approach to law analyses the costs of enforcement with a view to increasing the effectiveness of the law.\(^\text{32}\) Becker’s approach to enforcement is based on investigating violation of the law and its enforcement in terms of cost.\(^\text{33}\)

An illegal activity that causes harm to another person is a cost.\(^\text{34}\) While the enforcement process makes credible the imposition of a sanction, which contributes to deterrence of such illegal activity, the enforcement process requires a number of activities, such as detection of the violator, apprehension, conviction, imprisonment or infliction of other types of sanction. Thus, these enforcement activities are costly too.

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\(^{33}\) Gary S. Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 J. Pol. Econ. 169. The application and implications of the economic approach apply not only to criminal offences, but also to any types of violation of law.

\(^{34}\) However, from a social viewpoint, the cost of the offence is not that caused to the victim, but the amount of resources used to prevent the offence. George J. Stigler, ‘The Optimum Enforcement of Laws’ (1970) 78 J. Pol. Econ. 526, 528.
According to this approach, Becker poses the problem of how many resources should be devoted to punish a certain violation, and correspondingly, how many offences should be left unpunished.\(^{35}\) Apart from the most serious crimes, he concludes that pursuing a policy of enforcement of all violations of law would be undesirable because it would require excessive resources in comparison to the benefits (the number of foregone violations of law) flowing from such enforcement.\(^{36}\)

Becker’s approach to enforcement laid the basis to carry out a *cost-benefit analysis of law enforcement*. In particular, it requires enforcement costs be lower than the costs resulting from violation of the law.\(^{37}\) On the contrary, where enforcement costs are higher than the costs of the offence, it would not be efficient to enforce it.

The nature of this approach is followed by Posner: ‘It is not enough to have good doctrine; it is also necessary to have mechanisms that ensure, at reasonable cost, a reasonable degree of compliance with the law.’\(^{38}\) Similarly, Stigler stated that: ‘The goal of enforcement … is to achieve that degree of compliance with the rule of prescribed (or proscribed) behavior that the society believed it can afford.’\(^{39}\)


\(^{37}\) This principle is subject to some qualification that will be analysed in the course of the chapter. For example, even if enforcement costs are higher than costs caused by violations of law, one should also take into account the deterrent effect of the enforcement of certain violation. It may occur that if enforcement activities were foregone, the number of violations would increase dramatically.


c) The features of deterrence

The law and economics school argued that the main goal of enforcement is deterrence.\(^{40}\) In general terms, deterrence means that rules should be designed in such a way as to discourage individuals from violating the law, which can be accomplished by providing a set of incentives or disincentives that orient individuals’ behaviour. Accordingly, deterrence rests on the assumption that individuals respond to negative and positive incentives when deciding whether or not to violate the law.\(^ {41}\)

It must be acknowledged that however strong the incentive to make somebody comply with the law, no rule can prevent individuals from breaching the law. Rather, deterrence is based on the threat of the sanction that has ‘some moderating effect on the willingness to engage in criminal activity’.\(^ {42}\) Such willingness is determined by a balancing exercise in which the potential violator weighs the expected utility resulting from the offence, the chance of being caught and sanctioned and the utility deriving if he refrains from committing the offence.\(^ {43}\)

Given these premises, the goal of a rational approach to enforcement oriented to deterrence is to make unprofitable for the prospective violator to engage in a certain violation. This can be


\(^{41}\) Isaac Ehrlich, ‘Economics of Deterrence - Theory’, in Steven N. Durlauf and Lawrence E. Blume (eds), The New Palgrave Dictionary of Economics (2nd edn, Palgrave Macmillan 2008) <http://www.dictionaryofeconomics.com/article?id=pde2008_E000236> accessed 15 July 2013. Although some crimes or violations of law are not committed following a rational calculation, for the purposes of competition law this perspective is acceptable since in an economic context it is plausible to hold that businessmen make a calculated choice whether or not to breach competition law.

\(^{42}\) Supra Isaac Ehrlich, ‘Economics of Deterrence - Theory’.

reformulated by affirming that the prospective violator should internalise all costs deriving from the violation of the law.\textsuperscript{44}

Various factors affect the decision whether to violate the law or not. The following paragraphs outline two important ones: the probability of detection / conviction, and the individual’s attitude to risk. In general, deterrence theory holds that the number of offences decreases by increasing the sanction and by increasing the probability of apprehension and conviction.\textsuperscript{45}

\textbf{i. Probability}

According to a longstanding principle of enforcement, an increase in the probability of conviction results in a decrease in the number of offences.\textsuperscript{46} This rests on the assumption that the prospective violator knows the conviction rate as this is necessary to make a rational calculation whether to breach the law or not.

It is also generally accepted that probability of conviction is likely to affect the rate of offences more than a change in the amount or type of punishment.\textsuperscript{47}

An intuitive way to raise probability of detection and punishment is to increase enforcement resources. The more enforcement resources, the higher the probability they are discovered and sanctioned.\textsuperscript{48} However, increase of enforcement resources also means an increase in the social cost of offences.\textsuperscript{49}

\textsuperscript{44}The topic and the terminology of ‘internalisation of costs’ derive from economics. Essentially, a social activity that adversely affects third parties is an external cost that results in a misallocation of resources since the price of such social activity is lower than the social costs. Thus, internalisation of such costs makes the social activity allocative efficient. Anthony Ogus, \textit{Regulation: Legal Form and Economic Theory} (Hart, 2004) 18-19.
\textsuperscript{46}Gary S. Becker, ‘Crime and Punishment: An Economic Approach’ at 176. For example, this was asserted by Cesare Beccaria, \textit{Dei Delitti e delle Pene} (first published 1764).
\textsuperscript{47}Gary S. Becker, ‘Crime and Punishment: An Economic Approach’ at 176.
\textsuperscript{49}Gary S. Becker, ‘Crime and Punishment: An Economic Approach’ at 180.
ii. Individual’s attitude to risk

The individual’s attitude to risk also affects spontaneous compliance with the law.\textsuperscript{50} If an individual is risk averse, then the threatened sanction is more effective than in respect of a risk neutral individual. This means that the optimal sanction is likely to be lower for risk averse individuals than risk neutral ones.\textsuperscript{51} Similarly, a risk averse individual is willing to engage in an illegal activity if the expected gain is higher than that of a risk neutral individual.\textsuperscript{52}

d) The limits of the theory of deterrence

Given that the main tenets of deterrence theory have been developed by the law and economics school, it is not surprising that this theory has been exposed to the criticisms levelled against this school, some of which are the following.

The first is an ethical objection: punishment is administered in order to deter others from violating the law. This is contrary to the Kantian ethical principle that men are ends in themselves and should not be used for other purposes, which occurs when someone is punished in order to make the threat of the sanction credible for the other members of society.\textsuperscript{53}

Second, individuals do not always act to maximise their utility/self-interest.\textsuperscript{54} Indeed, many people attempt to reconcile pursuance of their private interest with collective interests. Even from a pure economic viewpoint, many individuals recognise that sometimes their long-term interest is best served when their short-term interest is sacrificed in favour of a collective interest.

\textsuperscript{50} Gary S. Becker, ‘Crime and Punishment: An Economic Approach’ at 179.
\textsuperscript{52} ibid 48.
Third, deterrence rests on the assumption that individuals make rational calculation on the expected utility and punishment when deciding whether to violate the law or not. However, they do not always act in a rational way.\(^{55}\) First of all, their ability to make decisions is affected by lack of, or partial, information.\(^{56}\) This influences perception of the risk of infliction of a sanction, which is more important than an ‘objective’ assessment of such risk.\(^{57}\)

In addition, with regard to companies, where rational economic calculations are likely to be made (for example, managers acting on behalf of corporations), it is still controversial to assume that corporations, as a whole, always act as utility-maximisers.\(^{58}\) In fact, illegal corporate behaviour is carried out by directors or even employees to pursue their own interest at the expense of that of the corporation.

Finally, as mentioned above, the theory of deterrence presupposes that individuals are responsive to a system of legal sanction: it is premised upon the fact that the non-occurrence of harmful conduct can be ascribed to a threatened sanction. However, this is a claim, which is difficult to

\(^{55}\)Christine Jolls, Cass Sunstein, and Richard Thaler, ‘A Behavioral Approach to Law and Economics’ (1998) 50 Stan. L. Rev. 1471. Here the limits are bounded rationality (i.e. human cognitive abilities are not perfect), bounded willpower (i.e. individuals may sacrifice the long-term interest for short-term benefits), and bounded self-interest (which refers to the above-mentioned fact that individuals do not always act to maximise their interest). Partial rationality of individuals was a powerful critique elaborated by behavioural economics. Although this discipline was seen as challenge to law and economics, nowadays it is considered as complementary to it. See, Christine Jolls, ‘On Law Enforcement with Boundedly Rational Actors’ in Francesco Parisi and Vernon Smith (eds), The Law and Economics of Irrational Behavior (Stanford University Press 2005) 269.

\(^{56}\)Economic literature on the problem of lack of information is extensive. For a survey see: Joseph E. Stiglitz, ‘Information and the Change in the Paradigm in Economics’ (2002) 92 The American Economic Review 460.

\(^{57}\)Neil Gunningham, ‘Enforcement and Compliance Strategies’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), The Oxford Handbook of Regulation (OUP 2010) 120, 122.

\(^{58}\)This is a longstanding debate primarily dealt with by corporate governance. One of the main issues is the separation between shareholders and managers. An early work that pointed out this problem was: Adolf Berle and Gardiners Means, The Modern Corporation and Private Property (New Brunswick 1991).
A decision to engage in illegal activities is the result of the interaction of many factors, which are difficult to observe and measure.

e) Relationship between deterrence and corrective justice

Corrective justice and deterrence may be compatible with each other: compensation both restores the victim’s *status quo ante* and at the same time may operate as a disincentive to breach the law.

However, they may also result in inconsistent outcomes. For example, if the offender’s gains are greater than the victim’s loss, then compensation is not sufficient to deter because the tortfeasor would be still better off. In this case, it has been argued that deterrence may be achieved through the imposition of punitive damages.\(^{60}\)

The opposite situation occurs when the victim’s harm is greater than the tortfeasor’s illegal gain. This is because damages consist of actual loss (*damnum emergens*) and loss of profits (*lucrum cessans*). While the former may correspond to the tortfeasor’s illegal gain, loss of profits makes victim’s damages greater than illegal gain. In this case, in order to achieve corrective justice, the awarded damages should be greater than the illegal gains. However, this might result in overdeterrence, the features of which are examined in the next paragraph.

As per competition law, illegal gains may be higher than the sum of losses suffered by antitrust victims. For example, a price-fixing agreement results in an overcharge that corresponds to


consumers’ losses. Here, there is correspondence between violator’s gain and victim’s loss. However, other breaches of competition law may confer other benefits to the violator such as strengthening its market power or making market entry more difficult for potential competitors. Here, the amount of compensation tailored to consumer’s losses may not be sufficient to deter because illegal gains are greater.

4. Conflict between deterrence and corrective justice: economic analysis

The instance in which compensation may be greater than illegal gain has been analysed by the law and economic school to highlight the risk of over-deterrence. Many human activities (industries, transport) are beneficial, but also risky. While the conventional view holds that the tortfeasor has to compensate the victim, Coase argued that compensation of economic loss should not be necessarily awarded because it would result in prohibiting or discouraging an economic activity that decreased the victim’s welfare. In other words, given that either allowing or prohibiting an activity results in a distribution of welfare, the real issue is who should bear the harm: the agent who put in place an economic activity or those who suffered a loss as a result of such economic activity.\(^6\)

Compensation exerts pressure to avoid harm. To achieve this, a number of precautions must be put in place (security devices to avoid traffic accidents, corporate plans to prevent corporate crimes, etc.). In addition, some beneficial activities might be averted for the fear of paying excessive compensation (i.e. when damages exceeds harm).\(^6\) Both precautions and avoidance of beneficial activities are a social cost, which should be borne insofar as the benefits outweigh the

\(^6\) A. Mitchell Polinsky and Steven Shavell, ‘Punitive Damages: An Economic Analysis’ at 882.
costs.\textsuperscript{63} When this is not the case, the law imposing compensation is socially inefficient and over-deterrence occurs.\textsuperscript{64} Over-deterrence is perceived to be a problem in competition law. For instance, some exclusionary practices or vertical restraints produce efficiency gains that are greater than private losses.\textsuperscript{65} Thus, their prohibition is socially inefficient.

5. Alternative theories of enforcement: responsive regulation

Although corrective justice and deterrence remain the two main theories underpinning enforcement of the law,\textsuperscript{66} including competition law, other theories have been advanced. Responsive regulation holds that regulatory responses should be different according to different industry structures.\textsuperscript{67} The underpinning idea is that individuals comply with the law for different reasons. Thus neither self-regulation nor threat of a sanction works in all situations.

Responsive regulation notes that various non-legal sanctions may be equally effective in orienting human behaviour. For example, adverse reputational consequences may be an effective deterrent.\textsuperscript{68} On this basis, proponents of responsive regulations set out an ‘enforcement pyramid’, in which enforcement action takes a step by step approach ranging from the ‘soft-sanction’ (e.g. persuasion) to the harshest one (e.g. licence revocation).\textsuperscript{69}

\textsuperscript{63} Richard A. Posner, \textit{Economic Analysis of Law} (6th edn, Aspen 2003) 168. This approach has been recognised by US law: in \textit{United States v. Carroll Towing Co.}, 159 F.2d 169, 173 (2d Cir. 1947), a case concerning negligence was resolved by adopting the negligence formula of Judge Learned Hand whereby the injurer should be held negligent if probability of the accident (P) multiplied per the loss (L) is higher than the cost of precaution (B), otherwise stated as $B < PL$.

\textsuperscript{64} A. Mitchell Polinsky and Steven Shavell, ‘Punitive Damages: An Economic Analysis’ at 890.

\textsuperscript{65} Herbert Hovenkamp, \textit{Federal Antitrust Policy} (4th edn, West 2011) 734.

\textsuperscript{66} Corrective justice refers tortious and criminal conduct. As previously explained, it provides a rationale for compensation of wrongful harmful conduct. The scope of deterrence is wider and is generally connected with enforcement in general.

\textsuperscript{67} Ian Ayres and John Braithwaite, \textit{Responsive Regulation} (OUP 1992) 4.

\textsuperscript{68} ibid 22.

\textsuperscript{69} ibid 35.
Responsive regulation has been criticised on different grounds. Here are some of the following: First, for some risks, for example, environmental damages, the step-by-step approach is inadequate. Second, corporate behaviour is often driven by the prevailing culture of a certain sector rather than regulation. Thus, reputational harm does not deter. Third, information asymmetry may also distort the decision whether to escalate the sanction or not.

Responsive regulation may not be adequate to competition law. Some violations (i.e. price fixing) are covert, thus the competition authority would not proceed even to implement the ‘soft-sanction’. If an investigation is carried out, by the time it is completed and the breach is ascertained, the anti-competitive effects are likely have already materialised on the market. Thus, it seems appropriate to administer a harsher sanction in the first place.

6. The arguments against private enforcement of competition law

The preceding paragraphs have set forth the goals that should be pursued when enforcing the law either by public authorities or by private parties. However, some critics claim that in some areas, private enforcement fails to achieve this. The following paragraphs highlight some of the arguments against private enforcement of competition law. Some have been drawn from general criticisms against excessive reliance on courts. This is the case of possible misuse of collective actions. Others refer specifically to competition law. This is the case of claims made by competitors against an undertaking holding a dominant position.

Most of the arguments against private enforcement have been elaborated by US scholarship. While they might not necessarily apply to the EU Member States, on the other hand, given the extensive experience that the US developed in private enforcement, it is still worth examining them to draw some insight.

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a) Negligible benefits for corrective justice

A first argument against private enforcement is that the need for corrective justice deriving from breaches of competition law is substantially less because losses are small and widespread.\(^{71}\)

Similarly, in complex markets, overcharges are passed on to different categories of downstream consumers, which poses problems of identifying who was actually harmed.\(^{72}\) Negligible benefits for corrective justice may not justify the costs borne by civil justice systems to provide consumers with compensation. In this respect, it has been argued that claimants may not be discouraged by litigation costs when they are able to recover them.\(^{73}\) Compensation of small losses is particularly relevant in class actions. Here, lawyers take the initiative to promote a claim by organising mass litigation, which is driven by lawyers and in which victims have little interest in the claim.\(^{74}\)

b) The competitor’s claim

A second argument relates to the problem of claims made by competitors.\(^{75}\) The concern is that exclusionary practices (i.e. a category of abuse of dominant position) create an incentive for competitors to file suits against the dominant undertaking rather than compete on the market. In particular, some competitors might bring an action for damages based not on consumer harm, but on economic losses (e.g. loss of profits) that are the outcome of superior efficiency of the dominant undertaking. Indeed, competitors’ losses are likely to be suffered before consumers receive the benefits flowing from the alleged exclusionary practice. Such a time gap means that competitors show that they have been victims of an exclusionary practice, but the dominant

\(^{71}\) Wouter Wils, ‘Should Private Enforcement Be Encouraged in Europe?’ (2003) 26 World Competition 473, 487.


\(^{75}\) This argument has been elaborated primarily by the Chicago School. For example, Frank H. Easterbrook, ‘The Limits of Antitrust’ (1984) 63 Tex.L.Rev. 1; Richard A. Posner, Antitrust Law (2nd edn, University of Chicago Press 2001); William Baumol and Janusz Ordover, ‘The Use of Antitrust to Subvert Competition’ (1985) 28 JLE 247.
undertaking may not be able to prove that in reality such practice benefited consumers. In the US, the introduction of the doctrine of antitrust injury was supposed to remedy some of these problems by equating competitive harm with consumer’s harm. However, it has been argued that the case for competitors’ enforcement is still unconvincing.

c) Ineffective deterrence

A third argument is concerned with deterrence. One strand of this argument is related to over-deterrence. As has been seen, it refers to the problem that some exclusionary practices and vertical agreements may also produce beneficial effects. Thus, their prohibition discourages efficient activities. While an antitrust agency may have discretion in not enforcing practices whose anti-competitive effects are marginal, private parties have the incentive (award of damages) to make a claim.

A second strand of this argument is somewhat opposite to the previous one and holds that private enforcement radically fails to achieve deterrence. To be effective, the deterrent effect of compensation should be directed to companies’ directors. However, the length of antitrust litigation, combined with the shortness of managerial tenure, means that directors are insensitive to the threat of compensation. Out of court settlements may overcome this problem, however they also reduce deterrence since the sum to be paid is lower than the illegal gains.

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77 Brunswick Corp. v Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 97 S.Ct. 690 (1977). In essence, the antitrust injury doctrine holds that the compensable damage must be the outcome of the anti-competitive effect of the antitrust violation.
80 Daniel Crane, ‘Optimizing Private Enforcement’ (2010) 63 Vand. L. Rev. 673, 691. In the English legal system, this argument is strengthened by the case Safeway Stores Ltd v Twigger [2010] EWCA Civ 1472. The Court held that the company who had been found responsible for breaching the Competition Act 1998 could not recover the imposed fine from the directors who had committed the wrongful act due to the principle ex turpi causa non oritur actio given
d) Adjudication of economic matters

This argument holds that courts are unsuitable to deal with economic matters, and thus with competition law too. Judges do not normally have the level of expertise that is required to assess economic situations. In fact, they rely on expert witnesses. On the contrary, competition authorities have technical expertise to deal with economic issues and are specialised in the field they operate.

In addition, while litigation is more flexible to accommodate an individual’s interest as affected by the circumstances of the case, at the same time such flexibility might frustrate the goals that policy-makers assigned to the regulation applied in the dispute. This is undesirable when it occurs in higher courts since their judgements become a ‘precedent’. As a result, the original policy goals set by the government are ‘overturned’ by the judiciary.

This latter problem is particularly relevant to competition law, where its underlying goals play a crucial role in the resolution of a dispute. This argument will be examined in greater detail later in relation to the concern that national courts might fail to understand the goals of competition law, thus frustrating the accomplishment of the value of corrective justice and the goal of deterrence.

that the company itself committed the violation of competition law, then it could not claim compensation for loss suffered as a result of its own illegal act.

83 For an overview of these problems, see Andrei Shleifer, The Failure of Judges and the Rise of Regulators (Mit Press 2012).
84 The criticism has been made in the US where the problem is compounded by the fact that factual-economic assessments are made by juries. See Herbert Hovenkamp, ‘The Antitrust Enterprise: Principle and Execution’ (Harvard University Press 2005) 58-66.
86 Of course, technically speaking this point applies to common law systems. However, in civil law systems too, higher courts’ judgements de facto tend to bind lower courts.
7. Replies to the arguments against private enforcement of competition law

The arguments in favour of private enforcement will be examined later. Here suffice to say that the above criticisms are not convincing.

The first remark is that they have been elaborated in the context of US litigation. Some of them provide important insights and are applicable to the EU Member States. For example, the need to control litigation costs and, in general, the impact on the civil justice system, are important issues given that the litigation system of some EU Member States is slow and overloaded. Here careful consideration must be given in relation to the amount of resources to be spent to implement an effective system of private enforcement.

With regard to the argument that the need for compensation is negligible because losses are small, this is not always the case. For example, some price-fixing agreements cause significant losses either because the price for a product or service is high, and thus the relevant overcharge has considerable impact on the final price, or because the price is low, but purchasers repeatedly buy the overcharged product or service, which means that the sum of individual losses is considerable. In addition, small losses are suffered by businesses too, which may have administrative structure to assess whether it is worth making a claim and collecting the relevant evidence. Finally, this argument disguises the fact that some consumers are not interested in compensation because they are not aware that they have been victims of antitrust violations. Knowledge of the losses they suffered may change their attitude.

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In relation to the problem of claims made by competitors, this issue should be examined in the context of the policy goals assigned to competition law. If one of the goals is the protection of the competitive process, which is the case of EU competition law, then it must be accepted that competitors are entitled to make a claim based on the fact that a practice carried out by a dominant undertaking is hindering their ability to compete. Here the real issue is not whether to enable competitors to make a claim, but the substantive conditions that must support a claim based on exclusionary practice.

As per the risk of over-deterrence, this is an empirical claim that should be substantiated by evidence. An Office of Fair Trading report tested this argument by asking legal advisers and companies whether companies refrain from adopting pro-competitive business practices due to the fear of breaching competition law. The survey indicated that this happens infrequently, and it primarily concerns some vertical practices between supplier and distributor rather than cases of abuse of dominant position. Remarkably, the same study reports that the threat of damages actions does not concern companies. Indeed, this last aspect suggests the need to extend antitrust liability to company directors, even if they no longer work for it.

88 In US antitrust, previous criticisms of the competitor’s claim were based on the misconception that antitrust harm corresponded to losses of allocative efficiency (i.e. the deadweight loss, that is to say the harm that consumers suffer because they buy alternative products that are worse than the product they forego to buy due to the higher price resulting from a breach of an antitrust provision). However, antitrust violations also results in competitor’s losses such as lost profits or lost investments. Herbert Hovenkamp, ‘Antitrust’s Protected Classes’ (1989) 88 Mich. L. Rev. 1, 11.
89 Alison Jones and Brenda Sufrin, EU Competition Law (4th edn, OUP 2011) 49-51.
90 The Court of Justice seems to recognise competitor’s standing in national civil proceedings. For example, Courage provides the right to compensation to any individual who suffered a loss from contract or conduct that restricts competition. This seems sufficient to guarantee standing to competitors. Case C-453/99 Courage and Crehan [2001] ECR 1-6297. In addition, in Muñoz the Court of Justice held that a competitor could enforce before national courts regulations on quality standards. The Court’s reasoning was essentially based on deterrence (competitor’s standing would help to discourage violations of such regulation). Case C-253/00 Muñoz [2002] ECR 1-7289.
92 28% of the interviewed companies (para 5.75 of the Office of Fair Trading Report).
94 Para 5.84 of the Office of Fair Trading Report.
With regard to the ineffectiveness of private enforcement to achieve deterrence, this should be assessed by taking into account the general epistemological problem that it is difficult to identify what factors, and their weight, made directors refrain from violating competition law. This is not to put forward a sceptical view about the deterrent function of private enforcement. Rather, it is advocated that the prospect of paying compensation of damages may exercise some form of pressure to comply with competition law provided that directors may ultimately be held personally liable. In other words, the capability of private enforcement to deter antitrust violations depends on how the relevant rules are designed, not on its intrinsic unsuitability to achieve this goal.

As per the criticism concerning courts’ unsuitability to deal with economic matters, some scholars argued that there is no evidence that administrative agencies outperform courts when applying antitrust. The authors recognise that more research is needed about issues such as institutional design and agency expertise, however they reject the idea that antitrust agencies have necessarily better expertise and that they should be given more discretion when enforcing the antitrust laws. Although their study refers to the US experience, EU policymakers should critically evaluate the alleged problem of courts’ unsuitability to deal with competition law.

8. The goals of EU competition law

The criticism that courts might not be suitable to deal with economic matters has been mentioned already. The next paragraphs outline the goals of EU competition law and attempts to predict whether national courts might encounter problems with such goals. The purpose is to understand whether competition law judgments entered by national courts might be inconsistent

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with the EU competition policy, which is the result of the interaction between the Commission enforcement and the CJEU case law.

The goals of competition law have a pivotal role for the resolution of competition law cases. National courts might be asked to deal with a greater number, and perhaps with a more diverse nature, of cases than those dealt with by the CJEU, which, in the field of competition law, primarily deals with judicial review of Commission decisions and preliminary ruling of cases referred to by national courts.

Thus, one might wonder whether national courts are able to follow and apply consistently the goals of competition law to the facts of the case. Given that such goals are governed by standards rather than specific rules, there is a risk of inconsistent outcomes across the EU national courts. At stake there is the need to implement correctly the EU competition policy across the EU countries.

a) The competitive process

Broadly speaking, the Court of Justice holds the competition rules pursue the maintenance of a competitive structure of the market, protection of the interest of competitors and consumers. This formulation may be interpreted as the US pre-Chicago School goal of the defence of the competitive process. In similar terms, EU legal scholarship argued that the goal of ‘maintenance

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98 Fox points out the similarities between the European and the US antitrust Warren era in relation to the goals of antitrust. Eleanor M. Fox, “‘We Protect Competition, You Protect Competitors’” (2003) 26 World Competition 149.
of a competitive structure’ has been shaped by the German ordoliberal school that affected EU competition law.\textsuperscript{99}

In particular, European liberal ideas affected the enforcement of the abuse of dominant position (Article 102 TFEU), which presupposes possession of significant market power the exercise of which reduces the process of rivalry between undertakings.\textsuperscript{100} Arguably, the European version of the protection of the competitive process has been set out in \textit{Michelin}, a case concerned with loyalty rebates. There, the Court of Justice held that ‘the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market’.\textsuperscript{101}

\subsection*{b) Consumer welfare}

An emerging goal alternative to the protection of the competitive process is consumer welfare. Technically speaking, consumer welfare refers to the difference between what a consumer is willing to pay for a certain product and the price actually pays for it.\textsuperscript{102} Although this goal elevates consumers as the beneficiaries of antitrust law, it underlies an ideological shift from the liberal version of the market oriented to create business opportunities to a market approach characterised by minimum antitrust intervention.\textsuperscript{103} While consumer welfare has the merit that it

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{99}]  
\item David Gerber, \textit{Law and Competition in Twentieth Century Europe: Protecting Prometheus} (OUP 1998).
\item On how ordoliberalism affected the enforcement of Article 102 TFEU see Liza Lovdahl Gormsen, ‘Article 82 EC: Where are we coming from and where are we going to?’ (2006) 2 The Competition Law Review 5. However, for an authoritative different view, Richard Whish, \textit{Competition Law} (6th edn, OUP 2009) 193. The author argues that the idea that the ordoliberalist doctrine affected the enforcement of Article 102 in a way that neglected efficiency concerns is a misdescription. In fact, analysis of the travaux préparatoires of the competition rules established in the Treaty of Rome shows that that the Treaty drafters were aware of the need not to jeopardise efficiency; see Pinar Akman, ‘Searching for the long-lost soul of art.82 EC’ (2009) O.J.L.S. 267.
\end{enumerate}
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refers to a more specific and measurable phenomenon, in some circumstances it is not clear whether a certain business arrangement is likely or not to enhance consumer welfare.

First of all, there are different classes of consumers where some have different preferences in terms of trade-off between price and parameters other than price. Some consumers prefer low prices, others prefer to pay high prices for better products or products accompanied by pre- and post-sale services carried out by distributors. In addition, there is a temporal dimension related to consumer welfare. An anti-competitive agreement reduces consumer welfare in the short-term, but may enhance it in the long-term. The problem is that such future benefits might not materialise which means that consumers have been harmed without receiving an offsetting benefit.

c) The EU internal market

The third goal of EU competition law is the preservation of the internal market. The Treaty of Rome was framed in order to achieve an internal market where the free movement of people, goods, services and capitals had to be ensured. To this end, it limited the EU Member States to put in place any measure that could hinder such freedoms. Nevertheless, the Treaty provisions

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104 Since the early years of the European Community, the Court of Justice recognised that price competition is not the only parameter of effective competition. Case 26-76 Metro SB-Großmärkte GmbH & Co. KG v Commission [1977] ECR 1875, para 21.

105 This is the topic of vertical restraints, where a producer and its distributor decide certain terms and conditions concerning the sale of the product to the final consumer (for example, the retail price) in order to align their interest and provide complementary services to consumers, thus increasing their welfare. However, some consumers might not attach sufficient value to such services whose cost is incorporated in the retail price. As a result, consumer welfare of these particular consumers is reduced. For an early debate in the US, see: William Comanor, ‘Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy’ (1985) 98 Harv.L.Rev. 983. For a recent comment, William Comanor, ‘Antitrust policy toward resale price maintenance following Leegin’ (2010) 55 The Antitrust Bulletin 59. In *Leegin* 551 US 887 (2007) the Supreme Court held that resale price maintenance clauses (ie vertical price restraints between producers and distributors) are to be assessed according to the rule of reason, which entails weighing consumer harm and consumer benefits. However, in his dissenting opinion, Justice Breyer stated that it was not easy for a court to identify when consumer benefits outweigh consumer harm.

106 This occurs, for example, in agreements between competitors, which provide restrictions of competition (relevant under Article 101(1) TFEU), but also produce efficiency gains that are passed-on to consumers (relevant under Article 101(3) TFEU).
on freedom of movement applied (and still apply) to the Member States, not to private parties. Thus, while the Member States could not enact measures that would jeopardise the internal market, private undertakings could achieve the same result by implementing commercial policies that de facto fragmented the internal market.

For example, some competitors could enter into a market allocation agreement, or a manufacturer could compel its distributors not to export goods in the market of another Member State. In both situations, goods could not freely move across the Member States. This risk was intensified by the fact that national industrial policies were aimed at protecting national champions, which could result in a distortion of the allocation of the resources throughout the European Union. Thus, preservation of the internal market was pursued by encouraging ‘parallel imports’, i.e. imports into other Member States carried out by non-official distributors.

Against this background, EU competition law was construed to prevent private parties from partitioning the internal market and the achievement of the internal market became the primary goal of EU competition law. Its underlying rationale is that effective competition requires free allocation of resources in the market place. If some resources cannot move within Member States, then competition is distorted. The legal basis underpinning EU competition law as a means to achieve the internal market was Article 3(1)(g) of the EC Treaty, which stated that competition in the internal market had not to be distorted.

108 Leon Brittan, A Diet of Brussels: The Changing Face of Europe (Little, Brown 2000). ‘Without a common competition policy, the Treaty of Rome would have removed trade barriers only to see them reincarnated in the guise of restrictive agreements between private firms.’ At 89.
109 Alison Jones and Brenda Sufrit, EU Competition Law (4th edn, OUP 2011) 38-44.
110 Now Article 3.1(b) TFEU and Article 3.4 TEU. These provisions must be read in conjunction with Protocol (No. 27) of the Treaty of Lisbon ‘Internal Market and Competition’ which provides: ‘the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.’
The Court of Justice interpreted the Treaty competition rules as a means to achieve the internal market. This was established since the early years of the European Community and confirmed in recent years. Even in cases that are apparently more concerned with matters other than competition law, such as intellectual property rights and provision of cross-border services, the purpose of competition law as a means to strengthen the internal market still plays an important role. Although the current EU Treaties do not directly contain a reference to distortion of competition when dealing with the internal market, the relationship between internal market and competition is set out in the Protocol No. 27.

9. The application of the goals of EU competition law by national courts

a) The application of the goal of competitive process by national courts

Arguably, the above competition law goals are likely to be difficult to be implemented by courts. The goal of competitive process is too vague to provide courts with clear guidance. In general, the main trade-off is between maintenance of a market structure with various independent competitors on the market (competition as a process of rivalry) and a market structure with fewer

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111 Cases 56 and 58/64 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission [1966] ECR 299. ‘what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between states.’ p 341. Also, Case 26-76 Metro SB-Großmärkte GmbH & Co. KG v Commission [1977] ECR 1875. ‘The requirement contained in Articles 3 and 85 [now Article 101 TFEU] of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.’ Para 20.

112 Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055. ‘Article 81 EC 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.’ Para 36.


114 Article 3 TEU.

115 Protocol (No. 27) of the Treaty of Lisbon ‘Internal Market and Competition’. The premise of the protocol is that the internal market includes a system ensuring that competition is not distorted. On this basis the Union is justified to take measures based on Article 352 TFEU.
competitors but that offer lower prices, that is to say prices that are close to the marginal cost (competition in the neoclassical sense).¹¹⁶

Competition authorities might strike a balance between these two opposite states of affairs effectively due to organisation, specialisation and expertise in dealing with economic matters. By contrast, courts do not have such an institutional design and therefore they might not be able to make an accurate assessment whether a unilateral practice altered or is likely to alter the structure of the market. Although expert witnesses assist courts in identifying the economic issues at stake, the decision making process requires a great deal of economic information that a generalist judge might find difficult to understand.

In addition, even if courts had the same expertise and capabilities of administrative authorities, the structure of litigation implies the presence of two opposing litigants. This means that only the claimant and defendant’s economic interests are taken into account. However, the underlying disputed economic situation may involve many economic interests that might not be represented before the court and that will be neglected in the courts’ decisions.

b) The application of the goal of consumer welfare by national courts

In some instances the application of the consumer welfare standard by courts may be problematic. This is the case of consumers indirectly harmed by an anti-competitive practice. This is the issue of the indirect purchaser standing, such as whether final consumers (i.e. indirect


The application of the consumer welfare standard by courts is also problematic in other respects. It has been seen that this goal could be interpreted as any interest to which consumers attach a value. Consumer welfare varies according to the type of market (for example, in pharmaceutical products, quality and effectiveness are more important than low prices) and the type of consumers (i.e. consumers have different preferences, which might depend on social classes, education, income, and so forth).

In some borderline cases, courts might have to decide about an alleged anti-competitive practice in which consumer welfare might be harmed depending on the meaning assigned to it. In such cases, appealing to consumer welfare as decisive criterion is not satisfactory. This is because courts’ decisions will reflect a certain idea of consumer welfare that benefits some consumers at the expense of others.

Finally, the application of consumer welfare standards by courts would be problematic with regard to those arrangements that produce both anti- and pro-competitive effects. Here, a cost-
benefit analysis may not be straightforward because of uncertainty whether and when efficiency gains materialise and how they are passed on to consumers.\(^{118}\)

c) The application of the goal of internal market by national courts

As per the internal market goal, litigation is likely to be raised by distributors engaged in parallel trade, that is to say by those distributors which export goods across the Member States in competition with distributors officially appointed by manufacturers for distribution in a certain territory. It may happen that the producer puts in place commercial practices aimed at eliminating or reducing parallel trade.

Elimination of parallel trade is likely to result in higher prices due to the presence of fewer distributors (i.e. official distributors) selling products in a certain assigned territory. In addition, distributors engaged in parallel trade are harmed as they would have their source of supply limited or terminated. Here, the interest of such distributors and consumers benefiting from parallel trade are aligned.

On the other hand, when parallel trade is allowed, consumers located in a Member State where prices are lower might experience shortage of supply of goods because the official distributor designated in such a Member State prefers to sell in other countries where prices are higher.\(^{119}\)

\(^{118}\) In this case, the Commission set out the methodology to make such assessment however they do not deal with the problem of uncertainty affecting occurrence of pro-competitive effects. ‘The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts.’ Commission Notice, ‘Guidelines on the application of Article 81(3) of the Treaty’ [2004] OJ C101/97, para 42.

\(^{119}\) Case C-468 to 478/06 Sot. Lelos kai Sia EE et al. v. GlaxoSmithKline [2008] ECR I-7139. The defendants justified its restriction of supply of some pharmaceutical products to distributors engaged in parallel trade on the basis parallel export was creating shortage of supply in the Greek market.
Given that parallel trade increases the number of sellers, sale prices are lower. Thus, manufacturers’ profits are reduced. This is problematic in some product markets, for example pharmaceuticals, which require a great deal of investment. Reduction of manufacturers’ profits means that less internal funds are available for the development of new products.\footnote{Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission [2009] ECR I-09291, paras 99 and 113.}

In such cases, the goal of preservation of the internal market conflicts with the welfare of some consumers and some distributors. While the Court of Justice has consistently taken a multi-goal view according to which EU competition law pursues different goals,\footnote{Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services, para 63.} EU ‘statutory law’ seems to suggest that protection of parallel trade overrides other interests.\footnote{Article 4(b) of the Commission Regulation on Vertical Agreements provides that the restriction of the territory into which a distributor may sell the manufacturer’s products constitutes a ‘hardcore’ restriction and thus it is unlawful and cannot be exempted by the Regulation itself. Commission Regulation (EU) 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.} It remains to be seen whether the Court of Justice will follow such a preference for the ‘internal market’ objective or other goals might prevail in particular circumstances.

d) Assessment of EU competition law litigation before national courts

The purpose of the preceding paragraphs was to evaluate the sceptical argument according to which courts are unable to properly administer economic regulation and in particular competition law. Given the lack of comprehensive evidence about the number of competition law cases dealt with by national courts and whether national courts are able to apply EU competition law consistently, this paragraph can only make a tentative assessment.

With regard to the goal of internal market, the Court of Justice case law on Article 101 and 102 TFEU and Regulation 330/2010 set out a \textit{per se} approach declaring unlawful, commercial clauses...
that partition the internal market.\textsuperscript{123} Given the \textit{per se} approach, this goal seems unlikely to raise problems when implemented by national courts.

As per the issue that in some instances courts decisions’ based on consumer welfare express a preference for a certain type of consumer benefit, it can be said that the same problem arises when decisions are taken by competition authorities. The independence of the latter undermines the argument that decisions that affect the rules of the market (e.g. what type of consumer benefit should be adopted) should be made by accountable bodies. Both courts and antitrust agencies interpret economic rules that significantly affect the market.

The goal of competitive process is the one that is likely to create more uncertainty because it is vague and, as the current EU case-law stands, no workable criteria of general application are provided for the courts. In novel cases, implementing the idea that a dominant undertaking has a duty not to impair genuine undistorted competition\textsuperscript{124} might simply be the reflection of a national judge’s particular idea of how markets should work and when they are competitive.

Overall, the fear that national courts are not able to administer EU competition law claims seems exaggerated. The CJEU has always interpreted the competition rules and sometimes in a different way from the Commission.\textsuperscript{125} If national courts struggle to enact judgments consistent with EU competition policy, this would be the reflection of the CJEU’s persistence in maintaining a general standard when interpreting the goals of competition law rather than national courts’ intrinsic inability.

\textsuperscript{123} Article 4(b).
\textsuperscript{125} Alison Jones and Brenda Sufrin, \textit{EU Competition Law} (4th edn, OUP 2011) 51.
10. The arguments for private enforcement of competition law

Previously, the arguments against private enforcement of competition have been challenged and it has been concluded that they are not convincing. With regard to the arguments in favour of private enforcement of competition law, they often derive from general considerations that view courts’ enforcement of law valuable and positive.

First, private enforcement complements public enforcement as the former allows saving government money.\textsuperscript{126} In particular, if litigation deals with a certain area, public enforcers are able to spend resources in other areas, which may require incisive investigative powers that private parties do not have.

Second, private enforcement pursues corrective justice by compensating victims. On the contrary, public enforcers’ action is not designed to award compensation. In theory it would be possible to entrust a competition authority with this task, but there remains the problem that public enforcers cannot investigate all possible offences. Thus, antitrust victims of undertakings, which have not been investigated, would remain uncompensated.

Third, and related to the second argument, private enforcement acts as a counterbalance when regulatory agencies do not act effectively, either because of limited resources\textsuperscript{127} or because they have been ‘captured’ by interest groups.\textsuperscript{128} Indeed, when a loss is significant, private parties might

\textsuperscript{126} Christopher Hodges, ‘Competition enforcement, regulation and civil justice: what is the case?’ (2006) 43 CML Rev 1381, 1394.

\textsuperscript{127} Christopher Hodges, ‘Competition enforcement, regulation and civil justice: what is the case?’ (2006) 43 CML Rev 1381, 1395. Hodges criticises private enforcement, but acknowledges the arguments in its support.

\textsuperscript{128} Hodges, ibid. Regulatory capture refers to the so-called ‘regulatory capture’ where the relationship between regulators and those subjected to regulation becomes so close that the former tend to favour the latter. Bronwen Morgan and Karen Yeung, An Introduction to Law and Regulation (Cambridge University Press 2007) 43. Posner also believes that courts are more immune from interest groups pressure. Richard A. Posner, ‘Regulation (Agencies) versus Litigation (Courts): An Analytical Framework’ in Daniel P Kessler (ed), Regulation versus litigation: perspectives from economics and law (The University of Chicago Press 2011) 20. Among the first contributors of
have a stronger incentive to act than competition authorities.\textsuperscript{129} In addition, private parties might have more confidence that their claim is going to be dealt with impartially.

Fourth, judges are ‘less mission-oriented than regulators’:\textsuperscript{130} given their diverse professional background and since they deal with more general matters than a specific regulation, they are less likely to identify themselves to a particular policy. They may pursue a more balanced approach than public agencies as they would apply the law by considering both the interests and policy set out in a certain regulation and general principles of law that occupy a central place in a certain legal system.

Nonetheless, in some EU Member States, there are specialised courts that deal with competition law. In this case, judges of competition law courts may have a mindset more similar to that of antitrust officials. Perhaps these judges may even include the positive features of both public enforcers and judges: specialisation and expertise of the former, less narrow approach to competition law and independence of the latter.

Fifth, the public enforcement perspective assumes that regulation has been devised in an optimal way in which all interests at stake have been properly regulated. However, this might not be the case. Even assuming that private interest groups have not exercised significant influence on policymakers when drafting the rules, regulation cannot foresee all contingencies. In this case, litigation might stimulate regulatory activity.\textsuperscript{131}

\textsuperscript{129} Regulatory failures due to pressure of interest groups, see, George Stigler, ‘The theory of economic regulation’ (1971) 2 The Bell Journal of Economics and Management Science 3.
\textsuperscript{131} W. Kip Viscusi, ‘Overview’ in W. Kip Viscusi, Regulation through Litigation (Brookings Institution Press 2002) 3.
Finally, as previously mentioned, private enforcement is an important contribution to enhance deterrence. This is desirable in situations like EU competition law, where there seems to be significant compliance deficit. A higher and successful number of competition law claims may change undertakings’ perception about the probability of being condemned to pay compensation, thus exerting pressure upon them to comply with competition law.

11. Conclusions on private enforcement of competition law

The arguments against private enforcement do not seem convincing. From a general viewpoint, the case against private enforcement of competition law seems to rest on the ideological stance that markets perform better in the absence of governmental intervention in the economy. This is the fundamental tenet of the Chicago school, which is equally applied both to substantive and enforcement antitrust rules. The argument is that markets are able to self-correct quicker and better than how courts’ decisions would achieve.

The reason for this is that judges are bound to make decisions on the basis of imperfect information, whereas markets are able to penalise inefficient decisions since they force firms to pursue efficient practices.132 This stance can be named as *laissez-faire* to enforcement, where the elected goals of the competition rules (namely, creation of allocative efficient markets and enhancement of consumer welfare) self-materialise through the market forces, thus making vigorous antitrust enforcement, be it public or private, undesirable.

Lande and Davis noted that the objections against private enforcement have been made ‘without any systematic substantive or empirical basis’.133 In fact, US private enforcement engenders

various benefits. For example, since the amount recovered from antitrust violators in private proceedings was higher than the criminal fines, it has been argued that private claims deter more than public enforcement.\textsuperscript{134} In addition, compensation resulting from stand-alone actions is also significant,\textsuperscript{135} which indicates that private enforcement is capable of deterring without relying on previous government action.

Many scholars submit that antitrust enforcement is positive. Werden estimates that consumer savings deriving from antitrust enforcement amount to 10\% of the total sales in the relevant market.\textsuperscript{136} Baker suggests that there is no evidence that antitrust enforcement is too high.\textsuperscript{137} As per private enforcement, Lande and Davis suggest that the benefits of private enforcement are substantial and possibly under-appreciated.\textsuperscript{138}

It is likely that the risks and the problems attributed to private claims have been exaggerated. In fact, the real issues are the amount of resources that should be spent by antitrust agencies and private parties and how to co-ordinate public and private enforcement. As per private enforcement, the goal is to devise legal mechanisms that lower the cost of litigation without compromising accurate fact-finding. Indeed, the best way to avoid unmeritorious or strategic claims is to guarantee that sound evidence on the alleged breach is collected effectively and at a reasonable cost.

\textsuperscript{134} ibid 893.
\textsuperscript{135} ibid 898.
Part II: The relationship between public and private enforcement

1. Introduction

The above paragraphs argued that private enforcement is capable of giving a contribution to remedy low compliance with EU competition law. Of course, much depends on the design of the relevant rules, but private enforcement is not intrinsically unsuitable to promote compliance with competition law. However, an increase of its role poses the need to re-evaluate the relationship between public and private enforcement. In other words, it is not correct to think about one enforcement without referring to the other, if not because they both pursue the same goal of implementing the law. Thus, at least to a certain extent, there should be some co-ordination between the two.

Such a relationship has been studied from a law and economic perspective, which focuses on the amount of resources that should be devoted to enforcing the law. Some scholars propose the creation of a market for enforcement in which victims could sell their compensation entitlement to private law enforcers.\(^{139}\) Others argue that a mix between public and private enforcement is desirable due to the risk that resources spent for private enforcement might be disproportionate to the welfare losses resulting from a certain offence.\(^{140}\) While this approach attempts to estimate the optimal amount of enforcement resources, it is also highly theoretical and does not consider the features of the decision-making process of each type of enforcement.

In reality, private enforcement and its relationship with public enforcement are not value-free, in fact they are affected by political ideology and political structures. For example, in the US

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predominance of litigation as way to resolve disputes reflects a particular way to understand and practise democracy. In this respect, the term ‘adversarial legalism’ is used to refer to a model of governance in which ‘policymaking, policy implementation, and dispute resolution’ occur ‘by means of lawyer-dominated litigation’. Adversarial legalism is an ideology that sees the judiciary as an institution capable of protecting individual rights against arbitrariness and corporate misbehaviour.

These features are dissimilar from the political and legal culture of the EU Member States, which seem more reliant on the action of public authorities. With regard to competition law, it has been argued that enforcement by the courts is extraneous to European markets (especially those based on the Rhenish model), which are characterised by more co-ordination between companies and the state. In general, it may be stated that increasing the role of private enforcement does not necessarily mean to embrace the alleged ‘US litigation culture’ or to disregard the importance of public authorities’ action. Rather, the goal is to provide citizens and businesses with tools to strengthen their economic rights.

2. Legal framework of the relationship between public and private enforcement of EU competition law

Regulation No. 1/2003 lays down the main rules of public enforcement, but it also sets out some general rules on the relationship between public and private enforcement. In particular, it

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142 Ibid 3.
provides that national courts may ask the Commission information in its possession or opinions
concerning competition rules.\textsuperscript{145}

National competition authorities may also submit oral observations to the national courts of their
Member States. In addition, the Commission too on its own initiative may submit written or oral
observations to national courts.\textsuperscript{146} These provisions set out the principle of co-operation between
the Commission and national courts,\textsuperscript{147} further specified by soft-law legislation.\textsuperscript{148}

Regulation No. 1/2003 cannot provide for all possible contingencies relating to the interaction
between national courts, national competition authorities and the Commission. This gap will
naturally be covered by future Court of Justice’s rulings originated by the concrete circumstances
of the cases pending before national courts. So far, the most important cases can be divided into
two groups.

The first deals with how enforcers’ decisions (Commission, national competition authorities, and
national courts) interact with each other.

The second examines third parties’ access to information held by antitrust agencies and that has
been obtained through the execution of leniency programmes. This aspect is important because
such information may be used before national courts and provide evidence of a competition law
infringement.

\textsuperscript{145} Article 15(1) of the Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid
down in Articles 81 and 82 of the Treaty [2003] OJ L1/1
\textsuperscript{146} Article 15(1) of the Council Regulation (EC) 1/2003.
\textsuperscript{147} The principle of co-operation is a general principle of European Law, previously contained in Article 10 EC and
now in Article 4(3) of the Treaty on European Union, which provides that ‘The Member States shall facilitate the
achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the
Union’s objectives.’
\textsuperscript{148} 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.
a) The Commission and national courts’ decisions

Regulation No. 1/2003 ensures uniform application of the competition rules. To this end, Article 16 provides that if a case is pending before the Commission, national courts which are dealing with the same subject cannot take decisions contrary to the Commission’s decision. In addition, national courts must avoid issuing decisions that would conflict with a possible Commission decision that has not been taken yet. This means that national courts may stay proceedings and wait for the Commission’s decision.

The origin of Article 16 can be found in *Masterfoods v HB Ice Cream*, a case that dealt with the validity of an exclusivity clause between HB and various retailers whereby the former would supply ice cream cabinets free of charge provided that they were used exclusively for its products. When Masterfoods entered the market for icecreams in Ireland, it attempted to persuade retailers to stock its products in HB’s freezer cabinets who could not accept due to the prior contractual commitment with HB.

Consequently, proceedings were brought before the Irish national court and the Commission. The Commission held that the exclusivity clause was illegal under Articles 101 and 102 TFEU. Meanwhile, the national proceedings reached the Irish Supreme Court, which referred the matter to the Court of Justice for a preliminary ruling. The Court of Justice ruled that national courts must avoid taking decisions that would run counter to a decision that is contemplated by the Commission.150

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149 Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.

150 Case C-344/98 *Masterfoods*, para 51. This duty applies even when the Commission decision conflicts with a decision given by a national court of first instance (para 52).
Two readings may be given of the Masterfoods principle and of Article 16 of Regulation No 1/2003. The first has to do with the institutional nature of enforcement and views Masterfoods as expressing the primacy of public enforcement over private enforcement. What is at stake is the type of power (administrative rather than judicial) that has ultimate voice in the enforcement of competition law. The second is ‘vertical-institutional’ and views Masterfoods as expressing the primacy of centralisation of enforcement of competition law over decentralisation.

On the first view, this judgment (and Article 16 of Regulation No 1/2003) is problematic because it reflects the issue of the relationship between an administrative body and a national court when both act as enforcers of EU law. Here, it could be argued that according to the principle of separation of powers, decisions of an administrative body should not prevail over decisions of national courts. This problem is compounded by the fact that both an administrative body (the Commission) and national courts are entrusted with the task of enforcing EU Law and specifically the competition law provisions.

On the second view, the Masterfoods decision reflects the need for consistency in the application of EU law,\textsuperscript{151} which can be guaranteed by the Commission as a ‘central’ institution. It has been counter-argued that this objective can be equally achieved by deferring controversial or unclear matters to the Court of Justice courtesy of the preliminary ruling procedure.\textsuperscript{152} However the Commission’s action may be more expeditious than a Court of Justice judgment.\textsuperscript{153} In turn, a


\textsuperscript{153} With reference to the cases completed in 2012, the average duration of proceedings for preliminary ruling was 15.7 months. Annual Report 2012 of the Court of Justice of the European Union, 104 <http://curia.europa.eu/jcms/jcms/jo2_7000/> accessed 29 July 2013.
Commission decision may be challenged under Article 230 TFEU, whose procedure is more appropriate in competition cases.\textsuperscript{154}

A less critical opinion holds that despite the wording of Article 16, which privileges public enforcement, in reality public and private enforcement remain independent,\textsuperscript{155} since ultimately also Commission decisions are subject to the European Court of Justice jurisdiction.\textsuperscript{156} In addition, as held in \textit{Masterfoods}, if a national court doubted the validity or interpretation of a Commission decision, it may or must refer the matter to the Court of Justice for a preliminary ruling.\textsuperscript{157}

In other words, although Article 16 seems to subject national courts to the Commission, it is more significant to note that Commission decisions are subject to the judicial review of the European courts, which ultimately means that these decisions are expression of EU law. Therefore, when national courts apply EU competition rules and deal with a matter that has already been dealt with by a Commission decision, they have to follow the Commission decision not because of a principle of primacy of the Commission, but because of the duty to interpret and apply EU law in a consistent way.

\textbf{b) Access to antitrust agencies' information and leniency programmes}

A second aspect of the legal relationship between public and private enforcement concerns access to information relating to competition cases, which is held by the Commission or national

\textsuperscript{154} Case C-344/98 \textit{Masterfoods}, Opinion of AG Cosmas, para 55. He noted that judicial review by the Court of First Instance (now General Court) and Court of Justice is more effective than a reply to a request for a preliminary ruling. In similar terms, in \textit{UPA} Advocate General Jacobs argued that national courts might not be the appropriate forum to challenge a Community measure via the preliminary ruling procedure. Case C-50/00 P \textit{Unión de Pequeños Agricultores (UPA) v Council} [2002] ECR I-6677, Opinion of AG Jacobs, paras 41-44.


\textsuperscript{156} ibid 24.

\textsuperscript{157} Case C-344/98 \textit{Masterfoods}, para 55.
competition authorities, and that has been obtained in the execution of a leniency programme. Leniency programmes grant undertakings either immunity or reduction of administrative fines if significant information about cartels to competition authorities is disclosed.\textsuperscript{158}

The effects of such programs are mixed.\textsuperscript{159} On the one hand they make anti-competitive agreements less stable by creating distrust among the cartelists. This is because each undertaking knows that any of the other parties has the incentive to reveal the existence of the cartel, which increases the probability of detection. In turn, this has a positive impact on deterrence. On the other hand, they entail a reduction of the fine,\textsuperscript{160} which constitutes an incentive for opportunistic behaviour. The offender enters into an illegal agreement, makes illegal profits, then denounces it, and finally obtains immunity for himself. Clearly, this lessens deterrence.

Would-be litigants are interested in obtaining information contained in leniency programmes because it would support damages actions with strong evidence. Thus, they ask either the Commission or national competition authorities to access such information. Sometimes public authorities refuse such a request because it might deter other undertakings from applying to such programmes as it would ultimately provide their victims with evidence to be used in civil liability actions.


\textsuperscript{159} Final Report 492.

\textsuperscript{160} Currently application for leniency does not affect civil liability, however, there is debate as to whether such a rule should be limited, thus granting reduction of compensation in order to further encourage the use of leniency procedures. See Commission, ‘White paper on damages actions for breach of the EC antitrust rules’ COM (2008) 165 final, para 2.9. This case has been made by Alan Riley who takes the example of US jurisdiction in which federal courts may deterble damages to leniency applicants. Alan Riley, ‘The modernisation of EU anti-cartel enforcement: will the Commission grasp the opportunity?’ (2010) ECLR 191.
In *Hydrogene Peroxide*, a company incorporated with the purpose to recover losses caused by a cartel formed by nine undertakings applied, on the basis of Regulation No. 1049/2001, to the Commission to access the statement of contents of the case file relating to the Commission decision that had sanctioned the cartel. The Commission refused on the ground that the statement of contents did not constitute a document according to Article 3(a) of the Regulation. The Commission was precisely concerned that disclosure of some documents would undermine its policy of leniency since undertakings would not be willing to reveal the existence of cartels due to the risk that third parties would bring an action for damages. The General Court disagreed and noted that such argument would justify denial of any documents relating to a competition case. Furthermore, it held that leniency programmes are not the only means to ensure compliance with the competition rules since damages actions also pursue this aim.

In *Pfleiderer*, the applicant requested access to documents to the German competition authority, which had been obtained through a leniency procedure. Again, the applicant requested such documents to bring an action for damages against the cartelists. As the competition authority refused full disclosure of the requested documents, proceedings were brought before the national court. In turn, the national court referred the matter to the Court of Justice for a preliminary ruling about the right to access to documents relating to leniency procedure that had been submitted to the national competition authority.

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163 Case T-437/08 *CDC Hydrogene Peroxide*, paras 31, 46, 56, 69.
164 Para 70.
165 Para 77, quoting Case C-453/99 *Courage and Creban*.
166 Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-05161.
The Court of Justice answer was more nuanced than *Hydrgene Peroxide*. It held that the effectiveness of the leniency programmes would be jeopardised if the relevant documents were accessible to those who were planning to bring a damages action.\(^\text{167}\) On the other hand, it also relied on the right to compensation, as established in *Courage*, and the principle of effectiveness and equivalence.\(^\text{168}\) Having set out the two competing interests (effectiveness of leniency programmes and effectiveness of the right to compensation), the Court of Justice held that their balance must be carried out by national courts, on a case-by-case basis, according to the national law.\(^\text{169}\)

The *Donau Chemie*\(^\text{170}\) judgment developed the matter of the balance between the two-above mentioned interests (effectiveness of leniency programmes and of the right to compensation). An Austrian court asked the Court of Justice whether EU law precluded national law which prohibited courts to disclose to third parties information available in the file of national proceedings that had been brought by the competition authority without the consent of the parties to such proceedings. The referring court noted that in *Pfleiderer* it was held that such a balance had to be carried out on a case-by-case basis. However, it pointed out that Austrian law already provided such a weighing in abstract terms, thus precluding national courts from carrying out a concrete assessment.

With regard to the interest of guaranteeing the effectiveness to the right to compensation, the Court of Justice held that if antitrust victims have no other way of obtaining the evidence needed

\(^{167}\) *Pfleiderer v Bundeskartellamt*, para 26.
\(^{168}\) *Pfleiderer v Bundeskartellamt*, para 30.
\(^{169}\) *Pfleiderer v Bundeskartellamt*, paras 31 and 32.
\(^{170}\) Case C-536/11, *Donau Chemie and Others* (Court of Justice, 6 June 2013).
to bring an action for antitrust damages, then a rule precluding such access would make the right
to compensation nugatory.\textsuperscript{171}

With regard to the competition authority’s interest not to disclose such information, the Court
reiterated that it is legitimate for national law not to allow generalised access to such information
in order to preserve both the effectiveness of leniency programmes and also other interests such
as professional and business secrecy.\textsuperscript{172}

Finally, the Court held that the balance between such interests had to be done by courts on a
case-by-case basis.\textsuperscript{173} It then specified that the risk that access to information obtained through a
leniency programme could jeopardise such programmes was not sufficient to reject disclosure of
such information that is necessary to bring damages actions by third parties.\textsuperscript{174}

The above cases posit interesting questions on the interaction between public and private
enforcement. Leniency programmes are an important tool for administrative enforcement and
are more effective if co-operating undertakings are protected from civil liability by precluding the
disclosure of the relevant documents to third parties who intend to make a claim. At the same
time, non-disclosure of such documents may hinder private actions, which in turn decreases
deterrence.

\textit{Pfleiderer} is problematic for two reasons. First, it entrusted national courts with the task of making
a balance between such two goals, which might create inconsistent outcomes. Second, apart from
referring to the principles of effectiveness and equivalence, it did not provide workable criteria
on how national courts should achieve such a balance. \textit{Donau Chemie} did not clarify this issue

\textsuperscript{171} Para 32.
\textsuperscript{172} Para 33.
\textsuperscript{173} Paras 44 and 45.
\textsuperscript{174} Para 46.
except for noting that disclosure of documents obtained through leniency programmes may be the only way to enable would-be claimants to gather evidence to bring damages actions. The end result is that each national court will exercise considerable influence on what system of enforcement (public rather than private) has priority.

3. Policy analysis of the relationship between public and private enforcement

It is accepted that enforcement of competition law should include both public and private action. The problem lies in establishing the right co-ordination between the two, which is an arduous task due to the interaction of numerous factors. In theory, the relationship between public and private enforcement should be consistent with the goals of enforcement, which are compensation and deterrence. However, it has been seen that such goals may diverge: full compensation of damages may not be sufficient to deter or, in some cases, it may over-deter.

The problem is compounded by the fact that the right to compensation cannot be denied even if, for example, a fine inflicted by a competition authority is sufficient to deter other undertakings. In other words, while the level of public enforcement may be tailored to the characteristics of a particular market, private enforcement remains grounded in the right to compensation as established in Courage. While statutory rules may limit the scope of this right, it is hard to think that they could repeal it. This makes the task of identifying the appropriate ratio between public and private enforcement.


176 In order to avoid excessive reliance on litigation, it has been proposed to entrust public bodies with the function of providing compensation. Christopher Hodges, The Reform of Class and Representative Actions in European Legal Systems (Hart 2008) 228. This is a sensible option as there is no reason why a public body should not be able to award compensation claims in its administrative proceedings. However, it does not resolve the main problem: public agencies' resources are limited and thus they cannot pursue all violations. Private parties intervene to complement public enforcement action. In other words, this option would leave uncompensated victims of breach of competition law that have not been investigated by a public body.
Clearly, these difficulties encountered at policy level have repercussions on determination of the more specific rules governing the relation between public and private action. For example, should stand-alone actions (private parties making a claim without relying on previous administrative decisions) rather than follow-on actions (private parties making a claim by relying on previous administrative decisions) be encouraged? While, the former increases deterrence, the latter decreases the cost of enforcement, and may be more accurate in providing the factual basis for compensation.

With regard to follow-on actions, an important issue concerns leniency programmes and compensation. As seen, Pfleiderer leaves the matter in an unsatisfactory state since it does not provide criteria to balance the effectiveness of leniency programmes with the right to compensation. More importantly, the balance between these two interests is left to national courts, which may result in different outcomes among the Member States. It will be seen in the next chapter that different rules on enforcement may give rise to some problems.

Even before the judgments examined in this paragraph, the Commission was aware of the frictions between the need to encourage private enforcement and the need to preserve the effectiveness of leniency programmes. The current proposal for a Directive provides that leniency corporate statements and settlement submissions is not admissible in actions for

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177 Final Report 266. The reason for being less expensive is that factual finding has been already carried out by the antitrust agency, thus private parties may rely on it.

178 In follow-on actions, the decisions of antitrust agencies are likely to be based on evidence that has been obtained through the use of investigative powers that are normally more extensive than private parties’ powers on access to the opposing party’s evidence. Thus, the amount of information held by antitrust agencies is considerable.

179 For example, it set out some proposals such as exclusion of discovery of leniency applications, rebate on damages claims, removal of joint liability for the leniency applicants. Commission Staff Working Paper. Annex to the Green Paper, ‘Damages Actions for breach of the EC antitrust rules’ COM (2005) 672 final, option 28, para 233, option 29, para 234, option 30, para 236 respectively. The case for reduction of civil liability has also been made by some scholars. See Alan Riley, ‘The modernisation of EU anti-cartel enforcement: will the Commission grasp the opportunity?’ (2010) ECLR 191.
Here it is clear that the Commission intends to provide undertakings with a powerful incentive to apply to leniency programmes even this undermines the possibility for injured parties to obtain evidence in support of their damages claim.

**Chapter conclusions**

This chapter aimed at answering two research questions: whether there is low compliance with Articles 101 and 102 TFEU, and whether, and the extent to which, private enforcement of competition law can give an effective contribution to remedy such a low compliance. Some empirical evidence has been provided which shows that violations of EU competition law are considerable and result in significant welfare losses.

On this basis, it has been concluded that more enforcement of competition law is desirable. Assuming that the resources that the Commission and national competition authorities of the EU Member States are not increased in the next years, this chapter examined whether private enforcement is capable to reducing such a compliance gap.

The traditional two rationales for private enforcement are corrective justice and deterrence. These goals are interrelated as the latter exerts pressure upon undertakings to comply with competition law. However, private enforcement has been criticised by some US scholarship on the grounds that it fails to achieve both goals. For example, compensation brings negligible benefits to antitrust victims given that they often suffer low-value losses.

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It has also been argued that private enforcement over-deters because it might discourage beneficial economic activities that have some anti-competitive elements. Alternatively, it has been argued that private enforcement does not achieve deterrence at all, either because of the short tenure of those who make the decision to breach competition law, or because the illegal gains resulting from such breaches are greater than compensation the undertaking could pay if found guilty.

A more radical criticism holds that courts are unsuitable to deal with sophisticated economic matters such as competition law. Competition law aims at creating and preserving competitive markets. However, there are different ideas of competitive markets, which are epitomised by the different goals assigned to competition law (consumer welfare, preservation of the internal market, and competitive process). The structure of litigation (claimant(s) versus defendant(s)) means that some economic interests at stake may not be represented in the dispute.

Such criticisms are likely to be exaggerated and they seem to rest on an ideological laissez faire approach to both public and private enforcement which believes that market forces would punish infringers quicker than public bodies. Empirical evidence shows that this is not the case. For example, duration of violations of competition law is considerable and cartels are more stable than economic theory believes. Evidence drawn from the US also shows that private enforcement has been beneficial. Antitrust litigation might give rise to the above-mentioned problems, but this is not a reason to reject its role and the benefits it may yield, especially in terms of deterrence. Rather, the relevant rules should be designed to facilitate such actions by taking into account the problems encountered in the US.
The second part of this chapter has examined the relationship between public and private enforcement. The reason is that both types of enforcement pursue the goal of deterrence. In addition, public enforcement may facilitate antitrust victims to obtain compensation. There are many aspects affecting this relationship. From a policy viewpoint, the issue is whether to encourage follow-on rather than stand-alone private actions since both types of action present advantages and disadvantages that may materialise according to the specific circumstances in which a breach of competition law takes place.

Accordingly, it is difficult to find a balance between public and private enforcement. In this respect, Schwartz wrote:

‘Two fundamental alternatives compete for ascendancy in antitrust enforcement. With public enforcement, society relies principally on the behavior of public officials in the enforcement agencies who respond to the opportunities produced by the political system. In contrast, under a scheme of private enforcement, reliance is placed on the behavior of individuals responding to the monetary incentives created by courts and juries. Which of these incentive structures will yield the better outcome is a question that cannot help but delight anyone addicted to choosing between imperfect alternatives.’\(^\text{181}\)

If this is correct, then crafting rules designed to determine optimal co-ordination between public and private enforcement is an exercise with serious limitations. Much also depends on the future CJEU case-law. Pfleiderer shows that national courts will also play a role in shaping the relationship between public and private enforcement. This is another factor that makes it difficult to design a coherent policy of co-ordination between public agencies and private parties.

Chapter 3
Harmonisation versus national autonomy

1. Introduction

The previous chapter has showed that private enforcement can give an effective contribution to reducing the compliance deficit with competition law. This chapter deals with the third research question: why the EU right to compensation should be harmonised. To this end, it sets out and assesses the arguments for and against maintenance of national law for the enforcement of the EU right to compensation, and the arguments for and against harmonisation of such rules. Finally, it deals with the principle of conferral and proportionality in relation to the Commission’s proposal of harmonisation.

The purpose of this chapter is to identify the general arguments for harmonisation and apply them in the context of competition law. In Part II, these arguments will be tested in four case studies. The end goal is to carry out the ‘comparative efficiency calculus’, as contained in the EU principle of subsidiarity, i.e. to understand whether measures designed to make the right to compensation more effective should be taken at the EU level rather than national level.

As explained in the first chapter, the fact that some Member States’ law is not effective in ensuring the right to antitrust compensation does not necessarily justify harmonisation of the relevant enforcement rules. In theory, a general EU obligation could simply prescribe the Member States to adopt a set of rules designed to make such a right effective. However, diversity

1 Unless the context suggests otherwise, ‘right to compensation’ or ‘right to antitrust compensation’ refers to compensation for losses caused by breach of Article 101 and/or 102 TFEU as established in Case C-453/99 Courage and Crehan [2001] ECR I-6297. Similarly, ‘damages actions’ refer to actions brought to obtain such compensation.
of such rules would still not address some problems, which are dealt with in this chapter, and that may justify the adoption of common EU rules.

2. The background: the principle of national procedural autonomy

Individuals may enforce EU rights before national courts. The principle of national procedural autonomy holds that unless otherwise provided by EU law itself, national law determines the procedural rules and the remedies for the enforcement of EU rights. This was established in *Rewe*², where the Court of Justice held that, in the absence of Community rules, the domestic legal system determines the procedural conditions that govern the action brought before national courts in order to protect Union rights. This principle also applies to actions for damages resulting from breach of Articles 101 and 102 TFEU.³

Procedural law can be defined as a set of rules that enables a party to make a claim before the court and a judge to adjudicate a dispute. Ideally, a system of procedure should result in decisions that substantiate the legal position of the parties deriving from substantive law.⁴ Although the principle of national procedural autonomy refers to procedural rules, some substantive rules may be applicable too. For example, in *Courage* the Court established the right to antitrust compensation. Perhaps, the expression ‘national procedural autonomy’ reflects the fact that this principle was established in *Rewe*, in relation to time-limits to bring an action, which is a typical procedural rule. Nowadays, this principle covers any national rule which is applicable in judicial proceedings, and whose nature is procedural, remedial, or substantive.

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⁴ Adrian A. S. Zuckerman, ‘Justice in Crisis: Comparative Dimensions of Civil Procedure’ in Adrian A. S. Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999). ‘In all systems of procedure doing justice means arriving at decisions which give the parties before the court what is legally due to them.’ at 3. Clearly, this is not always possible. For example, a successful judgment deciding on a personal injury claim cannot restore the claimant’s position.
Importantly, in *Rewe* the Court subjected the principle of national procedural autonomy to two requirements. The first is the principle of *equivalence* according to which the remedies and the procedural rules applicable to a certain national action must be equally applicable to similar actions brought to enforce European rights. The second is the principle of *effectiveness* according to which national procedural rules must not make the exercise of the European right impossible in practice or excessively difficult.\(^5\) When this is not the case, the ‘restrictive’ national procedural rule must be set aside.

The qualification ‘in the absence of Community rules’ has been interpreted as a competence of the European institutions to create their own system of harmonised procedural law.\(^6\) In fact, rather than reflecting the principle of the Member States’ competence in the area of procedure and remedies, national procedural autonomy should be seen as a recognition that the Treaty drafters could not create a system of rules on organisation or courts, remedies, procedures and so forth.\(^7\)

The term ‘autonomy’ is controversial. Although ‘autonomy’ may be interpreted as a manifestation of national sovereignty, national procedural law is ancillary to EU law, the function of which is to ensure effective application of substantive EU law.\(^8\) For example, in *Lemmens*\(^9\) the Court noted that although criminal procedure is a matter pertaining to the Member States, it can also be affected by EU law. If EU law can affect criminal procedure, *a fortiori* it can also affect civil

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\(^5\) In *Rewe* the Court of Justice held that national rules must not make ‘impossible in practice’ the exercise of EU right. Subsequently, this requirement was worded as ‘virtually impossible or excessively difficult’. See Case C-261/95 Palmisani v INPS [1997] ECR I-4025, para 27.


\(^8\) C.N. Kakouris, ‘Do the Member States possess judicial procedural “autonomy”?‘ (1997) 34 CML Rev. 1389, 1390.

procedure. Accordingly, ‘national procedural autonomy’ should be replaced by ‘procedural competence’ of the Member States.\textsuperscript{10}

National procedural rules reflect important values or organisational rules embedded in the legal system of the Member States. They pursue important interests such as legal certainty, sound administration and proper conduct of proceedings. For example, the EU case law on unlawfully levied taxes shows that although time-limits might restrict the individual’s right to recover such taxes, they also reflect the need of the Member States not to be held liable for a violation committed long time ago.\textsuperscript{11} Procedural rules are often designed to ensure equality between claimants and defendants. Thus, if a procedural rule is deemed to restrict the exercise of a EU right, which means that it must be disapplied, then the balance between claimant and defendant is disrupted.

The difficult issue is how to strike a balance between effectiveness of EU rights on the one hand and respect of organisational autonomy of the Member States in the field of judicial protection on the other.\textsuperscript{12} The risk is that excessive interference by the Court of Justice may disrupt the cooperation with national judges, which is essential for the enforcement of EU law.\textsuperscript{13} The task is arduous also because it depends on general expressions such as ‘making the exercise of EU right

\textsuperscript{11} This view was taken by the Court of Justice in Case 33/76 Rewe, where it was held that time-limits reflected the important value of legal certainty protecting both the taxpayers and the public authority.
\textsuperscript{13} Andrea Biondi, ‘The European Court of Justice and certain national procedural limitations: not such a tough relationship’ (1999) 36 CML Rev. 1271, 1272.
practically impossible or excessively difficult’. Clearly, this wording lends itself to different interpretations.

3. The principle of equivalence

The principle of equivalence provides that procedural rules governing actions for the enforcement of European rights must not be less favourable than those procedural rules governing similar domestic actions.\(^\text{14}\) The application of less favourable procedural rules to a EU law claim discriminates between those exercising EU rights and those exercising similar rights based on national law. Thus the principle of non-discrimination underpins the equivalence requirement.\(^\text{15}\) That said, the Court of Justice held that if domestic law provides for two types of actions, one among individuals, and the other between the state and individuals, which is less favourable to individuals, the latter can be applied in EU law claims made against the state.\(^\text{16}\)

National courts have the task to assess similarity of domestic and EU actions\(^\text{17}\) and the issue is how to determine what domestic actions are similar to the EU law claim. In Levez\(^\text{18}\) the Court held that consideration must be given both to the purpose and the characteristics of the similar domestic action. Although, these criteria are too vague to provide effective guidance, in competition law the issue seems less problematic. This is because the EU Member States have their own competition law, which quite often mirrors EU competition law.\(^\text{19}\) Accordingly, the

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\(^{16}\) Case C-231/96 Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze [1998] ECR I-4951.


\(^{19}\) By way of example, see Articles 1 and 2 of the Spanish ‘Ley 15/2007 de 3 de julio de Defensa de la Competencia’, or the Italian law 287/1990, ‘Norme per la tutela della concorrenza e del mercato’, Articles 2 and 3. For an analysis of the process of convergence of national regimes of competition law of the Member States see Hans Vedder, “Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law” (2004) 1 The ComplRev 5.
procedural rules that apply to claims based on national competition law also apply to EU competition law claims.\(^{20}\)

4. **Overview of the arguments in favour of harmonisation of procedural and substantive rules in national proceedings based on breach of EU competition law**

The next paragraphs examine the arguments in favour of harmonisation of procedural and substantive rules for antitrust damages actions. They are essentially three.

The first is grounded in the above-mentioned principle of *effectiveness*.

The second is based on the desirability to prevent an undertaking facing an antitrust claim from engaging in *forum shopping* strategies.

The third concerns the need to avoid excessive alteration of the *level playing field* among undertakings which are in competition between each other and that may be found liable of infringing competition law.

5. **The principle of effectiveness**

The principle of effectiveness has no clear definition and has been used in a flexible way and in different circumstances.\(^{21}\) Broadly speaking, its meaning is twofold: effectiveness as the need to ensure effective compliance with European law, and effectiveness as the need to effective judicial protection of European rights.\(^{22}\) This dissertation focuses on the latter. As seen above, the

\(^{20}\) As per the United Kingdom, such national provisions are Chapter I and Chapter II of the Competition Act 1998, which private parties can enforce by bringing actions before the Chancery Division of the High Court (in case of standalone actions), see Civil Procedure Rules 30.8, and CPR Practice Direction ‘Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998’. Private parties can also bring actions before the Competition Appeal Tribunal (in case of follow-on actions), Section 47A of the Competition Act, as amended by Section 18 of the Enterprise Act 2002.

\(^{21}\) Malcolm Ross, ‘Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?’ (2006) 31 E.L.Rev. 479. Snyder defines effectiveness broadly by emphasising that the law has effects on political, economical and social life outside the law, which means that it is a notion that goes beyond the simple elaboration of legal doctrine, Francis Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 MLR 19, 19.

obligation for the national law to provide effective judicial protection means that national law (procedural, substantive, or remedial) must not make the enforcement of a EU right before national courts practically impossible or excessively difficult.

The seeds of effectiveness could already be found in *Van Gend en Loos*.\(^{23}\) Although the ECJ did not mention such a principle, it held that individuals could rely on directly applicable Treaty provisions before national courts. This case established the principle that individuals play a part in the enforcement of EU law, in addition to the Commission enforcement action. The end was to ensure effective application of the Treaty provisions.

In *Franz Grad*,\(^{24}\) the principle of effectiveness was made explicit. There, the Court of Justice reasoned that the ‘effet utile’ of a decision (and thus, EU law in general) would be weakened if third parties could not rely on a decision the nature of which is binding.\(^{25}\) The reasoning is expressed in the wording: ‘the effectiveness of EU law would be weakened if …’. This principle has been frequently relied on by the Court of Justice in many landmark decisions.\(^{26}\)

The principle of effectiveness was also applied to competition law. In *Consorzio Industrie Fiammiferi*,\(^{27}\) the Court of Justice held that effectiveness of such rules required Member States’ national competition authorities to disapply national measures contrary to Article 101 TFEU. That conclusion was based on the principle of loyal co-operation between the Union and the

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\(^{24}\) Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825.

\(^{25}\) Para 5.

\(^{26}\) See for example, Joined cases C-6/90 and C-9/90 *Francovich and Others v Italian State* [1991] ECR I-5357, para 33.

\(^{27}\) Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055.
Member States.\textsuperscript{28} This principle was also the basis to establish the right to compensation of losses resulting from breach of EU competition law.\textsuperscript{29}

The principle of effective judicial protection has also been applied to remedies. Here the general rule is that the Treaty had not been intended to create new remedies in national courts to ensure compliance with European law.\textsuperscript{30} This was reiterated in recent cases.\textsuperscript{31}

However, on some occasions, the Court declared national rules affecting the availability of remedies incompatible with EU law. For example, in \textit{Von Colson},\textsuperscript{32} it held that if national law provides compensation for losses resulting from the breach of rights established in a EU directive, then its amount has to be adequate in relation to the sustained damage and capable of achieving a deterrent effect.

\textit{Factortame}\textsuperscript{33} is another example of the influence of the principle of effectiveness on remedies since the Court of Justice made available to the claimant the remedy of \textit{interim relief}, which was not permitted since national courts had no power to suspend, by \textit{interim relief}, the application of Acts of Parliament.

\textsuperscript{28} Para 50.
\textsuperscript{31} Case C-50/00 \textit{Unión de Pequeños Agricultores v Council of the European Union} [2002] ECR I-6677, para 41 and Case C-432/05 \textit{Unibet v Justitiekanslern} [2007] ECR I-2271, para 42.
\textsuperscript{32} Case 14/83 \textit{Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen} [1984] ECR 1891.
\textsuperscript{33} Case C-213/89 \textit{The Queen v Secretary of State for Transport, ex parte: Factortame Ltd} [1990] ECR I-2433.
a) Overview of the different stages of the principle of effectiveness

EU legal scholars have distinguished different phases in the way the Court of Justice applied the principle of effectiveness: a deferential phase, an interventionist phase, a retreat phase, and the current ‘balanced approach’.34

The deferential phase was epitomised by cases such as Rewe35 and Comet,36 which were concerned with the attempt of a trader to obtain the repayment of taxes unlawfully levied by a Member State. In both cases, the defence advanced by the Member States was that time-limits had elapsed. As seen above, in Rewe the Court of Justice formulated the principle of national procedural autonomy,37 but subjected it to the requirement that national rules should not make the exercise of EU rights impossible in practice.

In the interventionist phase, the Court was more prepared to declare national rules contrary to the principle of effectiveness. In cases such as Johnston38 (a case on sex discrimination), Factortame,39 (a case on interim relief measures) and Peterbroeck40 (a case on a national court’s duty to examine issues of EU law ex officio) the Court of Justice declared national rules that prevented or made difficult the exercise of EU rights incompatible with EU law. Similarly, in Marshall41 the Court declared the national rule imposing a cap on compensation for gender discrimination incompatible with EU law.

34 Takis Tridimas, The General Principles of EU Law (OUP 2006) 420-421. Of course, identification of such stages is the result of an interpretative, thus subjective, exercise. Dougan offers a similar view and recognises a first phase of deference to national procedural autonomy, a second phase of pursuance of effective judicial protection, and a third phase of a conservative approach. Michael Dougan, National remedies before the Court of Justice: issues of harmonisation and differentiation (Hart 2004) 104-105. Paul Craig and De Búrca divide case law on effectiveness into a first phase of strong initial requirement, a second phase of partial judicial retreat, and a phase 3 of need to guarantee a requirement that certain remedies must be available. Paul Craig and Gráinne De Búrca, EU Law (4th edn, OUP 2008) 313-320.
37 Case 33/76 Rewe, para 3 and Case 45/76 Comet, para 15.
In the *retreat* phase the Court took a conservative approach. For example, in *Steenborst-Neerings*, the Court of Justice held that a national rule limiting the retroactive effect of a claim for work incapacity benefits met the effectiveness requirement. In *Johnson II* the Court held that a national rule that restricted to one year the retrospective effect of benefits for incapacity for work was compatible with EU law.

The current *balanced* approach may be seen as a synthesis between the interventionist and retreat phase. It aims at achieving a balance between national rules and effectiveness of EU law through the application of a type of proportionality test according to which the restrictive effect of a domestic rule on a European right must be weighed against the interest that such domestic rule serves and the particular circumstances of the case.

For example, in *Océano Grupo Editorial* the Court of Justice was called to interpret Council Directive 93/13/EEC on unfair terms in consumer contracts and in particular whether national courts may determine on their own motion unfairness of some terms and conditions of consumer contracts before allowing a claim to be made before national courts. The Court ruled that national courts must have the power to evaluate such terms on its motion.

To draw this conclusion, the Court did not make a simple reference to the need to ensure the effectiveness of the European right. Rather, it took into account the circumstances surrounding

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44 Paul Craig, *EU Administrative Law* (2nd ed., OUP 2012) 715. The Author refers to this third stage as a ‘nuanced’ approach.
claims between sellers and consumers, the problem of consumers’ lack of knowledge of the law, and the legal costs involved in defending proceedings against the seller.46

b) The principle of effectiveness in EU competition law

The principle of effective judicial protection has been applied in competition law too. In *Eco Swiss China Time*47 one of the issues was whether an arbitration award could be annulled because it was contrary to Article 101 TFEU. The Court of Justice’s answer was positive: if national law provided that an arbitration award could be annulled on public policy grounds, then infringement of Article 101 TFEU constituted a valid public policy.48 The Court also declared domestic rules providing that the force of *res judicata* of an interim arbitration award could not be called into question even if that was necessary to examine whether the award was contrary to Article 101 TFEU as compatible with EU law.49

In *Courage and Crehan*50 the issue was whether the English rule of the illegality defence, which prevents a party to an illegal agreement from claiming damages resulting from the same agreement, was compatible with EU law. This rule is contained in many legal systems.51 To answer that question, the Court of Justice considered various factors such as the importance of EU competition law,52 the fact that Article 101(1) produces direct effects between individuals,53 the economic and legal context in which the parties to the contract operate, and in particular

46 Para 26.
48 Para 37.
49 Para 48.
51 As per English law, Lord Mansfield stated: “The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff.” *Holman v Johnson* (1775) 1 Cowp 341 [343].
whether a party is in a weaker position that compromises his ability to freely negotiate the terms of the contract.\[^{54}\]

It must be noticed that *Francovich* influenced the *Courage* ruling. Para 19 of *Courage* reproduces para 31 of *Francovich*. Both paragraphs refer to *Van Gend en Loos*\[^{55}\] where it was held that the Treaty imposes both burdens and confer rights on individuals. Para 25 of *Courage* is also similar to para 32 of *Francovich*: there the Court relied on the need to ensure that Community law takes full effect and individuals’ rights are protected.

In both *Francovich* and *Brasserie* the Court referred to the principle of national procedural autonomy, provided that national law respected the principles of equivalence and effective judicial protection. However, a significant difference between state liability cases and *Courage* was that in the former the Court of Justice provided some conditions for the right to compensation to arise.\[^{56}\]

Instead in *Courage* the Court provided only one condition that *de facto* applies only where the breach of competition law takes place in the context of a contractual relationship: it held that only the weaker party unable to negotiate the terms of the contract may claim compensation of damages arising from breach of EU competition law.

Save for this specific situation, the Court did not introduce any general conditions for compensation of damages resulting from breach of the competition Treaty provisions. Thus,

\[^{54}\] Para 33.
\[^{56}\] In *Francovich*: the directive should entail the grant of rights to individuals, it should be possible to identify the content of those rights, and there must be a causal link between the Member State’s breach and the individuals’ loss and damage. In *Brasserie*: the breached EU rule must be intended to confer rights to individuals, the breach must be sufficiently serious and a causal link between the breach and the damage.
once a EU competition law provision is breached and that breach causes damages to individuals, the EU right to antitrust compensation arises. Such compensation will be awarded through the application of national law, subject to the above-mentioned requirements of equivalence and effectiveness.\(^57\)

\(Vebic\)^\(^58\) also dealt with effectiveness in competition law. The issue was the compatibility with EU law of a national rule that denied the standing of a national competition authority before a national court entrusted with the judicial review of the decision taken by the authority itself. The Court of Justice held that the national competition authority had the right to participate as defendant or respondent in such proceedings to support its decision. If the authority was not allowed to participate, there would be the risk that the judge would be overly influenced by the arguments advanced by the undertaking adversely affected by the authority’s decision.\(^59\)

As seen in the second chapter, \(Donau Chemie\)^\(^60\) was concerned with national rules that prohibited disclosure to third parties of documents relating to judicial proceedings, which had been obtained through a leniency programme. The issue was whether such rules were making the right to compensation practically impossible or excessively difficult. The Court of Justice held that national courts had to weigh the interest to facilitate the right to compensation and the interest to keep leniency programmes attractive.

It is difficult to say whether these cases reflect the Court of Justice’s ‘nuanced’ approach whereby the circumstances of the case and the different interests at stake must be weighed against one

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\(^57\) Para 29.  
\(^58\) Case C-439/08 \(Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladewerkers\) [2010] ECR 1-12471.  
\(^59\) Para 58.  
\(^60\) Case C-536/11 \(Donau Chemie and Others\) (Court of Justice, 6 June 2013).
another, or they simply represent the Court’s willingness to be more interventionist in the field of competition law. In general, it seems that the Court’s ratio decidendi was clearly articulated and that the importance of EU competition policy played a considerable role.

In Courage, not only did the Court set aside the ‘illegality defence’, but went further and affirmed a general right to antitrust compensation. It has been suggested that recognition of this right was consistent with the Commission’s view that also damages actions between co-contractors promote competition and with its policy to promote decentralisation of the application of competition law by involving national courts too.

In Vebic the need to ensure that Article 101 and 102 TFEU were applied effectively justified the creation of the standing of a competition authority, which was not provided by national law. Establishing the standing of a public body to judicial proceedings may be seen as a manifestation of a strong interventionist stance. However, on a closer reading, lack of standing of a national competition authority was a macroscopic flaw that could seriously undermine the proper working of EU competition law enforcement.

In Donau Chemie the Court held that national courts must weigh the different interests at stake to decide whether to disclose documents obtained through a leniency programme. Reference to the need to ‘weigh-up’ the interest at stake may be seen as a manifestation of the nuanced approach. However, it did not provide further criteria to weigh such interests save for the indication that

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refusal to access to such documents was not justified if a prospective claimant did not have any other means to obtain evidence.\textsuperscript{63}

c) The principle of effectiveness in EU competition law as a source of legal uncertainty

The nuanced approach requires consideration of the circumstances of the case, the nature of the EU right and the purpose of the ‘restrictive national rule’. It seems difficult to draw uniform and coherent criteria from this test. In fact, this approach has been criticised for its uncertain application, which results in legal uncertainty.\textsuperscript{64} Equal application of procedural rules guarantees fairness, which in turn confers confidence and credibility to the legal system. Without legal certainty, fairness is jeopardised.\textsuperscript{65} This equally applies both to the claimant who intends to exercise a EU right and to the defendant of such a claim based on EU law.\textsuperscript{66}

The Commission identified some areas of national law that might hinder the effectiveness of antitrust compensation such as evidence, collective redress mechanisms, rules on the passing-on defence, the probative value of national competition authorities’ decisions, quantification of harm, and so forth.\textsuperscript{67} It is not unlikely that private parties might wish to challenge some of these rules on the grounds of the breach of the principle of effectiveness. However, it is also difficult to predict the outcome of such a challenge. Some national courts might not be willing to set aside the challenged national rules or to refer the matter to the Court of Justice for a preliminary ruling.

\textsuperscript{63} \textit{Donau Chemie and Others}, para 32.
\textsuperscript{64} Mark Hoskins, ‘Tilting The Balance: Supremacy And National Procedural Rules’ (1996) 21 E.L.Rev. 365. The Author argued that such purposive approach is inconclusive and therefore, in terms of legal certainty, it would be better not to apply it and to ask directly whether a procedural rule makes the exercise of the Community right impossible or excessively difficult, p. 375. Also, John McKendrick, ‘Modifying Procedural Autonomy: Better Protection for Community Rights’ (2000) 4 E.R.P.L. 565.
And crucially if a court makes such a reference, as the current case law stands, it is not clear how the Court of Justice will decide.

In addition, even if the Court of Justice were more prepared to set aside ‘restrictive’ national rules, this would create a piecemeal approach to the effectiveness of the right to compensation in which only those national rules that seriously hinder the right to compensation would be set aside. As a result, there would not be a coherent approach to private enforcement rules where the most relevant rules applicable in antitrust proceedings are designed to pursue the goals of corrective justice and deterrence. This requires a systematic approach where the different interests at stake are regulated *ex ante*, which can be achieved only by the EU legislature.

In other words, only harmonisation may pursue a comprehensive and coherent policy of enforcement of competition law.

d) Effective legal protection in the Treaty. Much ado about nothing?

The current TEU states that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’ 68 This provision codifies the principle of effectiveness, which is already present in the constitutional traditions of the Member States.69 On the one hand, it may be interpreted as the recognition of the Member States’ competence in ensuring effective legal protection. On the other hand, it does not state that, as a general rule, remedies for the protection of EU rights are an exclusive competence of the Member States.

Article 19(1) TEU limits itself to state the principle of effective judicial protection. That said, it does not provide how to strike a balance between effective protection of EU rights and national

68 Article 19(1) TEU.
rules that unduly hinder such a protection, nor does it lay down the consequences flowing from a Member State’s failure to provide effective legal protection of EU rights.\(^70\)

In the absence of specific criteria on how to strike the balance between effectiveness of judicial protection and respect for national law, it is plausible that the EU case law on the effectiveness of legal remedies still applies. However, the current case law does not provide clear criteria on the weighing of the different interests at stake, which means that legal uncertainty in this field is still present.

It follows that effective judicial protection is a matter, which still requires co-operation between national courts and the Court of Justice. In particular, much depends on the extent to which national courts are willing to question their national rules that hinder effective judicial protection and to refer the matter to the Court of Justice for a preliminary ruling.

The interesting question is whether a change in the interpretation of the requirement of effective judicial protection could be triggered, or even demanded, by the fact that now the principle of effectiveness has become primary law. Craig suggests that the constitutionalization of this principle could encourage the Court of Justice to be more searching when analysing national remedies.\(^71\) Similarly, Arnall notes that the principle of effective protection has now a higher status than that of national procedural autonomy. This, coupled with that fact that the principle of effective judicial protection is primary law, could prompt more activism by the Court.\(^72\)

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\(^{70}\) Arnall suggests that inadequacy of national law may even lead to infringement actions against the Member States. Anthony Arnall, ‘The principle of effective judicial protection in EU law: an unruly horse?’ (2011) 36 E.L.Rev. 51, 68.

\(^{71}\) Paul Craig, EU Administrative Law (2nd edn, OUP 2012) 726.

Some signs of this trend can be seen in the opinion of the Advocate General Jääskinen in Donau Chemie. Although the Court of Justice did not deal with that point, the Advocate General took the view that Article 19(1) second subparagraph should be construed as a provision that raises the standard of effective judicial protection. In particular, it demands a greater protection that that provided by the traditional formula that national law must not make the exercise of EU rights practically impossible or excessively difficult.\textsuperscript{73}

It is reasonable to conclude that second subparagraph of Article 19(1) TEU will bring some changes. However, the input for the development of the principle of effective judicial protection still comes from national courts, which cannot rely on specific criteria on how to assess a national restrictive rule. Thus, it would be desirable if in future case-law the Court of Justice provided national courts with specific and workable criteria. Until then, it is doubtful that national courts will make effective use of this new provision.

6. Forum shopping

Broadly speaking, forum shopping refers to a situation in which a claim can be alternatively made before courts located in different jurisdictions, the choice of which is motivated by a possible advantage conferred by the legal system.\textsuperscript{74} If a company has business operations in different Member States and is going to face multiple lawsuits, it would attempt to seize a court in a jurisdiction whose legal system would reduce liability compared to other countries in which it could be equally sued and incur higher liability. As a result, the company increases the chance of minimise its liability. The ‘strategic’ choice on the jurisdiction may also be determined by the

\textsuperscript{73} Case C-536/11 Donau Chemie and Others (Court of Justice, 6 June 2013), Opinion of AG Jääskinen, para 47.

\textsuperscript{74} Forum shopping has been defined as ‘the process of attempting to have an action tried in a particular jurisdiction where it is felt that one will receive the most favourable judgement or verdict’. Franco Ferrari, ”Forum shopping” despite international uniform contract law conventions” (2002) 51 I.C.L.Q. 689, 706. The author took this definition from the ‘Blacks Law Dictionary’.
likely duration of civil proceedings. In this case, a defendant may attempt to have jurisdiction declared in those states whose courts take a long time to deliver judgments.

Forum shopping is not necessarily negative. In fact, it may work in favour of claimants. For example, antitrust victims may succeed in seizing a court whose legal system is favourable to antitrust claimants and which has already showed a good rate of successful judgments for claimants. However, it is not possible to know in advance whether antitrust victims are able to seize such courts. Harmonisation of the most important enforcement rules would contribute to creating more equal conditions when claimants bring an antitrust damages action. For example, wherever a claim is made, antitrust victims know that they can rely on simple rules to join a collective action and on equal criteria for the quantification of damages.

Forum shopping has also an impact on the level playing field since minimisation of liability may put the defendant-undertaking at an unfair competitive advantage over other undertakings which might have been sued in jurisdictions where sanctions are higher than that seized by the first undertaking. EU competition law claims are particularly susceptible to forum shopping because both Article 101 and 102 TFEU apply when an agreement or abuse of dominant position has an effect on trade. The cross-border element of an infringement of competition law makes the relevant claim prone to be made in different Member States.

According to Regulation No 44/2001, the competent court is the one where the defendant has its domicile or the one located in the place where the harmful event occurs. Given that competition law infringements often result in widespread losses that materialise in different countries, the place of occurrence of the harmful event entails that many Member States’ national courts might be competent to deal with an antitrust claim. In addition, an anti-competitive agreement necessarily requires two or more undertakings, which gives rise to a joint liability of the concerned undertakings. As a result a claim may be made against multiple defendants, which can be sued in the place of their domicile.

Different jurisdictions may also come into play in relation to contractual obligations. In such cases, Regulation No 44/2001 provides that the forum is the place of performance of the obligation. Vertical agreements, and sometimes abuse of dominant position, involve a contract between undertakings which operate at different levels of the production or distribution process. In particular, a distribution agreement provides obligations for the manufacturer (sale of its products) and distributor (purchase of the manufacturer’s products and sale in a designated territory), which are often to be performed in different countries. Accordingly, different courts may be seized.

As for the determination of the *substantive law applicable* to non-contractual obligations, the general rule is that the law applicable is that of the country where damage occurs. Specific rules apply in relation to non-contractual obligations arising out of an act of unfair competition. In this case,

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77 Council Regulation 44/2001, art 5.3.
the law of the country where competitive relations of the collective interest of consumers are, or are likely to be, affected.\textsuperscript{81}

Particular provisions are also laid down for non-contractual obligations resulting from a restriction of competition.\textsuperscript{82} In this case, the applicable law is that of the country where the market is, or likely to be, affected.\textsuperscript{83}

Finally, with regard to the determination of substantive law relating to contractual obligations, different criteria apply such as the law chosen by the parties,\textsuperscript{84} or the place of habitual residence of the seller in sale contracts,\textsuperscript{85} of the service provider in provision of services contracts,\textsuperscript{86} or of the distributor in distribution contracts.\textsuperscript{87}

Competition law practitioners have recognised that forum shopping has become an inherent part of competition litigation.\textsuperscript{88} It is also submitted that claimants may put in place strategies to counter pre-emptive litigation by defendants.\textsuperscript{89} However, given the possibility of multiple fora, it is plausible to assume that defendants will continue to put in place successful strategies to escape or minimise liability.

\textsuperscript{81} Regulation (EC) 864/2007, art 6.1.
\textsuperscript{82} Restriction of competition refers to Article 101 and 102 TFEU. J. Fawcett, J. Carruthers and P. North, Cheshire, North & Fawcett, Private International Law (14th edn, OUP 2008) 811.
\textsuperscript{83} Regulation (EC) 864/2007, art 6.3(a).
\textsuperscript{84} Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, art 3.
\textsuperscript{86} Regulation (EC) No 593/2008, art 4.1(b).
\textsuperscript{87} Regulation (EC) No 593/2008, art 4.1(f).
\textsuperscript{89} Charles Balmain and Vera Coughlan, ‘More haste less speed: the evolving practice in competition damages actions in the UK’ (2011) 4 G.C.L.R. 147. A typical example of pre-emptive litigation is the so-called ‘torpedo action’ whereby a prospective defendant brings an action in a favourable jurisdiction seeking for a declaration that it did not breach competition law or its conduct did not cause any damages.
7. Level playing field

Level playing field refers to the objective of creating an economic environment with similar features in which companies may compete at the same conditions. An important factor affecting the level playing field is diversity of legal systems, which results in different obligations, liability standards, etc. Given that every market requires some degree of regulation and given that compliance with regulation is costly, equalisation of regulatory burdens contributes to creating a ‘level playing field’. In addition, different rules create high transactions costs for businesses, which operate in other Member States. Harmonisation removes such obstacles to trade thus creating efficiencies that may be passed on to consumers.

Some rules applicable in antitrust litigation are also relevant to ensure equality of competitive conditions. For example, different rules on determination and quantification of antitrust damages give rise to different amounts of compensation, which have an impact on the financial capability of a company to compete in the future. Similarly, small businesses, which have successfully claimed compensation, may receive different amounts depending on the jurisdiction where the claim was brought.

8. Harmonisation to ensure level playing field and avoidance of forum shopping

The argument here is that harmonisation is desirable to achieve some degree of level playing field and to avoid, or at least reduce the effects of, forum shopping strategies.

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92 Contra Carol Harlow, ‘Voices of Difference in a Plural Community’ (2002) 50 Am.J.Comp.L. 339, 367. The Author questions that the ‘market argument’ is sufficient to confer legitimacy on harmonised judicial protection.
The achievement of a perfect level playing field is illusory as this would require elimination of national legal systems to be replaced with one law only. In addition, it could be argued that labour and tax law, rather than competition law, are the most important factors that affect companies' competitiveness and alter the level playing field. However, the inevitability of legal differences should not justify abandoning this objective. Level playing field is a matter of degree that should be pursued if the harm caused by regulatory diversity is apparent or very likely, if the change of the relevant rules does not entail significant harmonisation costs, and where the benefits appear to be substantial.\footnote{The Final Report indicates harmonisation costs resulting from the adoption of certain common rules (e.g. group litigation). However, it does not measure such costs, which would be extremely difficult as it would entail economic assessment of changing and adapting to such new EU rules.}

With regard to the risk of forum shopping, the brief exposition of some rules on conflict of laws applicable to competition law proceedings has showed that competition law claims may give rise to numerous fora. Forum shopping is not negative \textit{per se}. However, in the context of competition law, undertakings are likely to have more resources than consumers to hire lawyers for the implementation of forum shopping strategies aimed at minimising liability. This may reduce the deterrent effect of competition law and further alter the level playing field in relation to undertakings subjected to the law of a jurisdiction which imposes greater liability. Harmonisation may lessen this risk. For example, a single criterion for the determination and quantification of damages would mean that their amount is likely to be similar whatever court is seized.

Harmonisation has some limits in those cases where undertakings seek to seize a jurisdiction whose civil justice system is slow and inefficient in order to delay finding of antitrust liability. Harmonised rules would not be able to prevent this outcome. This would be undesirable in terms of corrective justice, since the prospect for would-be claimants to receive compensation after...
many years discourages them to make a claim. In turn, this lowers the deterrent effect of antitrust compensation claims. Yet, like the argument in favour of creating some level playing field, also preventing forum shopping is a matter of degree. In some circumstances, harmonised rules contribute to reducing its negative effects.

9. Overview of the arguments against harmonisation of substantive and procedural rules in national proceedings based on breach of EU competition law

The following paragraphs set out the arguments against harmonisation of the substantive law of damages and the relevant procedural rules applicable in national competition law proceedings. The first two (introduction of extraneous legal values and desirability of preserving national differentiation) have a legal and political nature whereas the third (desirability of regulatory competition) is grounded in economics and political economy.

a) Introduction of extraneous legal values

The first argument is that harmonisation may introduce new values in the procedural system, which are extraneous to the legal culture of a Member State.⁹⁴ Civil procedure is not just a set of technical rules governing the courts’ decision-making process, but also a cultural product that reflects values and ideologies of those who enacted such rules.⁹⁵ In modern democracies, procedures should be conceived in such a way as to meet the basic standard of fairness and equality between the litigating parties, which in turn confer legitimacy to the process of disputes’ adjudication.

⁹⁴ For example Harlow reminds that law and legal procedure is part distinctive cultural heritage and thus should be equally considered by EU law. Carol Harlow, ‘A Common European Law of Remedies?’ in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds), The Future of Remedies in Europe (Hart 2000) 83. Also, Hodges writes: ‘the existing national models seem to be almost impossible to harmonise, at least without considerable violence to national structures.’ Christopher Hodges, The Reform of Class and Representative Actions in European Legal Systems (Hart 2008) 181.

A recurrent theme is the alleged difference between adversarial and inquisitorial models of civil procedure. In the former, judges are passive and their decisions depend on the parties’ submission of evidence and legal qualification of the facts of the case. In the latter, judges have a more active role in seeking evidence or qualifying the facts regardless of the parties’ submission. In reality, such models reflect more an ideal characterisation of a certain legal system. Member States have, to a different degree, elements of both adversarial and inquisitorial systems.96

Advocate General Jacobs points out that such difference is overstated. When dealing with the procedural rule of a court raising a point of law on its own, the common place is that continental law systems allow the judge to do so, whereas common law systems do not. However, this is not always the case since in civil law countries the judge cannot exceed the limit of the case as framed by the parties, and in common law countries the judge would consider of her motion a point of law relevant to public policy.97

Some procedural principles are subject to a compromise to achieve some pragmatic goals. For example, English procedural law provides a number of goals such as, for example, saving expense, ensuring that a case is dealt with expeditiously and fairly, and in a proportionate way by considering the money involved, the importance of the case and the complexity of issue.98 The accomplishment of these goals requires a balance among them, which means that no procedural value is applied in absolute terms.

98 Overriding Objective 1.1 of the Civil Procedures Rules 1998 (CPR). These are a delegated legislation under the Civil Procedure Act 1997.
Perhaps, the distinction between adversarial and inquisitorial is more of academic interest than real. It has been suggested that nowadays the main concern of national policy-makers is to devise an effective procedural system. Dualisms such as adversarial/inquisitorial, private/public, and so forth are outdated, and the real issue is to put in place an effective system where judicial protection is accomplished at reasonable cost and time and never-ending and unmeritorious litigation is avoided.  

Although some judgments of the CJEU might have an effect on some values informing national procedural systems, this should not be seen as a dramatic impact. EU law does change some values in substantive national law and there is no reason to exclude such changes from procedural law. If this remark is valid in relation to changes resulting from the Court of Justice’s decisions, then it should be even more valid if such changes took place through legislative action.

Accordingly, the point is not the extent to which the CJEU may introduce extraneous legal values, rather whether it is preferable to change procedural rules through the European judiciary or through European legislature. In the latter case, it would be possible to have a debate in which the national perspective is taken into account by the opinion of the Parliaments of the Member States. This would have the advantage that the Court would interpret EU rules within the framework set by EU policymakers. Thus, the Court would be less likely to adopt new procedural values.

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100 Paul Craig, EU Administrative Law (2nd edn, OUP 2012) 726.
This argument does not understate the problems of democracy within the European Union (for example, the lack of legislative initiative of the Members of the European Parliament) and the complex relationship between the European supranational and national interest. However, European legislative action would allow more debate than would be the case when the Court’s judgment sets de facto a rule whose consequence is effectively to harmonise procedural and remedial rules.

**b) National differentiation as a competing paradigm against uniformity**

The second argument is based on the ‘national perspective’ paradigm, which questions the imperative of uniformity of European law and recognises the legitimacy of various degrees of national differentiation.  

Such differentiation can take place as vertical differentiation, i.e. a contribution of the Member State to substantive regulatory policy within a certain sector of European action or legislative measure, and as horizontal differentiation, i.e. the ability of a Member State to decide whether or not to be involved in European action.

It has been argued that European intervention into domestic legal system should be limited to certain sectors only, which could include competition law.

Here it can be replied that EU membership of twenty-eight Member States poses the need to provide some flexibility. Indeed, it is accepted that in respect of some policies Member States have the power to opt-out. However, competition law is an important part of the internal market,

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102 Michael Dougan, *National remedies before the Court of Justice: Issues of harmonisation and differentiation* (Hart 2004) 111. The Author recognises some exceptions where uniformity is still acceptable, thus calling for a sectoral level intervention.

103 ibid 113.

104 ibid 202.
which is the core competence of the Union. In addition, harmonisation does not imply complete uniformity, rather the accomplishment of some objectives.

c) The paradigm of regulatory competition

The third argument against harmonisation lies in the paradigm of regulatory competition. This theory holds that when people, goods, services and capitals can freely move across different states, the existence of different legal systems is beneficial. The reason is that if businesses can choose where to locate their activities, they will tend to opt for those jurisdictions where regulatory and legal burdens are minimal, thus maximising their profits.

Regulatory competition is beneficial because it creates the incentive for states to design an efficient legal system where unnecessary legal burdens are avoided or removed. This theory has been elaborated in the US and essentially takes a market approach to regulation where businesses and individuals are the buyers of legal rules and the states the sellers.

This theory is based on the assumption that individuals and businesses are profit-maximisers (they relocate their activities into other states to maximise profits, utilities, and so forth). A second assumption is that, when productive factors move across jurisdictions, policymakers are responsive by changing the rules that encourage such productive factors to migrate to other jurisdictions.

Both assumptions are questionable. The first one is affected by utilitarian philosophy. Nowadays it is recognised that rationality of behaviour is a matter of degree, and that human conduct is never fully rational. The second assumption is also unrealistic because it presupposes that policy-
makers are informed about the effectiveness of other legal systems and that adoption of efficient foreign rules is technically unproblematic.

Some attempts to import this theory into the European legal discourse have been made. With regard to private law, it has been suggested that it should not be subject to harmonisation because it could benefit from such regulatory competition. Clearly, regulatory competition supports the view that harmonisation of the law of damages for breach of competition law is undesirable.

The theory of regulatory competition can be best explained within the broader theory of public choice, which holds that policymakers are subject to the pressure of private interests whereby the former enact legislation in favour of the latter. Regulatory competition contains this risk because, if the legal system of a state is not efficient due to the influence of private interests, then individuals or companies will move to another state, which would adversely affect the chance of re-election of policymakers.

i. Regulatory competition in competition law

In the US, regulatory competition has been primarily studied in relation to the place of incorporation of companies. However, there is a debate whether this theory may also apply to

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106 ibid 405.
competition law, in particular in the context of international antitrust. In particular, the belief is that states would lower their antitrust standard/enforcement in order to attract businesses that would operate in their jurisdiction.

First of all, regulatory competition in competition law faces the preliminary task of identifying what antitrust standard is undesirable as it is discourages businesses to operate in a certain jurisdiction, and what change should be put in place to attract new businesses. The answer depends on the different goals that antitrust should pursue.

The Chicago School views antitrust as a regulatory tool to achieve efficient markets. To this end, it emphasises the need to deter cartels, rather than unilateral conduct. Accordingly, optimal antitrust enforcement should focus on the former and set a high threshold for the finding of anticompetitive unilateral conduct.

The European school views competition law as a regulatory tool that pursues goals such as preservation of the internal market, consumer welfare, and the competitive process. Accordingly, antitrust enforcement should be more vigorous. In particular, the goal of the competitive process results in a lower threshold for the finding of anticompetitive unilateral conduct than the US.


111 See the previous chapter for an account of such goals. For a general overview of the EU school of competition law, Doris Hildebrand, ‘The European School in EC Competition Law’ (2002) 25 World Competition 3.

112 Eleanor M. Fox, “We Protect Competition, You Protect Competitors” (2003) 26 World Competition 149.
Secondly, it must be considered that antitrust laws have an extraterritorial reach. This means that if anticompetitive effects materialise in other states, the firm is still responsible according to the laws of such states. Therefore, firms would not necessarily be able to escape antitrust liability by locating their activities in jurisdictions with lax antitrust standard.

Finally, antitrust regulation plays a marginal role in companies’ decisions to enter a certain market. Rather, the whole legal environment is taken into account. It follows that policy-makers are not under pressure to change their competition law regimes to retain or attract businesses. This means regulatory competition is unlikely to occur.

**ii. Regulatory competition in private enforcement of competition law: winners and losers**

The paradigm of regulatory competition can also be applied in relation to private enforcement of competition law. According to this paradigm, in order to attract businesses, policy-makers should not encourage private enforcement because it would jeopardise the achievement of an efficient economic environment. This argument seems counterintuitive. After all, enforcement of competition law is supposed to achieve competitive markets.

Nonetheless, this argument makes sense in the light of the theory of over-deterrence, which refers to the concern that excessive enforcement discourages pro-competitive business conduct.

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113 As per the US: *United States v Aluminium Co of America* 148 F.2d 416 (1945). As per the EU: Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1993] ECR 1-1307.


116 The Final Report seems sceptical that such theory is applicable to competition law. In any case, even if this was the case, it is difficult to estimate whether this would be beneficial (so called ‘race to the top’) or detrimental (so called ‘race to the bottom’) since this should be analysed empirically. At 556.

117 Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart 2008) 131-140, 191-194. The Author points out a number of problems arising from collective actions that are related to the creation of a competitive economic environment.
The concern about over-deterrence has been previously challenged in chapter 2. Here suffice to say that discouraging private enforcement would weaken the position of consumers and small businesses. It is useful to show the implications of this policy.

Consumers would be deprived of the benefits of competitive markets: businesses would not fear large compensation claims and therefore they might enter into cartel agreements. Regulatory competition assumes that policymakers would be willing to change the enforcement rules in order to retain and/or attract welfare-creator factors. However, can consumers be considered as a class that creates welfare? Policymakers would not necessarily consider ‘consumer migration’ as a loss of welfare. Thus, they do not have incentive to change the rules on private enforcement.

Indeed, the opposite is true: traditionally consumers lack the same political influence that businesses have. As a result, it is more likely that policymakers would not adopt pro-consumers reforms due to the pressure of business lobbies. Here, it seems that regulatory competition would lead to a race to the bottom, rather than yielding beneficial effects.\(^\text{118}\)

It should also be borne in mind that EU consumers already face difficulties in making a claim. The reason is that once proceedings are commenced in one Member State, consumers located in other Member States will have to join such proceedings, which might be difficult due to information, language and costs. Thus, a low enforcement standard is inappropriate as cross-border claims already pose considerable challenges.

Low antitrust enforcement would also adversely affect small businesses, which are the beneficiaries of the prohibition of anticompetitive unilateral conduct of an undertaking which

\(^{118}\) The Final Report, when dealing with the ‘no policy change’ scenario, suggests that policymakers might trigger a race to the bottom by offering lenient competition law regimes in order to attract foreign firms. At 555.
occupies a dominant position. In this case, low enforcement of antitrust might be counterproductive if policymakers aim at creating a favourable economic environment in order to attract or retain small businesses.

As has been seen, regulatory competition rests on the assumption that policymakers are responsive to the risk that welfare-creators might leave their jurisdiction. The above considerations show that this assumption does not necessarily hold because it is too simplistic. Policymakers might favour low or high antitrust enforcement depending on the interests they represent. For example, they might be more willing to take into account the interests of large corporations which see unfavourably consumer’s collective claims. Alternatively, they may represent small businesses which are interested in a high standard of antitrust enforcement.

iii The ideological bias of the theory of regulatory competition

The theory of regulatory competition does not exclude that convergence of legal systems occurs. On the contrary, this is the coherent outcome of this theory: the market for legal rules reaches an optimum equilibrium whereby all states will adopt the same efficient rules. The assumption of this theory is that such changes are voluntarily triggered by policymakers, which will reform their laws pursuing an ‘efficient’ legal system. Thus, this theory rejects the idea that the law should be imposed by a supranational or centralistic authority.

This is an ideological argument, as it suggests that rules are efficient only when the market induces policymakers to enact efficient rules. The fallacy of this theory is that it is sceptical a priori that uniform or harmonised rules imposed by a supranational authority may be efficient in the first place. Such scepticism is motivated by the belief that regulatory competition counters the

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119 In this respect, it is said that a spontaneous convergence occurs. For example, Anthony Ogus, ‘Competition between national legal systems: a contribution of economic analysis to comparative law’ (1999) 48 ICLQ 405.
risk of regulatory capture of national policymakers. However, it may be counter-argued that national policymakers’ action may be ‘captured’ by particular lobbies, whereas supranational policymakers’ action may not be influenced by such lobbies and thus they may propose the adoption of efficient rules.

In addition, regulatory competition of antitrust enforcement rules requires time. First, the best private enforcement system must emerge. Secondly, the reasons of its success must be studied. Finally, its rules must be transplanted into another Member State. Even assuming that policymakers are willing to change the law, during the time required to implement this change, antitrust victims located in the Member States with a low antitrust enforcement would suffer adverse consequences.

d) Conclusive considerations on regulatory competition of private enforcement rules

The preceding sections showed the general weaknesses of the paradigm of regulatory competition and the problems arising out from its application to competition law. The ideological thrust of this theory is that it reduces the risk of regulatory capture of national policymakers who have the interest in creating an efficient legal system that attracts businesses.

However, some of its assumptions are questionable. First of all, policymakers operating in ‘inefficient’ jurisdictions are not necessarily willing to change their legal system and companies might not necessarily relocate to ‘efficient’ jurisdictions. Many factors affect the choice where to locate business activities, and the legal system is only one of them.

Secondly, with regard to competition law, it must be noted that EU competition law is already uniform, which means that companies would not choose to move to other EU jurisdictions. In
general, competition law plays a marginal role in the companies’ choice of where to locate their activities.

That said, it could be argued that regulatory competition would apply in relation to its enforcement rules. In other words, while substantive competition law is uniform, private enforcement rules should be different so that welfare-creators would choose the best legal system for the enforcement of the rights arising out of competition law.

Indeed, given that currently private enforcement of competition law is a matter left to national law, the likely scenario is that companies will engage in forum shopping to seize the court whose law is likely to minimise antitrust liability. Hodges notes that some national policymakers are putting in place some reform (for example collective actions). Yet, so far there is no evidence that other national legislators are following the example of those legal systems where private enforcement rules are in force and effective.

In conclusion, it seems that the theory of regulatory competition does not work with respect to private enforcement rules. It has been suggested that leaving the current fragmented system with no policy change would have no positive effect on deterrence, a small impact on corrective justice, and adverse effects on the level playing field.

120 For an overview in respect of collective actions, see: Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart 2008).
121 The Final Report 552.
122 The Final Report 554.
123 The Final Report 557.
10. Constitutional requirements for EU legislative action on private enforcement rules

a) The legal basis for harmonisation of procedural rules and law of damages in competition law proceedings

According to the principle of conferral, ‘the Union shall act only within the limits of the competences conferred upon by it by the Member States in the Treaties to attain the objectives set out therein’.124

The principle of conferral is a constitutional principle of the EU, which indicates that the Union does not have unlimited sovereignty, and that its powers (i.e. competences) are conferred by the Member States. In particular, the EU competences may be exclusive,125 shared,126 or designed to support, coordinate or supplement the actions of the Member States.127

It follows that the principle of conferral requires EU legislation be provided with a legal basis, the lack of which enables the Court of Justice of the EU to exercise the review of legality of legislative acts on the ground of lack of competence.128 If the Court of Justice finds that a certain act lacks competence, then it declares it void.129

Accordingly, harmonisation of the substantive law of damages and procedural rules requires a legal basis. Although the TFEU provides a clear list of competences, in many cases determination

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124 Article 5 TEU, second paragraph.
125 Article 3 TFEU.
126 Article 4 TFEU.
127 Article 6 TFEU.
128 Article 263 TFEU, second paragraph.
129 Article 264 TFEU, first paragraph.
of a legal basis might not be easy due to their open-ended character. Thus, the issue is to identify the extent to which the Union has power to enact legislation on a certain matter.\textsuperscript{130}

Article 3.1(b) TFEU provides that the Union has exclusive competence in establishing the competition rules necessary for the functioning of the internal market. However, this provision refers to the establishment of the competition rules, not to their application.\textsuperscript{131} The rules governing damages actions before national courts are related to the application of Articles 101 and 102 TFEU.

Article 81(2)(f) TFEU could also provide the relevant legal basis. It provides that measures shall be taken for ‘the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting compatibility of the rules on civil procedures applicable in the Member States’.

However, the general rationale of Article 81 TFEU may cast doubts on the existence of the legal basis appropriate to enact EU private enforcement rules. In particular, Article 81(1) refers to ‘judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases’. This seems to refer to specific issues of private international law rather than procedural rules applicable to antitrust actions.

\textsuperscript{130} Kieran St Clair Bradley, ‘Powers and procedures in the EU constitution: legal bases and the Court’ in Paul Craig and Gráinne de Búrca (eds), \textit{The Evolution of EU Law} (2nd edn, OUP 2011) 104-105.

In theory, the text of Article 116 TFEU\textsuperscript{132} suggests that this provision could also be used as a legal basis for harmonisation of private enforcement rules. In reality, Article 116 TFEU has been rarely relied on or interpreted by the Court of Justice. Thus, it is difficult to identify its scope and the conditions for its applicability.

AG Geelhoed set out the relationship between Articles 114 and 116 TFEU. Article 114 TFEU presupposes the existence of national law that creates imbalances occurring at sectoral level (i.e. generic distortions). Articles 116 has to do with specific distortions resulting from public authorities’ measures, which impose exceptional charges on certain kinds of production or on certain undertakings.\textsuperscript{133}

If this interpretation is correct, then Article 116 does not include the law of damages and procedural rules applicable in antitrust proceedings since law of damages and the relevant procedural rules do not impose exceptional charges on types of production or particular undertakings.

In the proposal for a directive of private enforcement rules, the Commission set out two possible legal bases: Articles 103 and 114 TFEU.\textsuperscript{134}

\textsuperscript{132} Article 116 first paragraph TFEU provides that ‘Where the Commission finds that a difference between the provisions laid down by law, regulations or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.’

\textsuperscript{133} Case C-308/01 GIL Insurance Ltd et al. v Commissioners of Customs & Excise [2004] ECR I-4777, Opinion of AG Geelhoed, paras 63-65. More accurately, the AG also considered Articles 107, 108 and 109 TFEU, i.e. the Treaty provisions on state aid, which he considered as a \textit{lex specialis} in respect of Articles 116 and 117 TFEU.

Article 103 TFEU provides that directives or regulations shall be laid down to give effect to the principles set out in Article 101 and 102 TFEU. However, the Commission recognises that this provision alone is not sufficient to provide the proposed directive with sufficient legal basis because its aim is not only to give effect to Articles 101 and 102 TFEU, but also to reduce the uneven level playing field created by diversity of national laws applicable to antitrust litigation.

Accordingly, the Commission argue that the directive should also be underpinned by Article 114 TFEU, which is concerned with the adoption of measures for the establishment and functioning of the internal market. Indeed, this seems the most appropriate legal basis and is also consistent with the fact that EU competition law has been instrumental to the achievement of the internal market.

Some EU legislation includes remedies at the EU level whose legal basis lies on Article 114 TFEU. For example, Directive 2004/48 is concerned with measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. The most significant remedies are damages, injunctions, recall or removal from commerce of goods which infringe intellectual property rights, or their destruction.

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135 ibid 9.
136 Article 114 TFEU empowers the Union to adopt measures to establish or ensure the functioning of the internal market.
137 Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v Commission [1977] ECR 1875. The reasoning that lead to such instrumental relationship was based on Article 3(1)(g) of the EC Treaty ‘a system ensuring that competition in the internal market is not distorted.’ Reference to distortion of competition has been removed by the Treaty of Lisbon. However, Protocol (No. 27) ‘Internal Market and Competition’ of the Treaty of Lisbon restores the link between internal market and competition as it provides: ‘the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.’
138 Article 114 TFEU refers here to the harmonisation clause which in the previous Treaties was contained in Article 100a TEC as amended by the Maastricht Treaty.
140 Article 1.
Directive 85/374 on liability for defective products provides producer’s liability for damages caused by defect of his product.\textsuperscript{141} Directive 1999/44/EC on sale of consumer goods\textsuperscript{142} provides that the seller shall be liable to the consumer for any lack of conformity of the delivered product. Here the main remedy is repair or replacement of the product, and when these are unreasonable, reduction of price or rescission of the contract.

Directive 2011/83/EU on consumer rights\textsuperscript{143} provides for the consumer’s right to withdrawal. Directive 90/314 on package holidays\textsuperscript{144} provides for the consumer’s right to compensation. Although competition and consumer law are distinct areas, the way damages occur is similar: single business conduct causes damages to a great number of consumers. The fact that such consumer legislation was underpinned by the harmonisation clause strengthens the case for recourse to Article 114 TFEU also with respect to antitrust damages actions.

That said, a pure reference to the ‘internal market harmonisation clause’ is not sufficient. In \textit{Germany v European Parliament and Council},\textsuperscript{145} the Court of Justice annulled the Directive No 98/43 on the advertising of tobacco products. The Commission argued that advertising of tobacco products had a cross-border dimension and that uniform rules were desirable to enable advertising agencies to provide services and avoid distortion of competition among agencies operating in different Member States.


By contrast, Germany contended that given the limited cross-border dimension of advertising of tobacco products\textsuperscript{146} and the national market in which advertising companies operated,\textsuperscript{147} the directive had no connection with the internal market. In fact, the directive was concerned with harmonisation of public health,\textsuperscript{148} a matter for which not only did the EU lack competence, but it was also excluded from harmonisation.\textsuperscript{149}

In that case, the Advocate General stressed that ‘the internal market is not a value-free synonym for general economic governance’ and that the internal market ‘cannot be equated with creation of a general Community regulatory power’.\textsuperscript{150} The Court of Justice agreed and held that the Treaty provisions empowering the EU in relation to the internal market could not be construed as ‘a general power to regulate the internal market’.\textsuperscript{151}

In particular, the Court established that disparities between national rules and the abstract risk of obstacles to the exercise of fundamental freedoms were not sufficient to justify recourse to what is today Article 114 TFEU.\textsuperscript{152} In addition, distortion of competition in the internal market resulting from different domestic legislations had to be appreciable.\textsuperscript{153}

It has been noted that successive case law relaxed such requirements and the Court is more willing to find legislative competence for rules that impede the functioning of the internal market.\textsuperscript{154}

\textsuperscript{146} Paras 15, 16 and 17.
\textsuperscript{147} Para 22.
\textsuperscript{148} Para 32.
\textsuperscript{149} Today, Article 115 TFEU, paragraph 5.
\textsuperscript{150} Para 83 of the Opinion of the General Advocate.
\textsuperscript{152} Para 84.
\textsuperscript{153} Para 106.
\textsuperscript{154} P Craig and G de Búrca, \textit{EU Law} (5\textsuperscript{th} edn, OUP 2011) 92-93.
In *The Queen and Secretary of State for Health*, the Court dealt with the Directive 2001/37/EC which made provisions for manufacturing, presentation and sale of tobacco products and found that the harmonising measures therein contained had the objective of improving the conditions for the functioning of the internal market.

For our purposes, it is interesting to point out that the Court held that measures referred to in now Article 114 TFEU must be intended to improve the conditions for the establishment and functioning of the internal market and must contribute to eliminating obstacles to the free movement of goods or provisions of services or the removal of distortions of competition.

That paragraph quoted paragraph 95 of *Germany v European Parliament and Council*, however while in the latter the Court dwelt on the issue of distortion of competition caused by disparities of national legislations, it did not do so in *The Queen and Secretary of State for Health* where the analysis of distortion of competition was not made. It seems that the cumulative requirements, according to which measures justified by Article 114 must both contribute to eliminating an obstacle to trade and removing distortions of competition, has been dropped.

This reading seems to be confirmed by the *Germany v European Parliament and Council of the European Union*, another case concerned with a request of annulment of a directive making provisions for advertising and sponsorship of tobacco products. There the Court expressly held

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155 Case C-491/01 *The Queen and Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453.
156 Para 74.
157 Para 60.
that when obstacles to trade have been ascertained, then it is not necessary to prove distortion of competition to justify recourse to Article 114 TFEU.\textsuperscript{159}

i. Application of the of the case law on the ‘harmonisation clause' to substantive and procedural law for antitrust damages actions

The foregoing shows that if harmonisation of substantive and procedural law on antitrust damages actions is to be justified by Article 114 TFEU, then national rules must create a concrete risk to obstacles to trade or result in an appreciable distortion of competition.

The requirement of ‘concrete risk of an obstacle to trade’ is problematic. Harmonisation of the rules governing antitrust damages actions is aimed at making the right to compensation accessible, which operates after economic arrangements have been made. Put differently, it would be implausible to argue that businesses are hindered in trading due to possible difficulties in bringing antitrust actions.

This is not to say that facilitation of economic rights does not affect trade. For example, inadequate consumer rights to be exercised in a cross-border context might discourage these transactions, thus being an obstacle to trade. However, difficulties in the exercise of the right to antitrust compensation are unlikely to hinder trade especially because antitrust violations often occur unbeknown to businesses and consumers.

In reality, this limb of the test is not appropriate to be applied to antitrust damages actions. \textit{Germany v European Parliament and Council} and subsequent case law were concerned with national rules that were directed to businesses and prescribed the way in which provision of advertising

\textsuperscript{159} Para 67.
services had to be made. By contrast, rules on antitrust damages actions operate after business transactions take place. Considerations on the effectiveness of antitrust compensation mechanisms might not necessarily constitute a concrete obstacle to trade.

The existence of different national rules on antitrust damages actions is more likely to satisfy the requirement of ‘appreciable distortion of competition’. As has been seen, lack of uniform private enforcement rules and the characteristics of competition law violations create the conditions for undertaking to choose jurisdictions with low antitrust enforcement, thus minimising their liability.

In addition, even if in some claims undertakings would not be able to adopt forum shopping strategies, the problem of disparity of level playing field remains. In other words, undertakings operating in jurisdictions with low antitrust enforcement are at a competitive advantage than others operating in jurisdictions with robust enforcement. The former would have more financial resources resulting from breaches of competition law than the latter, which are subject to more competitive pressure.

In this respect, it should be remembered that on average cartels last more than five years. Therefore, the amount of financial resources resulting from ‘illegal’ market power is considerable, which means that distortion of competition within the internal market can be considered appreciable.

**ii. Conclusive considerations on the legal basis of possible harmonisation of antitrust damages actions**

EU cases on national procedural autonomy contain the statement: ‘in the absence of Community rules, …’. It might be tempting to argue that this wording is able to justify harmonised procedural
and remedial rules. This argument is strengthened by the principle of effectiveness, which requires setting aside national rules that excessively restrict the exercise of EU rights (antitrust compensation, in our case).

However, considering the constitutional significance of the principle of conferral, more convincing arguments are desirable. The fact that some national rules make the right to antitrust compensation excessively difficult is not itself sufficient to justify harmonisation. Indeed, Article 19(1) second indent, compels Member States to provide effective legal protection without necessarily imposing what rules should be adopted and leaving them the choice on how best to ensure such a goal.

The preceding paragraphs argued that Article 114 TFEU is the most appropriate legal basis for harmonisation of the rules applicable to antitrust damages actions. The thrust of the argument is that EU competition law serves the purpose of preserving the internal market. Thus, given that Article 114 TFEU is concerned with the internal market, it can provide a legal basis to harmonise competition law private enforcement rules.

However, recourse to Article 114 TFEU is justified provided that the national rules create a concrete obstacle to trade and appreciably distort competition. While national rules applicable to antitrust damages actions fall within the latter requirement, it is dubious that they also constitute a concrete obstacle to trade.

Nonetheless, it has been argued that the requirement of ‘concrete obstacle to trade’ should apply to national rules relating to the way in which undertakings carry out their activity, not to rules concerned with antitrust compensation. Indeed, strict adherence to this requirement would make
almost impossible the conferment of legal basis to this type of legislation even though national rules appreciably distort competition.

b) The principle of subsidiarity

The TEU provides that ‘the use of Union competences is governed by the principles of subsidiarity and proportionality’.\(^{160}\) The principle of subsidiarity requires an assessment of comparative efficiency between European and national intervention in pursuing a certain objective; a EU measure should be adopted if its objective can be better attained at European level by reason of the scale or effects of the proposed actions.\(^{161}\) Such an assessment must be supported by qualitative and quantitative indicators.\(^{162}\)

The judicial review on the principle of subsidiarity has been virtually absent.\(^{163}\) The comparative efficiency calculus is not a technical assessment, rather it reflects a political evaluation made by the EU institutions. This also explains the Court of Justice’s reluctance to conduct judicial review on the ground of this principle.\(^{164}\)

The comparative efficiency assessment is notoriously arduous to make. One of the reasons is that some legislation pursues a certain policy, which includes different objectives and interests to take into account. This is the case of rules governing antitrust damages actions where different objectives can be identified.

\(^{160}\) Article 5.1 TEU.

\(^{161}\) Article 5.3 TEU.

\(^{162}\) Article 5 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.


The first is to make the right to compensation effective, which is an individual interest because it achieves corrective justice for antitrust victims.

The second is deterrence since the right to compensation is also instrumental to encourage compliance with Articles 101 and 102 TFEU, which is a collective interest.

In addition, it is important that the application of private enforcement rules designed to make the right to antitrust compensation effective does not create adverse effects. Earlier, it has been argued that diversity of legislation is likely to give rise to two problems: forum shopping and level playing field.

Chapter two provided some empirical data on the magnitude of antitrust violations and the amount of antitrust litigation. The same chapter has also showed that few actions exclusively based on breach of Articles 101 and 102 TFEU have been brought since the Courage judgement was delivered.

This confirms the point made by the Commission that most Member States do not provide on their own initiative rules designed to make the right to compensation effective.\(^\text{165}\) Thus, in relation to the need to facilitate antitrust victims to bring such actions, it is plausible that this objective can be best carried out at the Union level.

In addition, even if the Member States had in place an effective system of antitrust compensation, diversity of legislation is likely to give rise to the problem of forum shopping and significant alteration of the level playing field. On this basis, it can be argued that harmonisation

contributes to reducing the impact of these problems and therefore it meets the subsidiarity principle.

c) The principle of proportionality

The principle of proportionality plays also a role when devising EU legislation. The TEU states that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. The first chapter already dealt with some aspects of this principle.

Proportionality in the EU has been normally interpreted as comprising three elements: whether the measure is suitable to attain a certain objective, whether there are less restrictive means to achieve the objective, and whether the restriction caused by the measure is disproportionate in relation to the objective.

Like the principle of subsidiarity, the assessments required under the principle of proportionality often reflect policy choices that the Court of Justice is reluctant to overturn. In cases concerned with political, economic, or social choices, which require complex assessments, the Court of Justice reviews EU measures only when they are manifestly inappropriate.

The harmonisation programme, as outlined in the preparatory documents and in the Commission’s proposal for a directive, is suitable to achieve the objective to make the right to compensation more effective with a view to enhance corrective justice and deterrence. Changes

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166 Article 5.4 TEU.
167 Paul Craig, EU Administrative Law (2nd edn, OUP 2012) 591. A slightly different version of this principle is whether a certain objective is desirable, whether the proposed action is suitable to achieve that end, and whether there are less restrictive means to achieve the same end.
168 Ibid 592.
169 Case C-491/01 The Queen and Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd [2003] ECR I-11453, para 123.
170 Some of these rules will be examined in the following chapters.
of procedural rules have been devised to re-balance the position between claimants, who are often in a weak position, and defendants. The best example is facilitation of disclosure of evidence, which is clearly crucial for the success of a claim.\textsuperscript{171}

The evaluation of the existence of less restrictive means to achieve the desired objective may be contentious. The issue is the extent of the desired objective and the degree of effectiveness. In other words, it would be possible to enact less intrusive procedural rules for the Member States. However, they might be less effective in the attainment of the goal of easing the conditions to make antitrust damages claims.

The problem is compounded by the fact that in some Member States the level of infringement of competition law may be greater than others. Thus, vigorous private enforcement rules (i.e. strong disclosure requirements, extensive time limits to bring actions, and so forth) are desirable for the former, but unnecessary for the latter.

Nonetheless, this problem should not be exaggerated: different levels of compliance with competition law may change in the course of time. Thus some enforcement rules leanings to claimants might be inappropriate for a certain Member State in a certain given time, but become desirable if subsequently in that Member State antitrust infringements arise.

Finally, as for the requirement of not imposing on the Member States excessive adverse effects caused by a possible harmonisation, this can be seen in terms of harmonisation costs. These refer

\textsuperscript{171} See, Commission, ‘Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union’ COM (2013) 404 final. Another example is the provision of an effective system of collective redress. However, the Commission has not included rules on collective actions in such proposed directive since it wants to make provisions in another EU proposal which deals with collective actions for breaches of EU law that creates low value losses, not only EU competition law.
to those costs that Member States incur in adapting the legal system to the new rules.\footnote{172}{The Final Report 173.} Such costs may be significant when legal changes are put in place, however they are incurred one time only and yield benefits in a long time span.\footnote{173}{The Final Report 173.}

11. Conclusions: harmonisation and empirical evidence

This chapter has examined the general arguments in favour and against harmonisation of law of damages and procedural rules applicable to antitrust damages actions. Particular attention has been devoted to the principle of effective judicial protection according to which domestic law must not make the exercise of EU rights (in our case, the right to antitrust compensation) excessively difficult or impossible.

The arguments against harmonisation rely on the desirability to maintain this matter within the domain of national law. In particular, EU rules on damages actions might introduce procedural values extraneous to some legal systems. In addition, legal differentiation should be accepted as a new paradigm of EU law. Finally, national law might trigger a type of regulatory competition that would result in an efficient system of private enforcement.

It has been argued that these arguments are not convincing.

New procedural values might be introduced in any case, either by EU legislation or by the Court of Justice. The former solution is preferable, as it would allow the national parliaments of the Member States to set forth their view during the legislative-making process.

Related to this argument, the claim that legal differentiation is desirable does not persuade. Many provisions of the above-mentioned proposed directive are worded in general terms, which would allow the Member States some flexibility in its implementation.
Finally, the argument of regulatory competition seems flawed since it is based on various assumptions that are not realistic. Perhaps, this paradigm fits more the US legal system, which is legally, economically, and culturally more uniform than the EU.

The arguments herein set out in support of the case for harmonisation are three.

The first relies on the need to ensure the effectiveness of the right to compensation. It has been argued that this principle alone does not necessarily justify harmonisation. EU law could compel the Member States to put in place an effective system of private enforcement, by leaving them free to decide how to accomplish it. Nonetheless, the experience so far does not show particular activisms by the Member States.  

In addition, harmonisation would create the opportunity to pursue a comprehensive and consistent policy of private enforcement at EU level, which cannot be pursued by the Member States since they would not be in the position to consider all the issues arising from violations of EU competition law (e.g. need to facilitate victims located in various Member States to bring or join an antitrust actions in the national court located in another Member State).

The second and the third arguments rely on the desirability to avoid forum shopping strategies by undertakings which have just been sued or face the prospect of being sued and to avoid excessive disparity in the level playing field. The negative effects of these phenomena have been highlighted. Forum shopping results in the minimisation of undertakings’ liability. Level playing field may be also significantly altered by private enforcement rules. It has been pointed out that harmonisation cannot completely solve these problems, however it might reduce their negative

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174 This is the opinion of the Commission. The next chapters will make references to the current national legal systems.
effects. Both the goal of reducing forum shopping and the level playing field is a matter of degree.

The latter two problems are the main arguments for harmonisation and they have been tested with respect to the principle of conferral, subsidiarity and proportionality. It has been submitted that while there is some estimate about the level of infringements of competition law, there are still few antitrust cases brought before national courts. Thus, there is no yet significant empirical evidence about the problems relating to forum shopping and alteration of the level playing field.

This last point brings to light a significant problem that EU policymakers face when making their assessments concerning the comparative efficiency calculus, the existence of less restrictive means for the achievement of a certain objective, and whether the proposed EU action is disproportionate in relation to such an objective: availability of reliable empirical evidence showing the existence of the problems presented in this chapter.

In particular, there is a paradox that emerges when applying the principles of subsidiarity and proportionality. Harmonisation is a means to achieve the objective of making the right to compensation more effective, which compensates victims and increases compliance with competition law. Harmonisation is also supposed to reduce the adverse effects arising from forum shopping and significant alteration of the level playing field.

The paradox lies in the fact that so far there is little empirical evidence that shows that the application of national law is giving rise to such problems, which is undesirable given that sound policies should be evidence-based. Thus, lack or little evidence undermines the case for harmonisation. At the same time, lack of harmonisation does not facilitate antitrust actions in the
first place, which prevents the formation of extensive evidence about the problems encountered in national proceedings.

In other words, evidence is needed to justify harmonisation of private enforcement, but at the same time such evidence cannot be produced because the lack of harmonised rules discourages national proceedings that could provide important insight about the shortcomings of national law in ensuring the effectiveness of the right to compensation.

Hypothetically, this problem could be resolved by imposing on the Member States the obligation to put in place an effective system of private enforcement. Afterwards, once national antitrust proceedings are more frequent, evidence about problems of forum shopping, level playing field, distortion of competition in the internal market should be collected to evaluate whether harmonisation is justified. However, this solution would require many years to be properly implemented.

A reasonable way to circumvent this dilemma is to proceed on the assumption that the problems of forum shopping and alteration of level playing field are plausible. Harmonisation would also create the opportunity to enact a comprehensive policy or private enforcement where the national perspective is taken into account, but at the same time the ‘view from the top’ enables the EU institutions to deal properly with the issues arising from cross-border claims.

Weighing the arguments for and against harmonisation is not easy because it is difficult to measure the effects of a policy that encourages private enforcement designed at national level, rather that a policy decided at EU level. This is especially the case when the arguments for and against are qualitatively different. It is not possible to compare the introduction of extraneous
procedural values with the risk that some claimants may not be compensated as a result of successful forum shopping strategies. On balance, in the author’s view, the case for harmonisation seems more convincing than the case against.
Part II

Case studies

Substantive aspects of damages claims in EU competition law.

Causation

and

Punitive Damages
Overview

Causation and punitive damages

Private enforcement of EU competition law entails the application of private and procedural law. Chapters four and five are concerned with two important aspects of substantive law: causation and punitive damages.

Causation refers to the link between conduct and effects. It answers the question of how adverse effects have been generated and whether they can be attributed to the defendant’s conduct.

Causation is also relevant to determine the extent to which damages may be compensated. This refers to remoteness of damages, i.e. the indirect consequences produced from the defendant’s conduct and for which she is not liable. This is particularly relevant to competition law whose breach results in a wide range of adverse economic effects. Causation is pivotal to discriminate between economic harm which can be compensated, and economic harm which cannot be compensated.

The choice to deal with this topic lies also in the view that its ordinary rules might be inadequate to deal with economic torts and thus to ensure full effectiveness to the right to antitrust compensation. Accordingly, a reform is suggested in order to take into account the characteristics of breach of competition law. Although the Commission does not include causation among the rules that should be harmonised, it is argued this choice is unsatisfactory.
With regard to punitive damages, they result in the award of a sum greater than the normal compensatory damages suffered by the victim of a tort.\(^1\) Thus, they depart from the fundamental principle of corrective justice which aims at restoring the victim’s *status quo ante* had the tort not been committed.

In *Courage*\(^2\) the Court of Justice recognised both the right to compensation to individuals who suffered a loss caused by breach of Articles 101 or 102 TFEU, thus embracing a corrective justice perspective, and the usefulness of such a right to discourage such practices, thus recognising its deterrent function.

Punitive damages should be seen in the light of the deterrent function. The reason is that compensation based on the victim’s loss is not sufficient to deter a potential tortfeasor. To be an effective deterrent, compensation should be based on the tortfeasor’s gain. Punitive damages are precisely determined on the basis of such gain.

Currently, few Member States provide for punitive damages to be awarded in antitrust proceedings. Thus, there is no disparity of level playing field or risk of forum shopping. Instead, it is suggested that the main rationale for introducing punitive damages at EU level is to enhance the deterrent function of damages actions. If the amount of compensation is related to victims’ losses, damages actions are unlikely to discourage undertakings from breaching competition law.

This dissertation primarily considers English law when dealing with punitive damages and causation though references to the legal system of other EU jurisdictions are made too. The

\(^{1}\) Harvey McGregor, *McGregor on Damages* (18th edn, Sweet and Maxwell 2009) 420. Punitive damages are also called exemplary damages. This chapter refers indistinctly to both.

choice of English law has been motivated by the fact that there is a rich scholarship on causation. In addition, this it has been one of the first European jurisdictions that dealt with punitive damages in competition law.

With regard to causation, some reference to other EU jurisdictions is made too. The purpose is to show that even when the concept of causation is similar, its application may differ, thus resulting in different enforcement outcomes.

Finally, this chapter also considers some US scholarship on punitive damages. Its contribution to such damages has been significant both in terms of analysis of their rationale and of the problems arising from them.
Chapter 4

Causation

1. Introduction to causation and its harmonisation

Causation in the law is concerned with causal relationship between human conduct and harm or loss, for which the law allows compensation. It serves the purpose to connect conduct and event in such a way that the latter is the consequence of the former. In this respect, the first aspect of the causation inquiry is concerned with factual connection between conduct and harm. The emphasis is therefore on the ‘materialistic’ elements of the factual situation and can be referred to as ‘factual causation’ inquiry. The second aspect is concerned with holding the author of conduct responsible for the harm. Here, the emphasis is on the normative elements of the factual situation and can be referred to as ‘legal causation’ inquiry.3

Causation has been an important subject-matter since ancient Greek philosophy4 and is concerned with two aspects: ontological (what causation is), and epistemological (how causation can be known).5 The philosophical inquiry of causation aims at identifying all possible factors, both human and non-human, that account for the production of an event.6 Modern philosophy conceives of scientific causation in such a way to make it empirically verifiable and includes all possible elements (antecedents) that contributed to an event. The problem with this approach is

6 David Hume formulated the first modern theory of causation and held that causation requires regularity, ie a constant conjunction of two objects. Tim Crane, ‘Causation’, in A C Grayling (ed), *Philosophy 1* (OUP 1999) 184. Mill offered a different account of causation as a number of antecedents, which must all concur to produce a certain event. J L Mackie, *The Cement of the Universe* (Clarendon Press 1980) 60. For example, lighting a match causes a fire, but production of fire also requires oxygen. Therefore, both the lighting of the match and oxygen are elements of the set of conditions. See also H L A Hart and T Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 18.
that it does not say when a retrospective examination of the factual antecedents that produced a certain event should stop. In theory, such backward investigation may be endless.

By contrast, causation in the law has a more pragmatic aim to determine whether human conduct was part of a set of circumstances that caused a particular event. To this end, all factors that account for the occurrence of a certain event must be ascertained, which is done by relying on the scientific inquiry. Subsequently, the inquiry aims at discovering whether human conduct was among the factual antecedents that brought about an event. When this is the case, it is said that a person caused an event. Finally, various legal criteria are applied to hold the author of the conduct legally responsible. It follows that the causation in the law inquiry is constrained by the law itself which prescribes what type of conduct and/or event are necessary to hold someone legally responsible.

Clearly, causation rules apply in competition law proceedings too. Modern advanced markets are characterised by the presence of numerous economic relationships which may make the application of such rules difficult. This is likely to jeopardise the principle of effectiveness since it makes excessively difficult to exercise the right to antitrust compensation. Thus, it is suggested that some causation rules should be harmonised in such a way as to facilitate antitrust damages actions.
2. Legal causation and policy considerations

With regard to legal causation, policy considerations may extend or limit liability when the causal link between conduct and harm cannot be explained conclusively. Terms such as ‘proximate cause’, ‘foreseeability’, ‘harm falling within the risk’ are used to halt or extend the causal connection of conduct and harmful event. However, they are not concerned with factual causation, but with policy.

Policy plays a role in situations such as supervening events or intervening acts where the effects of the original conduct are intertwined with the effects of concomitant or successive acts. Given that the resulting factual context becomes too complex to be understood in terms of a ‘single conduct’ that causes a ‘single event’, policy considerations provide a pragmatic solution to establish or limit the defendant’s responsibility.

When the claimant’s conduct is highly unreasonable, so that the damage caused by his/her conduct overwhelms the initial damage caused by the defendant, then the claimant’s conduct may amount to a novus actus and the defendant is not liable. Given that the claimant’s conduct may be

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7 It is commonly said that the common-law system is centred upon the idea of policy. However, there may be controversy on how to define the term policy. Weinrib defined it as independent and desirable goal. Here independence of a goal refers to the fact that its justification resides in values that are outside tort law. Ernest J Weinrib, ‘The Disintegration of Duty’ in M Stuart Madden (ed), Exploring Tort Law (Cambridge University Press 2005) 177. One of the meanings of policy given by Hart and Honoré was a great variety of different considerations that should be taken into account by the courts. H L A Hart and T Honoré, Causation in the Law (2nd edn, Clarendon Press 1985) 103-105.


9 Supervening event is defined as a second event that occurs after a first event. The first event has already caused some harm, but the second event would have caused the same harm. Mark Lunney and Ken Oliphant, Tort Law (4th edn, OUP 2010) 248. This is exemplified in Baker v Willoughby [1970] AC 467. There, a car accident injured the claimant, which resulted in a first injury. After the car accident, and before the trial, the claimant was shot by two robbers, which caused a further injury.

10 Intervening act is defined as a second event which occurs after a first event, which was not sufficient itself to cause certain harm. Rather the materialised harm presupposes the first event on which and second event interposes. Mark Lunney and Ken Oliphant, Tort Law (4th edn, OUP 2010) 257.

11 McKew v Holland and Hannon and Cubitts (Scotland) Ltd [1969] 3 All E.R. 1621.
qualified as contributory negligence or novus actus, problems may arise as to the criteria to distinguish between such two situations.\textsuperscript{12}

Remoteness of damage is another example of limitation of liability justified by policy considerations. Although the defendant triggered a chain of events, his/her liability is limited to the harm that was reasonably foreseeable\textsuperscript{13} and does not extend to all damages flowing from the original conduct.

While factual causation and responsibility are conceptually separate, they are also interrelated. As Lord Hoffmann wrote: ‘… there are varying causal requirements, depending upon the basis and purpose of liability.’\textsuperscript{14} This relates to the fact that the law frames the terms of reference within which the causation enquiry takes place.

3. \textbf{Set of conditions and but-for test}

The traditional method to ascertain factual causation relies on the ‘but-for’ test. This holds that an event would have not occurred if a certain conduct had not taken place,\textsuperscript{15} and is carried out by counterfactual analysis, which proceeds as follows. First, the event and its factual context are observed. Second, a conjecture is made on what factual conditions may have produced the event. Finally, it makes a ‘retrospective’ speculation, in which it eliminates those factual conditions

\textsuperscript{12} \textit{Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd) [2009] EWCA Civ 1404}. Aikens L.J. wrote: ‘The line between a set of facts which results in a finding of contributory negligence and a set of facts which results in a finding that the “unreasonable conduct” of the claimant constitutes a novus actus interveniens is not, in my view, capable of precise definition.’ [45].

\textsuperscript{13} \textit{The Wagon Mound (No 1) [1961] A.C. 388.}

\textsuperscript{14} \textit{Kuwait Airways Corp v Iraq Airways Co [2002] 2 A.C. 883.}

\textsuperscript{15} The test has been described as “The “but for” test is a recognised and simple analytical tool in the law of tort when considering questions of causation. The test asks whether the loss alleged by the claimant would have occurred but for the unlawful conduct of the defendant.” \textit{Enron Coal Services Limited (In Liquidation) v English Welsh & Scottish Railway Limited [2009] CAT 36, 2009 WL 4872689 [88].}
selected as possible ‘causes’. If it is inferred that the event would have not occurred without the ‘eliminated’ factual conditions, then those factual conditions were the cause of an event.

The ‘but-for’ test is methodological as it indicates how to discover the causal link between human conduct and harm. However, it does not explain what a ‘cause’ is. In particular, it is argued that it is limitative to think of causation as a single cause. Rather, a particular combination of some factual conditions results in a certain event. In other words, a harmful event is the consequence of a set of conditions. On this basis, some legal scholars take the view that a cause is ‘a necessary element in a set of conditions jointly sufficient to produce the result’.16

4. The limitations of the but-for test

In simple situations characterised by temporal and spatial immediacy between conduct and event, in which conduct and event are easily observable, and where adequate scientific explanation is available, speculation on the factual situation that would have resulted but for a certain conduct is accurate. However, in some circumstances there is no sufficient scientific certainty that explains causal mechanisms concerning some physical phenomena.17

In addition, a set of conditions that is sufficient to cause an event requires coexistence of a number of necessary conditions. However, according to this approach, it may be difficult to distinguish between ‘mere conditions’ or ‘factual antecedents’ on the one hand, and ‘cause’ on the other.18 As explained above, if each condition is necessary, but not sufficient to cause an event,

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16 Tony Honoré, ‘ Necessary and Sufficient Conditions in Tort Law ’ in David Owen (ed), Philosophical Foundations of Tort Law (Clarendon Press 1995) 363. This formulation accounts for the problem act that a certain event may be brought about independently by different sets of conditions. In this case, a condition alone is not sufficient to cause an event, but it is a necessary member of such set. In turn, such a set of conditions is sufficient, but not necessary to cause an event, because alternative sets of conditions are equally able to produce the same event. This is called ‘INUS’ (Insufficient but Necessary part of an Unnecessary but Sufficient) condition. At 365.

17 Anthony Dugdale and Michael Jones (eds), Clerk and Lindsell on Torts (10th edn, Sweet and Maxwell 2012) 69.

then it follows that the whole set of conditions is considered as the cause of an event. However, this may lead to counter-intuitive results.

For example, when a vehicle collides into another vehicle, it is common sense to hold that the former caused the accident. However, the accident was made possible precisely because the second vehicle was in a certain point and at the time where the collision occurred. Thus, it could be argued that the second vehicle’s driver was part of the factual antecedents that caused the event.

An attempt to solve this problem has been made by distinguishing between normal and abnormal conditions. Unlike normal conditions, only abnormal conditions account as ‘cause’. However, this approach gives rise to the problem of how to distinguish between normal and abnormal conditions. Here, context may help to differentiate between the two types of condition.

For example, if the second vehicle was respecting the traffic rules and the first was not, it is reasonable to conclude that the first vehicle caused the accident. However, this conclusion is made possible by relying on normative criteria, not on scientific method. Notwithstanding this objection, this approach is plausible given that, as explained above, the law itself frames, and thus affects, the terms of reference of the causation inquiry.

19 See for example, Reeves Respondent v Commissioner of Police of the Metropolis Appellant [2000] 1 A.C. 360, 391.
20 Hart and Honoré base the distinction by relying on relativity of the context. They use the example of combustion and oxygen: in an ordinary situation oxygen is a normal condition and is not considered as a cause or contributing factor to combustion, but in others (e.g. in an experiment carried out in a laboratory which requires lack of oxygen) the presence of oxygen may be considered as the cause. H L A Hart and T Honoré, Causation in the Law (2nd edn, Clarendon Press 1985) 35.
Another problem is over-determination, which occurs when two conducts, each of which is sufficient to produce a harmful event, act simultaneously and independently.\textsuperscript{21} It means that if the first conduct had not taken place, the event would have materialised because of the second conduct and vice-versa. As a result, neither the first nor the second conduct was the cause of the event. Over-determination may be resolved by considering each conduct as a cause of the event.\textsuperscript{22}

A final criticism levelled against the ‘but for’ test is that it may result in too lenient treatment for the defendant. Given that the standard of proof is the balance of probability,\textsuperscript{23} when it is likely that the harm would have occurred even without the defendant’s conduct, then the defendant is not held responsible despite the fact that her conduct was adequate to produce the harm complained of.

5. Causation in other EU Member States

Although causation plays a pivotal role to establish liability, English law and other EU jurisdictions alike have almost no statutory provision.\textsuperscript{24} Although the EU Member States take different approaches to causation, this does not necessarily lead to dissimilar outcomes.\textsuperscript{25}

\textsuperscript{21} H L A Hart and T Honoré, \textit{Causation in the Law} (2\textsuperscript{nd} edn, Clarendon Press 1985) 123. See also, Richard Wright, ‘Causation in Tort Law’ (1985) 73 CLR 1735, 1775-1776. The Author distinguishes over-determination between ‘preemptive causation’ in which the harmful effects of a certain act are pre-empted by the more immediately operative effects of another act, and ‘duplicative causation’ in which the harmful effects of a certain act are combined or duplicated with the effects of another act.


\textsuperscript{23} Mark Lunney and Ken Oliphant, \textit{Tort Law} (4\textsuperscript{th} edn, OUP 2010) 220.

\textsuperscript{24} Cees van Dam, \textit{European Tort Law} (OUP 2006) 1100.

\textsuperscript{25} ibid 1101.
In German law, two aspects must be considered when dealing with causation: the liability-founding causation, which refers to conduct and infringement of a right, and the liability-specifying causation, which refers to infringement of a right and damage.26

The first step to establish causation is the application of the *conditio sine qua non* test, which holds that without a certain condition, the outcome under investigation would have not occurred. This resembles the English but-for test since it is primarily based on a counterfactual analysis.

The second step involves adequacy of causation, which holds that the defendant is liable only with respect to the consequences that were reasonably expected or foreseeable or not very unlikely.27

The final step is based on policy considerations, among which the protective purpose of the rule must be considered.28 Although the German causation test appears to be well articulated, it is important to stress that in difficult cases, policy considerations exercise decisive influence.29

Article 1382 of the French Civil Code is the general provision establishing tortious liability,30 however, it does articulate the causation test. French law provides that the causal connection

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27 Cees van Dam, *European Tort Law* (OUP 2006) 1103. Adequacy theory has also been defined as a generalising theory because the cause is deemed to be connected with the event on the basis of statement of regular sequence. H L A Hart and T Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 465.
29 ibid 67.
30 Article 1382 ‘Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.’ ‘Any act by a person committed by reason of fault, which causes damage to another person, obliges the person committing such act to compensate it.’ [the English translation is mine].
must be certain and direct, which is general rule that applies to damages resulting from breach of obligation.\textsuperscript{31} Again, no statutory definition of ‘directness’ and ‘certainty’ of damage is given.

In general, French legal doctrine does not appear concerned about theories of causation.\textsuperscript{32} Since neither the \textit{conditio sine qua non} test nor adequacy of causation are entirely satisfactory, it has been suggested that it is necessary to go beyond these theories.\textsuperscript{33} In general, French case law shows inconsistencies and unpredictability when dealing with causation.\textsuperscript{34}

Italian law does not set out the causation test either. The general provision of tort liability refers to causation, but no rule specifies this concept.\textsuperscript{35} It is generally accepted that relevant causation criteria are borrowed from criminal law.\textsuperscript{36}

Similarly to French law, Italian law provides that compensable damage must be the immediate and direct consequence of conduct.\textsuperscript{37} The Italian Supreme Court has interpreted such

\textsuperscript{31} Article 1151 of the Civil Code provides: ‘Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention.’ ‘In the case that the non-fulfilment of the agreement is due to the debtor's intention, the damages and the interests include the creditor's proved loss and the loss of profit, which immediately and directly flows from the non-fulfilment of the obligation.’ [the English translation is mine].

\textsuperscript{32} Cees van Dam, \textit{European Tort Law} (OUP 2006) 1105.

\textsuperscript{33} Philippe Brun, \textit{Responsabilité civile extracontractuelle} (Lexis Nexis Lirec 2005) 146.


\textsuperscript{35} Article 2043 of the Civil Code: ‘Qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.’ ‘Any intentional or negligent fact that causes unjust damage to other people obliges the author of the fact to compensate damage.’ [the English translation is mine].

\textsuperscript{36} Article 40 of the Criminal Code: ‘Nessuno può essere punito per un fatto preveduto dalla legge come reato, se l'evento dannoso o pericoloso, da cui dipende l'esistenza del reato, non è conseguenza della sua azione od omissione. Non impedire un evento, che si ha l'obbligo giuridico di impedire, equivale a cagionarlo.’ ‘No person shall be punished for committing a fact that has not been previously qualified as a criminal offence, if the harmful or dangerous event, on which the criminal offence depends, is not the consequence of that person's action or omission. Non-preventing of an event, which one has the legal duty to prevent, equates to commit it.’ [the English translation is mine].

\textsuperscript{37} Article 2056 of the Italian Civil Code regulates damages in tort. It refers to Article 1223 of the Italian Civil Code, which provides that: ‘Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta.’ ‘Compensation
requirement in the light of the theory of adequacy of causation,\(^{38}\) which means that direct and immediate consequences must be foreseeable according to ordinary experience.\(^{39}\)

6. Relevance of causation for the type of economic loss in competition law

Although competition law is primarily concerned with the protection of economic interests, not all economic losses arising out of market transactions are recoverable. For example, a successful entrepreneur might drive out its competitors because consumers prefer its products. Here competitors’ economic interests are harmed, but they cannot be compensated because they are the result of the proper working of the markets.

Causation plays a pivotal role also in competition law because it allows distinguishing between recoverable and non-recoverable economic loss. The recoverable economic loss must be the type of consequence that the prohibition of anti-competitive agreements or abuse of dominant position aims at preventing.\(^{40}\) In particular, the main consequence that Articles 101 and 102 TFEU intends to avoid is the creation of an anti-competitive effect. In other words, an economic loss is recoverable when it is the materialisation of an anti-competitive effect.

Anti-competitive effect, ‘restriction of competition’ and so forth are vague terms that may be understood by making reference to the goals of competition law. As has been seen, such goals are consumer welfare, which primarily aims at avoiding price increase, market foreclosure, which

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39 Alberto Trabucchi, *Istituzioni di Diritto Civile* (46th edn, Cedam 2004) 904. Other legal scholarship adopts the concept of ‘efficient cause’, which refers to statistical regularity: conduct is considered as legal cause of an event if, *ex ante*, the event was the foreseeable and preventable consequence of a certain conduct. Francesco Galgano, *Diritto Civile e Commerciale* (3rd edn, Cedam 1999) 347.

40 This seems to be a general principle applicable to damages resulting from breach of statute: ‘Non-compliance with a statutory duty cannot be actionable unless the injury was of the type which the statute was passed to prevent.’ Anthony Dugdale and Michael Jones (eds), *Clerk and Lindsell on Torts* (10th edn, Sweet and Maxwell 2012) 550, para 9-49.
primarily protects chances for businesses to compete ‘on the merit’, and preservation of the internal market, which refers to goal of avoidance of undertakings’ restriction of freedom of movement of goods, services, and capital.\textsuperscript{41}

US antitrust law has applied a similar reasoning in order to delimit the scope of damages claims whose cause of action lies on the antitrust laws. \textit{Brunswick}\textsuperscript{42} was concerned with an acquisition of a bowling company in financial difficulties from a manufacturer of bowling equipment. The claimant, a company operating in the bowling business, submitted that that acquisition would prevent the increase of its market share because, but for the acquisition, the target bowling company would have exited the market.

The Court observed that mergers, either lawful of unlawful, produce effects that adversely affect some people. However, Section 7 of the Clayton Act prohibits mergers insofar they produce anticompetitive effects and is not meant to benefit competitors. On that basis, the Court formulated the antitrust injury doctrine, which is the injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants’ act unlawful.

So far, the Court of Justice has not had yet the opportunity to deal with how the competition law goals determine a type of harm that may be compensated. However, in \textit{Manfredi} the Advocate General confirmed the correctness of this approach as he held that private actions may be brought by the parties whose interests are protected by competition law.\textsuperscript{43}

\textsuperscript{41} The Court of Justice of the EU generally refers to the internal market, which also includes freedom of movement of people. However, while anti-competitive conduct might prevent the freedom of movement of goods, services, or capital, it is difficult to think that it might prevent freedom of movement of people. Indeed, the Court of Justice’s case-law on competition law is concerned with restrictions of movement of goods, services, and capital only.

\textsuperscript{42} Brunswick Corp. v Pueblo Bowl-O-Mat, Inc. 429 US 477 (1977).

7. Causation in EU law

As previously mentioned, the Courage judgment may be also seen as the coherent development of the earlier case law on state liability. With regard to causation, in Francovich the Court held that the causal link between the Member State breach of EU law and the individual’s damage is one of the conditions that must be present to give rise to the right to compensation. The Court reiterated this requirement in Brasserie and in Köbler. In such cases the Court did not offer any definition of this concept. In theory, it could have identified the common features of causation that are present in the different legal traditions of the Member States and formulate a ‘synthesis’ applicable to all situations in which EU law requires causation. However, the Court did not give any indications of what is meant by causation and to date EU law does not have its own rules on causation. It follows that national rules on causation apply.

With respect of individual’s losses resulting from breach of competition law, in Courage the Court of Justice did not explicitly say that causation was one of the conditions to hold an infringer of competition law liable like it did in Francovich, Brasserie, and Köbler. However, it used the term ‘caused’ when it recognised the right to any individual to claim damages. In Manfredi, the Court was more specific about causation since it confirmed the necessity of the causal relationship between agreement or practice and damage. In addition it held that the Member States’ legal systems provide the rules governing causation. Despite the different wording between the case law on state liability and that on breach of competition law by individuals, the outcome remains

46 Case C-224/01 Gerhard Köbler v Republik Österreich [2003] ECR I-10239.
47 Cees van Dam, European Tort Law (OUP 2006) 279.
48 Case C-453/99 Courage Limited v Bernard Creban [2001] ECR I-6297, para 26. The Court used the expression ‘damages for loss caused to him …’.
50 Para 61.
51 Para 64.
the same. National rules on causation apply provided they comply with the principles of effectiveness and equivalence.\textsuperscript{52}

8. Causation in EU competition law

In EU competition law, causation plays a role in two distinct stages. In the first, the causal link must be established between conduct, which is prohibited by a competition law provision, and its anti-competitive effects. In the second, a causal link must be established between anti-competitive effects and individual’s loss.

Of course, these stages overlap: anti-competitive effect is not an abstract concept, on the contrary, it affects individuals (consumers, businesses, the government, etc.). However, anti-competitive effect on the one hand, and damages flowing from breach of competition law on the other, are two distinct phenomena.

In particular, the first causal connection must establish whether agreement or conduct resulted in anti-competitive effects. For example, horizontal anti-competitive agreements result in price increases. In some cases, establishing the anti-competitive effect is also relevant because its occurrence means that a competition provision has been breached.\textsuperscript{53}

The second causal connection must establish whether the anti-competitive effects have caused losses to an individual. For example, horizontal anti-competitive agreement results in a price increase, which is the anti-competitive effect. When an individual purchases the overcharged

\textsuperscript{52} Para 64. The principles of effectiveness and equivalence are the two requirements that must be met for the application of national procedural rules.

\textsuperscript{53} This is the case of agreements whose effects are the restriction of competition. They contrast with agreements whose object is the restriction of competition.
product, she suffers a loss. This second type of causation links anti-competitive effect and individual’s loss, which is claimed in an antitrust action.

With respect of individual’s losses resulting from breach of competition law, the Court of Justice used the term ‘caused’ when it recognised the right to any individual to claim damages. In *Manfredi*, the Court of Justice specified the issue of causation as it confirmed the necessity of the causal relationship between agreement or practice and damage. In addition it held that the Member States’ legal systems provide the rules governing causation.

This last passage is consistent with the principle of national procedural autonomy, although causation rules fall within substantive law rather than procedural. The application of this principle is confirmed by the qualification that also in respect of the causation rules, national provisions must respect the principles of effectiveness and equivalence.

The fact that national legal systems govern causal relationship is not surprising. While on a number of occasions the Court of Justice referred to the principle of causation, EU law does not have its own rules on this concept and therefore it relies on the national legal systems.

54 Case C-453/99 Courage Limited v Bernard Crehan [2001] ECR I-6297, para 26. The Court used the expression ‘damages for loss caused to him …’.
56 Para 61.
57 Para 64.
58 Para 64. The principles of effectiveness and equivalence are the two requirements that must be met for the application of national procedural rules.
59 For example, joined cases C-6/90 and C-9/90 Francovich and Others v Italian State [1991] ECR I-5357, para 40.
61 Joined Cases C-46/93 and 48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport [1996] ECR I-1029, para 65. In the context of Member State’s liability, the Court of Justice held that national courts must determine whether there is a causal link between the breach of the Member State’s liability and the damages sustained by the individual. Although, this passage refers to the factual inquiry of causation (ie the historical connection between breach of the law and damage), the Court of Justice did not give any express indications of the rules, which should govern the causation inquiry. This seems to confirm that domestic systems provide for such rules as long as the principles of equivalence and effectiveness are respected (para 67).
a) **Per se** violations of competition law

Causation in competition law is complicated by the fact that while some competition law provisions are breached when anti-competitive effects arise, others do not require materialisation of anti-competitive effects. In such latter cases, it is said that competition rules are breached *per se*. It would follow that in these latter cases the first type causation inquiry (connection between unlawful conduct and anti-competitive effect) is not necessary.

However, the distinction between *per se* and ‘effects-based’ violations must be clarified. In reality, also *per se* violations produce anti-competitive effects (an exception is when anti-competitive agreements are not implemented). Nonetheless, their proof is not required because *per se* violations simplify the enforcement: evidence of the existence of anti-competitive conduct, either an agreement or unilateral conduct by an undertaking in a dominant position, is sufficient to hold that competition law has been infringed.

Some anti-competitive agreements are *per se* violations. They are also called ‘by object’ violations\(^62\) because the anti-competitive agreement has the object of restricting competition. In this case, the anti-competitive element is inherent in the agreement itself. Abuse of dominant position is also a *per se* infringement of competition law. This is exemplified in *Hoffmann-La Roche*\(^63\) in which the definition of abuse\(^64\) suggested that the abuse itself restricts competition, without requiring analysis of the effect on the market.


\(^{63}\) Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

\(^{64}\) ‘An objective concept … which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.’
Given that *per se* violations produce anti-competitive effects, an action for damages based on a *per se* violation still requires proof of the two above-mentioned types of causation: first, that the unlawful conduct resulted in anti-competitive effects and second, that the loss complained of in a damages action flowed from the anti-competitive effects.

**b) The but-for test and competition law**

The but-for test works well in simple factual contexts where human conduct triggers physical or mechanical processes that alter the course of events. In simple factual contexts, there is immediacy between human conduct and materialisation of harm. However, when the factual context is fraught with many circumstances, or with third parties’ actions interacting with the factual context, or when there is a time lag between conduct and harm/loss, the but-for test may be inadequate to account accurately for the causal relationship between conduct and event.

This consideration applies to market regulation, where the but-for test is not always suited to deal with the complexities of the market. Markets are the result of countless economic activities, many of which affect other companies’ behaviour. Business transactions and business conduct have an impact on other economic actors and businesses decisions are often taken to react to other companies’ market behaviour. For example, new products, new pricing strategies, new business alliances, etc. often prompt other companies’ response in order to remain competitive.

When numerous economic transactions take place, retrospectively it may be difficult to reconstruct how they interacted between each other and determined the current company’s economic situation. Business decisions are taken by considering the economic environment and a single economic factor may not be able to account for a company’s business determination.

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65 Some scholars also argued that the but-for test is inadequate in competition law from a perspective based on statistical inferences. Indeed, they reject the deterministic nature of causation to rely on stochastic causation which examines the overall effects on a call of transaction. Hanns Abele, Georg Kodek, and Guido Schaefer, ‘Proving causation in private antitrust cases’ (2011) 7 Journal of Competition Law and Economics 847, 852.
With regard to competition law, the but-for test may work with sufficient accuracy in simple situations such as a cartel between distributors or producers who sell directly to businesses and consumers. Here, the anti-competitive agreement and businesses and/or consumers’ purchase of the overcharged product are the ‘cause’ of the economic loss.

However, in other breaches of competition law that are directed against other businesses (e.g., primarily abuse of dominant position) the but-for test might be difficult to apply. Indeed, it is precisely in such situations that business conduct, especially by dominant undertakings, changes the market situations by triggering business decisions of the other undertaking which operates in the same market as the dominant undertaking. Here, it may be difficult to distinguish between the harmful economic effects flowing from breach of competition law, and the adverse economic effects resulting from business decisions taken to counter the consequences of business conduct that amounts to abuse of dominant position.

In competition law, unlawful conduct consists of economic activity. The pattern in which the economic harm materialises is different from the way in which physical harm occurs. In the market context, conduct manifests itself through change of prices,66 difficulty to access suppliers or foreclosure of production inputs,67 difficulty in accessing the market,68 and so forth. In such circumstances, it is normal that a business victim of a competition law violation puts in place business behaviour designed to react to such a violation. Crucially, a breach of competition law may aggravate previous critical conditions of the victim. Even when the economic state of a

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66 This is the case of price-fixing or other agreements which result in higher prices (Article 101 TFEU), but also abuses of dominant position related to prices such as predatory pricing, Case C-62/86 Agco Chemie BV v Commission [1991] ECR I-3359; discriminatory pricing, Case 27/76 United Brands [1978] ECR 207; price squeeze, Case T-271/03, Deutsche Telekom v Commission [2008] ECR II-477, Case T-398/07 Kingdom of Spain v Commission (General Court, 29 March 2012); discounts and rebates, Case T-219/99 British Airways v Commission [2003] ECR II-5917.


company is not serious, competition law violation may induce the management to make business
decisions that will turn out to be unwise and ultimately lead to the undertaking’s failure.

The problem is that explaining how the initial breach of competition law has determined the final
company’s economic state, and what would have happened had the breach of competition law
not occurred, might be a highly speculative exercise. This problem is compounded when a
violation of competition law prolongs in the course of time and/or when there is considerable
time lag between the breach of competition law and the resulting economic harm. In this case,
numerous economic activities interpose between the breach of competition law and the
company’s loss. As seen above, when a situation is the result of a multitude of elements, making
an accurate counterfactual is an arduous task.

Finally, in the market context, the but-for test is also unsatisfactory because it lends itself to easy
defences in competition law damages actions. The main thrust of the defence would be based on
the claim that the economic loss would have occurred anyway, due to concurrence of other
economic circumstances.\textsuperscript{69} For example, in a price-fixing situation, the cartelists might argue that
although they had agreed to increase prices, they did not implement the illegal agreement, and
instead the higher prices paid by consumers were due to inflation, to a price rise of an input in
the upstream market, or to legitimate decisions by which prices are set within different groups of
companies.\textsuperscript{70} In a predatory pricing situation, the dominant undertaking might defend itself by
arguing that even if prices had been set above-cost,\textsuperscript{71} thus not amounting to an abuse of

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\textsuperscript{69} This problem has been recognised in the Commission Staff Working Paper. Annex to the Green Paper, ‘Damages


\textsuperscript{71} In particular, prices below average variable costs are presumed to be eliminatory, whereas prices below average
total costs but above average variable costs are considered abusive if they are a part of a plan for the elimination of a
dominant position, the competitor would have failed in any case because it could not have competed with such hypothetical above-cost prices.

c) Causation in two paradigmatic national competition law cases

Two cases may be useful to illustrate the foregoing considerations. *Arkin*\(^2\) could be read in the light of the fact that the victim of a breach of competition law provision is not passive, but reacts to counter the adverse economic effects. The issue is then: what happens when such a ‘reactive’ business decision is wrong? In *Arkin*, a liner company was competing against two other companies. A rate war between the claimant and the defendants started, which resulted in a decrease of the claimant’s revenue. Subsequently, the claimant became insolvent and proceedings were commenced on the grounds of Articles 101 and 102 TFEU.

The English judge found no abuse of dominant position, nor anti-competitive agreement. However, *obiter dicta*, the judge also held that the claimant’s loss had been caused by the claimant’s irrational behaviour of undercutting rates to a level that he would trade at loss, without reasonable prospect that he could soon raise rates to a profitable level. That meant that, even if there had been an infringement of Article 101 and 102, the losses were caused by the claimant’s conduct. From a legal viewpoint that was an intervening dominant cause that broke the chain of causation.\(^3\)

This finding shifts the attention from the defendant to the claimant. For the sake of the argument, let us assume that in *Arkin* the defendant had breached competition law. The above point on causation would lead to the conclusion that even in this hypothetical situation, the

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\(^2\) *Arkin v Borchard Lines Ltd & Ors.* [2003] EWHC 687 (Comm).

\(^3\) [536].
claimant would have been denied compensation because its bankruptcy would have been declared in any case due to its inconsiderate undercutting.

The problem is that however ill-judged was the claimant’s pricing strategy, that commercial decision was triggered by the defendant’s conduct. However, according to the but-for test, such a circumstance does not play any role. Even if competition law had been breached, by relying on the breach of the chain of causation, the judge would have still ascribed the damage only to the claimant’s conduct and undermined the role of the defendant’s conduct. This approach is too simple because the victim’s wrong business decision was in turn determined by the defendant’s conduct. If the latter had not breached competition law in the first place, then the victim would have not acted in the way it did.

This situation shows that the boundaries between tortfeasor’s conduct, victim’s contributory negligence and victim’s novus actus interveniens may be difficult to draw. An abuse of dominant position is likely to have significant effects on the market because it is carried out by an undertaking holding considerable market power. Thus, it would be unreasonable to expect the victim of such a violation to remain passive. However, in Arkin contributory negligence in the market context was not sufficiently developed.

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74 Contributory negligence is a defence available when the claimant’s own negligence contributes to the damage of which she complains. It is a partial defence that affects the claimant’s quantum of recovery. Tony Weir, *An Introduction to Tort Law* (2nd edn, Clarendon Press 2009) 123.

75 When the claimant’s conduct is highly unreasonable, so that the damage caused by his/her conduct overshadows the initial damage caused by the defendant, then the claimant’s conduct may amount to a novus actus and the defendant is not liable. *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All E.R. 1621.

76 *Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)* [2009] EWCA Civ 1404 [45] (Aikens LJ) ‘The line between a set of facts which results in a finding of contributory negligence and a set of facts which results in a finding that the “unreasonable conduct” of the claimant constitutes a novus actus interveniens is not, in my view, capable of precise definition.’

77 Few references are made in paras 495 and 496.
Enron Coal Services Limited (In Liquidation) v English Welsh & Scottish Railway Limited\textsuperscript{8} is another example of the difficulties arising out of the application of the but-for test. The case was a follow-on action from a decision of the Office of Rail Regulation and was concerned with damages deriving from loss of chance. Due to breach of Article 101 TFEU and Chapter II prohibition of the Competition Act (price discrimination), the claimant lost the chance to submit a competitive tender to a third party, Edison Mission Energy Limited.

When dealing with causation, the Competition Appeal Tribunal applied \textit{Allied Maples}\textsuperscript{79} and framed the test by asking three questions. First, whether, but for the abuse, the claimant would have submitted a bid to a third party. Second, whether it would have sought to negotiate with the third party a more competitive contract of supply. Third, whether such a negotiation would have increased the chance of entering into a competitive contract with the third party.

In the central passage of the judgment, the Competition Appeal Tribunal had to consider a hypothetical claimant’s bid, purged from any effects deriving from anti-competitive conduct, and then to consider whether the third party would have accepted it. The Tribunal took the view that the third party would have assessed the hypothetical bid on the basis of both price and non-prices factors, the latter being the claimant’s flexibility in the delivery of goods, quality of services, and the commercial relationship between the contracting parties.

On the basis of the submitted evidence, the Tribunal held that even in the absence of the abuse, the claimant had no real or substantial chance to enter into a contract for the supply of coal. Therefore, the Competition Appeal Tribunal rejected the claim. The conclusion is highly

\textsuperscript{8} [2009] CAT 36, 2009 WL 4872689.

\textsuperscript{79} \textit{Allied Maples Group Ltd. v Simmons & Simmons} [1995] 1 W.L.R. 1602.
speculative and the causation test set a very high standard for loss of chance claims based on breach of competition law.

d) Policy considerations to overcome causation issues in competition law proceedings

Given the above-mentioned problems in applying the but-for test in competition law, it is suggested that some policy criteria should be introduced to temper the current rules on causation. As previously seen, policy criteria operate in ordinary tort cases where the factual context is too complex to be adequately dealt with by the but-for test.

Accordingly, the same can be done with respect to competition law. In particular, policy considerations may be linked with the goals of private enforcement of competition law, namely corrective justice and deterrence. This hermeneutic operation is not new. The relationship between the goals of a certain discipline and the causal relationship has already been investigated.80

Linking causation with corrective justice means that the tortfeasor must compensate the victim when the former causes harm to the latter on the grounds of individual justice, regardless of any related collective social goal.81 Indeed, causation itself may be grounded in corrective justice. Corrective justice presupposes a loss for which someone is responsible, in turn someone is responsible only to the extent of a loss caused to another person.82

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On the other hand, according to the but-for test, the existence of concurrent causes, each of which was suitable to produce a harmful event, releases the tortfeasor from liability. In order to avoid this outcome, corrective justice may provide a justification for imposing liability upon the author of the conduct even in the presence of such concurrent causes.83

It is submitted that also with respect to competition law, and on the basis of corrective justice, antitrust victims could be compensated when an undertaking breaches competition law which is materially connected with the type of economic harm compensable under competition law, regardless of the occurrence of concurrent economic factors that in any case would have determined such economic harm.

Alternatively, imposition of liability may be justified on the basis of deterrence in circumstances where the but-for test is of limited use.84 In general, deterrence aims at making breach of competition law unprofitable by the threat of compensation. However, there is a narrower view of deterrence according to the economic approach, which construes causation in terms of economic efficiency.

According to this latter view, conduct should be deemed to have caused a harmful event when this promotes efficient allocation of resources. It follows that a definition of ‘cause’ is

83 For a summary of the arguments based on corrective justice and that justify imposition of liability in the presence of casual indeterminacy see: Donal Nolan, ‘Causation and the Goals of Tort Law’ in Andrew Robertson and Tang Hang Wu (eds), The Goals of Private Law (Hart 2009) 174.

84 In fact, on the specific issues of causation in fact and in the presence of causal indeterminacy, Nolan argues that relaxation of the casual requirements grounded on corrective justice is difficult to justify. Instead, the Author, on the basis of McGhee v National Coal Board [1973] 1 WLR 1 (HL) and Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22, [2003] 1 AC 32 argues that deterrence was the rationale behind imposing liability. It should be emphasised however that Nolan defines deterrence as specific deterrence, not as market deterrence Donal Nolan, ‘Causation and the Goals of Tort Law’ in Andrew Robertson and Tang Hang Wu (eds), The Goals of Private Law (Hart 2009) 166.
unnecessary since the causation inquiry is based on efficiency. Clearly, the underpinning of this approach is that the purpose of a legal system, tort included, is to pursue efficiency.

The problem with this approach is that it may result in denying compensation to victims when it is efficient that they bear the losses resulting from the breach of the law. This argument has been made in the context of enforcement and holds that if the losses resulting from violating the law plus the enforcement costs are greater than the benefits, it is more efficient not to enforce the law.

Notwithstanding this problem, the goal of deterrence could also be relied on in causation for breach of competition law in the presence of other economic factors each of which is sufficient to determine economic harm. Indeed, there is no reason to accept that deterrence should be construed only according to the terms set out by the school of law and economics. In fact, deterrence can be simply meant as a goal that discourages undertakings to violate competition law.

e) A proposal to amend the but-for test in competition law

To summarise the foregoing analysis, in order to amend the possible shortcomings of the but-for test in competition law, causation in competition law should be framed as follows.

As a preliminary consideration, let us recall that in some market situations there might be a lack of immediacy between breach of competition law and materialisation of harm. During such an

85 William Landes and Richard Posner, The Economic Structure of Tort Law (Harvard University Press 1987) 229. In reality this position does not mean that causation is not required. Rather, it presupposes the existence of a historical-material connection between conduct and harm. Such a connection is construed according to the conditio sine qua non. However, the policy criteria that determine whether to impose liability or not are based on economic efficiency. H L A Hart and T Honoré, Causation in the Law (2nd edn, Clarendon Press 1985) lxx-lxxi.
interval of time, third parties’ economic activities, or even the own victim’s economic activity, may negate the causal connection according to the but-for test.

The general rule should be that causation is deemed to be established when the undertaking’s anti-competitive conduct is suitable to give rise to the economic loss complained of by the defendant. Such adequacy should be sufficient to establish causation and should not be negated by external economic events that in ordinary circumstances break the chain of causation. However, a more nuanced assessment should be made when the victim itself puts in place economic conduct that is suitable to break the chain of causation.

In other words, an undertaking violating competition law should not be able to defend itself by claiming that the harmful event would have occurred anyway due to third party’s conduct or ordinary economic phenomena. For example, cartelists may defend themselves by claiming that while they agreed to fix prices, nonetheless they did not implement the anti-competitive agreement. In fact, the price increase complained of by the claimant has been caused by inflation. According to this proposal, this defence would be rejected.

With regard to the problem of the victim’s conduct that was put in place to respond to a breach of competition law, different assessments should be made. Here, corrective justice may not be capable of justifying a relaxation of the but-for test in order to ensure the victim’s compensation because the victim itself may be partly to blame for his economic harm. In this case, the causation inquiry should take into account different situations.

If the victim’s business conduct is manifestly wrong and does not meet any reasonable business standard, then it should constitute a novus actus interveniens, thus breaking the chain of causation.
This should be evaluated by taking into account the information available to the victim at the time in which the events unfolded.

However, when the victim’s conduct is not manifestly wrong, but nonetheless turns out to be unwise and aggravates the economic harm originated by the breach of competition law, then the victim’s conduct should be qualified as contributory negligence.

Finally, the ordinary limitation of liability based on the principle of remoteness of damage would operate as they currently stand. This refers to the problem that ‘the possible consequences of any human conduct are potentially endless’.\(^\text{87}\) Thus, it is necessary to halt such ‘forward’ causation process to avoid indefinite liability for the defendant. In English law, remoteness of damage is based on the idea of foreseeability of damage.\(^\text{88}\)

In competition law remoteness of damage is likely to arise, among other things, in relation to the indirect purchaser standing. This refers to a situation where cartelists sell the overcharged product to distributors who in turn pass on the overcharge to buyers further down the chain. The issue is whether final buyers (i.e., indirect purchasers) are entitled to compensation against the cartelists. The Commission believe that indirect purchasers should be compensated.\(^\text{89}\)

For the purposes of causation, it is generally accepted, and thus it is foreseeable, that undertakings buying from a cartel pass on the overcharge further down the chain. However, while this is the case in simple markets characterised by the presence of cartelists who sell to distributors, who in turn sell to final consumers, this might not be the case in more complex


markets where the economic process includes numerous undertakings operating in different stages.

In this latter case, one might ask whether the rule of remoteness of damage would operate and, if so, at what stage it is reasonable to halt cartelists’ liability. This problem is compounded by evidentiary difficulties such as proving a reasonable estimate of how much the initial overcharge affected the price of the product bought by final consumers. Perhaps, it is unlikely that final consumers who brought products in such complex markets would make a claim precisely because of such evidentiary difficulties. However, as a matter or principle, remoteness of damage would be an acceptable defence.

9. Causation in competition law and harmonisation

The legal notion of causation is problematic. Even if a common sense approach is preferred, problems are likely to arise when conduct consists of business behaviour, either collusive or unilateral, that takes place in the market context. National law provides the underlying legal framework of causation. The continental *conditio sine qua non* and the common law but-for test share similar features.

In the Commission Staff Working Paper annex to the Green Paper, the main concern is directed to evidentiary issues of causation rather than the notion of causation itself. The Green Paper states that dissimilar notions of causation among the Member States will not lead to ‘diverging results’. In fact the Green Paper does not suggest any clarification of the notion of causation or harmonisation. Similarly, the Commission’s proposed directive does not include any rules concerning causation.

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The argument against harmonisation relies on the fact that Member States’ causation rules are already similar and therefore there is no need to harmonise them. While it is true that national courts might interpret their causation rules in different ways, thus giving rise to different outcomes, such divergence itself does not necessarily justify their harmonisation. Harmonisation requires a stronger justification than differences among legal systems.

The case for harmonisation is centred on the principle of effectiveness. Remember that it provides that the application of national law in the enforcement of a EU right should not make the exercise of that EU right impossible or excessively difficult. It has been shown that the economic effects arising in the market are interrelated between each other and intermingle with third parties’ action.

As a result, it is difficult to identify what was the ‘cause’ that generated a certain economic loss. This is not just an evidentiary issue. The problem lies in what is meant by ‘cause’ in the economic context. Is it just the business conduct of the undertaking which has breached competition law, or is it a set of conditions (‘the market context’) in which such business conduct has played a predominant role?

It has been seen that often there is no immediacy between conduct and economic harm. In such a temporal gap, third parties’ economic actions interfere in such a market context. In addition, it can be expected that competition law victims, especially the victims of an abuse of dominant position, respond to such conduct by putting in place conduct aimed at countering the abuse of dominant position.
When ‘the market context’ is complex, antitrust victims might find it difficult, if not impossible, to identify and prove the causal relationship between conduct and harm. The undertaking breaching competition law might argue that the claimant’s economic harm is the outcome of a set of economic conditions of which its conduct played no significant role. The undertaking could also argue that such harm would have occurred in any case.

Accordingly, it has been argued that if the undertaking’s conduct has resulted in anti-competitive effects and victims have suffered a loss as a result of such anti-competitive effect, then they should be compensated and the defendant should be precluded to defend itself by showing that other external economic conditions would have in any case determined the economic loss.

The principle of effectiveness fits in this context. Since it provides that domestic rules making the exercise of the EU right impossible or excessively difficult must be set aside, the above-mentioned rules that negate the causal connection between conduct and loss could be disapplied. Policy considerations such as corrective justice and deterrence would strengthen the preclusion of such defences.

Nonetheless, this principle has some limits because it results in the disapplication of domestic rules, but it does not prescribe how to decide in other complex situations. Different national judicial attitudes might induce some judged not to set aside domestic rules. Given the importance of causation rules, it is also doubtful that the CJEU would be prepared to declare them incompatible with EU law on the grounds of the principle of effectiveness.

By contrast, harmonised rules on causation would provide the opportunity to design them in such a way as to achieve corrective justice and deterrence from a systematic viewpoint. Even if
the CJEU were prepared to hold that the traditional but-for test (*or condictio sine qua non*) does not comply with the principle of effectiveness, its judgments on causation in competition law would be the result of a piecemeal approach developed according to requests of preliminary rulings from national courts. Thus, it is unlikely that the CJEU case law would result in the same systematic regulation that the EU legislator would be able to accomplish when enacting comprehensive causation rules.

10. Causation and the proposal for a directive on damages actions in EU competition law

The proposal for a directive on damages actions does not make express provisions for causation. However, under the rules on quantification of harm, it provides a presumption that a cartel causes harm. This presumption indicates that the Commission is aware that causation is likely to create difficulties for claimants. However, this presumption may be insufficient to alleviate the above-mentioned issues arising from causation. Indeed, the wording is vague and, depending on how this provision is implemented by the Member States, it may enable the undertaking to escape liability in the examples that have been made in this chapter. For example, it is not clear whether this presumption covers the issue of ‘over-determination’, which refers to the simultaneous presence of different economic phenomena, including a cartel, each of which is suitable to cause a price increase. Recall that in such a case, the infringing undertakings may be able to defend themselves by arguing that the purchasers’ overcharge was caused by reasons other than the cartel. The presumption contained in the draft directive may disallow this defence. However, this outcome depends on how the future directive is implemented by the Member States and how national courts interpret the relevant rules.

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92 Article 16(1) reads as follows: ‘Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption.’
A second shortcoming with this presumption is that it does not include those situations in which a business, which is a victim of an infringement of competition law (eg abuse of dominant position), reacts to such an infringement by putting in place business practices that worsen its financial position. Recall that the infringing undertaking may escape liability by proving that the victim itself breached the chain of causation thus causing its own economic harm.

Given the complexities of such situations, specific rules on causation should have been proposed. In the absence of EU rules on causation, the Member States will have considerable discretion in the implementation of this presumption, which may jeopardise the effectiveness of the right to antitrust compensation.
Chapter 5

Punitive damages

1. Introduction to punitive damages and their harmonisation

Exemplary or punitive damages are a type of damage that aims at punishing the tortfeasor.¹ They entail the award of a sum of money greater than the losses suffered by the victim. They differ from compensatory damages as they do not aim at restoring the victim’s status quo ante had the tort not been committed. Thus the rationales of compensatory and punitive damages are different: the former relates to corrective justice, the latter to the aim to punish² and/or deter the tortfeasor.³

Exemplary damages have been criticised on the following grounds:

First, they should not be allowed because punishment is not a function of civil law; in addition award of compensation already amounts to a form of punishment.⁴ On the other hand, there are situations in which, for policy reasons, some conduct is illegal because it is harmful, but is not criminalised.⁵ In such cases, punitive damages may well accomplish a punishment goal without resorting to criminal sanction. In addition, criminal, regulatory and administrative sanctions may be inadequate, which may leave scope for the civil sanction.

¹ Rookes v Barnard and Others [1964] A.C. 1129, 1162. ‘Punitive damages must be punishment to the defendant and not compensation to the plaintiff’.
² Harvey McGregor, McGregor on Damages (18th edn, Sweet and Maxwell 2009) 420.
⁵ Law Commission, Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997) 94.
Secondly, exemplary damages result in a windfall to the claimant because they are greater than the loss suffered by the victim. It is argued that their amount is excessive. The reply to this objection is that such a windfall is a necessary by-product of punitive damages.

In addition, exemplary damages are unpredictable and uncontrollable. This is because in some jurisdictions award of exemplary damages is discretionary and depends on various criteria. In this respect it may be argued that lack of legal certainty does not deter because some non-risk averse tortfeasors may underestimate their amount and decide to commit a wrong.

Moreover, they might encourage unmeritorious litigation since they alter the decision in favour of making a claim by providing an incentive to sue when a claim has a weak legal basis or weak evidence. However, in relation to US antitrust law, it has been replied that antitrust damages are not excessive since they do not include neither prejudgment interests, nor losses of allocative efficiency.

With regard to competition law, some criticisms have been levelled against these damages. The first is that the application of leniency policies may result in whistleblowers having their fine commuted to zero. Imposing punitive damages may jeopardise the policy to encourage whistleblowers.

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6 ibid.
7 ibid.
11 Fishman v Estate of Wirtz, 807 F.2d 520 (1986). Prejudgement interests refer to the interest starting from the time of the loss until the date when the judgement is given.
13 Mark Brealey and Nicholas Green, Competition Litigation (OUP 2010) 478-479.
Secondly, quantification of punitive damages is an appropriate task for administrative agencies, not for courts, especially with reference to calculation of the wrongdoer’s gains. This criticism may well apply to infringements of competition law, whose quantification of losses requires sophisticated economic analysis.

Thirdly, exemplary damages may deplete company’s resources thus denying other prospective claimants compensatory damages. In addition, these damages may put into jeopardy future undertaking’s financial viability, with social repercussions for jobs and other stakeholders of the undertakings.

Some benefits brought by exemplary damages have been highlighted too.

The main one is deterrence, which consists of two aspects.

First, in some circumstances the gains flowing from a wrong are greater than the losses inflicted on the victim. If the amount of compensation was equal to victim’s loss, a wrongdoer would still have the incentive to commit a wrong.\(^{15}\)

Second, a tortfeasor may decide to commit a wrong because she knows that there is a low probability of being found liable. Exemplary damages counteract such probability.\(^{16}\) If the probability of being found liable is 50%, then increasing more than twofold the amount of compensation makes the decision to commit a wrong unprofitable. This aspect will be later analysed in more details given its relevance in antitrust enforcement.

\(^{15}\) Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 100.

In addition, it is disputed that punitive damages encourage unmeritorious litigation. In fact, when a claim is well founded, the prospect of being awarded exemplary damages is an incentive to encourage risk-averse would-be claimants to make a claim. In reality, it cannot be said in advance whether exemplary damages create a positive rather than negative incentive. Various factors account for the decision to bring an action and some of them depend on the concrete circumstances of the case.

Currently, few Member States provide for punitive damages. Thus, there is no significant risk of alteration of the level playing field. Nonetheless, this situation may change since some Member States may decide to introduce them. In addition, there is currently a need to enhance the deterrent function of damages actions. Harmonisation of punitive damages is crucial to accomplish this objective since the main rules would be designed by taking into account the circumstances and the types of violation of competition law that require these damages.

2. A collective perspective on punitive damages: societal damages

Recent US scholarship on punitive damages focuses on ‘societal damages’. Societal damages have been defined as harm inflicted on the members of the society who are not the direct victims of a wrong.\textsuperscript{17} Such damages suit two particular categories of harm: multiple victims harmed by a single tortious act and multiple victims harmed by repeated tortious acts.\textsuperscript{18} They accomplish both corrective justice with respect to those victims who have not made a claim, and deterrence as they are based on the insights on deterrence.\textsuperscript{19}

\textsuperscript{17} Catherine Sharkey, ‘Punitive Damages as Societal Damages’ (2003) 113 Yale L.J. 347, 351.
\textsuperscript{18} Catherine Sharkey, ‘Punitive Damages as Societal Damages’ 389.
\textsuperscript{19} Catherine Sharkey, ‘Punitive Damages as Societal Damages’ 391.
Societal harm consists of two categories: specific harm to identifiable individuals and diffuse harms that affect the society in general. In particular, diffuse harm refers to harm which extends beyond identifiable individuals. Damages resulting from breach of competition law may fall within this latter category. The main adverse effects of breach of competition law are overcharge, the ‘umbrella effect’, deadweight loss, decreased incentive to innovate, and loss of productive inefficiencies.

While adverse effects related to price increase may refer to a class of individuals who bought the overcharged product, the other harms are more difficult to refer to a particular class of consumers and to measure. For example, the effects of less innovation are normally diffuse. Managerial inefficiency is also a diffuse harm as in the long term it decreases a company’s ability to compete on the market and to trigger the process of rivalry among businesses. In these cases, punitive damages may account for damages that are difficult to measure, but that are pernicious in the long term.

3. Deterrence and punitive damages

In Rookes, Lord Devlin expressed the concern that exemplary damages may amount to a punishment greater than that inflicted if the defendant’s conduct were criminal. In addition, such

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20 Catherine Sharkey, ‘Punitive Damages as Societal Damages’ 400.
22 Deadweight loss is a loss of allocative efficiency, Herbert Hovenkamp, Federal Antitrust Policy (4th edn, West 2011) 83-86.
23 Final Report 412.
24 [1964] A.C. 1129. With regard to English law, Rookes is the current authority on exemplary damages. It provides that they may be awarded on three grounds.
The first is an ‘oppressive, arbitrary or unconstitutional actions by the servants of the government’.
The second arises when ‘the defendant’s conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.’ Here, the defendant estimates that his gains resulting from
‘punishment’ is imposed without the guarantees offered by criminal law. Therefore he held that punitive damages must be awarded with restraint and suggested that some upper limits should be made.\textsuperscript{25}

While this concern is understandable, punitive damages should be awarded on the basis of a principled approach. With regard to competition law, in chapter two it has been argued that, despite its limits, a rational policy of enforcement should take into account some insights provided by the theory of deterrence.

In particular, law and economics scholarship has developed the theory of ‘optimal deterrence’. Its goal is to design a sanction in such a way that the would-be wrongdoer should internalise all the social costs resulting from illegal conduct, that is to say to pay for the losses created by his conduct. Optimal deterrence should avoid both overdeterrence and underdeterrence.

Overdeterrence occurs when the wrongdoer pays more than the generated loss. This is because it would encourage taking unnecessary precautions to avoid liability, thus deterring social beneficial activities. Underdeterrence occurs when the wrongdoer pays less than the generated loss. This is because precautionary activities are insufficient, and prices would be too low in respect of the risks involved in the production, thus encouraging excessive risk activities.\textsuperscript{26}

In order to implement optimal deterrence, punitive damages should be calculated by adding compensatory damages, which correspond to the loss generated by illegal conduct, and wrongdoing will be greater than the victim’s loss. If compensatory damages were the only remedy, the defendant would not be deterred to commit a wrong. Exemplary damages operate in such a way to strip the defendant’s gains. The third is when exemplary damages are authorised by statute.

\textsuperscript{25} [1964] A.C. 1129, 1227-1228.

exemplary damages. Exemplary damages operate in order to fill the gap between compensatory damages and optimal deterrence. In particular, they are awarded whenever the wrongdoer has a chance to escape liability and are calculated by multiplying compensatory damages by the probability of being found liable.27

Various factors account for a situation in which the defendant may escape liability. Victims may not sue due to difficulties in proving causation, other evidentiary problems, and when the litigation costs exceed the expected gains.28 Here, an award of punitive damages may provide an incentive to accept the risk of an adverse litigation outcome. Other circumstances that increase the probability of escaping liability are when a person is not aware of being a victim because the harm is concealed, or when the tortfeasor is unknown.29

4. Punitive damages in EU Competition Law

One of the issues submitted to the Court of Justice in Manfredi was whether national courts could award punitive damages on their own motion. Advocate General Geelhoed argued against the award of punitive damages for breach of EU competition law.30

He reached this conclusion by noting that, according to EU law, compensation for harm produced by breach of EU law has a compensatory nature, and should not allow the victim to

27 Mitchell Polinsky and Steven Shavell, ‘Punitive Damages: An Economic Analysis’ 874. This model of calculation of punitive damages based on the ‘multiplier’ is not the only one, and other criteria to determine whether or not to award such damages have been advanced. For example, Robert Cooter, ‘Economic Analysis of Putative Damages’ (1982) 56 S. Cal. L. Rev. 79. The Author argues that punitive damages should be awarded for intentional torts only.
30 Joined Cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-6619, Opinion of AG Geelhoed, para 70. ‘Ensuring the useful effect of Art.81(1) EC does not, to my mind, necessitate the award of compensation greater than the harm suffered’.
obtain an economic advantage.\textsuperscript{31} However, he also noted that this issue is not dealt with by EU law, which means that national law governs this matter.

While this solution shows consideration for national law, it is also problematic. In an earlier passage, the Advocate General reminded that private and public enforcement serves the two different purposes of deterrence and compensation respectively\textsuperscript{32} and that civil sanctions may increase the deterrent effect.\textsuperscript{33} However, to achieve this latter goal, punitive damages may be necessary.

The Court of Justice confirmed the reference to the principle of national procedural autonomy,\textsuperscript{34} and that according to the requirement of equivalence, if punitive damages are available in actions based on national competition law, then such damages must be also be available in actions based on EU competition law.\textsuperscript{35}

The Court of Justice has no longer dealt with punitive damages although an interesting remark was made by the Advocate General in \textit{T-Mobile Netherlands}.\textsuperscript{36} There, when dealing with a concerted practice, Advocate General Kokott suggested that a serious infringement could be taken into account by national courts to award punitive damages if they are available.

\textsuperscript{31} Manfredi, Opinion of AG Geelhoed, para 68.
\textsuperscript{32} Manfredi, Opinion of AG Geelhoed, para 64.
\textsuperscript{33} Manfredi, Opinion of AG Geelhoed, para 65.
\textsuperscript{34} Manfredi, para 92.
\textsuperscript{35} Manfredi, para 99.
\textsuperscript{36} Case C-8/08 \textit{T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit} [2009] ECR I-4529, Opinion of AG Kokott, para 107.
5. Punitive damages in UK Competition Law: the policy

Given that Manfredi established that punitive damages are a matter of national law, this paragraph deals with English law. The reason is that this jurisdiction is developing some experience in competition litigation and two recent cases provide interesting insights into punitive damages.

In this respect, Devenish\(^\text{37}\) is an important authority. The case was concerned with a damage claim for a cartel involving a certain class of vitamins. The cartelists had already been fined by the Commission, thus the case was a follow-on action in which the claimants, direct and indirect purchasers, asked \textit{inter alia}, exemplary damages.

Their award was denied on three grounds:

First, the principle of \textit{no bis in idem} precluded such an award since the defendants had already been fined by the Commission.\(^\text{38}\)

Second, Article 16 of Regulation no. 1/2003 prohibits national courts from taking decisions running counter to Commission decisions. An award of punitive damages would have amounted to an assessment that the administrative fine was not sufficient to punish and deter, a conclusion that would be inconsistent with the Commission decision.\(^\text{39}\)

Third, punitive damages would be against the English principle of double jeopardy because the defendant had already been fined.\(^\text{40}\)

In \textit{Devenish}, it seems that denial of punitive damages was motivated by the fact that it was a follow-on action and a fine had already been imposed. An additional reason was that defendants had benefited from immunity policy and the award of punitive damages would have undermined

\(^{37}\)\textit{Devenish Nutrition Ltd v Sanofi-Aventis SA} [2007] EWHC 2394 (Ch).
\(^{38}\)[52].
\(^{39}\)[54].
\(^{40}\)[64].
leniency programmes. The need to preserve such programmes was confirmed in *2 Travel*, a follow-on action concerned with ‘national’ abuse of dominant position (Chapter II, Competition Act 1998). There, the Competition Appeal Tribunal awarded such damages also on the basis that, unlike *Devenish*, there had no been leniency applicants.

From a general ‘deterrence’ perspective, the rationale of *Devenish* is consistent with the idea that punitive damages should be awarded in order to discourage violation of the law. The reason is that effectively *Devenish* established that punitive damages should not be available in follow-on actions. Given that follow-on actions do not bring any benefits in terms of deterrence (the violation has already been ascertained by the competition authority), then punitive damages should not be awarded in such actions.

However, *2 Travel* seems to have adopted a different approach whereby punitive damages in follow-on actions are allowed, however they are denied when the defendant is a whistle-blower who benefited from immunity. The Competition Appeal Tribunal have accepted the risk that more punitive damages claims will be made and attempted to counter this risk by requiring that such claims need to have been executed intentionally or recklessly.

Given that *2 Travel* allows punitive damages in follow-on actions, this judgment is not entirely consistent with the ‘deterrence’ perspective. As seen above, the competition law violation has

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41 [51].
42 *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.
43 [495].
44 We are under no illusions but that this Judgment is likely to incentivise the bringing of claims for exemplary damages in competition cases. That is a matter for future Tribunals. We would only emphasise that the mere fact that an infringement of the competition rules has been found is insufficient to justify the pleading of such a claim. In any case where exemplary damages are sought, it will be necessary to plead, and to plead with specificity, facts and matters alleging that the competition law infringement in question was executed either intentionally in breach of the law or recklessly so as to be regarded as sufficiently outrageous as to fall within Lord Devlin’s second category. Otherwise, we consider, the claim will fall to be struck out.’ [598].
already been discovered, thus punitive damages would not serve the purpose to discourage such violation. However, by denying punitive damages against whistle-blowers, it still pursues deterrence in a different way. Indeed, protecting the defendant from punitive damages is an incentive to apply for leniency programmes, which makes cartels unstable, which in turn increases deterrence.

6. Punitive damages in UK Competition Law: the test

In some circumstances, the application of the test for the award of punitive damages might be problematic. Both Devenish and 2 Travel referred to the Rookes’ second category for the award of punitive damages: ‘the defendant’s conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff’.

This requirement does not always suit all infringements of competition law. For example, in cartels in which the overcharge is paid directly by final consumers, the consumers’ loss equates to the undertaking’s gain. In this case punitive damages would not be available, which is undesirable given that cartels are the most serious competition law infringements.

With regard to abuse of dominant position, the approach seems different. 2 Travel recognised that undertakings might be unable to predict whether their conduct amounts to an abuse of a dominant position.⁴⁵ Such uncertainty means that undertakings act by running the risk that their conduct is contrary to Chapter II of the Competition Act or Article 102 TFEU. The existence of this risk was deemed to be incompatible with the Rookes’ second category, which presupposes intentional conduct to infringe the law.⁴⁶

⁴⁵ [482].
⁴⁶ [484]-[488].
On this basis, *2 Travel* laid down the conditions under which punitive damages should be awarded. It held that such damages should be awarded when the risk of infringing the provision of abuse of dominant position was unacceptable, a situation that arises when the undertaking was aware that its conduct was ‘probably unlawful’ or ‘clearly unlawful’.\(^{47}\) However, such a situation also must be weighed against other factors such as:

‘(1) Any expected pro-competitive effects of the conduct.
(2) The degree and seriousness of any anti-competitive effects.
(3) The motive of the undertaking for acting.
(4) The practicability of achieving the same commercial or pro-competitive aim by following a different course of action with less serious anti-competitive effects.’\(^{48}\)

This test seems to introduce a rule of reason that requires the balancing between pro-competitive and anti-competitive effects. While this approach might be praised because it enforces the provision of abuse of dominant position in the light of economic analysis, in reality it introduces legal uncertainty because in some cases the economic approach depends on market data in which business conduct takes place, and the appraisal might vary over time if there is a change in the market circumstances.

**7. Assessment on punitive damages in UK competition law**

A rational policy of punitive damages should award them in order to counter the undertaking’s assessment that the probability of being found liable is low. This means that courts would have to make a retrospective appraisal of the circumstances of the case such as, for example, the characteristics of the violation of competition law and whether it was difficult to detect.

\(^{47}\) [490].

\(^{48}\) [490].
According to UK competition law, punitive damages are awarded when ‘the defendant’s conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff’. Thus, UK competition law does not take into account the undertaking’s calculation on the above-mentioned probability.

This seems to be a drawback because low probability of being found liable plays an important part in the decision whether to engage in illegal conduct. With regard to the UK test, which is based on the assessment of illegal gains being greater than the caused losses, it may not suit some violations of competition law, such as cartels, where illegal gains tend to correspond to consumers’ loss.

With regard to the UK domestic version of abuse of dominant position, 2 Travel seems to have introduced a specific test. First of all, it must be proved that the undertaking was aware that its conduct was at least ‘probably unlawful’. Secondly, other economic and non-economic factors must be weighed.

In some abuses of dominant position, there might be uncertainty whether business conduct breaches competition law or not. In this case, pursuing deterrence through the imposition of punitive damages would not work since deterrence presupposes undertaking’s deliberate decision to engage in illegal behaviour.

However, apart from this exception, the law should be framed in such a way as to award punitive damages when an undertaking calculates that there is a high probability of escaping liability thus engaging in illegal conduct. This solution would be consistent with the concern raised in 2 Travel
whereby punitive damages should not be granted in situations of legal uncertainty, but would catch situations in which the undertaking acts in the knowledge of breaching competition law in order to make illegal profits.

8. Proposal for introducing punitive damages for EU competition law

US antitrust provides for treble damages for breach of the Sherman Act. Effectively they amount to punitive damages. Trebling antitrust damages has been criticised because it sets a statutory presumption that the probability of being found liable is one out of three, which is arbitrary because antitrust violations may have either a higher or lower rate. On this basis, it is recommended a tailored approach in which punitive damages are calculated on the basis of a reasonable estimation,\(^49\) even though it is acknowledged that such evaluation is an arduous task.\(^50\)

The adoption of punitive damages has been considered at the European level. In the elaboration of the policy options on damages actions for breach of EU competition law, the Commission set out four definitions of damage: compensatory, recovery of illegal gain, double damages for horizontal cartels, and prejudgment interests starting from the infringement of competition law.\(^51\)

Double damages for horizontal cartels appear to be the closest category to exemplary damages. Although in the successive White Paper, the Commission no longer mentioned these four categories, it also recalled that ‘as a minimum’ victims should receive full compensation.\(^52\) The


use of the word ‘minimum’, referred to compensatory damages, might leave some room for the introduction of punitive damages, which would represent the ‘maximum’ option.

The Commission documents do not give any explanation why the proposal for double damages was dropped. During the consultation process, a number of opinions expressed their opposition to punitive damages. On the other hand, the Final Report, when setting out the policy ‘scenarios’, made the case for double damages.

The European Parliament seems to oppose the introduction of punitive damages. For example, in an early document it stressed that only the damage actually suffered should be compensated. In a later resolution, it held that award of punitive damages should be avoided.

The Commission itself did not follow the recommendations of the Final Report. In a proposal for a directive, there is no explicit mention of punitive damages as it provides that the Member States should ensure that actions for damages should pursue full compensation. The expression ‘full compensation’ seems to refer to the concept of compensatory rather than punitive damages.

53 For example, the CBI stated their contrariness by relying on the usual argument of windfall for the claimant. This position was expressed for all types of infringement, including horizontal cartels. ‘EC Commission Green Paper on Damages Actions’ CBI Response. April 2006. <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/cbi.pdf> accessed 12 August 2011.
54 Final Report 548.
58 Article 2.2.
Indeed, the second paragraph of Article 2.2 of the draft directive provides the traditional definition of compensation based on corrective justice as it states that ‘Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed.’ The same provision lists the heads of damages such as actual loss, loss of profit, and payment of interest.’ This leaves little doubt that punitive damages have been excluded from the scope of the directive. Indeed, the Impact Assessment Report on the above-mentioned proposal for a directive on damages actions\textsuperscript{59} confirms that the directive wants to avoid the outcome of over-compensation which is defined as a situation in which victims systematically receive damages higher than the entire suffered loss. In the public consultation that preceded the draft of the impact assessment and the draft directive, many respondents welcomed this choice.\textsuperscript{60}

9. Punitive damages and harmonisation

Punitive damages create a dilemma. On the one hand, they encourage unmeritorious claims because compensation may be greater than the alleged losses. On the other hand, they are an important tool to deter would-be wrongdoers and encourage prospective claimants to make a claim. Striking a balance between these two competing goals is an arduous task because policymakers cannot predict the particular circumstances in which a claim should be encouraged rather than discouraged.

The difficulty in designing a structure of incentives, which addresses the problems of claimants’ apathy and abusive litigation, seems to favour the argument that punitive damages should not be


\textsuperscript{60} At p 87.
awarded. For example, in the EU, the proposal to adopt punitive damages evokes the fear that it incentivises unmeritorious litigation.\textsuperscript{61} Such arguments have been made in the light of the US experience, although some scholars have challenged the commonplace that treble damages are always awarded.\textsuperscript{62}

The problem is compounded by the fact that it has been proposed to adopt collective actions to facilitate antitrust claims. The next chapter will examine the argument that the combination of punitive damages and collective actions has created a chance for opportunistic lawyers’ behaviour in which litigation is driven to pursue their interest rather than that of the victims.

Despite such objections, the case for the introduction of punitive damages seems convincing because they are one of the most powerful tools to enhance the deterrent function of damages actions. Estimates about the low level of compliance with competition law suggest that more deterrence is desirable. The issue is therefore to design the rules to accomplish this goal.

For example, punitive damages should be excluded in some circumstances. First of all, they should not be awarded in follow-on actions. Since the competition authority has already discovered competition law infringement, follow-on actions achieve little in terms of deterrence.

In addition, punitive damages should not be imposed on applicants of leniency programmes. Such programmes apply to cartels and it is important to preserve the goal to incentivise such applications because cartels are the most serious form of violation of competition law, because they are difficult to detect, and because the relevant evidence is often concealed.

Finally, punitive damages should be excluded for non-cartels infringement because they are easier to detect than cartels. Here the rationale of increasing damages to discount the probability of being discovered is less compelling. They should also be excluded for violations which may produce pro-competitive and anti-competitive effects, which normally occur in vertical agreements and abuse of dominant position.

With regard to the question whether punitive damages should be regulated at European rather than national level, currently, only three Member States provide punitive damages. This means that the risks of excessive disparity in the level playing field and forum shopping are not significant. Nonetheless, this situation may change if some Member States decide to introduce them. In this scenario it is unlikely that such national rules would take into account the above-mentioned exceptions in which punitive damages should not be awarded. This would jeopardise consistency in the enforcement across the Member States.

As the current situation stands, the main reason why punitive damages should be introduced at the EU level is that even if the number of damages actions brought before national courts was higher, it is unlikely that they would enhance deterrence. Simply put, undertakings would not

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consider compensation as a serious threat to make them comply with competition law. For example, as seen in chapter 2, a report of the OFT stated that undertakings are not concerned about the risk of being sued by private parties for breach of competition law.

The proposed directive does not mention punitive damages, nor does it explain why the proposal for their introduction in the early preparatory papers was rejected. A plausible explanation is that they are the most representative feature of US antitrust litigation, which raises the fear that the EU would imitate the US ‘litigation culture’. Thus, the Commission has chosen not to include them to facilitate the adoption of the directive. While this choice may be praised for its pragmatism, it does pose serious doubts about the capability of damages actions to promote and increase compliance with competition law.
Procedural aspects of damages claims in EU competition law.

Evidence

and

Collective Actions
Overview

Evidence and collective actions

Chapters six and seven are concerned with two procedural aspects that are relevant in competition law litigation: evidence and collective redress respectively.

With regard to evidence, its classification as a part of procedural law may be disputed since it influences both substantive and procedural law. On the other hand, evidence is primarily applied in judicial proceedings and within the framework set by procedural law.

Evidence is concerned with knowledge of factual situations, that is to say with facts that constitute the elements of a cause of action. In short, ‘the function of the law of evidence is to regulate the process of proof of facts for the purposes of legal proceedings.’

Evidentiary rules constrain individuals’ behaviour on how to obtain and submit evidence, which has an impact on the outcome of a claim. From the EU law perspective, the principle of national procedural autonomy includes national evidentiary rules, which means that they must also comply with the principle of effectiveness.

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2 Bentham wrote that ‘The field of evidence is no other than field of knowledge.’ Jeremy Bentham, ‘Introductory view of the rationale of evidence’ (Bowring, first published 1843) 10.


4 Ian Dennis, The Law of Evidence (4th edn, Sweet and Maxwell 2010) 27. In reality, the distinction between law and facts is not always clear-cut. The reason is that only legally relevant facts are taken into account, which means that the law itself frames construction of facts that are relevant for legal purposes. Put differently, the law determines the meaning of some factual elements.

This principle is particularly important in the context of competition law proceedings because some breaches of competition law, e.g. cartels, are difficult to prove. Therefore, too restrictive evidentiary rules may adversely affect the effectiveness of the right to compensation.

In competition law proceedings, evidentiary rules are also likely to be taken into account when different fora are available since undertakings would choose the jurisdiction whose evidentiary rules are not in favour of claimants. On this basis, harmonisation of some aspects of evidence is considered. That said, not all evidentiary rules should be harmonised. For example, while harmonisation of disclosure rules is highly advisable, the same cannot be said with respect to the standard of proof as it would prove to be ineffective.

With regard to collective actions, the underlying theme is the need to aggregate claims, which all share the same cause of action, i.e. breach of EU competition law. Sometimes, the same breach harms a great number of individuals. In addition, although the value of individual losses may be small, their sum results in considerable illegal gains for the undertaking. Accordingly, individuals have little, if no, incentive to make a claim. It follows that collective actions have an impact on the effectiveness of the right to compensation.

Different regulations of collective actions are likely to determine different liability outcomes, which gives rise to the risk that undertakings might engage in forum shopping strategies and to the problem of an excessive alteration of the level playing field.
Chapter 6
Evidence in competition law proceedings

1. Introduction to evidence and its harmonisation

The features of competition law pose particular challenges in relation to evidence. Difficulties and costs associated with the collection and assessment of evidence affect some crucial aspects of private enforcement such as the incentive to make a claim, the probability to it, and litigation costs. Broadly speaking, there are two main obstacles: asymmetry of information and collection of evidence. Such problems might discourage stand-alone actions and create passive reliance on the evidence collected in the course of investigation undertaken by a competition authority.

Harmonisation of some evidentiary rules is desirable because they have an impact on the conditions for the exercise of the right to compensation, which is relevant to the principle of effectiveness. In addition, they also exercise decisive influence on the liability outcome. This means that if evidentiary rules are not tailored to the particular characteristics of violations of competition law, they may frustrate antitrust damages actions.

a) Asymmetry of information

‘Asymmetry of information’ refers to the fact that individuals and undertakings have different degrees of information on some facts. In particular, infringers of competition law tend to conceal

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the evidence relating to the breach of competition law. In litigation, asymmetry of information means that a would-be claimant may not be able to gather evidence to support a claim. This affects her decision to make a claim since the burden of proving the infringement of Article 101(1) and Article 102 TFEU rests on the party or authority alleging the infringement.

The problem is compounded by the fact that anti-competitive effects materialise primarily through price increase, which may also be the result of lawful economic decisions. Thus, it is not correct to simply infer that price increases derive from infringements of competition law. This means that evidence of illegal conduct (agreements, concerted practices or decisions of associations of undertakings, abuse of dominant position) is needed, which is the reason why undertakings conceal it.

This problem has been addressed by granting the Commission extensive investigative powers, such as the power of inspection of business and private premises. However, such powers are not available to private parties. As a result, individuals can only rely on the ordinary rules on collection of evidence according to the law of the country in which antitrust proceedings are seized.

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8 This problem is clearly recognised by the Court of Justice. See for example, Case T-208/06 Quinn Barlo Ltd v Commission [2011] ECR II-07953, para 46.


10 For example, national courts may ask the Commission to transmit information held by the latter: Regulation 1/2003, Article 15(1). The Commission’s powers of inspection are also intense: its officials may enter any premises of the undertakings concerned, examine books and other records, seal any business premises, books or records: Regulation 1/2003, Article 20(2). Premises other than the place of business of the investigated undertakings may be inspected too, including the homes of directors, managers and other members of the staff of the undertakings: Regulation 1/2003, Article 21(1).
b) Collection of evidence

A second problem is that in competition law litigation, evidence is also based on dispersed economic information. As already seen, the typical anti-competitive effect manifests itself through prices (price increase, price discrimination, low prices in the short-term with a prospective increase in the long term). Significant statistical samples of market prices remedy the practical impossibility of collecting all price increases of a certain product. However, its production and analysis may be costly.

Once such information has been gathered, it must be also assessed to discover whether it results from illegal conduct rather than lawful economic processes. Both operations are expensive, which might deter a would-be claimant to carry them out unless a prima facie case is strong enough to bear the risk. In general, this negatively affects the decision whether to make a claim, which might result in underdeterrence.

Discharging the burden of proof is further complicated in those agreements that produce both anti-competitive and pro-competitive effects. These agreements are unlawful if the former outweigh the latter. Normally, the existence of ‘mixed agreements’ is not difficult to prove because they are written. However, some of the exempting conditions (Article 101(3) TFEU), such as efficiency gains and consumer benefits, may be difficult to substantiate.

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11 There are also other anti-competitive effects which do not result in price increase, the main one being foreclosure of competitors thought anti-competitive agreements or abuse of dominant position.
13 I shall refer to such agreements as ‘mixed effects’ agreements.
14 As already mentioned in this dissertation, modern economic analysis holds that many business practices produce both competitive and anticompetitive effects. However, this is not the position of EU Law. For example, agreements that limit distributors’ freedom to determine the resale price (i.e. resale price maintenance) are unlawful per se regardless of the benefits they may bear; see Article 4(a) of the Commission Regulation (EU) 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1. On the other hand, the general structure of Article 101 provides that agreements that restrict competition may be exempt if certain positive conditions are met. See, para 11 of the Commission Notice, ‘Guidelines on the application of Article 81(3) of the Treaty’ [2004] OJ C101/97.
Often efficiency gains materialise at a later stage than the anti-competitive effects. Proof of the passing on to consumers of efficiency gains may also require specific economic information.\(^\text{15}\) While the burden of proof of the exempting conditions of Article 101(3) must be discharged by the defendant,\(^\text{16}\) it is plausible that the claimant wants to know whether such conditions have been met before making a claim.

\section*{2. Economic analysis in competition law}

In competition law litigation another important aspect of evidence is that it is concerned with economic assessment. With regard to public enforcement, the Commission have already recognised its importance and have set out some basic principles to which economic evidence must comply.\(^\text{17}\) The thrust of the argument behind reliance of economic analysis in competition law is that a formalistic legal approach is undesirable because it does not identify the benefits and the negative effects of business conduct.

While a \textit{per se} approach is beneficial because it lowers the cost of antitrust enforcement,\(^\text{18}\) in some circumstances it is too crude to accurately determine whether business practices are anti-competitive. This creates the risk of decisions in which business practices are condemned when in fact they are beneficial (false positive). In turn, this results in over-deterrence, which is

\begin{footnotesize}
\begin{itemize}
\item[15] In the time pre-Regulation 1/2003, the application of Article 101(3) was reserved to the Commission. It was argued that once the efficiency gains were proved, then there was an assumption that such efficiency gains would be automatically passed-on to consumers. However, this might change as the Guidelines on the Applicability of Article 81(3) provide more detailed requirements. Brenda Sufrin, 'The evolution of Article 81(3) of the EC Treaty' (2006) 51 The Antitrust Bulletin 915, 936.
\item[16] Regulation 1/2003, Article 2.
\item[18] The rationale of a \textit{per se} prohibition lies in the experience that it does not produce any precompetitive effect. Thus it is useless to examine the effects of a business practice. This results in lower enforcement costs. Andrew Gavil, William Kovacic and Jonathan Baker, \textit{Antitrust Law in Perspective} (2nd edn, West 2008) 79.
\end{itemize}
\end{footnotesize}
undesirable because it might prohibit socially beneficial business conduct. Economic analysis is supposed to prevent such an outcome.

However, while economic analysis can be more accurate about the welfare effect of business practices, it is also based on their economic characteristics and on the economic context in which they take place. It follows that the lawfulness of business practices is more uncertain because it depends on the historical economic circumstances taken into account in such economic analysis, with the result that a change in such circumstances may make a business practice unlawful.19

This creates more legal uncertainty than a situation in which legality of business practices depends on their formal compliance with a set of predefined legal categories. In turn, legal uncertainty might deter undertaking from adopting a certain business practice. The paradox is that while the per se approach is undesirable because it does not identify positive welfare effects, thus chilling competition, the economic analysis approach fails to provide legal certainty, which also deters undertakings from putting in place certain business practices.20

3. Evidence in competition law: fact finding through economic analysis

Economic evidence is based on empirical investigation on prices, elasticity of demand, ease of entry of potential competitors, and so forth. Such questions are dealt with by econometric analysis that is based on statistical methods, the main one being multiple regression analysis.21

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19 See for example, para 44 of the Commission Notice, ‘Guidelines on the application of Article 81(3) of the Treaty’, which states that assessment of restrictive agreements is made on the basis of the facts existing at any given point of time. Such an assessment is sensitive to changes in the facts.
21 Simon Bishop and Mike Walker, The Economics of EC Competition Law (3rd edn, Sweet and Maxwell 2010) 722-723. Multiple regression analysis is a statistical technique designed to identify information resulting from the relationship between variables.
Regardless of whether the role of economics should increase, numerous competition rules already rely on the economic analysis. The reason is that modern economics has achieved a level of sophistication that provides accurate knowledge and measurement of economic phenomena.22

For example, market power is nowadays the central feature upon which analysis of competitiveness of market is conducted. This requires definition of the relevant market, which is primarily based on cross-elasticity of demand.23 Subsequently, market shares of the concerned undertakings must be discovered. The nature of such investigation is essentially economic.

Economic analysis was already required by the Court of Justice since the early years of EU competition law. In Société Technique Minière the Court, when dealing with the issue whether an agreement had the object or effect of restricting competition, held that the economic context in which the agreement operated, and the actual competition that would occur in the absence of the agreement, had to be considered.24

In some abuses of dominant position, economic analysis is also necessary. For example, predatory pricing requires analysis of prices and costs.25 Similarly, exploitative abuses of dominant position require some economic analysis to determine whether prices charged by the dominant undertaking are excessive.

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25 For example, an important issue is whether average total costs, rather than average variable costs, should be considered as a basis to determine whether the undertaking was charging below costs. See Case C-62/86 Azco Chemie BV v Commission [1991] ECR I-3359.
Reliance on economic proof should not mislead about the role of economics in competition law. Indeed, one thing is to advocate that competition law should be concerned with economic efficiency and/or consumer welfare only. This is a normative proposition and this stance is questionable by critics of the school of law and economics.26

Another thing is to advocate economics in order to assist in applying the above concepts (market power, definition of the relevant market, consumer welfare effects, and so forth), but without assigning to competition law the normative and exclusive goals of efficiency and/or consumer welfare.

This second aspect implies to attribute to economics an epistemological task. Reliance on economics is justified to gain knowledge on economic phenomena without assigning to it a normative role. This is also consistent with the Court of Justice jurisprudence,27 which held that the goal of competition law provisions is not consumer welfare only.

4. Economic evidence and the courts

An important aspect of the debate on economic analysis is whether courts are suited to properly handle economic evidence. In the US, scepticism over Courts’ ability to appraise economic evidence is one of the arguments that militate against private enforcement of antitrust.28 In that jurisdiction, the problem is compounded by the fact that juries are called to make factual

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26 Modern competition law scholarship argues that competition law should be primarily concerned with consumer welfare. However, the underlying framework of consumer welfare is welfare economics, which takes an approach oriented to efficiency. The tenet is that efficiency gains are passed-on to consumers, with the consequence that the latter benefit from efficient arrangements. Such tenets were elaborated by the law and economics movement of the Chicago School, which takes ‘efficiency’ and the related concept of ‘wealth maximisation’ as a normative value that describes the legal system and prescribes how such system should be. For a criticism of this approach, Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 237.


evaluations also in antitrust cases. In particular, concerns have been raised whether judges and juries are sufficiently prepared to assess economic evidence.\(^{29}\)

Expert economic witnesses provide judges crucial assistance. In fact, nowadays complex antitrust litigation without the assistance of economic experts is unthinkable.\(^ {30}\) In the US, some empirical evidence seems to show that judges who have undertaken economic training and who are aided by economic expert witnesses might still make errors in the assessment of complex economic evidence. However overall judges’ economic training is beneficial.\(^ {31}\) In fact, a recent study challenged the claim that US judges cannot perform as well as the Federal Trade Commission in antitrust matters.\(^ {32}\)

A second problem is that economic analysis is not neutral. Rather, it is based on different assumptions that underpin various schools of economic thought. In addition, the way in which an economic theoretical framework is interpreted and applied may vary within the same adherents of a school. Plurality of frameworks and bodies of opinion result in different economic readings of the facts at issue. Not surprisingly, a litigant may easily find an economic expert advocating her case.

This poses the problem of experts’ reliability and the quality of information relied on to make an economic case. Partisanship of economic expertise is not always perceived as a problem. Expert

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witnesses have the interest to preserve their reputation \(^{33}\) and if they give an opinion, which is inconsistent with their previous research, the adverse party is likely to point it out with a resulting loss of credibility. In addition, pre-trial discovery enables the other party to scrutinise the expert witness evidence.

US law dealt with the problem of how a judge should assess opposing expert views. It requires an expert witness to have a certain level of methodological standard. This latter condition was set in *Daubert v Merrell Dow Pharmaceuticals* \(^ {34}\) in which it was held that the trial judge should make a preliminary assessment whether the reasoning or methodology underlying the offered scientific evidence is scientifically valid and can be properly applied to the facts of the case. \(^{35}\)

5. Economic evidence before the Court of Justice of the EU

Expert evidence, which also includes economic evidence, has become an important part of litigation before the CJEU. However, the Court assesses evidence freely, which means that economic analysis is of assistance to the Court’s appraisal, but it cannot replace legal assessment. \(^{36}\)

Generally speaking, two models of expert evidence can be traced in the EU Member States.

In the first, expert evidence is produced by neutral experts appointed by the Courts.


\(^{34}\) 509 US 579 (1993).

\(^{35}\) The implications of this case have been widely discussed by US antitrust scholars. For example, Roger D. Blair and Jill Boylston Herndon, ‘The Implications of Daubert for Economic Evidence in Antitrust Cases’ (2000) 57 Wash. & Lee L. Rev. 801. The Authors point out that exclusion of a party’s expert witness is likely to result in the dismissal of the case as the party would not be able to quantify damages or to prove crucial elements such as the relevant market and the anticompetitive effects. At 802. John E. Lopatka and William H. Page, ‘Economic Authority and the Limits of Expertise in Antitrust Cases’ (2005) 90 Cornell L. Rev. 617. Here the authors argue that *Daubert* has conferred the Courts discretion on the methodology employed by expert witnesses and has also enabled them to select the broad economic theories. At 621.

In the second, expert evidence is adduced by an expert appointed by the litigating party. Here, the evidence of the party’s expert witness is examined and cross-examined by the other parties. To a certain extent, the first and second model reflect the adversarial and inquisitorial ideologies underpinning civil proceedings. The system of expert witness’ evidence adopted before the Court of Justice of the EU represents a combination of these systems.\(^{37}\)

The CJEU has issued various judgments, which dealt with evidence submitted in competition law proceedings. These rulings have been made in the context of the judicial review of Commission’s decision on competition law and in which the Court was asked to evaluate the evidence that the Commission had relied on in its decisions. Here the Court developed a number of principles dealing with evidence. The following sections deal with two important principles: the doctrine of margin of appreciation and standard of proof.

6. The doctrine of margin of appreciation and its effects on follow-on actions

The doctrine of ‘margin of appreciation’ maintains that the Commission enjoys discretion when making complex assessment of economic nature. As a result the Commission’s assessment is not subject to the scrutiny of the CJEU. Effectively, this means that the Court has limited the extent of its judicial review.

With regard to competition law, a seminal form of this principle was contained in the early cases of the Court of Justice. In \textit{Consten}\(^ {38}\) the Court ruled that its review had to examine the reasons set


out in the Commission’s decision. The doctrine of the Commission’s margin of appreciation was also held in respect of control of concentrations and definition of the relevant market.\textsuperscript{39}

Such self-imposed judicial restraint is subject to the qualification that the rules of procedures and statement of reasons have been complied with, facts have been accurately stated, lack of manifest error of appraisal or misuse of power.\textsuperscript{41} Similarly, the Commission must base its assessment on accurate, reliable and coherent evidence, which provides all relevant data that allow appraising a complex situation.\textsuperscript{42}

Policy discretion appears to be the main rationale for granting the Commission a margin of appreciation.\textsuperscript{43} In addition, the CJEU does not always have the means to evaluate in detail the economic evidence relied on by the Commission. While these are sensible justifications, it has been noted that the doctrine of margin of appreciation prevents justiciability of competition law in cases where economic evidence alone determines the outcome of the case.\textsuperscript{44}


\textsuperscript{40} Case T-301/04 Clearstream v Commission [2009] ECR II-3155.

\textsuperscript{41} Case T-271/03 Deutsche Telekom AG v Commission [2008] ECR II-477, para 185.

\textsuperscript{42} Case T-301/04 Clearstream v Commission [2009] ECR II-3155, para 47; Case C-12/03 P Commission v Tetra Laval BV [2005] ECR I-987, para 39; Case T-201/04 Microsoft v Commission [2007] ECR II-3601, para 482. In Case C-413/06 P Bertelsmann [2008] ECR I-4951 the Court of Justice held that evidence must be factually accurate, reliable, consistent, and contain all the information which must be taken into account to assess a complex situation, para 145. Self-imposed judicial restraint with regard to the assessment of complex economic matter is not exclusive to competition law. For example, in Case C-491/01 The Queen and Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd [2002] ECR I-11453, the Court of Justice took the same approach when it assessed whether the Directive 2001/37/EC had complied with the principle of proportionality. The Court recognised the existence of the Community legislature’s discretion whether the adopted measures are suitable to achieve the proposed aim and do not go beyond what is necessary to achieve such aim as long as such measures are not manifestly inappropriate, paras 122 and 123.

\textsuperscript{43} See for example, Case C-344/98 Masterfood Ltd. [2000] ECR I-11369. Here the Court stressed the Commission is responsible for defining and implementing Community competition policy, para 46.

\textsuperscript{44} Heike Schweitzer, ‘The European Competition Law Enforcement System and the Evolution of Judicial Review’ in Claus-Dieter Ehlermann and Mel Marquis (eds), European Competition Law Annual 2009 (Hart 2011) 101-103.
The doctrine of the margin of appreciation applies in respect of the Commission’s economic evidence before the CJEU. This situation is different from economic evidence presented before national courts that has been produced by the litigants’ expert witnesses. Here, ordinary national rules on expert witness apply, which might also confer on national courts the power to scrutinise in more detail the experts’ assessment.

However, this doctrine has an impact on national proceedings when the CJEU finds an infringement of EU competition law and a follow-on action is brought before national courts. If the CJEU accepts the economic evidence presented by the Commission, then the CJEU decisions are likely to contain relevant findings of facts that will be relied on by the litigants. Given that national courts cannot rule against the CJEU decisions, the doctrine of the margin of appreciation extends its effects on national courts.

7. Evidence key rules: standard of proof

Imperfect or insufficient information is a common occurrence in litigation. This gives rise to the issue of what degree of knowledge is sufficient to justify the belief that a certain event has occurred. The standard of proof addresses this issue since it prescribes the degree of certainty that is required to establish occurrence of a fact.\(^{45}\) Implicitly, the standard of proof recognises that past events cannot be known with absolute certainty.

Standard of proof is a typical common-law concept that cannot be found in other non-common law Member States.\(^{46}\) Of course, in other legal systems, judicial decisions are also taken despite the lack of comprehensive evidence. However, different ideas underpin the issue of how to carry

out factual adjudication on the basis of incomplete evidence. In particular, rules on assessment of
evidence seem to lend themselves to misunderstanding between common-law and civil-law
countries.\textsuperscript{47} This is not surprising because assessment of evidence is primarily concerned with
fact-finding, which underlies different epistemological approaches.

In English law, the standard of proof in civil cases is based on the balance of probabilities, which
implies that an event is said to be proved if it is ‘more likely than not’.\textsuperscript{48} Conversely, civil law
countries refrain from formulating detailed rules on how to assess evidence. Rather, it provides a
general principle whereby the judge has the freedom to evaluate evidence. This is often referred
to as ‘intime conviction’.

As has been seen, sometimes evidence does not grant absolute certainty of the knowledge of past
events. Various reasons account for this: evidence may be incomplete, inconclusive, ambiguous,
or coming from sources that have a different degree of credibility.\textsuperscript{49} When partial evidence is
adduced, the standard of proof requires that the occurrence of a fact must be ‘more likely than
not’, which means that uncertainty is resolved by relying on ‘probability’.

\textsuperscript{47} Christoph Engel, ‘Preponderance of the Evidence versus Intime Conviction: A Behavioral Perspective on a Conflict
Between American and Continental European Law’ (2008) 33 Vt.L.Rev. 436. The Author argues that differences
between American law and continental European legal system lie in different conceptualisation (in American law
proof is an objective concept, in ‘continental law’ proof is subjective). Sometimes the debate on common-law and
civil-law approaches to standard of proof is lively. Kevin Clermont and Emily Sherwin, ‘A Comparative View of
Standards of Proof’ (2002) 50 Am.J.Comp.L. 243. Here the Authors ‘rudely wonder how civilians can be so wrong’.
At 244. The reply came from Michele Taruffo who pointed out that Clermont and Sherwin made a number of
mistakes: reducing the diversity of the continental European legal system and conceiving the principle of ‘intime
conviction’ as a type of standard. The Author also criticises reliance on Bayesian theories to explain and justify

\textsuperscript{48} Secretary of State for the Home Department v Rehman [2003] 1 AC 153 [55].

In this respect, there is a debate whether in judicial trials probabilistic judgments have a mathematical nature or not. The application of mathematical probability in judicial trials refers to ‘Bayesianism’ theories. The mathematical probability approach to knowledge of past events is controversial. On the one hand it allows a more accurate finding because terms such as ‘very probable’, ‘probable’, ‘improbable’ convey little meaning and therefore a finding expressed in terms of numerical probability seems more appropriate.

On the other hand, numerical probability of past events conceals the problem that in reality the judge forms her judgement by relying on a conventional approach to probability to which, ex post, such numerical probabilities are attached. Put differently, conclusions over past events that are based on measurements seem more objective than non-mathematical reasoning, but in fact they are still the outcome of a subjective assessment.

Other arguments militate against factual findings made on the basis of numerical probabilities. First, mathematical probability theory is concerned with occurrence of future events, whereas in judicial trials it is applied to reconstruct past events.

Second, numerical probabilities are used by judges and jurors who are normally innumerate, which means that they cannot understand the nature of probability or interpret propositions expressing probability.

51 It is difficult to define precisely what Bayesianism probability is. In broad terms, it refers to a ‘personalist’ or ‘subjective’ interpretation of probability in which elements of other probability theories are relied on. It aims at measuring the rational belief in a certain proposition, the probability of which varies according to the available stock of knowledge that a person has. D H Kaye, ‘What is Bayesianism? A Guide for the Perplexed’ (1987) 28 Jurimetrics 161, 167.
7.1 Standard of proof in national law and European competition law

As previously mentioned common law and civil law have different ways of dealing with the problem of imperfect or insufficient information. Standard of proof is particularly relevant to competition law proceedings since they are fact-finding intensive. EU law has also dealt with the theme of standard of proof, which has been influenced by some EU Member States’ legal systems. Thus, to understand how the Court of Justice is developing its rules concerning the degree of knowledge that must be met to establish the facts at issue, a reference to the national legal systems is desirable.

a) Standard of proof in national law

In English law, the civil standard of proof is based on balance of probabilities. However, since such a standard allows a certain degree of flexibility, and since breach of Article 101 carries with it a liability to penalties and fine, a standard of high degree of probability (but less than that applicable in criminal matters) was applied.\(^54\) It is difficult to establish whether this point is authority in respect of competition law proceedings. However, it has been argued that a higher standard of proof would be inconsistent with the principle of effectiveness of EU law and therefore the ordinary civil standard based on preponderance of probability should be applied.\(^55\)

With regard to French law, the adopted ‘standard’ of proof is the ‘conviction of the judge’.\(^56\) This seems to confirm that French law has adopted the principle of unfettered evaluation of evidence,\(^57\) thus influencing EU law.

\(^{54}\) Shearson Lehman Hutton Inc. and Another v Maclaine Watson & Co. Ltd. and Others [1989] 3 C.M.L.R. 429, para 284.
\(^{55}\) George Cumming, Brad Spitz and Ruth Janal, Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts (Kluwer 2007) 56-57.
\(^{56}\) George Cumming, Brad Spitz and Ruth Janal, Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts (Kluwer 2007) 192.
\(^{57}\) In reality, French law seems to recognise some exceptions to such principle. For example, authenticated deed by notaries carries more weight than ordinary evidence. See: <http://ec.europa.eu/civiljustice/evidence/evidence_fra_en.htm> accessed 4 November 2011.
The term ‘conviction’ is more vague than ‘balance of probability’. However, it could be argued that the judge may be intimately convinced about a past event when she thinks that occurrence of past events is probable. The absence of more specific indication on how to assess proof has been explained by referring to a rejection of the French pre-revolution system of formal evaluation of proof, which dictated the probative force of evidence.\(^{58}\)

In a recent case, which was concerned with an indirect purchaser’s claim of damages,\(^{59}\) the French Supreme Court annulled a previous Court of Appeal’s decision on the basis that an award of damages to indirect purchasers required proof that the direct purchaser had previously passed-on the overcharge to the indirect purchaser. It has been argued that the French Supreme Court applied a high standard of proof in respect of indirect purchasers’ claims.\(^{60}\)

In reality, the French Court was concerned that an award of damages to the indirect purchaser without a finding that the direct purchaser had passed-on the overcharge would result in unjust enrichment. However, it also shows evidentiary difficulties in bringing a competition law claim, even in follow-on actions based on the Commission’s findings of anti-competitive agreements.

In Italy, the principle of free evaluation of evidence is also recognised\(^{61}\) save for specific means of proof such as public deed,\(^{62}\) or written documents of the party against whom they are produced.\(^{63}\)

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\(^{60}\) Yann Utzschneider and Hugues Parmentier, ‘The new frontier of antitrust: damages actions by indirect purchasers and the passing on defence in France and California’ (2011) 32 E.C.L.R. 266.

\(^{61}\) Article 116 of the Civil Procedure Code.

\(^{62}\) Article 2700 of the Civil Code.

\(^{63}\) Article 2702 of the Civil Code.
Similar solution is provided in Spanish law, which leaves the judge free to appraise the evidence, but also prescribes full probative force of public deeds and written documents of the party.

German law also recognises the principle of free evaluation of evidence, which confers discretion to the judge in the process of fact-finding. However, this is interpreted as requiring a standard higher than that of predominance of probability. On the other hand, German case-law does not require absolute certainty, thus allowing a judgment to be made despite partial evidence that may give rise to some doubt.

b) The CJEU and standard of proof in European competition law

In general, the CJEU case-law on evidence recognizes the principle of unfettered evaluation of evidence. Apart from some exceptions provided by the EU legal system, the Court appraisal of evidence is free and unconstrained by the rules of the national legal systems. This means that no specific indication on the standard of proof is given.

EU legislation occasionally mentions the standard of proof. For example, the fifth recital of Regulation No. 1/2003 states that the application of that regulation does not affect national rules on the standard of proof in relation to the ascertainment of the facts of the case, provided that such rules are compatible with the principles of EU law.

65 Respectively, Articles 319 and 326 of the Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.
66 Section 286 of the Zivilprozessordnung (ZPO).
67 George Cumming, Brad Spitz and Ruth Janal, Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts (Kluwer 2007) 262.
However, although Regulation No. 1/2003 uses the term ‘standard of proof’, it does not necessarily refer to the common-law idea of balance of probabilities. Rather, it seems to refer to the national rules concerned with assessment of evidence. Similarly, although occasionally the Court of Justice refers to the standard of proof too, it seems that it has done so loosely, without defining this concept.

In competition law proceedings, the Court of Justice held that ‘standard of proof’ does not differ depending on the type of situation that must be assessed. For example, in *Activision Blizzard*, a case concerned with vertical agreements, contrary to the party’s suggestion, the standard of proof to prove the existence of an agreement is the same for horizontal and vertical relationships. Equally, in *Bertelsmann* the Court held that there is no different standard of proof for a decision approving, rather than prohibiting, a concentration. In general, the terminology concerned with assessment of evidence refers to ‘sufficiently cogent and consistent body of evidence’.

### 7.2 Harmonisation of standard of proof

The foregoing paragraphs highlighted the main differences between the common law and civil legal system on the assessment of evidence. Terminology and concepts between the two systems vary but they all refer to the process of inferential reasoning. The question is whether national

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71 The French version of Regulation No. 1/2003, uses the term: ‘niveau de preuve’, the Italian version: ‘grado di intensità’.
75 Case C-413/06 P Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala) [2008] ECR I-4951, 46.
76 Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375, para 228.
rules on the standard of proof applicable in national civil proceedings based on EU competition law should be harmonised.

The argument against harmonisation relies on the fact that, with regard to the principle of effectiveness, there seems to be no evidence that the standard of proof adopted in some EU countries would make the exercise of the right to compensation of losses resulting from breach of EU competition law impossible or excessively difficult.

The case for harmonisation might point out that different standards will lead to different outcomes. Thus, undertakings may attempt to seize a court in a jurisdiction with a high standard of proof thus increasing difficulties in substantiating violations of competition law. This also alters the level playing field of undertakings exposed to antitrust liability.

In reality, the case for harmonisation of standard of proof seems flawed because different standards reflect different ways on how to conduct factual adjudication. In theory, it would be possible to provide a single standard of proof applicable in all EU jurisdictions. However, it is doubtful that it would be effective since it would be given different meanings according to the judge’s legal culture.

It has been seen that the common-law approach to standard of proof relies on probability. Conversely, civil-law countries do not provide a ‘pseudo-scientific’ and measurable criteria concerning factual adjudication. Rather, they attempt to express the need that proof of facts needs to be persuasive, credible, coherent, and so forth.
A common lawyer might criticise the civil-law approach by arguing that it is imprecise, as it does not provide the judge with measurable criteria to express factual propositions.

The civil lawyer might reply that it is not possible to assign a probabilistic judgment over the occurrence of a fact. Indeed, even in common-law countries some legal scholars questioned the Bayesian approach to evidence.

In conclusion, providing a EU common standard of proof would be flawed because it is illusionary to describe how the judge should think to reach an acceptable belief over past events: neither a probabilistic-mathematical approach, nor a intuitive approach are able to prescribe how to conduct inductive reasoning so that occurrence of past events is inferred from the available evidence.

Economic phenomena and economic data are complex and may be interpreted in a variety of ways, thus it would be too difficult to provide in advance a clear methodology. This task is normally carried out through the assistance of expert witnesses whose assessment is scrutinised by the judge and the litigants.

Perhaps, the only feasible harmonisation on standard of proof concerns the aspect of the effects of decisions of national competition authorities in national proceedings. The Commission has proposed that national courts cannot take decisions running counter to the findings contained in final decisions of such authorities. Effectively, this amounts to an irrebuttable presumption of national competition authorities’ factual finding, which prevents national courts from applying their rules on evaluation of evidence.

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8. Evidence key rules: disclosure

Disclosure, or discovery, is another aspect concerning evidence. It refers to a procedure by means of which one party in a civil action obtains information or disclosure of documents that are relevant to proceedings. Disclosure regulates the process of collection of information available to the other parties for the purposes of legal proceedings. Various reasons provide a rationale for disclosure.

First, the opposing party does not have the interest to disclose information that might adversely affect her case. Thus, that party must be compelled to do so.

Second, disclosure enables the parties to assess the prospect of success of their case. This is beneficial for the civil justice system because it discourages claims not adequately substantiated, or facilitates settlements of disputes.

Third, disclosure accomplishes the goal of fairness in civil litigation because the parties know what information will be relied on to support the claim.

On the other hand, disclosure is normally expensive and burdensome. For example, it places a significant burden on companies compelled to disclose evidence. In turn, such evidence must be analysed by lawyers to identify what information is relevant to the claim. It will be seen that in the US disclosure has been criticised because it may be abused to increase costs upon the other party.

The rules of evidence, of which disclosure is an important part, show important differences between an inquisitorial and adversarial system. The fundamental principles of the adversarial systems are that the parties decide how to frame an action (dispositive principle, i.e. the parties

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78 Paul Matthews and Hodge M. Malek, *Disclosure* (Sweet and Maxwell 2007) 3.
are free to dispose of their rights), and that the parties are free to decide what information to submit on which the judge will base the decision.\textsuperscript{80}

In general, in civil law countries, the judge directs the process of collection of evidence, which takes place during the trial.\textsuperscript{81} The litigants apply for the evidence to be admitted in the trial, and the judge admits only the evidence that is relevant to prove the parties’ allegations. In addition, evidence is gradually produced during the trial, normally to reply to the opposing party’s allegation.

In common law countries, disclosure of evidence takes place before the trial.\textsuperscript{82} Here the judge’s involvement is normally limited and not necessary. This is because the law itself imposes upon the party the duty to disclose the existence of documents and to discover them. This means that evidence is formed before the trial and a party knows what information the opposing party relies on.

Although in theory the inquisitorial and adversarial systems are at the opposite ends of the spectrum, western legal systems contain some elements of both.\textsuperscript{83} For example, French law provides that the judge may, upon a party’s application, order the other party to produce an item of evidence.\textsuperscript{84} The fact that evidence is disclosed upon the other party’s application is more consistent with the adversarial system rather than the inquisitorial.

\textsuperscript{81} Final Report 348.
\textsuperscript{82} Civil Procedure Rule (CPR) 31.2. provides that ‘A party discloses a document by stating that the document exists or has existed.’
\textsuperscript{84} Article 11(2) of the French Civil Procedure Code: ‘Si une partie détient un élément de preuve, le juge peut, à la requête de l’autre partie, lui enjoindre de le produire, au besoin à peine d’astreinte. Il peut, à la requête de l’une des parties, demander ou ordonner, au besoin sous la même peine, la production de tous documents détenu par des tiers s’il n’existe pas d’empêchement légitime’. ‘If a party holds evidence, the judge may, upon request of the other party, order to produce it, and impose a penalty if the party fails to do so. The judge may, upon request of one of the
Similarly, the French judge shall qualify the facts without being constrained by the legal framework given by the parties.\textsuperscript{85} However, it also provides that the judge shall not change the meaning or legal basis given by the parties.\textsuperscript{86} This provision seems to contain two principles: the first is consistent with the inquisitorial system (the judge is free to qualify the facts at issue), the second is consistent with the adversarial system (the parties determine the facts and set out the rules applicable to the facts).

\textbf{8.1 Disclosure in competition law}

In competition law, disclosure may be an effective means to overcome the above-mentioned problem of asymmetry of information between the victim and the undertaking which infringed competition law. Even if crucial documents proving illegal meetings may be destroyed, other business information concerning, for example, price patterns of the undertakings breaching competition law, may be important to infer illegal conduct.

In general, the more extensive disclosure rules are, the stronger is the incentive to sue. As a result, disclosure rules have an impact on the deterrent effect of private enforcement.\textsuperscript{87}

\begin{footnotesize}
\textsuperscript{85} Article 12(2) of the French Civil Procedure Code: ‘Il doit donner ou restituer leur exacte qualification aux faits et actes litigieux sans s’arrêter à la dénomination que les parties en auraient proposée’. [The judge] has to give or restore the exact legal meaning of the facts and legal conduct without being constrained by the legal framework given by the parties.’ [the English translation is mine].

\textsuperscript{86} Article 12(3): ‘Toutefois, il ne peut changer la dénomination ou le fondement juridique lorsque les parties, en vertu d’un accord exprès et pour les droits dont elles ont la libre disposition, l’ont lié par les qualifications et points de droit auxquels elles entendent limiter le débat’. ‘However, in respect of the rights the parties can freely assign, [the judge] cannot change the basic framework or the legal basis given by the parties and upon which the parties wish to delimit their arguments’. [the English translation is mine].

\textsuperscript{87} On the other hand, discovery may be a double edged sword: the defendant may retaliate against the claimant by threatening the latter to make a discovery request. Final Report 373.
\end{footnotesize}
Disclosure rules have also an impact on the probability of committing mistakes since inadequate information does not enable the judge to assess properly the parties’ allegations.\(^{88}\)

While disclosure rules are an important tool to counter the problem of asymmetry of information, they may also lend themselves to abuse. Disclosure is costly and entails the use of considerable company resources to fulfil request of disclosure. This, coupled with the one way-fee shifting rule, has been used as a threat to settle cases in which violation of the antitrust laws is not certain.\(^{89}\)

The proposed Commission’s directive seems to address some of these concerns. It attempts to strike a balance between guaranteeing availability of evidence and avoiding abuses from would-be claimants.

First, it prescribes that a claimant must present some evidence showing plausible grounds that she suffered harm as a result of the defendant’s infringement, before national courts order disclosure of evidence.\(^{90}\)

Second, the party requesting disclosure must show that evidence is in the control of the other party or a third party to the claim or a defence and specify narrowly pieces of evidence or categories of evidence.

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\(^{88}\) Final Report 345.


Third, the proposed directive introduces a proportionality test when a party requests disclosure of evidence. This means that national courts must consider the legitimate interests of all parties and third parties concerned such as the likelihood that a breach of competition law has occurred, the scope and cost of disclosure, whether the evidence to be disclosed contains confidential information, in which case arrangements must be made to protect such confidentiality. 91

8.2 Disclosure and harmonisation

Disclosure addresses the problem of asymmetry of information. With regard to public enforcement, the EU legislator has dealt with this problem by providing the Commission with incisive investigative powers. 92 As for private enforcement, national law regulates the process of disclosure. In this respect, it is important to enable private parties to gather sufficient evidence to discharge the burden of proof. It is against this background that proposals to introduce common rules on disclosure are to be understood.

Here the rationale for harmonisation could be twofold.

The first is to reduce opportunities to adopt forum shopping strategies. Undertakings who are sued for breach of competition law would attempt to seise courts in jurisdictions with restrictive disclosure rules. Even when competition law proceedings are commenced in jurisdictions with favourable disclosure rules, evidence may still be kept in other Member States whose evidence rules may provide limited compulsory access. In theory, the seized court may request evidence to courts of other Member States.

91 Article 5.3.
92 For example, Article 20 of Regulation 1/2003.
However, Regulation No. 1206/2001\textsuperscript{93} provides that the requested court shall execute such a request in accordance with its law.\textsuperscript{94} This means that the law of evidence of the Member State with restrictive disclosure rules, and where crucial evidence against the undertaking is held, applies. Harmonised rules on disclosure would attenuate this problem.\textsuperscript{95}

The second is related to the principle of effectiveness. Some Member States provide restrictive rules on disclosure.\textsuperscript{96} While this has not necessarily prevented the success of some competition law claims,\textsuperscript{97} ordinary rules on disclosure do not take into account the features of breaches of competition law. Therefore, it cannot be excluded that in some circumstances (e.g. cartels), they make the exercise of the right to compensation excessively difficult.

It may be argued that such a difficulty or practical impossibility should not justify harmonisation. As has been seen, procedural rules that make the exercise of EU rights excessively difficult or impossible are disapplied.\textsuperscript{98} This would remove disclosure rules that hinder an antitrust action. However, disapplication alone might not be sufficient to remedy the problem because it creates a legal vacuum without necessarily replacing the disapplied rule with a rule that facilitates the collection of relevant evidence.

As has been seen, with respect to disclosure of evidence, an optimal policy should aim to balance


\textsuperscript{94} Council Regulation (EC) 1206/2001, art 10(2).

\textsuperscript{95} I use the term ‘attenuate’ because, as it will be seen, the proposed directive provides a minimum standard on disclosure of evidence in competition law proceedings, but it also allows Member States to maintain or introduce wider disclosure rules (Article 5.8).


\textsuperscript{97} The Ashust Report at 108.

on the one hand the need to reduce asymmetry of information, thus allowing would-be claimants
to assess the probability of success of a claim and to ease the burden of proof, and, on the other
hand, the need not to make requests for disclosure oppressive for undertakings. Harmonised
rules would provide the opportunity to design such rules by balancing these competing goals and
taking into account the specific features of competition law proceedings.

The proposed Directive sets out a minimum standard on disclosure of evidence\(^9\) that domestic
laws must meet. Prospective claimants must show that the undertaking is in control of evidence
before a court can order the disclosure of such evidence.\(^10\) However, at the same time courts
exercise control over requests of disclosure by making sure that the extent of disclosure is
proportionate.\(^11\) If the directive is adopted, it remains to be seen how such provisions will be
implemented. However, such EU rules have set a minimum standard of effectiveness and
provided more legal certainty both for claimants and defendants.

\(^9\) Article 5.8 provides that Member States may maintain or introduce disclosure rules wider than those contained in
the directive.
\(^10\) Article 5.1 provides as follows: ‘Member States shall ensure that, where a claimant has presented reasonably
available facts and evidence showing plausible grounds for suspecting that he, or those he represents, has suffered
harm caused by the defendant’s infringement of competition law, national courts can order the defendant or a third
party to disclose evidence’.
The second paragraph provides that national courts shall order the disclosure of evidence where the party requesting
disclosure has:
‘(a) shown that evidence in the control of the other party or a third party is relevant in terms of substantiating his
claim or defence; and
(b) specified either pieces of this evidence or categories of this evidence defined as precisely and narrowly as he can
on the basis of reasonably available facts.’
\(^11\) Article 5.3 provides as follows: Member States shall ensure that national courts limit disclosure of evidence to that
which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts
shall consider the legitimate interests of all parties and third parties concerned.’ When determining whether the
request for disclosure is proportionate, courts shall consider ‘(a) the likelihood that the alleged infringement of
competition law occurred; (b) the scope and cost of disclosure, especially for any third parties concerned; (c) whether
the evidence to be disclosed contains confidential information, especially concerning any third parties, and the
arrangements for protecting such confidential information; and (d) in cases where the infringement is being or has
been investigated by a competition authority, whether the request has been formulated specifically with regard to the
nature, object or content of such documents rather than by a non-specific request concerning documents submitted
to a competition authority or held in the file of such competition authority.’
The starting point in the draft directive is that the claimant must present some evidence showing plausible grounds for suspecting that he suffered harm from breach of competition law. Given that national courts may order disclosure of evidence, this requirement upon the claimant operates as a first safeguard against unreasonable requests of disclosure. The transposition into national law of this requirement will be crucial because if the standard to show ‘plausible grounds for suspecting that harm resulted from violation of competition law’ is set too high, then this requirement will turn out to hinder collection of evidence.

Some Member States might decide to adopt a vague standard, thus leaving national courts to determine the circumstances in which it is plausible to suspect that an individual or a business has been victim of an infringement of competition law. Alternatively, national law itself might set out a list of concrete circumstances in which it is reasonable to think that a breach of competition law took place. Finally, a mix between the two techniques is possible.

The draft directive also provides that the would-be claimant must show that the requested evidence is relevant and must define it as precisely and narrowly as he can. The former is not a novel requirement since most Member States’ law requires evidence be relevant to be admitted in the trial. With regard to the need to define evidence narrowly and precisely, this can also be seen as a rule that addresses the concern the disclosing evidence is costly for businesses and therefore claimants’ lawyers might strategically make requests to disclose evidence to put pressure to settle the dispute in favourable terms, even the claim does not appear to be supported by persuasive evidence.

Another significant requirement concerning disclosure of evidence, which is likely to give rise to legal uncertainty, is that national courts shall assess whether a certain request to disclose evidence
is proportionate. To do so, national courts must balance the legitimate interests of all parties and parties concerned, which requires consideration of several aspects, such as the likelihood of the occurrence of the alleged infringement, the scope and cost of disclosure, the possibility that the requested evidence contains confidential information, and so forth. Given that the proposed directive has not established a hierarchy between such interests, national courts might interpret such requirements differently, thus giving rise to different outcomes.
Chapter 7

Collective redress

1. Introduction to collective redress and its harmonisation

Often breaches of competition law (e.g., price-fixing agreements) cause a great number of victims. Collective actions are the main answer to the problem of ensuring compensation of widespread losses. They play a central part in private enforcement of competition law because they enable the management of a large number of claims within the same proceedings.

Various names exist to refer to collective actions such as class actions, representative actions, multi-party litigation, collective redress, and so forth.\(^1\) Different denominations reflect different ideological views that underpin such actions as well as the practical aims that they are supposed to achieve in various jurisdictions. This chapter uses the term collective actions, class actions, etc. indistinctly since it deals with their general principles, rather than the technical aspects of such actions.

Class action has been defined as ‘a legal procedure, which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in one suit’.\(^2\) An alternative denomination is ‘collective redress’, which focuses on the outcome (award of a

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\(^1\) The Ashurst Comparative Report outlines a classification based on the characteristics of each Member State’s legal system. Public interest litigation refers to litigation undertaken by a representative organization that is not done on behalf of any identified individuals but for the benefit of public at large. Class action indicates a procedure whereby one party or a group of parties may sue as representatives of a larger class of identified individuals. Collective claim consists in a single claim brought on behalf of a group of identified/identifiable individuals. Any award benefits the group as a whole, not individuals. Representative actions are single claims brought by as association on behalf of a group of identified individuals. The award is made to the individual members. Finally, joint action refers to a set of claims by several claimants together or joined by the judge hearing the claims due to some link between them. Denis Waelbroeck, Donald Slater and Gil Even-Shoshan (Ashrust), *Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report* (2004) 53. Hereinafter: ‘Ashrust Report’. <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> accessed 10 July 2013.

redress) rather than the mechanism. In collective redress mechanisms ‘the law grants associations or other representative bodies are conferred the right to bring cases either in the interest of persons which they represent or in the public interest’.

The central feature of class action is the aggregation of various claims, which share the same cause of action and whose claimants have not been adequately protected by public regulatory action. The economic rationale for aggregating multiple claims lies in the goal of achieving economies of scale. The more claims are dealt with in a single action, the lower the litigation costs of each claim, which makes the management of low-value claims economically viable.

Collective redress plays a pivotal role both at individual and collective level. At the individual level, it provides a mechanism to compensate those who suffered a loss, thus achieving corrective justice. At the collective level, it makes the threat of compensation credible, because it increases the likelihood of bringing a suit. Therefore, it enhances deterrence.

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5 ‘The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device’. Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980) 340.
7 While the aggregation of small claims is the most quoted rationale, there is no reason to deny the aggregation of large claims too. George Priest, ‘Economics of Class Actions’ (2000) 9 Kan. J.L. Pub. Pol’y 481.
8 It has been noted that deterrence itself does not require compensation, but disgorgement from the defendant. Alexandra Lahav, ‘Fundamental Principles for Class Action Governance’ (2003) 37 Ind. L. Rev. 65, 71 and footnote 20. It has also been argued that class action engenders positive externalities, which is a benefit that goes beyond deterrence. William B. Rubenstein, ‘Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action’ (2006) 74 UMKC Law Review 709. The gist of the argument is that judgments orient other people’s future behaviour; at 723. In antitrust however a perceived problem is over-deterrence, that is to say the fear of antitrust liability which deters businesses from carrying out conduct that overall is economically beneficial. This means that class actions may be undesirable due to the perception, wrong or right, that it punishes welfare-enhancing conduct.
Closely related to this point, the economics of deterrence requires that it should be pursued at optimal level, which requires taking into account both the social costs caused by illegal conduct and the costs of enforcement in prosecuting such conduct.\(^9\)

Since the cost of enforcing each small claim is often greater than the loss itself, and given that class actions reduce the enforcement costs, from an economic viewpoint collective redress is \textit{prima facie} socially beneficial.

Other benefits ascribed to collective actions are predictability of the civil procedure rules for multiple defendants,\(^10\) proportionality among various factors such as rectitude of decision, timely justice and reasonable costs,\(^11\) access to justice,\(^12\) and judicial economy.\(^13\)

Harmonisation of collective actions is desirable because it would enhance the effectiveness of the right to antitrust compensation. Collective actions may be already seen as a mechanism that facilitates actions for damages. However, it is possible that national rules regulating these actions might not consider the difficulties that cross-border claimants might encounter in joining the relevant proceedings.

In addition, collective actions may be regulated differently, which results in different liability outcomes. This gives rise to the opportunity for some undertakings to attempt to implement forum shopping strategies. For example, an undertaking would attempt to seize a court in a jurisdiction where collective actions are heavily regulated and where formal procedural flaws

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\(^12\) Rachael Mulheron, \textit{The Class Action in Common Law Legal System: A Comparative Perspective} (Hart 2004) 52.

\(^13\) Rachael Mulheron, \textit{The Class Action in Common Law Legal System: A Comparative Perspective} (Hart 2004) 57. Judicial economy seems to refer to the above-mentioned process of economies of scale. They achieve both a collective interest (lowering the costs for the civil justice system) and individual interest (making affordable to make low-value claims).
might frustrate such actions. In turn, this may create an excessive disparity of the level playing field if some undertakings operate in jurisdictions where collective actions are often successful.

2. The models of class actions

Proper organisation of the aggregation of multiple claims is a crucial aspect for the success of class actions. As has been seen, potential claimants are not encouraged to make a claim because of its low-value. In addition, there is a problem of information: would-be claimants need to be informed about the imminence of a collective claim and whether their legal entitlement may be included in the class action.

These problems affect the choices on how to aggregate claims. Broadly speaking, two opposing regimes of class actions have been devised. The first is the *opt-in model*, which provides that a claimant must take some legal steps in order to join the action. Thereafter the claimant will be bound by the judgment, and awarded the entitlements granted by the judgment.¹⁴

The benefit of the opt-in scheme is that individuals are free to choose whether to bring an action. This is an important legal value as benefits and adverse effects resulting from an action should be borne only if an individual choses to exercise an action. In addition, it lessens the danger that litigation becomes unmanageable due to the high number of claimants.¹⁵

Conversely, the disadvantages are that few individuals may join the class action because of the steps they need to take to be part of it. In fact, as the opt-out experience shows, it may be argued

that such steps are unnecessary. Another drawback is that opt-in models provide for a time-limit to join the action, which may have expired before individuals know about the possibility of joining a collective action.\textsuperscript{16}

The second model is the \textit{opt-out regime}, which provides that individuals who fall within a certain class are automatically part of the action unless they take an affirmative step to be excluded.\textsuperscript{17} Thus, under this regime a claim is brought by a representative without consent of the other class members. The benefits of this regime are reduction of litigation costs and uniformity.\textsuperscript{18}

Broadly speaking, the opt-out procedure consists of two stages. In the first, the representative claimant must take steps to notify the potential members about the existence of such collective action. In the second, the class members who do not wish to be part of such action must lodge opt-out notices.\textsuperscript{19}

In the opt-out regime, a single decision binds all class members. This is beneficial for defendants who will deal with the claim in the same proceedings. An additional benefit is access to justice\textsuperscript{20} since this regime alleviates the problem that some would-be claimants are not informed about the existence of a collective action in time to opt-in, or who might not be pro-active to affirm their claim.

\textsuperscript{16} Scottish Law Commission, \textit{Multi-Party Actions} (Scot Law Com No 154, 1996) 34-35.
\textsuperscript{17} Rachael Mulheron, \textit{The Class Action in Common Law Legal System: A Comparative Perspective} (Hart 2004) 34.
\textsuperscript{18} This benefit has been highlighted by Mulheron who quoted the litigation commenced in England based on unlawful levy of charges on customer accounts. It was estimated that from Mach 2006 to August 2007 over 53 thousand claims were filed by consumers against banks in county courts. Rachael Mulheron, 'The case for an opt-out class action for European Member States: a legal and empirical analysis' (2009) 15 Colum.J.Eur.L. 409, 449.
\textsuperscript{20} Scottish Law Commission, \textit{Multi-Party Actions} (Scot Law Com No 154, 1996) 34.
Conversely, the disadvantages are that an individual may be bound by a decision resulting from proceedings that she has never initiated or joined. Related to this, it is also objectionable that a representative makes a claim on behalf of people from whom he has never received express mandate. In addition, the opt-out regime creates a large number of nameless claimants, which raises a series of problems that will be seen in the next paragraphs.

Finally, class members who wish to opt-out are precluded from doing so when the time-limit has expired.\(^{21}\) Related to this point, this regime might result in a situation where a decision given in opt-out proceedings produces *res judicata* effect, with the result that the members who previously opted-out might find it difficult either to start a separate action or to continue proceedings previously commenced.\(^{22}\)

Common-law jurisdictions have predominantly adopted the opt-out system,\(^{23}\) although England represents a notable exception.\(^{24}\) However, the choice between opt-in or opt-out may not be necessarily established *a priori* by legislation since it is possible to grant the courts discretionary power to decide what regime best fits the concrete characteristics of class litigation.\(^{25}\)

That said, empirical studies showed that in England the opt-in regime displayed some flaws and the possibility to institute opt-out proceedings should not be excluded.\(^{26}\) In essence, arguments for consumer justice and market control support the case for the opt-out regime, whereas


\(^{24}\) Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart 2008) 119.


arguments based on fundamental rights and avoidance of procedural abuses support the case for
the opt-in regime.\textsuperscript{27}

Some case law seems to confirm that the opt-in model may not be effective. In France a decision of the Cour de Cassation dismissed an action brought by a consumer association based on price-fixing agreement between mobile operators.\textsuperscript{28} Although the action was based on a previous decision of the French national competition authority, it was dismissed because the consumer organisation made a public appeal on its website to join the action, a practice that was prohibited by the French consumer code.

This case shows that, in the opt-in model, a simple procedural limitation made it extremely difficult to gather a sufficient number of consumers to make a collective action meaningful.\textsuperscript{29} Had the opt-out regime been adopted, consumers would have been automatically included in the action. The opt-out procedure would have also maximised the resources that the French competition authority spent in the investigation of the cartel between mobile operators since consumers would have been compensated.

3. The class action in the US

The US legal system created modern class actions. Despite its merits and the pragmatic aims that class actions pursue, the fiercest criticisms against this procedural device have been advanced in this jurisdiction.

\textsuperscript{27} Christopher Hodges, \textit{The Reform of Class and Representative Actions in European Legal Systems} (Hart 2008) 130.
\textsuperscript{28} Cour de cassation, 26 May 2011, \textit{UFC-Que Choisir v. Sté Bouygues Télécom}, no. 531, 10-15.676.
\textsuperscript{29} For a comment, Jocelyn Delatre, ‘Case Comment, Cour de Cassation, 1re Chambre Civile, May 26, 2011’ (2012) 33 E.C.L.R. 263.
Some problems of class actions will be highlighted in the next paragraphs, especially to the extent that they may arise in the EU. Here it is interesting to note that class actions may suffer from ideological bias whereby American law is individualistic, which is reflected in the strong tradition of individualistic litigation.  

On the other hand, at the end of ‘70s, it was acknowledged that ‘the traditional notion of civil litigation as merely bilateral private dispute resolution is outmoded’. In the US, class actions gave rise to intense debate, and legal scholarship appeared divided between maintenance of the opt-out system, or its reform.

Currently, it is regulated by the Federal Rules of Civil Procedure 23. In 1966 this rule was reformed to shift from the opt-in to the current opt-out regime. The current version provides the following requirements: minimum numerosity, commonality, identity of claims or defences between the representative parties and those of the class, and fair and adequate protection for the class.

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35 ‘(1) the class is so numerous that joinder of all members is impracticable;’
36 ‘(2) there are questions of law or fact common to the class;’
37 ‘(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;’
38 ‘the representative parties will fairly and adequately protect the interests of the class.’
Other important requirements are predominance,\textsuperscript{39} which means that the common issues must prevail over the individual one,\textsuperscript{40} and superiority,\textsuperscript{41} which means that the class action must be a more efficient means for the resolution of the dispute than other procedures.

4. The problems with class actions

As mentioned above, class actions are criticised on a number of grounds. This paragraph provides an outline of the main problems. Before proceeding, two remarks must be made. First, the problems presented in the next paragraphs have arisen in the US, which is notoriously litigation-oriented. Second, the US legal scholarship mentioned above acknowledges that empirical evidence is little and inconclusive.\textsuperscript{42}

Class actions are complex legal phenomena that are difficult to investigate. Thus, while European legislators should not ignore the highlighted problems of class actions, on the other hand a critical analysis is warranted to understand whether the same issues would arise in the EU Member States. This is advisable in order to understand whether EU legislation should facilitate collective actions.

a) Individuals bound by litigation started by other representatives

The first problem concerns opt-out procedures and has to do with the fact that the resulting judgment binds individuals who did not make any steps to be involved in such litigation.\textsuperscript{43}

\textsuperscript{39} Fed. R. Civ. P. 23(b)(3). [The action may be certified as class action] ‘if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.’

\textsuperscript{40} The predominance criterion is more demanding than commonality: here the US courts must inquiry ‘whether proposed classes are sufficiently cohesive to warrant adjudication by representation’ Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir.2005).

\textsuperscript{41} Fed. R. Civ. P. 23(b)(3). [The action may be certified as class action] ‘if the court finds that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.’

\textsuperscript{42} Rand Report 18.

\textsuperscript{43} Rand Report 1.
The nature of this problem is primarily legal and goes to the heart of the individualistic setting of the modern Western legal system where an individual is vested with individual rights and has the freedom to decide whether to enforce them or not.

A variant of this problem is that even if an individual has opted-out in order to bring her own claim, she may be bound by the judgment arising from the collective procedure. However, this second issue is not unique to class actions, rather it is common to any litigation in which two proceedings are based on the same or related cause of action.44

b) The potential for abuse in collective actions

The second problem of class actions is that the number of its members, and the corresponding amount of the requested compensation, may be so high that the prospect of losing the dispute exerts pressure upon the defendant to settle the claim regardless of the merit and the weight of evidence.45 This problem is aggravated in opt-out procedures where the number of claimants is not identified at the outset, but may be high due to the inclusion of the whole class of claimants.

Against this, it can be argued that settlements are already an established practice in the UK46 and in the other EU Member States In any case, it is normal that companies that cause diffuse damages face large compensation claims. While settlements dictated by fear and agreed in the absence of significant evidence are undesirable, the high amount of compensation reflects the

44 At the EU level, this situation is regulated by Article 28(1) Regulation No. 44/2001 which provides that ‘Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.’ Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
46 With regard to competition law, see Barry Rodger ‘Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005’ (2008) 29 E.C.L.R. 96. Indeed, this is the policy adopted in the Civil Procedure Rules, which encourages settlements. This policy has been very effective especially because of the rules on costs.
reality that in the modern market economy, a great multitude of people are harmed by companies’ wrongdoing.

A second aspect of the potential for abuse in collective actions can be ascribed to what has been termed as entrepreneurial litigation. This refers to the fact that the peculiar characteristics of collective litigation (high agency costs and asymmetry of information) provide lawyers with the opportunity to behave in an opportunistic way at the expense of the client’s best representation.

A striking example lies in low-value claims where the claimant’s benefit is sometimes negligible whereas lawyers are awarded considerable fees. This results in the creation of the wrong incentive whereby litigation is driven by lawyers for the pursuance of their own interest (legal fees) rather than that of their clients.

Another problem resulting from the relationship between lawyers and clients has to do with settlements. In class actions litigated in the US, lawyers play a pivotal role in the settlement decisions. The problem is that lawyers have the incentive to settle too early for a low amount and secure high legal fees. The problem is worsened by the fact that in class actions, clients do not have the incentive to monitor their lawyer’s behaviour.

49 See for example, Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 340 (1980). ‘That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.’
52 Here the monitor costs are too high in respect of the potential benefit. In addition, it is difficult for a client to observe the lawyer’s work both because the client cannot accurately assess the lawyer’s performance and because such performance is carried out outside the client’s supervision. Jonathan R. Macey and Geoffrey P. Miller, ‘The Plaintiff’s Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform’ (1991) 58 U.Chi.L.Rev. 1, 13-14.
Cheap settlements may also be the result of collusion between the claimants’ lawyers and defendant’s lawyers, though risk aversion of the lawyer's class representative may also account for low-value settlements. In the US, settlements must be approved by the courts, which means that judges may reject a settlement that is too unfavourable to class members. However, judges’ appraisal of the terms of settlements is based on inadequate information that has been provided by the parties themselves.

Legal scholars have suggested some solutions based on the market, democratic mechanisms, or judicial models. A type of market approach is to auction the right to represent the class. Another one is to link lawyers’ remuneration to the benefits received by the class members. The democratic approach provides that class members are given the opportunity to approve or reject a settlement. Finally, the judicial administration solution advocates a more proactive role of the judge in the governance of class actions.

Coffee, a corporate law scholar, advocates the market approach, which views class members not like the beneficiaries of lawyers’ code of conduct duties, but as consumers who need to be informed in order to make a choice. By applying Hirschman’s framework of ‘exit, voice and loyalty’ to class action, Coffee holds that ‘exit’ refers to opt-out mechanisms, ‘voice’ to granting class members more power to hire or dismiss their lawyers and to authorising a settlement, and ‘loyalty’, to the need to expand lawyers’ fiduciary and ethical duties.

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In general, no procedural rule can remedy the outlined problems. Thus, rather than adopting specific rules addressing single problems, an effective governance of class actions should be based on the principles of disclosure, adversarial process, expertise of decision makers, independence of decision makers from influence and self-interest of class counsel. These principles would confer the courts’ discretion in the management of collective actions, thus avoiding abuses.

5. Collective actions for the enforcement of consumer rights in the EU Member States

Some form of regulation of collective redress is present in sixteen EU Member States and primarily addresses consumer law issues. Given that it would be out of the scope of this chapter to set out a detailed analysis of the Member States’ rules on collective redress, this paragraph outlines the main features of such mechanisms.

This provides a background to understand whether diversity of rules on collective actions jeopardises the effectiveness of the right to compensation, alters the level playing field among undertakings, and gives them the opportunity to choose the most favourable jurisdiction to minimise their antitrust liability.

Broadly speaking in the EU, two approaches to collective redress have been identified.

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60 Christopher Hodges, The Reform of Class and Representative Actions in European Legal Systems (Hart 2008) 15.
The first is centred on public intervention where enforcement action is primarily driven by public authorities. The United Kingdom, Republic of Ireland, Sweden, Finland, Norway and Denmark fall within this approach.

Conversely, the second is based on the involvement of private bodies such as consumer associations.

Interestingly, some of these systems grant compensation without the involvement of courts. Clearly, such classification does not exclude that a Member State may have features of both models. For example, despite the role of the public body, in Sweden class actions may be initiated by individuals or organisations too. In Norway, the opt-in model is adopted, but in some circumstances the opt-out procedure may be activated.

With regard to English law, and in respect of competition law, collective proceedings may be brought through the ‘Group litigation order’, which is a court management system in which various claims are aggregated. Alternatively, a claim may be made through a representative party with the same interest.

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61 Norway is not a EU Member State, but belongs to EFTA.
62 Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart 2008) 16. Here the Author seems to refer to consumer claims arising from consumer legislation.
65 Civil Procedure Rule 19.10 defines ‘Group Litigation Order’ as ‘an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law’.
66 Civil Procedure Rule 19.6 provides that ‘representative parties with same interest

(1) Where more than one person has the same interest in a claim—
(a) the claim may be begun; or
(b) the court may order that the claim be continued,
by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

In respect of competition law, see *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284. Here a claim based on breach of Article 101 TFEU and Section 2 of the Competition Act was made against British Airways through this type of procedure. The claim was dismissed on procedural grounds as it was not possible to identify the members of the class who had ‘the same interest’ capable of being represented by the representative.
The second model (i.e. involvement of private bodies in the collective action), can be found, by way of example, in Germany, Austria, Netherlands, Italy, Spain and Portugal. French law provides collective interest actions and joint representative actions. The former is brought by consumer organisations for breach of the collective consumer interest. Damages awards are apportioned to the consumer organisations. The latter pursues the individual interest of consumers. In this procedure, consumers must be identified.67

A significant aspect is that circa 10% of collective enforcement of consumer rights involves cross-border issues, which has witnessed the following problems: application of different national laws before the same court, possible multiplication of fora, different rules on the standing of consumers organisations, and limited knowledge on the working of collective claims filed in other Member States. Here the risk of forum-shopping has been recognised.68

The Commission argues that these problems have adverse effects on consumer’s confidence when making cross-border claims. Leaving the current state of diversity of national legal systems would have the benefit of not imposing legislative burdens on the Member States, but would result in distortion of competition.69


6. Proposals for collective actions at the EU level

Enforcement of small claims has not been ignored by the Commission. For example, the European Small Claims Regulation\(^{70}\) attempts to address this issue. However, it applies to cross-border disputes greater than Euro 2,000.00 and it may apply to collective redress if the Member State’s domestic law provides such a system.

As already mentioned, the Commission has always been aware that collective actions are pivotal for the success of private enforcement. In all the preparatory documents on private enforcement different options to collective redress were set out.\(^{71}\) A proposal for a directive of 2009 subsequently withdrawn also provided rules on collective actions.\(^{72}\)

In such documents, the Commission suggested the adoption of the opt-in mode\(^{73}\) because it viewed unfavourably the opt-out procedure due to the excesses that have been experienced in other countries.\(^{74}\)

In the last proposed directive of 2013 on private enforcement, the Commission opted not to include collective actions and to take a horizontal approach according to which a common rules on all types of collective redress, which involve scattered losses.\(^{76}\)

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Therefore, the relevant policy may now be found in the Commission Green Paper on Consumer Collective Redress\textsuperscript{77} and the Commission working paper on collective redress.\textsuperscript{78} In the Green Paper the Commission seems to prefer the opt-in system, but with the possibility to allow those consumers who did not initially opted-in to join the collective action.\textsuperscript{79}

7. Assessment of collective actions

The design of the procedural rules for collective redress is crucial for the success of private enforcement of competition law, which is often characterised by the presence of widespread low-value losses. While, in the EU there is still little empirical evidence to draw reliable conclusions, in the US, class actions have given rise to various problems, two of which are recalled.

First, they are fraught with conflicts of interest: internal conflicts between class members, conflicts of interest between class members and their lawyers, conflicts in respect of the level of risk that class members and/or their lawyers are willing to bear, and conflicts over control of litigation.\textsuperscript{80} These problems are aggravated by that fact that claimants have difficulties and little interest in monitoring their lawyers’ behaviour.

US legal scholarship is concerned that the combination of these factors resulted in the incentive to bring unmeritorious claims, settlements agreed regardless of the merit, settlements in which the value of compensation was marginal for claimants, but that are profitable for lawyers in terms of legal fees.

The second problem is that class actions have proven to be costly for the civil justice system. Paradoxically, class actions were developed to make access to justice more feasible and to lower the cost of enforcement of individual rights, but nowadays they are feared because of the costs they entail.

In the US this latter aspect determined a change in the judicial attitude to class actions. It has been noted that in the regulation of class actions there is the intersection of three types of interests: mass tort victims, defendants, who are exposed to substantial liability claims and legal fees, and courts, which seem unwilling to deal with this type of litigation.

The outcome of the interaction between such factors is that ‘the last two parties in this triad have increasingly, but tentatively, reached a de facto coalition that has protected their own interests at the expense of tort victims’ 81. This conclusion is discouraging because it seems to testify the ineffectiveness of a system designed to tackle the problem of mass tort.

Against this conclusion, it could be retorted that the traditional model of bipolar litigation (one claimant versus one defendant) is unfit to deal with mass claims. In addition, while the costs of class actions are very high, they are still lower than the sum of litigation costs of single claims. Given, that no realistic alternative to a system of collective action seems available, the goal should be to devise a system that addresses the above-mentioned problems. 82

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Collective actions require acceptance of a general principle though. The management of a great number of claims necessitates a compromise between the claimants’ positions since it is unrealistic that a single solution accommodates all claimants’ individual interest.\(^\text{83}\) The accomplishment of a collective solution would be impossible if all single interests had to be protected.

In the EU, given the recent introduction of mechanisms of collective redress, data over their effects are not available and extensive empirical research has not been done yet. In general, it seems unwise to discourage collective actions because, as explained, they address important issues that the traditional model of litigation cannot deal with. In any case, while it is possible that problems arise, they should be measured against the benefits that collective actions bring.

8. **Collective actions and harmonisation**

Another important consideration is whether collective actions should be introduced at the EU level or whether the Member States should maintain the competence in regulating such rules.

The case against harmonisation rests on two arguments.

The first is that national systems are so different that any harmonisation would exercise ‘violence to national structures’.\(^\text{84}\) In addition the Member States are still developing their own system, which means that they are experimenting with new solutions.\(^\text{85}\) Undoubtedly, experimenting with new rules is beneficial not only to the Member State itself, but also for the others, which might benefit from such experience.


\(^{84}\) Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart 2008) 181.

\(^{85}\) *Ibid.*
The second argument focuses on the impact that collective actions would have on the civil justice system. The US experience shows that they entail considerable costs. Therefore, a solution at the national level, which is tailored to the characteristics of the civil justice system of each country, would be more sensible. In particular, each Member State would implement a policy on collective actions that is realistic in terms of the financial resources that a Member State can afford to spend.

Conversely, the case for harmonisation relies on the arguments previously expounded. First, different regimes on collective actions are likely to result in different degrees of facilitation of these actions. Thus, undertakings exposed to antitrust liability would attempt to seize proceedings in jurisdictions where the procedural hurdles would make it difficult to bring such actions or easy to dismiss them. This prospect would discourage consumers to make a claim, even those who are located in jurisdictions which facilitate these actions.

Second, different rules on collective actions may result in the alteration of the level playing field. This may occur when some undertakings facing the prospect of antitrust civil liability are not able to seize proceedings in jurisdictions that provide high procedural hurdles for these actions, whereas other undertakings do. As a result, the latter will be at a competitive advantage in respect of the former. The above-mentioned French case *UFC-Que Choisir* illustrates that a formal procedural flaw may spoil the validity of a class action.

The existence among the Member States of opt-in and opt-out regimes also affects the level playing field among undertakings and the possibility to implement forum shopping strategies. The opt-out model is capable of representing a great number of claimants. Thus, a successful action brought under this regime results in an amount of compensation greater than would be
awarded under the opt-in regime. This makes a considerable difference among undertakings, which are sued in jurisdictions which have different regimes.\(^{86}\)

Finally, as per the effectiveness argument (i.e. national rules must not make the exercise of EU rights impossible or excessively difficult), at first glance, collective actions do not pose problems. The rationale behind collective actions is to facilitate the right to compensation. Of course, there may be some rules that make the exercise of collective actions difficult, however this depends on the standard applied to assess whether such ‘restrictive’ rules are effectively making the exercise of the right difficult.

In this respect, so far there is no empirical evidence showing that the EU Member States’ collective actions regimes are making the exercise of EU rights excessively difficult. However, consideration should be given to the fact that infringement of Articles 101 and 102 TFEU are inherently characterised by cross-border anti-competitive effects. Thus, it is important to monitor that the Member States’ regulations on collective actions improve the right to compensation of claimants that are located in other Member States.

The goal to achieve effectiveness of the right to compensation does not however sit easily with the previous Commission’s orientation to exclude the opt-out model. The opt-in model requires consumers to join the collective action. The problem is that the participation rate of victims is already low in opt-in class actions.\(^{87}\) It is plausible that the participation rate will be even lower in the EU due to different languages and the unlikely awareness of consumers about litigation


initiated in other jurisdictions. Here, the opt-out regime would contribute to including a greater number of consumers located in other EU Member States.

Finally, it has been argued that harmonised measures designed to guarantee the effectiveness of the right to compensation would provide the opportunity to put in place a comprehensive and systematic policy of private enforcement applicable in all Member States. However, the rules previously proposed to regulate antitrust collective actions do not seem to pursue this goal. For example, the main problems affecting collective actions are that they may incentivise unmeritorious claims inadequately supported by proper evidence, and that they may result in cheap settlements with marginal value for claimants, but very profitable for lawyers in terms of legal fees. Collective actions also enable lawyers to behave in an opportunistic way and not best represent their clients’ interest.

In this respect, the Commission’s approach has been minimal. In a draft directive that was subsequently withdrawn, it provided that damages were to be distributed to the largest possible extent to the represented injured parties.88 It also imposed the obligation upon the Member States to ensure that qualified entities, which would be charged with representing the injured parties, act in the best interest of the latter.89 This shows that the Commission has recognised the risk of the abuse of collective actions only to a limited extent since it has not addressed the problem of possible conflicts of interests between claimants and their lawyers. This is a sensitive matter because normally lawyers’ codes of conduct are self-regulatory and it is likely that they already regulate conflict of interests. It remains to be seen whether collective actions will raise new issues that such codes do not adequately address.

89 Article 7.3.
The proposed directive has opted for not including rules on collective actions. Rather, it has chosen to take a comprehensive approach whereby such actions may be available in the presence of ‘scattered losses’. This solution has the advantage of introducing common procedural rules regardless of the type of EU right for which compensation is claimed. However, it remains to be seen whether future EU rules on collective actions will also deal with the problems highlighted in this chapter, in particular the risk that collective actions may provide lawyers with the opportunity to make unmeritorious or abusive claims. The Commission seem to be aware of this issue. For example, the Commission’s policy document that deals with collective redress set out a number of questions for consultation of stakeholders. A specific section is precisely devoted to the need to avoid abusive litigation.

It also remains to be seen whether such horizontal approach will prove to be a more effective solution than sectoral rules designed to address the specific needs arising out in the different areas of laws. In theory there is no need to differentiate between the type of violation of EU rights when the resulting loss manifests itself in the same way. In fact, the title of the Commission’s policy document that deals with collective redress suggests the goal of achieving a ‘coherent approach’. Future experience will show whether this is the case or whether the specific characteristics of infringements of competition law (eg consumer’s law of awareness of being a victim of a breach of competition law) make desirable the adoption of sectoral rules applicable to antitrust proceedings.

91 At p 9.
In any case, the Commission constant references to the intention to avoid replicating the US collective litigation style seems to confirm the trend already emerging in previous policy documents that the opt-out model will be excluded. If this is the case, the risk is to have low participation to collective actions, which is the opposite of what the Commission intend to achieve.
Chapter 8
Conclusions

1. Overview
This dissertation has provided a critical analysis of the harmonisation of the law of damages and its procedural framework for breach of EU competition law (‘private enforcement rules’). The scope of the law of damages and the procedural rules governing civil actions before the courts is wide. Discussion of all such rules would have resulted in a superficial analysis. Therefore, this dissertation has investigated the policy rationale behind private enforcement of competition law, the general rationale for harmonisation of domestic rules, and some national rules that play a pivotal role in the enforcement of the right to compensation of losses suffered as a result of breach of Article 101 and 102 TFEU (‘antitrust compensation’).

To answer the research questions, this dissertation has been structured in two parts. The first examined the role of private enforcement and the arguments against and for harmonisation. In short, the arguments against are focused on the desirability for the Member States to maintain some national legal values as well as to maintain a certain degree of national differentiation. The paradigm of regulatory competition may be read as the economic version of such differentiation. The arguments for harmonisation rely on the principle of effectiveness and desirability to reduce opportunities for forum shopping and to promote a certain degree of level playing field. In the second part, the arguments for harmonisation have been tested in respect of some substantive and procedural rules.
2. The research questions and the framework for analysis

The first research question was **whether and the extent to which there is significant low compliance with Articles 101** (prohibition of anti-competitive agreements) **and 102** (prohibition of abuse of dominant position) **TFEU**. Chapter 2 provided some significant data concerning detection rate, magnitude, duration and welfare losses caused by some violations of competition law. Such data derive from statistical estimates. The major problem with such statistics is that cartels are hidden, which makes it difficult to accurately estimate the level of infringement of competition law. On the other hand, even the most conservative estimate has showed that there is a high degree of violation of competition law, which causes considerable welfare losses. Thus, it has been submitted that encouraging private enforcement is **prima facie** desirable.

The significant degree of violation of competition law was the premise which led to the second research question: **whether and the extent to which private enforcement may contribute to a reduction in such a compliance deficit**. The reason for this question is that private enforcement of competition law has been criticised on a number of grounds. Two of them are worth mentioning.

First, courts do not have the institutional capability to deal with sophisticated economic matters involved in competition law claims. This concern underlies the fear that courts might not be able to distinguish between the economic harm caused by breach of competition law, which is compensable, from that caused by the ordinary working of the markets, which is not.

Second, courts cannot administer properly competition law because it has to do with the governance of a multitude of economic interests that cannot fit within the traditional litigation structure based on a claimant(s) against a defendant(s). Discussion of the goals of EU competition law provided an example that some economic interests might not be represented in
civil antitrust proceedings. In this respect, it may be argued that competition law is a regulatory tool that should be enforced by competition law agencies, which pursue public interest and enjoy a certain degree of discretion, rather than private parties, who are driven by the prospect of receiving compensation of damages.

Notwithstanding such criticisms, the benefits of private enforcement seem to be considerable. First, public enforcers’ resources are limited, thus, private parties bring additional resources to the enforcement of competition law. Second, problems of ‘regulatory capture’ or ‘regulatory failure’ may also be attenuated if private parties can commence antitrust proceedings in the case of inertia by the competition authorities. Major involvement of private parties results in greater deterrence, which is beneficial because it promotes spontaneous compliance with the law. Finally, private enforcement aims at compensating antitrust victims, which is extraneous to the institutional tasks of competition authorities.

One of the assumptions underpinning the debate about private enforcement is the deterrence theory. In its simplest form, it holds that a negative consequence (i.e. compensation of damages) acts as an incentive to comply with the law. The US law and economics school has refined this theory by holding that competition law (or any laws in general) should be enforced if the benefits of enforcement outweigh the costs. The costs to be taken into account are the social losses resulting from the breach of competition law (e.g. the overcharge that consumers pay as a result of an anti-competitive agreement), the costs of enforcement (public and private resources spent to enforce competition law), and the costs of foregoing beneficial activities (e.g. efficient business conduct) due to the undertaking’s fear of violating competition law (overdeterrence).
Against this background it has been argued that there is little empirical evidence showing that the costs connected with private enforcement have outweighed the benefits. Given the lack of conclusive evidence, it seems that the debate over the policy of private enforcement seems biased by the respective ideological positions of legal scholars. Those who are in favour of a laissez faire stance are suspicious of excessive enforcement of competition law, and thus of private enforcement too. The implication is that antitrust victims should bear the losses resulting from breaches of competition law. Those who favour more government intervention in the economy tend to accept that antitrust civil litigation may play a positive role. This also entails a revaluation of the corrective justice rationale.

Given the questionable assumptions of the Chicago School’s version of the deterrence theory (rationality assumption, full availability of information, and so forth), and given the importance of the goal of corrective justice, it seems plausible not to discourage private enforcement of competition law. In fact, deterrence and corrective justice are interrelated since a credible prospect of compensating the victims is an incentive not to breach the law. It is submitted that corrective justice and deterrence might conflict with each other. However, such a conflict seems to occur only in extreme circumstances. Therefore, a rational policy of private enforcement can be based both on corrective justice and deterrence.

The goal of corrective justice dates back to the natural law tradition. In competition law it aims at reversing the welfare losses that antitrust victims suffered as a result of a violation of competition law. Perhaps, this is another reason why the law and economics school is hostile to private enforcement: it is a means to restore the initial individual’s welfare, which has been altered by a breach of competition law. This is a goal that the Chicago School either opposes or is sceptical
of. In particular, it argues that distribution of welfare is a ‘neutral’ aspect that the law should not attempt to modify, rather the law should aim at promoting efficiency.

With regard to deterrence, this dissertation rejects the Chicago School’s version based on an analysis of costs and benefits of enforcement. Rather, it adopts a simple version based on the need to make a certain sanction (compensation in our case) credible to dissuade a would-be violator from breaching the law even though it has also been recognised that the core of the deterrence theory rests upon full information and rationality assumptions, which might not hold in all circumstances.

The second part of chapter two has been devoted to the relationship between public and private enforcement. If private enforcement has to play a greater role, this is bound to reset the relationship between the two. The main problem is whether to encourage stand-alone actions or follow-on actions. The argument that public enforcers’ resources are limited supports the former solution. In addition, follow-on actions do very little to increase deterrence. However, follow-on actions avoid unmeritorious claims as they are based on the findings of a competition authority. Public and private enforcement respond to political inputs and monetary opportunity respectively. Thus, it must be accepted that the design of rules that achieve the optimal balance between public and private enforcement is an arduous task.

Given the positive role of private enforcement to increase compliance with competition law, chapter three dealt with the main research question of this dissertation, such as whether national legal systems are adequate to guarantee effectiveness of the right to antitrust compensation and to increase compliance with EU competition law, or whether these objectives can be better achieved at the EU level, in particular by harmonising some
procedural and substantive rules governing damages actions based on breach of Articles 101 and 102 TFEU. In essence, this is a subsidiarity question, a principle enshrined in Article 5(3) TEU and that must be taken into account by the European legislature.

The rationale behind such a question is that it is one thing to establish that some Member States’ legal systems are ineffective in ensuring the right to antitrust compensation. Another is to have EU legislation uniform to all Member States. For example, it could be argued that there are different ways to ensure the effectiveness of the right to antitrust compensation and therefore the Member States should be left free to adopt their own rules, provided that they meet a minimum standard to ease compensation claims. This solution would give more flexibility to the Member States because they would be able to take into account the capability of their civil justice system to cope with the increasing number of competition law claims.

3. The arguments against harmonisation

A first argument against harmonisation of private enforcement rules is that it would introduce extraneous legal values in the Member States’ legal system. In addition, in recent years the general EU goal of unifying many areas has been questioned. This can be expressed in the catchphrase ‘one size does not fit all’. To some extent, the EU has not neglected the need to preserve national rules. The recurrent use of EU opt-out clauses is an indication that the EU has acknowledged this concern. Against these arguments, it can be retorted that a certain degree of harmonisation would be likely to be achieved by the CJEU in its interpretative work. If this is correct, then harmonisation pursued by the EU legislature, which is more accountable than the EU judiciary, should not be ruled out as a matter of principle. Rather, the point is which rules should be subject to harmonisation.
The theory of regulatory competition has also provided an additional argument against harmonisation of private enforcement rules. This theory has been developed by the US law and economics school. It maintains that legal systems should not be unified and left free to compete between each other in order to offer the most hospitable legal environment to businesses and people. This triggers competition in which each state puts in place an efficient legal system. This process would result in a ‘race to the top’, which will lead to the emergence of the most welfare-enhancing legal system. In addition, it counters lobbies’ action aiming at influencing the law-making process in order to obtain protectionist legislation. As stated above, this theory presupposes that states are free to decide their own rules, which rules out harmonisation measures.

This theory has been criticised because it might result in the repeal of rules that protect other parties. In this case, it is argued that regulatory competition leads to a ‘race to the bottom’, where ‘protective’ or ‘public interest’ rules are eliminated in order to create a business friendly environment. While in the EU the theory of regulatory competition has not made many proselytes, this dissertation has nonetheless applied it to competition law. The main finding is that, while regulatory competition might work in some areas, for example tax law or labour law, the same cannot be said with regard to the enforcement rules of competition law. The characteristics of this type of law make it unlikely the occurrence of a competition in which each Member State offers the ‘most efficient’ legal system.

The theory of regulatory competition works if productive factors are free to move between the Member States. However, this is not the case for competition law because even if the competition rules of a Member State, or its enforcement rules, are unfavourable to businesses, companies still sell and operate in that Member State and thus they are subject to its competition
law. The alternative is to leave the market of that Member State and not to trade there, which is an unrealistic scenario. In addition, some ‘inefficient’ competition rules might favour some businesses. For example, businesses participating in cartels would benefit from operating in a Member State with a low standard of enforcement since they would make extra profits.

4. The arguments for harmonisation

4.1 The ‘internal market’ arguments for harmonisation

With respect to the arguments in favour of harmonisation, the first is related to the level playing field. It refers to the goal of putting undertakings in the same economic conditions when competing in the EU internal market. Level playing field played a considerable role in the early EU harmonisation measures, however in recent years it has been criticised. Although, it is submitted that a certain degree of disparity among the EU legal systems is inevitable, this goal should not be abandoned. Some antitrust liability rules, for example, availability of punitive damages, result in different compensation outcomes. This means that companies condemned in jurisdictions with lenient liability rules will be at a more of a competitive advantage than others.

For example, suppose a company is found liable in a jurisdiction that does not provide punitive damages, whereas a competitor is found liable in a jurisdiction that does provide them for a similar breach of competition law. The first company will pay fewer damages than the second. As a result, it will have more resources to compete against that company. In addition, the first company will not have the incentive to comply with competition law. As a result, the first company will make more profits (i.e. illegal profits resulting from anti-competitive effects) than the second one.
Forum shopping is another argument for harmonisation. Due to the cross-border nature of anti-competitive effects, some undertakings might be able to seize courts in jurisdictions where private enforcement rules are more lenient than other jurisdictions, or which may frustrate de facto antitrust damages actions. As a result, undertakings might be able to minimise their antitrust liability at the expense of antitrust victims. This appears to be inconsistent with the EU principle of effectiveness of the right to compensation. In addition, it has adverse impact on deterrence. For example, jurisdictions with a high standard for disclosure of evidence may lower the probability of undertakings being found liable. Again, it is plausible that if undertakings could choose the jurisdictions, they would opt for a jurisdiction whose rules make it more difficult to obtain an order of disclosure of evidence.

4.2 The principle of effectiveness

Chapter three also dealt with the EU principle of effectiveness, which is an additional argument for harmonisation. This principle provides that national rules must not make the exercise of EU rights impossible or excessively difficult. When this is the case, such national rules must be set aside, which is undesirable for two reasons. First, it results in legal uncertainty. Second, and in relation to procedural rules, it may disrupt the balance between claimant and defendant, a balance that was set by national legislature according to its own legal values. In private enforcement of competition law, the principle of effectiveness means that a claimant must not find excessively difficult to obtain compensation of damages.

It may be argued that the principle of effectiveness of the right to antitrust compensation does not necessarily justify EU rules on private enforcement.

There are two strands of this argument.
a) The first holds that the Member States’ legislation could ensure the right to antitrust compensation without the need to have common EU rules.

b) The second is that the Court of Justice may be able to achieve a step-by-step harmonisation de facto through its case law based on the principle of effectiveness without the need to enact EU legislation.

**a) Effective national legislation without common EU rules?**

With regard to the first argument, it has been seen that Article 19(1) second indent of the TEU holds that Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. This provision could be the legal basis to compel the Member States to provide adequate protection of the right to antitrust compensation without introducing uniform EU rules. In other words, there could be national legislation, adopted upon the input of EU law, aimed at ensuring the effectiveness of the right to antitrust compensation and in which the requirement of ‘effectiveness’ is left open to the interpretation of the Member States’ legislatures.

Against this argument it can be replied that harmonised private enforcement rules are likely to facilitate EU cross-border claims to a greater degree than ‘effective’ national law. For example, in the absence of harmonisation each Member State has its own time limits to bring an antitrust damages action. This might hinder would-be claimants located in other Member States as they do not know whether they still have time to file a suit. A EU time limit would enable antitrust victims to know at the outset whether a claim may be made whatever jurisdiction is seized. In other words, knowledge of antitrust victims about the enforcement rules may contribute to making such victims more proactive in seeking redress also in cross-border situations.
More importantly, this ‘effectiveness from a national perspective’ approach would not remedy the risk of possible forum shopping or achievement of level playing field. Inevitably each Member State would interpret the requirement not to make antitrust damages actions excessively difficult or practically impossible in a different manner. This would result in different standards of judicial protection, which would give undertakings the opportunity to attempt to commence or transfer proceedings in jurisdictions with the lowest standard. Similarly, different legal standards may result in different compensation outcomes, thus increasing differences of the competitive conditions in which undertakings operate.

b) Harmonisation through case law

With regard to the second argument (harmonisation achieved through case-law rather than EU legislation), two remarks can be made. The first has already been mentioned above: the Court of Justice case-law would be based on the interpretation of the principle of effectiveness, which determines the disapplication of national law, which in turn is undesirable because it results in legal uncertainty.

The second is that this approach would not allow to have a comprehensive and coherent set of rules on private enforcement. Often important policy considerations underlie the law of damages and procedural rules, which enable the judge to restrict or extend the scope of compensation. Uniform EU rules would provide the opportunity to set such policy-filters at the EU level in order to pursue a coherent and rational policy of enforcement, aiming at both corrective justice and deterrence, and in which such rules would be designed precisely to ease competition law compensation claims.
It is unlikely that the Court of Justice case-law would be able to achieve such a systematic approach in which the goals of corrective justice and deterrence are properly balanced.\(^1\) The reason is that the Court would intervene through the preliminary ruling procedure. Here, it should be noted that only courts of last instance have a duty to refer the matter to the Court of Justice.\(^2\) Thus only a minority of national rules allegedly contrary to the principle of effectiveness would be examined by the Court of Justice. More importantly, national law would be the ‘input’ on which the Court of Justice would be called to give judgment. The Court’s answer would depend on the terms in which national courts framed the question for a preliminary ruling.

In addition, the Court of Justice might provide some general criteria on how to achieve effectiveness, but then entrust national courts with the task of applying them. This is the case of *Pfleiderer*\(^3\) where the Court of Justice held that national courts must decide on a case-by-case basis whether to allow the disclosure of leniency documents by balancing the interest of protecting public enforcement and the interest of the right to full compensation. Here, it is foreseeable that differences among the Member States will arise and will create more legal uncertainty. This is the reason why the Commission proposed that national courts should not order disclosure of leniency documents and that such documents are not in any case admissible in actions for damages.\(^4\) This is an example of a clear-cut rule that pursues a certain policy goal (i.e. the effectiveness of public enforcement).

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1. Van Gerven argues in similar terms as he writes that harmonisation through case law has its limits, particularly in those situations in which uniformity is desirable to achieve level playing field. Walter Van Gerven, ‘Harmonisation of private law: do we need it?’ (2004) 41 CML Rev. 505, 524.

2. Article 276 TFEU. In addition, see CILFIT that has attenuated the duty to refer for a preliminary ruling. Case 283/81 CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415.


Finally, the approach of harmonisation through case-law would preserve considerable diversity of the Member States rules on private enforcement, which would not deal with the risks of forum shopping and uneven level playing field.

5. Testing the case for harmonisation: four case studies

The arguments for harmonisation, as set out in the first part of the dissertation, have been tested with respect to causation, punitive damages, evidence and collective actions. The purpose was to show whether national rules governing these areas are adequate to guarantee the effectiveness of the right to antitrust compensation and whether they give rise to the problems of forum shopping and excessive disparity in the level playing field.

Chapter four dealt with causation. Causation is relevant to determine the type of harm that should be recoverable following a breach of competition law. The recoverable losses must fall within the type of consequence that the prohibition of anti-competitive agreements and abuse of dominant position aims at preventing (i.e. anti-competitive effect). The goals of competition law allow identifying such anti-competitive effect. Thus, causation links conduct (the breach of competition law) with the type of consequence (the anti-competitive effect) that competition law intends to prevent.

Classic rules of causation are primarily based on the scheme where a single conduct brings about one or limited effects. Here the but-for test, or the *conditio sine qua non*, provides an effective method to identify the ‘cause’, which is based on hypothetical reasoning (had the conduct not taken place, the effects would have not materialised). Problems already arise when such effects spread and go beyond the initial harm, and/or third party’s acts interfere with the flow of effects arising from the original tortious conduct. Courts developed criteria, which can be explained in
terms of policy goals, that indicate when the ‘chain of causation’ is broken, thus limiting the
tortfeasor’s liability in relation to unforeseeable harmful effects.

Competition law provides an interesting test for the application of the theory of causation. Here,
either a single conduct (for example, abuse of dominant position) or joint conduct (for example,
price-fixing agreement) results in several economic effects. However, in competition law the
factual context in which conduct and harm occur is characterised by many economic
circumstances. Third parties’ economic actions interfere with such factual economic context. In
addition, the harmed party may behave in such a way as to counter the adverse economic effects
of the unlawful conduct, which may worsen her economic position. The time lag between
unlawful conduct and economic losses makes the ascertainment of the factual economic context
an arduous process.

It has been argued that these circumstances make the application of the traditional but-for test
inadequate to identify the economic losses resulting from breach of competition law. To remedy
this problem, it has been suggested introducing some policy criteria that would limit the range of
the defendant’s defences. From a theoretical viewpoint, these criteria may be justified on policy
considerations such as corrective justice or deterrence. Indeed, tort law scholarship has explained
some English courts’ decisions on causation precisely by referring to such goals.

The first criterion excludes external events from the causation inquiry. The but-for test provides
that the defendant’s conduct is not considered the cause of the loss if such loss would have
occurred in any case even in the absence of the defendant’s conduct. The proposed legal criterion
could operate by excluding this defence: if the defendant’s conduct is suitable to cause harm,
then third parties’ economic actions, or general economic phenomena that interfered with the
economic context in which losses occurred, should not be relied on to negate the defendant’s liability.

Similarly, the second criterion should operate when the victim itself has put in place some conduct that is suitable to produce the loss, thus negating the causal connection between her loss and the defendant who breached competition law. This situation primarily occurs in abuse of dominant position where the victim of abusive conduct may react by putting in place business conduct that later turns out to aggravate her economic position. Unless such a ‘reactive’ business conduct is manifestly wrong, thus constituting a *novus actus interveniens*, or unwise, thus constituting contributory negligence, the claimant’s conduct should not be relied on to negate or limit the defendant’s liability.

Finally, it has been suggested that although the principle of effectiveness could be relied on to justify the preclusion of the but-for test defences (i.e., the loss would have occurred in any case), thus making harmonisation unnecessary, in reality EU legislation would provide the opportunity to enact comprehensive rules on causation that would take into account a variety of complex market situations in order to simplify the identification of the ‘cause’ of economic losses resulting from breach of competition law.

Chapter five has investigated whether punitive damages should be introduced for some violations of competition law (primarily, naked cartels). The main rationale for punitive damages lies in deterrence since a greater amount of compensation alters the would-be violator’s probability calculus whether to infringe competition law. The main problem with punitive damages is that they incentivise would-be claimants to make a claim and, at the same time, to commence unmeritorious litigation.
Some scholars and EU policy-makers are against the introduction of punitive damages. Others have proposed that double damages should be introduced at least for cartels. This dissertation argued that punitive damages should be adopted, but limited in some circumstances. First, they should not be awarded in follow-on actions because they achieve little in terms of deterrence. They should not be imposed on applicants of leniency programmes because they would discourage would-be applicants. Finally, punitive damages should not be awarded, or at least courts should have discretion whether to award them or not, in non-cartels infringements since they are easier to detect and because vertical agreements and some abuses of dominant position might yield both anti- and pro-competitive effects.

Punitive damages evidently affect the amount of compensation. Since currently only a few Member States provide the award of punitive damages, the risk of forum shopping and alteration of level playing field is not serious. Rather, the concern is under-deterrence in the whole EU. In other words, restitutionary compensation may not constitute a credible threat to make undertakings comply with competition law. This is the case when illegal gains are greater than the inflicted losses or when undertakings’ estimate of risk of being found liable is low. Availability of punitive damages counters such factors, thus enhancing deterrence.

Chapter six dealt with evidence. It is commonplace that no claim would succeed without evidence. Here, two main problems deserve attention. First, in competition law cases, evidence consists of market information, primarily price of products/services, which is dispersed. As a result, collection and assessment of this evidence is costly and complex.
Second, evidence of some infringements of competition law is concealed. EU policy-makers are aware of this problem, which is why the Commission was granted extensive investigative powers. However, private parties do not have such powers. Instead, they can only rely on ordinary civil procedural rules. This dissertation has analysed two important evidentiary rules: standard of proof and disclosure.

Standard of proof concerns assessment of evidence. The term ‘standard of proof’ refers to the way in which evidence is assessed in common-law countries. Civil law countries rely on different legal categories such as ‘intime conviction’. This dissertation has explored the case whether different rules on the assessment of evidence might increase the risk of different outcomes depending on the jurisdiction in which evidence is produced and evaluated.

It has been argued that the problem is not the existence of different legal concepts. Indeed, standard of proof, ‘intime conviction’ and so forth, refer to the process of inference according to which a judge makes a factual judgment on a past event from particular pieces of evidence. Rather, the difficulty lies in laying down rules on how such inferential reasoning should be made. Judges of national courts have different legal cultures and experiences in the assessment of evidence. It is doubtful that common EU rules would lead to similar evaluation of evidence.

With regard to disclosure rules, they address the problem of asymmetry of information between violators of competition law and their victims. Here, the differences between common-law and civil law countries are significant. Harmonisation of the disclosure rules would be desirable because the extent to which information can be obtained by prospective claimants affects the probability of a successful claim.
Strict disclosure rules reduce the probability to make a claim, which is an important factor that accounts for the low level of antitrust litigation. This decreases the deterrent justice function of private enforcement. It is plausible to hold that restrictive disclosure rules might make the exercise of the right to compensation excessively difficult, thus jeopardising the achievement of corrective justice. Finally, diversity of disclosure rules among the Member States would be exploited by undertakings in their forum shopping strategies. These arguments support the case for harmonising disclosure rules.

Chapter seven dealt with collective redress. Collective redress refers to a wide array of procedural mechanisms whose common feature is the aggregation of claims, often of low value, in order to be dealt with together in the same proceedings. Such aggregation allows economies of scale in the treatment of each claim, which lowers the cost of enforcement. This makes it viable to claim compensation for small losses. In addition, it enhances deterrence as the threat of paying considerable compensation of damages becomes credible.

Although the EU Member States have already in place some form of collective redress, so far experience of such actions has not been significant. In general, there seems to be reluctance to change the current national rules in order to facilitate collective redress because of the fear of the abuses that occurred in the US. Such abuses may consist of bringing unmeritorious claims, pressure to enter into settlements regardless of the merits, and low-value settlements that bring little benefit to the claimants, but are profitable to the claimants’ lawyers in terms of legal fees.

Given that harmonisation of collective actions aims at facilitating them, the potential for abuse may support the case against harmonisation. Here, it could be replied that uniform EU rules could be designed to prevent such abuses. However, on this point, the Commission’s response
has been partial. While in the previous preparatory documents it set out a number of options on collective actions, the proposed directive did not include any rule, but opted for a horizontal approach where collective actions would be available for compensation of ‘scattered’ losses resulting from breach of any type of EU law.

A first argument for harmonisation lies in the need to strengthen the principle of effectiveness. The rationale behind collective actions is to facilitate the exercise of the right to compensation. Thus, at first sight collective actions comply with this principle. In addition, there is no systematic empirical evidence showing that domestic regimes on collective actions are making it difficult to exercise the right to compensation.

However, *UFC Que Choisir*, a French case concerned with a collective action brought by consumers, shows that a simple procedural flaw could jeopardise the entire collective action. Here, EU legislation could prevent the application of excessively formalistic national rules that would frustrate such actions. Another aspect of the relationship between effectiveness and collective action relates to the choice whether to adopt opt-in rather than opt-out regime. It has been argued that the latter adheres more to the principle of effectiveness. In opt-out regimes all EU consumers would not need to join the collective action and receive, if the action is successful, compensation with minimum procedural requirements.

An even stronger case for harmonisation rests on traditional ‘internal market’ arguments of the risks of forum shopping and disparity in the level playing field. Undertakings facing the prospect of liability would attempt to seize proceedings in the courts of those Member States whose rules do not facilitate class actions. When forum shopping is not possible for all undertakings involved
in a certain infringement, they would be subjected to different class action regimes, which determine different liability outcomes, thus determining different conditions of competition.

All these national rules have been analysed in the light of the three objectives that harmonisation is supposed to accomplish: desirability to put in place a comprehensive and consistent policy designed to ensure the effectiveness of the right to compensation, desirability to avoid forum shopping strategies aimed at reducing the risk of liability, and desirability to avoid excessive disparity in the level playing field.

Although this dissertation has taken an analytical approach by examining the arguments for harmonisation separately, they are all interrelated. This means that while a certain argument suits a particular rule, it is likely that it has an impact on the others. For example, the principle of effectiveness has been applied to the causation rules. However, if causation rules are effective, then compensation of damages will become a more serious incentive to promote compliance with competition law.

6. Evidence-based policy: what standard?

This dissertation has argued that the case for harmonisation is more convincing than the case against. However, it must be said that so far there is no significant empirical evidence that shows that national law is giving rise to significant problems of forum shopping, further increase of unequal competitive conditions, and lack of effectiveness. The primary reason is that there have been few antitrust actions before national courts although there may be differences among the EU Member States. Settlements also account for such a low number. In addition, many cases are follow-on actions, where the most important evidence has already been produced by the
competition authority. Thus, they are not representative of the difficulties encountered by antitrust claimants.

Lack of empirical evidence about ‘hindrance’ of national law in bringing antitrust actions shows a paradox. The EU law requires EU policymakers to show that national law creates an appreciable distortion of competition before enacting EU measures based on the harmonisation clause.\(^5\) The paradox is that inadequacy of national law might be the primary factor why few antitrust actions are brought before national courts. But at the same time, scarcity of such actions does not allow gathering sufficient evidence about the fact that it is precisely national law that is hindering such actions, and that competition in the internal market is already distorted by the lack of effective enforcement. As a result, EU policymakers may not adopt harmonisation measures aimed at remedying inadequacy of national law due to the lack of proper evidence, thus perpetuating a situation of low level of private enforcement.

Of course, the problem of insufficient empirical evidence occurs in many areas, not just competition law. In an ideal world, data and further investigations should provide policymakers with adequate information to enact sound policies. However, the crucial question is: should policymakers refrain from acting when such information is not available? This dissertation attempted to test the arguments for harmonisation on the assumption that despite the magnitude of violations of competition law, few antitrust actions are brought. This is indirect evidence that national law is currently not adequate to guarantee effectiveness of the right to compensation. Similarly, it has proceeded on the plausible assumption that even if national legal systems were adequate, the risk of forum shopping and the problem of uneven level playing field would be likely to materialise.

7. Policy again: subsidiarity and proportionality

This dissertation has also dealt with the principles of subsidiarity and proportionality. The principle of proportionality requires, inter alia, identifying the less restrictive option among available EU measures, and that the restrictive effects of a EU measure are not disproportionate in relation to the objective pursued by such measure. The principle of subsidiarity involves a comparative efficiency calculus according to which a EU measure should be adopted if its objective can be better achieved at the EU rather than national level. Clearly, these inquiries involve significant policy choices rather than technical assessments.

In these tests, the crucial aspect is the identification of the objective that private enforcement rules are meant to achieve. It has been argued that corrective justice and deterrence are the two main goals of private enforcement. However, while corrective justice may be seen as an objective that should be pursued per se, deterrence is a goal that is instrumental to the ultimate goal of increasing compliance with competition law. This latter goal is the ‘objective’ of harmonisation of private enforcement rules against which, for example, the identification of the less restrictive option or the comparative efficiency calculus are to be made.

Suppose that EU policymakers wanted to increase compliance with competition law by 90%. This requires private enforcement rules strongly unbalanced in favour of claimants. It would entail availability of punitive damages, vigorous disclosure rules, and so forth. In this case, less restrictive means would be available, but they might not be effective to achieve the 90% target. The same can be said when appraising the disproportionate restrictive effects of a certain EU measure. Vigorous ‘pro-claimants’ rules create a significant burden upon the defendant that
would not be necessarily disproportionate if the ambitious target of increasing compliance by 90% is to be pursued.

These considerations lead to further questions.

First, what is a tolerable/physiological degree of violation of competition law? Is the goal of increasing compliance with competition law by 90% too ambitious? Is the goal of 40% too lenient? What if undertakings operating in some Member States already tend to comply with competition law whereas others located in other States tend to disregard it? Perhaps, the former comply with competition law because they operate within a ‘culture of competition’ regardless of the sanctions imposed by competition law. In this case, changing the enforcement rules would not be necessary.

These issues confirm that the assessments involved in the principles of subsidiarity and proportionality are fraught with a great deal of political appraisal, hence policy discretionality. It is generally accepted that greater compliance with competition law increases the competitiveness of a state. Nonetheless, it also requires spending resources (e.g. to national antitrust agencies or civil justice systems) that may be used to pursue other policies that also enhance a country’s competitiveness. Thus, the Member States in which there is already a great deal of compliance with competition law might object that enhancing the role of private enforcement is likely to bring few benefits.

Second, should the EU institutions design private enforcement rules with a view to achieving a ‘minimum compliance target’ or a higher target? For example, let us suppose that currently the detection rate of cartels is 30%. Should the EU institutions aim at increasing such a rate at least to 40% or should they aim at a higher detection rate? The ‘minimum target’ option would give
the Member States more flexibility in accomplishing the degree of competition law compliance, together with the design of antitrust litigation rules tailored to achieve their particular goal. In doing so, the Member States would make this assessment by taking into account the level of breach of competition law occurring in their jurisdiction, the resulting welfare losses, and so forth.

In this case, the Member States would also have the possibility to take into account the state of their civil justice system. Indeed, it would be pointless to introduce EU private enforcement rules if the Member States’ justice system would not be able to cope with an increased number of competition law claims. The Member States could reconcile the need to provide more resources to cope with the prospect of an increase of antitrust litigation with other specific civil justice policies.

Notwithstanding these considerations that support the case for a ‘minimum’ harmonisation, the dilemma over the best level (EU versus Member State) for the adoption of policies of competition law may not be so serious. In fact, the proposed directive covers only some aspects on the law of damages and the relevant procedural rules. Perhaps, this indicates that the Commission is aware of the need to provide the Member States with flexibility in the implementation of such rules.

Indeed, this seems a pragmatic way to proceed. The proposed directive will introduce only a limited number of rules. Once implemented and enforced, the legal community (scholars, lawyers, and so forth) should investigate whether national courts are failing to deliver meaningful results for antitrust victims. If problems such as unmeritorious litigation or fears that antitrust

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6 Article 15(2) of the Regulation No. 1/2003 already provides that Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 [now 101] and 82 [now
litigation is inhibiting beneficial economic activities emerge, or if new problems hindering the effectiveness of antitrust litigation come to light, then EU private enforcement rules should be amended and/or new rules be added. Indeed, once EU private enforcement rules are enforced, it will also be possible to produce evidence-based policies.

8. The draft directive: an assessment

Overall, the draft directive seems to be conservative. For example, with regard to collective redress, the Commission’s policy documents indicate the preference for the opt-in system. This solution is more in line with the traditional procedural principle that only those who decide to join an action will be bound by the court’s decision. In addition, some concerns were raised that the opt-out model is too close to the US system. Yet recent experience in the UK shows that this model is less effective than the opt-out system by which a class of victims is automatically included in a collective action unless they take the steps to opt-out.

A second example, is the lack of punitive damages. This solution was advocated in the Final Report at least for cartel cases, by increasing the award of damages by 50%. This would have been less than the US treble damages. In other words, the provision of punitive damages was conservative both in relation to its amount and to the type of infringement. The possibility of awarding punitive damages was already dropped in the White Paper and that stance is now confirmed in the draft directive, which states that compensation of damages does not have to result in a higher amount than the suffered loss.

The non-adoptions of opt-out collective actions and punitive damages show that the Commission paid attention to the concerns raised by the stakeholders, especially businesses. The fear is that

\[102\] of the Treaty [now TFEU]. However, the point is that broader research should be made about the state of private enforcement in a Member States, which should not be limited to the text of a written judgment.
EU private enforcement rules could encourage unmeritorious claims. If that is the case, there seems to be a trade-off: the effectiveness of private enforcement rules versus legitimacy of the Commission’s initiative to facilitate antitrust damages actions. The wide consultation held in relation to these rules enabled some stakeholders, primarily businesses, to raise their concern.

The Commission seems to have accepted such concerns thus leaving out some rules that could prove to be very effective both in compensating antitrust victims and increasing the deterrent impact of antitrust litigation. This way, the Commission may have gained more legitimacy (i.e., consensus and acceptance) in its initiative: first, it proved that it listened to, and took into account, businesses concerns. Second, it showed that it chose a European way to private enforcement rather than copying the US model.

More legitimacy in this area is understandable if one considers that some private enforcement rules affect important principles of national civil procedure and will have an impact on the civil justice systems of the Member States. However, if the future experience proves that EU private enforcement rules do not meet the expectations of other stakeholders because, for example, few claims are brought, or few consumers join collective actions, then the Commission may lose credibility in putting in place a successful policy of private enforcement. If this analysis is correct, it seems the old dilemma between input legitimacy (consensus over the decision making process) and output legitimacy (consensus based on successful policy outcomes) is still alive.

If we take the 1999 Commission White Paper on modernisation of competition law as the starting point of EU private enforcement, then fourteen years have been necessary for a draft directive to come to light. Despite the European right to antitrust compensation established in *Courage*, few cases have been brought. The difficulties in bringing an antitrust action remain
almost the same and vary depending on the characteristics of the national legal system and willingness of national policy-makers to facilitate such actions. In fourteen years, the following policy documents have been issued: two reports on calculation of damages, a Green Paper, a 627 pages academic report to make antitrust damages actions more effective, a White Paper plus the relevant Staff Working Paper and the Impact Assessment Report, a withdrew proposal for a directive, a submitted proposal for a directive plus its impact assessment report, and a communication on quantification of harm plus the relevant Staff Working document.\(^7\)

Given the amount of effort devoted to EU private enforcement, it was reasonable to have great expectations from the latest Commission’s draft directive. If we exclude its final provisions, the draft directive consists of 18 articles. Some of the critical aspects affecting antitrust litigation have been addressed. For example, there are rules on evidence, which have been designed having in mind some of the characteristics of the violations of EU competition law. Provisions have also been made with respect to disclosure of evidence adduced in the context of administrative enforcement. A clear-cut rule has been proposed in relation to the binding effects of decisions made by national competition authorities when such decisions are relied on before national courts. Equally, the passing-on defence and the standing of indirect purchasers will have to be permitted.

Nonetheless, the draft directive suffers from a serious shortcoming: the absence of rules about collective actions. The Commission justified this choice by referring to a European Parliament resolution, which called for an integrated approach to collective redress.\(^8\) Thus, instead of providing collective action rules applicable only to antitrust proceedings, the Commission will


propose rules on collective redress applicable to civil proceedings for compensation of scattered losses deriving from any breach of EU law. This stance is not unreasonable. However, it would have been possible to introduce rules on collective redress applicable to antitrust proceedings and then evaluate their working and effectiveness. Such an evaluation would have provided valuable insights when designing general rules on collective redress. In other words, the experience acquired in the application of competition law collective actions could have been used to improve the rules on collective redress applicable to other breaches of EU rights.

The lack of rules on collective redress is a serious shortcoming because without collective actions, antitrust litigation is unlikely to be effective to all antitrust victims. Rather, antitrust litigation would remain a viable route for businesses, which have the financial resources to make a claim. With regard to consumers, much depends on how national legal systems design collective redress. In addition, the problems of risk of forum shopping and the uneven level playing field are likely to materialise until EU rules on collective redress are put in place.

It seems that the draft directive has limited itself to address only the most critical issues affecting antitrust litigation (save for the rules on collective actions). In reality, more EU rules should have been provided. For example, the draft directive has not covered the aspect of funding of litigation, whose rules greatly affect the choice whether to make a claim or not. It has also been seen that it virtually does not contain any rules on causation. The fewer EU rules, the more national rules apply. As a result, successful damages actions will depend on the sensitivity of national legislatures to implement the future directive with the goal of putting in place an effective system of compensation, rather than limiting to transpose the directive without taking into account how existing national law might jeopardise such a goal.
Article 3 of the draft directive is entitled: ‘Principles of effectiveness and equivalence’. It contains the essence of these principles as elaborated by the CJEU. One might argue that it has been pleonastic to reproduce them since they are already part of the *acquis communautaire*, and now the principles of effective judicial protection has been codified and constitutionalised by the Treaty of Lisbon (Article 19(1) TEU). However, given the pivotal role that domestic laws and national courts have in antitrust compensation, it might remind national courts of their task to protect rights conferred upon individuals by EU law and national legislatures of their duty to transpose correctly EU directives.
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**Proposed legislation and other preparatory acts**


**Websites**