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Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US

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Abstract: This paper examines the core features of the EU reform package designed to encourage greater volumes of private enforcement of the EU competition rules, particularly the Directive 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. Its principal objective is not, however, to scrutinize these provisions in detail. Rather, its purpose is to reflect on the questions of why, especially when compared with the position in the US, it has proved so difficult for a culture of antitrust litigation to develop in the EU, why the Commission believed that EU measures were necessary to kindle it and to consider, against that backdrop, whether the EU package is likely to achieve its stated goals.

Section 2 commences by exploring how private enforcement has developed in the US, examining not only the factors that have facilitated and encouraged it, but the extremes widely-believed to have bedeviled and undermined it, and the steps which have consequently been taken to limit and curtail private actions there. Section 3 then examines the EU system and seeks to unpick the different factors that have operated over time as barriers to private litigation in the EU Member States and to identify those that still exist. Having set out the factors that have encouraged and hindered litigation in the US and the EU respectively and examined some of the pros and cons of each system, it is possible to reflect more fully on the questions of whether private litigation should be further encouraged in the EU, what measures might be desirable or required to overcome the obstacles which exist to it, what measures should be avoided, whether the current package is likely to succeed, what pitfalls might be anticipated and/or what further developments and clarifications are likely to be required in the future.

Section 4 concludes that the package of reforms is not likely to lead to over-enforcement or to the encouragement of unmeritorious antitrust actions in the EU. What may be more of an issue, however, is whether it has done enough to boost and facilitate private damages actions and to create the level playing field across the EU sought by the Commission. Not only does the Directive not institute a completely harmonised framework, leaving a number of potential obstacles to national actions and areas of legal ambiguity outstanding, but a number of the Directive's provisions are liable to introduce considerable complexities into national proceedings. Further, scope for some significant divergences between national rules remain; such differences are likely to continue to affect where litigants choose to commence their actions and to result in forum-shopping.

Keywords: Antitrust, Private Enforcement, EU Damages Directive, Damages, Compensation, Deterrence

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Private Enforcement of EU Competition Law: A comparison with, and lessons from, the US

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1. INTRODUCTION

In order for the objectives of a competition law system to be achieved, effective enforcement of the rules must take place. Without it, the meaning of the law will not be developed and elucidated, breaches of the rules will not be halted, punished or deterred and victims of violations will not be compensated;¹ ‘deterrence, compensation, and remediation’² will not be ensured.

A critical issue to be determined when designing or developing a competition law system is therefore how effective enforcement mechanisms can be established. Many systems rely heavily on public enforcement to protect society’s interest in the efficient working of markets. The questions of how public enforcement institutions should be designed, how they can curb and deter infringements and how competition law decisions should be taken, checked and reviewed, has provoked extensive debate and a rich and wide literature.³ This paper, however, focuses on private enforcement and, in particular, on the questions of whether private enforcement of the rules by those specifically harmed by a competition law violation should be encouraged in the EU (and, if so, how) and how it should interact with public enforcement. These are important issues. Public enforcers have limited resources which they may concentrate principally on ensuring that serious violations which cause wide-spread harm to consumer welfare (such as cartels) are brought to an end and deterred. Accordingly they are not able to root out and prevent all violations of the rules or to ensure compensation for victims. In the EU, for example, the European Commission (the ‘Commission’) does not have power to award damages to those that have suffered loss in consequence of an antitrust infringement, although it has been active in trying to facilitate

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¹ W Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 *World Competition* 3. Competition law can be conceptualised as rules to correct public wrongs, private wrongs or market failures, see N Dunne, ‘The Role of Private Enforcement within EU Competition Law’ (2013–14) 16 *Cambridge Yearbook for European Legal Studies* 143.

² See AI Gavil, ‘Designing Private Rights of Action for Competition Policy Systems: The Role of Interdependence and the Advantages of a Sequential Approach’ in P Lowe and M Marquis (eds) *Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies* European Competition Law Annual 2011 (Hart, 2014) (remediation provides means for halting offensive conduct and perhaps correcting for its adverse competitive effects, as with equitable and injunctive relief).

³ Decision theory has prompted close scrutiny of system design and evaluation of system performance – in particular the cost of enforcement, whether it is likely to produce errors (Type 1 or Type 2 errors) and the likely implications of such errors, see eg, Gavil (n 2), EM Fox and MJ Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP 2012), WE Kovacic, ‘Rating the Competition Agencies: What Constitutes Good Performance?’ (2000) 16 *George Mason Law Review* 903; M Trebilcock and E Iacobucci, ‘Designing Competition Law Institutions’ (2002) 25 *World Competition* 361.

private actions by victims for compensation.⁴ Private litigation may consequently play a fundamental part in ensuring effective enforcement of the competition law rules.

In the US, Congress made a conscious policy choice when adopting the antitrust laws to encourage private litigants to participate in their enforcement.⁵ Over time, and combined with other elements of, and developments in, the US system, the net result of this choice has been that, uniquely in the world, a vast majority of antitrust enforcement in the US (approximately 90% of cases⁶) emanates from private litigation rather than public enforcement. Such actions arguably play a crucial function decentralising decision-taking, democratising antitrust policy, affirming the rule of law, deterring violations and ensuring that victims obtain compensation. The system has encouraged such high volumes of litigation, however, that it has been felt necessary, through a series of steps, to adjust the system to ensure that some of its perceived excesses are moderated; in particular, to ensure that unmeritorious antitrust litigation is not encouraged which may have the consequence of chilling procompetitive behaviour and so undermining the objectives of the antitrust laws.⁷

This position contrasts starkly with that which has existed in the EU. Until 2004,⁸ the central role in enforcing Articles 101 and 102 (the ‘antitrust’ rules) was played by the Commission.⁹ Although a key objective of Regulation 1/2003¹⁰ was to allow a more decentralised enforcement system to emerge with the courts and tribunals of the individual Member States (the national courts) (as well as national competition authorities (NCAs)) participating more actively within it, a number of factors have combined to preclude private actions from developing evenly across the EU. Indeed, although litigation is growing rapidly in some Member States, particularly the UK, the Netherlands and Germany, significant barriers to private antitrust actions continue to exist in others.

For many years the Commission has taken the view that the EU situation is unsatisfactory and more needs to be done, whilst avoiding the problems that have confronted the US system, to stimulate and harmonise national rules governing private enforcement and to stimulate a culture of competition within the EU: ‘The overall enforcement of the EU

⁴ See section 3 below. But see eg OFT Press Release 88/06 ‘Independent Schools agree settlement’ 19 May 2006 and the provisions on voluntary redress in the UK’s Consumer Rights Act 2015, Schedule 8.

⁵ See now especially Clayton Act 1914, ss 4 (superseding and expanding provisions set out in the Sherman Act 1890) and 16 and section 2 below.

⁶ See eg, HJ Hovenkamp, ‘Quantification of Harm in Private Antitrust Actions in the United States’ *University of Iowa Legal Studies Research Paper*, <http://ssrn.com/abstract=1758751> or <http://dx.doi.org/10.2139/ssrn.1758751>, Report for the European Commission, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios* DG COMP/2006/A3/012D, 28 and D Crane, *The Institutional Structure of Antitrust Enforcement* (OUP 2011) 163. It is difficult to get completely precise statistics relating to the ratio of private to public enforcement however. Because many separate private action cases may be filed in relation to the same case before consolidation, see n 61, there may be over-counting of private actions. In contrast, as many public cases may be resolved before a case is filed, there may be under-counting of government actions.

⁷ But see eg, RH Lande, ‘The Proposed Damages Directive: The Real Lessons from the United States’ March (2014) (2) *CPI Antitrust Chronicle* 1 and section 2 below.

⁸ Prior to 2004, Regulation 17 of 1962 [1959–1962] OJ Sp Ed 87 (the first Regulation implementing Articles 101 and 102), conferred the exclusive right on the Commission to rule on the compatibility of an individual agreement with Article 101(3) and made it difficult for the national courts to take part in the enforcement process.

⁹ The Directorate General for Competition (‘DG Comp’, currently headed by Commissioner Vestager) is responsible for competition policy and enforcement. Enforcement of the EU merger rules has since the first EU Merger Regulation came into force fallen exclusively to the Commission, see now Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1, Art 21(2), and cannot be enforced either by NCAs or by private persons before the national courts.

¹⁰ Regulation 1/2003 on the implementation of the rules on competition laid down in [Articles 101 and 102 TFEU] [2003] OJ L1/1. The Commission simply does not have the resources to enforce the rules throughout the EU.

competition rules is best guaranteed through complementary public and private enforcement.¹¹ In 2013, after extensive debate and discussion as to whether, and if so how, to develop a European approach to private enforcement,¹² the Commission proposed a package of measures on private antitrust actions including: a recommendation of non-binding principles for collective redress mechanisms for Member States;¹³ a practical guide on the quantification of harm for damages to assist national courts¹⁴ and a draft Directive¹⁵ designed to facilitate damage claims by removing the main obstacles to full compensation for victims of antitrust violations and ensuring that private and public enforcement operate harmoniously together. The final Directive 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 (the ‘Directive’) was signed into law on 26 November 2014 and must be transposed into national law by 27 December 2016.¹⁶

This paper examines the core features of this package. Its principal objective is not, however, to scrutinise these provisions in detail. Rather, its purpose is to reflect on the questions of why, especially when compared with the position in the US, it has proved so difficult for a culture of antitrust litigation to develop in the EU, why the Commission believed that EU measures were necessary to kindle it and to consider, against that backdrop, whether the EU package is likely to achieve its stated goals. Section 2 thus commences by exploring how private enforcement has developed in the US, examining not only the factors that have facilitated and encouraged it, but the extremes widely-believed to have bedevilled and undermined it,¹⁷ and the steps which have consequently been taken to limit and curtail it. Section 3 then examines the EU system and seeks to unpick the different factors that have operated over time as barriers to private litigation in the EU Member States and to identify those that still exist.

¹¹ Commission, ‘Proposal for a Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the Competition law provisions of the Member States and the European Union’ COM(2013) 404 final, Explanatory Memorandum 1.2.

¹² They deal with damages actions but not injunctions, see especially a study prepared for DG Comp by Ashurst on damages actions before national courts of the then 25 Member States (The Ashurst Report): D Waelbroeck, D Slater & G Even-Shoshan, ‘Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report’ (2004), Commission, ‘Green Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM(2005) 672 final, Commission, ‘Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules’ SEC(2005) 1732 and Commission, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM(2008) 165 final.

¹³ Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60; see also IP/13/524 and MEMO/13/530 (enabling consumers, by joining claims with others, to get access to justice and pursue infringements of competition law, where the cost of individual action may otherwise have acted as a deterrent, see rec 9). The Recommendation applies not only in the field of competition law but also horizontally to consumer protection, environmental protection, data protection, financial services and other areas where claims for injunctions or damages in respect of breaches of EU law are relevant, rec 7.

¹⁴ Commission, ‘Staff Working Document – Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’ SWD(2013) 205.

¹⁵ Commission Proposal (n 11). On 17 April 2014, the Parliament adopted a text of the directive that was agreed between the Parliament and the Council and which included some amendments to the original Commission proposal. The Directive was formally adopted in November 2014, see Directive 2014/104/EU 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 [2014] OJ L349/1.

¹⁶ *ibid.*

¹⁷ ‘[T]he conventional wisdom in the international competition community [is] that U.S.-style private enforcement has been a disaster’, Lande (n 7) 1.

Having set out the factors that have encouraged and hindered litigation in the US and the EU respectively and the pros and cons of each system, it is possible to reflect more fully on the questions of whether private litigation should be further encouraged in the EU, what measures might be desirable or required to overcome the obstacles which exist to it, what measures should be avoided, whether the current package is likely to succeed, what pitfalls might be anticipated and/or what further developments and clarifications are likely to be required in the future. Section 4 concludes that the package of reforms is not likely to lead to over-enforcement or to the encouragement of unmeritorious antitrust actions in the EU. What may be more of an issue, however, is whether it has done enough to boost and facilitate private damages actions and to create the level playing field across the EU sought by the Commission. Not only does the Directive not institute a completely harmonised framework, leaving a number of potential obstacles to national actions and areas of legal ambiguity outstanding, but a number of the Directive's provisions are liable to introduce considerable complexities into national proceedings. Further, scope for some significant divergences between national rules remain; such differences are likely to continue to affect where litigants choose to commence their actions and to result in forum-shopping.

2. THE PRIVATE LITIGATION SYSTEM IN THE US

The significant role played by private actions in US Antitrust law has resulted from a combination of different individual features of the US system which have developed sequentially¹⁸ and matured over time. A first point of central importance is that the Clayton Act¹⁹ itself encourages private enforcement of the antitrust laws by providing, for: treble damages for those injured by reason of anything forbidden in the antitrust laws;²⁰ injunctive relief against threatened loss or damage by a violation;²¹ the use of judgments entered against the defendant as *prima facie* evidence against that defendant;²² clear limitation periods;²³ and successful plaintiffs (claimants) to recover costs, including reasonable attorney's fees, contrary to the ordinary rule in the US that each party bears its own attorney fees and costs.²⁴

These provisions did not trigger significant volumes of private antitrust litigation on their own, however. Rather, it was not until the 1960s and 1970s that private litigation began to burgeon. Partly, this growth reflected the development of a more interventionist antitrust policy between the 1940s and 1960s, underpinned by a scepticism about the ability of firms and the markets to provide a successful economic outcome and a mistrust of big business and concentrated markets.²⁵ At this time the Supreme Court²⁶ adopted broad interpretations of the antitrust statutes (for example, making wide use of per se

¹⁸ See eg, Gavil (n 2).

¹⁹ See n 5 above.

²⁰ Clayton Act 1914, s 4.

²¹ *ibid* s 16.

²² *ibid* s 5(a).

²³ The ordinary limitation period of 4 years (*ibid* s 4B) also gets suspended during government enforcement proceedings, s 5(i).

²⁴ Clayton Act 1914, s 5(a).

²⁵ See eg E Levi, 'The Antitrust Laws and Monopoly' (1974) 14 *University of Chicago Law Review* 153, C Kaysen and D Turner, *Antitrust Policy* (Harvard University Press 1959).

²⁶ During the Warren Court Era (at this time the Chief Justice was Earl Warren (1953-1969)).

rules and applying lenient procedural, substantive and evidential burdens of proof²⁷) which made it relatively easy for plaintiffs to win cases.²⁸ Combined with the fact that:²⁹

- wide-ranging pre-trial discovery powers exist in the US which assist the collection of relevant and essential evidence;
- federal rules allow for consolidation of antitrust claims and for the bringing of opt-out class actions;³⁰
- lawyers regularly accept antitrust cases on a contingency fee (no win, no fee) basis;
- many antitrust cases are tried by jury³¹ (so conferring an element of ‘unpredictability’ to antitrust trials); and
- defendants, as joint tortfeasors, are jointly and severally liable for any damage caused with no right to contribution from co-defendants;³²

private litigation has been able to flourish. Further, as US public enforcement agencies have never adopted such a central role in antitrust enforcement as has their European counterpart, the European Commission, those injured by an antitrust violation have frequently had little choice but to litigate if they wish the infringement to be brought to an end.

In 1968 and 1977 respectively the Supreme Court also handed down two important judgments, *Hanover Shoe Inc v United Shoe Machine Corp*³³ and *Illinois Brick Co v Illinois*,³⁴ which facilitated private litigation. These cases hold that: the possibility that a claimant might have recouped some of an anti-competitive overcharge by passing it on to its customers is *not* relevant in the assessment of antitrust damages’ cases;³⁵ and claims brought by *indirect* purchasers should generally be refused³⁶ (indirect purchaser actions are however possible in a number of states under state law³⁷). Although these principles might be criticized on the grounds that they may deny compensation to the real victims of the anticompetitive activity and allow direct purchasers to collect a windfall, they do concentrate antitrust claims in the hands of those most likely to sue,³⁸ simplify damages’ litigation by

²⁷ For example, courts have applied lesser burdens of proof as to the amount of damages in antitrust cases eg *Zenith Radio Corp v Hazeltine Research* 395 US 100 (1969).

²⁸ H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press 2005) 1.

²⁹ See Gavil (n 2) (explaining that ‘the field of *complex litigation*’ did not develop until mid-century).

³⁰ So permitting small claimants to spread costs and aggregate similar claims, making them easier and more economical to bring, see Federal Rules of Civil Procedure, Rule 23 (defining the standards for bringing class actions).

³¹ Criminal antitrust proceedings always involve trial by jury (US Const, the Fifth Amendment) and both the plaintiff and the defendant can demand a jury trial in civil cases (US Const, the Seventh Amendment) (circuits are split on the question of whether there is a ‘complexity exception’ to this right ie whether a jury trial should be denied where the complexity of the factual and legal evidence render it beyond the ability of a jury, see eg *In re Financial Securities Litigation* 609 F2d 411 (9th Cir 1979) (there can be no exception to the right), *cert denied* 446 US 929 (1980) and *In re Japanese Electronic Products Antitrust Litigation* 631 F2d 1069 (3rd Cir 1980) (recognizing an exception)).

³² *Texas Industries v Radcliff Materials, Inc* 451 US 630 (1981).

³³ *Hanover Shoe Inc v United Shoe Machine Corp* 392 US 481 (1968).

³⁴ *Illinois Brick Co v Illinois* 431 US 720 (1977).

³⁵ Otherwise such claims would become excessively complicated, private actions would be deterred and a wrongdoer in breach would be able to retain his unlawful profits and the fruits of his own illegality.

³⁶ If the fact that loss has been passed on by the purchaser may not be taken into account *defensively* in a claim between the seller and the purchaser, it should not be open to an indirect purchaser to use the passing on principle *offensively* in damages proceedings. The court set out three exceptions to this position however.

³⁷ Such rules are not pre-empted by federal law, *California v ARC Corp* 490 US 93 (1989).

³⁸ In contrast, provision for apportionment of recovery through the distribution chain, would increase the overall costs of recovery through injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group and reduce the incentive to sue.

allowing difficult issues of remoteness and tracing of injury to be side-stepped and reduce the process costs of litigation.³⁹ In establishing these principles the Supreme Court consequently seemed to elevate the remediation and deterrent functions served by private enforcement, higher than its compensation function.

By enlisting in these ways the help of those most directly affected by anticompetitive conduct in the enforcement of the law, numerous antitrust cases have been privately litigated, providing the platform for some of the most significant principles of antitrust law to be developed and for the rapid evolution of the law. Private actions have also been able to fill enforcement gaps, offset periods of lax government enforcement, ensure compensation of victims and that disputes between private parties are resolved privately without drawing public agencies within them.

It is well-known, nonetheless, that the virtues of the private enforcement system are not universally extolled and that its benefits have been hotly-debated. Wide-spread concern has been articulated that, especially in the 1960s-1970s and in relation to class actions, damages' actions got 'out of control' and that such litigation, motivated by private profit rather than public interest considerations, frequently did not achieve its objectives of ensuring meaningful compensation of victims, including smaller businesses and final consumers, and/or of deterring serious violations. Rather, given the combination of claimant-friendly procedural, evidential and substantive rules,⁴⁰ the system has been criticised for being prone to error and for encouraging 'anaemic' claims to be brought and settled by defendants eager to avoid protracted and expensive litigation. In addition, there has been concern that private actions might actually undermine public enforcement and deterrence, by discouraging leniency applications.

Although not all might agree with these, or all of these, criticisms, these types of anxiety have led to a dramatic recalibration of the system. Not only has the legislator stepped in in order to diminish the disincentive of submitting amnesty applications, by de-trebling antitrust damages for corporations that participate in the amnesty programme and cooperate with claimants,⁴¹ but the Supreme Court has expressed concerns about the 'coercive'⁴² elements of the antitrust system, the risk of false positives they create and handed down a series of opinions which, collectively, limit the types of antitrust claim that can successfully be brought and appreciably raise the bar for antitrust claimants.⁴³ In 1977, for example, in order to temper the expansive reach of the substantive rules, it introduced a requirement that plaintiffs should establish not only a violation of the law but 'antitrust injury' ('injury of the type the antitrust laws were intended to prevent ...');⁴⁴ so allowing recovery only for loss stemming from the competition-reducing aspects of the conduct. Subsequently, courts have imposed demanding standards for class certification⁴⁵ and the Supreme Court has also

³⁹ In addition, from the defendant's perspective, they preclude a multiplicity of claims and the risks of duplicate recovery from arising, but see n 37 above and text.

⁴⁰ Especially eg, the right to treble damages, the fact that the defendant never gets its costs, even if it wins, the fact that liability is joint and several with no right to contribution from co-defendants and the expansive use by the Supreme Court of per se rules in the 1960s and 1970s. These difficulties are exacerbated by the fact that the costs of discovery may be astronomical (and are likely to be mainly borne by the defendant) and the opt-out class action system encourages huge volumes of litigation and multiple procedures being launched against alleged anti-trust infringers.

⁴¹ The Antitrust Criminal Penalty Enhancement and Reform Act 2004.

⁴² See eg, *Bell Atlantic Corp v Twombly*, 550 US 554 (2007) 557, n 53 below and text, and FH Easterbrook, 'Discovery as Abuse' (1989) 69 *Boston University Law Review* 635.

⁴³ Gavil (n 2).

⁴⁴ *Brunswick Corp v Pueblo Bowl-O-Mat, Inc* 429 US 477 (1977) 489.

⁴⁵ See eg, *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305 (3d Cir 2008).

introduced rigorous doctrines of remoteness,⁴⁶ tough screens for introduction of expert testimony⁴⁷ and been supportive of efforts to safeguard against antitrust claims having a chilling effect on competition through the use of procedural, evidential⁴⁸ and substantive rules. For example, in *Matsushita Electric Industrial Co v Zenith Radio Corp*⁴⁹ the Supreme Court indicated that summary judgment should be granted in favour of a defendant where the plaintiff's claim makes no economic sense, is implausible, requires inferences to be drawn from ambiguous evidence, or where the evidence does not tend to exclude the possibility that the defendant acted lawfully (as opposed to illegally),⁵⁰ in *F Hoffmann-La Roche Ltd v Empagran SA*⁵¹ the Supreme Court reined in the circumstances in which foreign claimants are able to seek damages before the US courts, in *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*,⁵² the Court, retreating from previous case law, adopted a 'skeptical stance . . . toward the benefits of judicial policing of refusals to deal' and counselled generally against an undue expansion of section 2 of the Sherman Act liability, in *Bell Atlantic Corp v Twombly*,⁵³ the Supreme Court stepped up the standard for pleading an antitrust complaint, obtaining discovery and surviving a motion to dismiss (in that case the Court essentially dismissed a complaint on the grounds that the factual allegations made were no more likely indicative of prohibited than permitted action) and in *Leegin Creative Leather Products Inc v PSKS, Inc*⁵⁴ the Court took a further step in the retreat from per se rules commenced in *Continental TV, Inc v GTE Sylvania*⁵⁵ (where the Court held that rule of reason is the prevailing and presumptive standard under section 1 Sherman Act) and overruled the nearly century-old rule against minimum resale price maintenance, holding that such arrangements should be analyzed under the rule of reason.

The developments relating to procedure have, in particular, made it easier for antitrust defendants to escape a full antitrust trial either on the basis that the complaint fails to state a claim upon which relief can be granted (a Federal Rules of Civil Procedure (FRCP) 12(b)(6) motion)⁵⁶ or, following discovery, a FRCP 56, on the basis that 'there is no genuine issue as to any material fact' so that 'the moving party is entitled to judgment as a matter of law'.⁵⁷ Further, and crucially, there seems little doubt that the perceived 'excesses' of the treble damages system have been an important factor influencing the Supreme Court in its decision over the last 35 years to rein in the substantive reach of the antitrust laws, making it now extremely difficult for private plaintiffs not only to bring antitrust actions but to 'win'

⁴⁶ See eg, *Blue Shield v McCready* 457 US 465 (1982) and *Hanover Shoe* (n 33).

⁴⁷ See eg, *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993) (demanding that the evidence must be relevant and reliable).

⁴⁸ *ibid.*

⁴⁹ 475 US 574 (1986).

⁵⁰ The Court held that a plaintiff should be able to produce evidence that tends to exclude the possibility of a benign hypothesis before its case could be put to a jury. See also eg *Monstanto Co v Spray-Rite Service Corp* 465 US 752 (1984), and *Eastman Kodak Co v Image Technical Services, Inc* 504 US 451 (1992).

⁵¹ 542 US 155 (2004).

⁵² 540 US 398 (2004).

⁵³ 550 US 554, 557 (2007) ("... when allegations of parallel conduct are set out in order to make a [§ 1](#) claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action"). The holding of this case applies more broadly than just to antitrust cases, to private actions more generally.

⁵⁴ *Leegin Creative Leather Products, Inc v PSKS, Inc* 551 US 877 (2007).

⁵⁵ 433 US 36 (1977).

⁵⁶ A FRCP 12(b)(6) motion results in the dismissal of claims that do not allege the facts necessary to sustain a cause of action. It requires 'a short and plain statement of the claim showing that the pleader is entitled to relief; FRCP 8(a)(2).

⁵⁷ The FRCP 56(c).

them.⁵⁸ Indeed rule of reason cases are notoriously unattractive for plaintiffs to litigate; given the complexity of the analysis required they are likely to require expert testimony on a range of issues and lengthy and costly trials.

The Supreme Court has repeatedly expressed fear that enforcement should not be permitted to ‘chill the very conduct the antitrust laws are designed to protect’⁵⁹ and this concern has influenced its efforts to ‘scale back the application of the U.S. antitrust laws. The consequence of getting it wrong – or false positives – is much greater when a firm is exposed to treble, rather than single, damages for its alleged wrongdoing ... These combination of factors has led our Supreme Court to craft increasingly tough liability rules for antitrust offences and increasingly high hurdles for plaintiffs to move beyond the pleadings stage or to survive summary judgment or a directed verdict to get to a jury. The concern is not just that juries will get it wrong, but that the fear of false positives will chill business behaviour that may benefit consumers.’⁶⁰

Statistical evidence⁶¹ reflects the impact of these recalibrating measures on antitrust litigation. They illustrate that, although private antitrust actions rose dramatically though the 1950s, 1960s and 1970s, the number peaked in 1977 (the year that *Sylvania*⁶² was decided and as ‘the Court began to embrace “new learning” among antitrust scholars who argued that the antitrust laws were intended to protect competition in order to promote economic efficiency and consumer welfare, not to shield small producers from larger, more efficient rivals’⁶³). Since then it has fallen from its apex.⁶⁴ Although the number of cases did begin to rise again for a while (mirroring perhaps increased government focus on cartel activity), after 2008 it has fallen again, most likely as a reaction to ‘the long string of pro-defendant decisions in the Supreme Court, culminating in the Court’s 2007 decisions in *Leegin* and *Bell Atlantic v Twombly*’.⁶⁵ In 2010, 2011, 2012 and 2013 there were 544, 475, 702 and 801 new federal private antitrust cases filed respectively,⁶⁶ figures which are considerably lower than those filed in 1977 and 2008 (in excess of 1600 and 1300 respectively).

There is now some concern that the pendulum has swung too far in the opposite direction; the rules are so rigorous and provide so little certainty that meritorious litigation may be being discouraged. As antitrust law has shifted away from clear rules the costs of deciding antitrust cases have been increased without concern ‘for the loss of certainty that had been associated with now abandoned per se rules and lenient burdens of proof and the increased party and institutional costs associated with reliance on more demanding standards of proof. Neither has it been concerned with the possibility that the incidence of false negatives could increase due to cost and lack of access to the necessary proof.’⁶⁷ Indeed, in

⁵⁸ W Kolasky, ‘Different Roads’, (2008) 11(2) *Global Competition Review* 17, 17.

⁵⁹ *Matsushita Electric* (n 49) 594. *Monsanto Co v Spray-Rite Service Corp*, 465 US 752 (1984) 762-764.

⁶⁰ Kolasky (n 58) 19.

⁶¹ The statistics have to be treated with some caution, however, and can potentially be misleading; for example, they may lead to over-counting as numerous cases may be filed relating to the same case in different federal or state courts before getting consolidated.

⁶² *Sylvania* (n 55). See also *Brunswick* (n 44), and n 44 and text.

⁶³ W Kolasky, ‘Antitrust Litigation: What’s Changed in Twenty-Five Years?’ (2012) 27 *Antitrust* 9.

⁶⁴ In contrast to federal civil claims generally which continued to increase overall, *ibid* 10.

⁶⁵ *ibid*. In *Leegin* (n 54) the Supreme Court overruled a nearly century old rule that resale price maintenance was illegal per se under Sherman Act s 1.

⁶⁶ See <<http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02ASep13.pdf>>.

⁶⁷ Gavil (n 2) 7-8

2013, following an important study of 60 private US antitrust cases,⁶⁸ Professors Davis and Lande⁶⁹ published a paper ‘defying conventional wisdom’, rejecting some of the more anecdotal and unsubstantiated concerns about private enforcement and concluding that the private actions studied demonstrated that they had played an important role both in compensating victims and deterring violations. They found not only that the cases analysed (47 of which were opt-out class actions brought through lawyers working for a contingency fee) demonstrated that significant amounts of cash (in excess of \$33.8 billion) was returned to victims of anticompetitive behaviour,⁷⁰ but it was clear that they had uncovered violations which might otherwise have been undiscovered; a third of the cases examined were stand-alone actions, actions which did not follow-on from public enforcement, and a number of the follow-on cases extended significantly beyond the parameters of the original government case. This complemented and bolstered their views, articulated in a separate paper, that private antitrust actions deter anticompetitive conduct more effectively even than criminal cartel proceedings pursued by the Department of Justice.⁷¹

3. BARRIERS TO PRIVATE LITIGATION IN THE EU

The US experience indicates that private actions can play an important role in the enforcement process and in ensuring that its compensatory, remediation and/or deterrence functions are achieved. Indeed, a widely held view is now that optimal enforcement requires public and private enforcement to be combined harmoniously. It also demonstrates, however, that it is a delicate and complex task to craft rules (governing procedure, evidence and substance) in a way that will achieve, and balance, the competing objectives pursued and which will minimise error costs. Further, that an important issue to be resolved may be what the primary function of private enforcement should be – deterrence of wrongs which harm society as a whole or compensation of those individuals specifically harmed by the infringement.

This section scrutinises the rights which EU law confers on individuals harmed by an infringement of Article 101 or 102 and the barriers to private litigation that have existed in the EU and which caused the Commission to conclude in 2005 that the system of damages for infringements of competition law of the Member States ‘presents a picture of “total underdevelopment”’.⁷² Although private enforcement has steadily been increasing, from approximately 54 decided judgments within the EU in 1999 to 146 in 2011,⁷³ the Commission still concluded in 2013 that ‘[d]espite some recent signs of improvement in a

⁶⁸ See RH Lande and JP Davis, ‘Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) 42 *USFL Rev* 879, and JP Davis and RH Lande ‘Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement’ (2013) 36 *Seattle UL Rev* 1269.

⁶⁹ JP Davis and RH Lande, ‘Defying Conventional Wisdom: The Case For Private Enforcement’ (2013) 48 *Georgia Law Review* 1.

⁷⁰ They found that recovery levels were much higher in cases involving direct purchasers and that only 11 of the cases involved indirect purchasers.

⁷¹ RH Lande and JP Davis, ‘Comparative Deterrence from Private enforcement and Criminal Enforcement of the US Antitrust Laws’ (2011) *Brigham Young Univ Law Review* 315, but see GJ Werden, SD Hammond & BA Bartlett, ‘Deterrence and Detection of Cartels: Using All The Tools and Sanctions’ (2011) 56 *Antitrust Bulletin* 207 and RH Lande and JP Davis, ‘The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond and Barnett’ (2013) 58 *Antitrust Bulletin* 173.

⁷² Green Paper (n 12) 1.2. This view was based on the Ashurst Report (n 12).

⁷³ See B Rodgers (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (Wolters Kluwer, 2014) 87. Only 31% of all the cases analysed were damages claims.

few Member States, to date most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered';⁷⁴ victims only commenced private actions in 25% of cases where antitrust infringement decisions had been adopted by the Commission. Not all might agree that this picture indicates that steps should be taken to stimulate private enforcement,⁷⁵ or that EU measures are required⁷⁶ and/or are a practicable means of doing so. Nevertheless it has been seen that the Commission concluded that EU instruments to strengthen damages actions,⁷⁷ and to balance it with public enforcement, were requisite. In its view the new measures adopted will, by overcoming some barriers to effective redress, 'democratise enforcement and empower the victims of antitrust infringements to receive effective compensation ...'.⁷⁸

In order for the EU package to achieve its objectives, it must, of course, successfully tackle the obstacles that exist to national damages' actions, whilst ensuring that the foundations are put in place for workable litigation systems to develop in each Member State which, without harming public enforcement, will minimise error costs. The discussion below consequently considers the combination of factors which have, over the years, conspired against the development of a coherent and uniform enforcement system across the EU and which barriers still remain.

A first important point is that, in contrast to the position in the US, the EEC Treaty, the EC Treaty and the TFEU have all been silent on the question of whether private rights of action for damages or injunctions must follow from a violation of the EU competition law rules; until the Damages Directive was adopted in 2014, no EU legislation specifically addressed private rights of action for damages (or injunctions). Rather, such rights derive, as next described, from the jurisprudence of the ECJ⁷⁹ which has developed only in a gradual and piecemeal fashion.

Second, although it has been clear since the ECJ's judgments in *Belgische Radio en Televisie v SV SABAM*⁸⁰ that Articles 101(1) and 102 have direct effect, and consequently that litigants can rely on rights derived from those provisions in private proceedings in the national courts,⁸¹ until Regulation 1/2003 came into force in 2004, national courts could not apply Article 101(3); the Commission's exclusive right to grant exemptions under Article 101(3), coupled with its wide interpretation of Article 101(1),

⁷⁴ 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 provision of the Member States and the European Union COM(2013) 404 final, Explanatory Memorandum, 1.2 and *ibid*.

⁷⁵ See eg, W Wils, 'Should private antitrust enforcement be encouraged?' [2003] 26(3) *World Competition* 473 (but see now Wils (n 1) 3).

⁷⁶ Although final judgments are relatively low, these do not take account of the numerous cases that are settled. See speech K Coates, 'Cartels and Follow On Damages Actions', 24 November 2014 ('Many of these cases settle. I was talking to an economist a few months ago who had advised on - he thought approximately - 50 damages calculations. Not one of the cases went to final judgment') and Dunne (n 1).

⁷⁷ See section 1 above.

⁷⁸ Speech J Almunia, 'Looking back at five years of competition enforcement in the EU' Global Antitrust Enforcement Symposium, Washington, 10 September 2014.

⁷⁹ Which are now affirmed in Regulation 1/2003 (n 10) (providing that national courts must have the power to apply Articles 101 and 102 and for cooperation between the national courts and the Commission and consistency in interpretation of the provisions by all decision-takers).

⁸⁰ Case 127/73 [1974] ECR 51, para 16 ('As the prohibitions of Articles [101(1) and 102] tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned with the national courts must safeguard').

⁸¹ Regulation 1/2003 (n 10) Art 3(1).

meant that for a number of years the Commission exercised tight control over enforcement⁸² and national courts were excluded from playing a full role in antitrust cases. Third, even where Articles 101 and 102 were applied, a lack of clarity surrounded the question of what *exact* rights Articles 101 and 102 conferred upon individuals. Although the ECJ has long made it clear that national courts must protect EU rights, respect the principle of supremacy⁸³ and ensure the availability of adequate remedies sufficient to guarantee real and *effective* judicial protection for EU rights,⁸⁴ for some time the question of what particular remedies were required to protect rights derived under Articles 101 and 102 was a matter of acute controversy and speculation. It was only in 2001, in *Courage Ltd v Crehan*,⁸⁵ that the ECJ (creating a new ‘Euro-tort’⁸⁶ along the lines of *Francovich*⁸⁷) expressly confirmed that full compensation must, in principle, be available to those that have suffered loss in consequence of a breach of Article 101 or 102⁸⁸ and in *Manfredi*⁸⁹ that it clarified that full compensation must include recompense not only for actual loss but also for loss of profit plus interest.⁹⁰

Fourth, even post-*Crehan* private litigation has been, and is still being deterred by the fact that the principle of national procedural autonomy⁹¹ confers considerable latitude on the national systems and the national courts in dealing with an antitrust damages claim.⁹² The protection given to EU rights is, consequently, heavily dependent on the procedural, evidential, and substantive rules governing civil litigation applicable in each particular Member State and how EU law – in particular the principles of equivalence and effectiveness⁹³ – is considered to constrain their operation.⁹⁴ In the absence of EU

⁸² See eg, speech M Monti, ‘Effective Private Enforcement of EC Antitrust Law’ Sixth EU Competition Law and Policy Workshop Florence, 1–2 June 2001.

⁸³ See case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, para 9.

⁸⁴ See case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, especially para 23 and case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5.

⁸⁵ Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297. See also joined cases C-295&298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 and case C-557/12 *Kone AG v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317.

⁸⁶ N. Dunne, ‘Antitrust and the Making of European Tort Law’ (2015) *Oxford Journal of Legal Studies* 1,3

⁸⁷ See Cases C-6 and 9/90, [1991] ECR I-5357, see n. **Error! Bookmark not defined.** and text.

⁸⁸ Although the Court did not specifically deal with Art. 102 it referred to the need to compensate those who have suffered loss caused to them by a contract *or* by conduct liable to restrict or distort competition.

⁸⁹ *Manfredi* (n 85) paras 60, 83–100 the ECJ held that: (i) EU law did not prevent national courts from taking steps to ensure that protection of EU rights does not entail unjust enrichment of those who enjoy them but that it had to be possible to award punitive damages if such damages could be awarded pursuant to similar actions founded on domestic law; and (ii) the right to seek compensation must include compensation not only for actual loss but also for loss of profit plus interest.

⁹⁰ In case 56/65 *Société La Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 234, 250 the ECJ clarified that individual *clauses* in an agreement affected by the Article 101(1) – and Article 102 – prohibition are void (and that the agreement as a whole will also be void where those clauses are not severable from the remaining terms of the agreement (but that this is a matter for national law) case 319/82 *Société de Vente de Ciments et Bétons de l’Est SA v Kerpen & Kerpen GmbH & Co KG* [1983] ECR 4173. In case 213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433 the ECJ has also made it clear that national courts must ensure that interim measures are available where necessary to protect putative EU rights.

⁹¹ *Rewe-Zentralfinanz* (n 84) ((‘in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of rights which citizens have from the direct effect of Community law’).

⁹² See obstacles identified by the Commission in its Green Paper (n 12).

⁹³ The rules must not be less favourable than those relating to similar claims of a domestic nature (the principle of equivalence); and must not make it virtually impossible or excessively difficult to exercise the rights that the national courts are obliged to protect (the principle of effectiveness).

harmonising measures,⁹⁵ therefore, considerable opacity has surrounded a multiplicity of questions, including, how national claims should be framed (and in particular whether fault should or can be a constituent element of the cause of action), how causation can be established and damages calculated, whether national courts are required (or permitted) to award ‘punitive’ damages and whether other national rules governing the claim comply with EU law and, especially, the principle of effectiveness; for example, rules relating to standing, remoteness, illegality, a passing on defence or setting out limitation periods. The ECJ has been requested to give rulings on some of these issues,⁹⁶ but where no specific judgment exists, the position remains subject to differing interpretations and, accordingly, uncertainty. For instance, the question of whether EU law demands that indirect purchasers should have standing to bring antitrust proceedings and/or whether defendants should be able to raise a passing on defence, would appear to depend on how the principle of effectiveness stressed in the ECJ’s *Crehan* and *Manfredi* judgments is to be construed: specifically, whether it suggests that the principal purpose of private enforcement is the attainment of corrective justice⁹⁷—with deterrence operating merely as a socially beneficial by-product of such actions⁹⁸—or whether it primarily a tool to increase enforcement and to bring to an end and deter violations.⁹⁹ Although the Court has stressed the importance of private actions to the strengthening of the working of the competition rules and to the maintenance of effective competition,¹⁰⁰ in *Manfredi* the ECJ also clarified ‘... that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101]’.¹⁰¹

Fifth, although the principles of equivalence and effectiveness may require some rules,¹⁰² which render nugatory the right to compensation, to be struck down or disapplied,¹⁰³ the extent to which EU law can require Member States more positively or proactively to facilitate damages claims and to put in place measures, or reform institutions in a way, which would ensure an effective enforcement framework is even less clear-cut and even more controversial.¹⁰⁴ In particular, the existence, or not, of specialist competition law tribunals or courts, the speed of litigation and individual national rules governing access to information and evidence, litigation costs, funding and cost rules, follow-on actions, mechanisms for collective redress and remedies for final consumers are all factors which may

⁹⁴ As many national cases settle it is not easy to draw a picture of how national courts are resolving these issues Coates (n 76) (‘That highlights one of the problems we have to deal with: although there are a number of points of law that will inevitably require clarification, there are a lot of judgment calls being made in the shadows.’)

⁹⁵ The Commission recognises in its Notice on cooperation with the national courts the particular difficulties that may arise in consequence of the fact that there is no harmonisation of procedures in the Member States, see the Cooperation Notice [2004] OJ C101/54, paras 9–10.

⁹⁶ For example, in *Crehan* (n 85) para 31, the ECJ held that although the illegality of the agreement cannot operate as a general bar to claims brought between parties to a contract concluded in breach of Article 101(1), it can do so where the claimant co-contractor can be said to bear ‘significant responsibility’ for the breach. See also *Manfredi* (n 85).

⁹⁷ P Nebbia, ‘Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?’ (2008) 33 *European Law Review*, 23, 28.

⁹⁸ K Roach and MJ Trebilcock, ‘Private Enforcement of Competition Laws’ (1996) 34 *Osgoode Hall Law Journal* 461, 496.

⁹⁹ See eg, F Hoseinian, ‘Passing-on Damages and Community Antitrust Policy—An Economic Background’ (2005) 28 *World Competition* 3, 7, Nebbia (n 97) 28, R Nazzini, ‘The Objective of Private Remedies in EU Competition Law’ (2011) 4 *Global Competition Litigation Review* 131, 139–140.

¹⁰⁰ *Crehan* (n 85) para 27, *Manfredi* (n 85) para 91.

¹⁰¹ *Manfredi* (n 85) para 61.

¹⁰² See n 96 above.

¹⁰³ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie* EU:C:2013:366, para 32.

¹⁰⁴ See Dunne (n 1).

dramatically affect the culture of competition and the feasibility of successfully launching private litigation. Thus, even if, for example, it were clear that EU law demands that indirect purchasers should be able to seek compensation before a national court, such a right might be worthless in a state where the national tools are inadequate to allow that right to be effectively exercised – perhaps because procedural mechanisms do not allow for actions to be grouped together collectively or for relevant evidence to be uncovered, collected or appropriately processed and assessed. In some jurisdictions individuals may simply be less litigious than in others.¹⁰⁵

Indeed, it seems clear that features of the national litigation systems in the individual Member States have been deterring or constraining EU claimants. In particular:

- the cost and risk of litigation frequently operates as a deterrent, especially where claimants have not suffered much loss individually and where class or other consolidated actions and contingency fees are not available¹⁰⁶ or where national cost rules provide disincentives to litigation (e.g., where claimants are obliged to pay the defendant's legal costs if unsuccessful);¹⁰⁷
- it is extremely difficult for claimants to gather the requisite evidence under many national systems; the question of when national courts can order disclosure vary considerably between Member States;¹⁰⁸
- proceedings may be being deterred in some States by uncertainty over the weight to be given to decisions of NCAs;
- many national courts have limited experience dealing with antitrust arguments and may not, consequently, be the most appropriate or understanding forum for the hearing.¹⁰⁹

Sixth, a matter of specific contention in the EU has been the relationship between public and private enforcement which are closely connected. As in the US, not only do public enforcement actions by the Commission have a facilitating effect on private enforcement (a Commission decision finding a competition law infringement may be relied upon to establish the existence of a breach¹¹⁰ and may provide evidence helpful in

¹⁰⁵ For a discussion of the position in the Member States on many of these issues see Rodger, *Competition Law*, n 73, especially Chap 2. For the view that individuals in Lithuania are less litigious because, historically, the clutches of the Soviet Union precluded the Lithuanian legal system from development, see J Malinauskaite, 'Private Enforcement of Competition Law in Lithuania: a Story of Underdevelopment' [2013] 3 *Global Competition Law Review* 123, 133. In post-communist societies it may also take time for a fair competition culture to develop.

¹⁰⁶ Only 0.4% of the 1268 antitrust judgments decided between 1999-2012 identified in Rodgers, *Competition Law* n 73, were aggregated/class consumer cases, 162. Class actions may not only facilitate relief for certain victims but may produce external benefits for society as a whole, WB Rubenstein, 'Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action' *Public Law and Legal Theory Research Paper Series, UCLA School of Law*, No. 06-10, <http://www.ssrn.com/abstract=890303>.

¹⁰⁷ See, eg, J Peysner, 'Costs and Financing in Private Third Party Competition Damages Actions' (2006) 3(1) *Competition Law Review* 97.

¹⁰⁸ Disclosure is recognised in the UK but does not exist in many civil law systems. National courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the EU competition law rules, see Regulation 1/2003 (n 10) Art 15(1).

¹⁰⁹ See eg, Gavil (n 2) and Malinauskaite (n 105) 133.

¹¹⁰ Regulation 1/2003 (n 10) Art 16. In the UK, for example, the Competition Act 1998 s 47A also specifically allows 'follow-on' claims to be brought before the CAT where a breach of Article 101 or Article 102 (or the UK domestic equivalent) has been established in a public law decision (by the Commission or the UK's competition authority). The Directive provides that NCA infringement decisions are binding on national courts within that same member state, see n 136 and text.

establishing causation and harm¹¹¹) but it has been recognised that private actions can reinforce public enforcement by increasing the resources available for the prosecution of competition law infringements, the likelihood of detection and the cost of non-compliance. The interaction between the two enforcement systems has however become strained. In particular, tensions have arisen between the need to ensure, on the one hand, the effectiveness of the right to compensation available to victims of anti-competitive practices and, on the other, the effectiveness of the leniency programme, which constitutes a key tool for the Commission in its fight against cartels and, consequently to public enforcement.¹¹²

Litigants in the EU have frequently sought access to leniency evidence not only through discovery but through seeking access to a competition agency's file or by filing a claim under transparency rules.¹¹³ Although the Commission, supported by some NCAs and Advocate General Mazák, has taken the view that access should *not* be granted to self-incriminating statements voluntarily provided by leniency applicants as this could substantially reduce the attractiveness of the leniency programme and, in turn, the effective enforcement of Article 101,¹¹⁴ in *Pfleiderer*,¹¹⁵ the ECJ favoured a more balanced approach to the question. It held that a national court had, in deciding whether to grant access to leniency documents, to weigh, according to national law and taking into account all the relevant factors in the case,¹¹⁶ the respective interests of the leniency applicant (to have voluntarily submitted corporate statements protected) and the claimant (to have access to documents which would facilitate the claim).¹¹⁷ Building on this approach the ECJ in *Bundswettbewerbsbehörde v Donau Chemie*,¹¹⁸ held that 'in competition law... any rule that is rigid, either by providing for absolute refusal to grant access ... or for granting access as a matter of course . . . is liable to undermine the effective application of ... Article 101'.¹¹⁹ Although these cases stressed that the national court should have the opportunity to consider the issues on a case-by-case basis weighing the competing interests, in *EnBW*¹²⁰ the Court recognised that access should be required only in cases of absolute necessity where relevant evidence was not available from alternative mechanisms.

4. CONCLUSIONS

¹¹¹ Wils (n 1) 15–16. The Commission is often criticized, however, for taking too long to publish its cartel and other decisions while it negotiates with the addressees of the decision about confidentiality claims.

¹¹² Case C–360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I–5161.

¹¹³ See Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation) [2001] OJ L145/43 and eg, case T-2/03 *Verein für Konsumenteninformation* [2005] ECR II-1121, Case T-437/08 *CDC Hydrogen Peroxide v Commission* [2011] ECR II-8251 and Ombudsman Decision 3699/2006/ELB, 2010.

¹¹⁴ *Pfleiderer* (n 112) Opinion of Mazák AG, paras 38–42. In his view an interference with the injured parties' right to an effective remedy and a fair trial was justified by the legitimate aim of ensuring the effective enforcement of Article 101 by NCAs and ultimately private litigants' possibility of obtaining an effective remedy.

¹¹⁵ *Pfleiderer* (n 112).

¹¹⁶ *ibid* para 31.

¹¹⁷ *ibid* para 30.

¹¹⁸ *Donau Chemie* (n 103).

¹¹⁹ *ibid* para 31. It thus concluded that an Austrian law which prohibited disclosure to third parties of court files on public law competition proceedings, unless all parties to the proceedings agreed, was not compatible with the principle of effectiveness and so conflicted with EU law.

¹²⁰ Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg AG* ECLI:EU:C:2014:112.

In section 3 it has been seen that although, as cases have come before it, the ECJ has developed and clarified the rights that Articles 101 and 102 confer on private persons, uncertainty still surrounds many issues relating to how national rules should guarantee real and effective judicial protection for those rights and what limitations and obligations EU imposes on national law governing the claim. Consequently, the ability of claimants to recover damages in antitrust cases diverges significantly between Member States. Further, a tension between private and public enforcement has been emerging.

Because of the close connection between private and public enforcement and their ability to impact on each other, public enforcement agencies frequently take a keen interest in the development of private enforcement. Indeed, it has been seen that, in the EU, it has been the Commission which has spearheaded the campaign to encourage greater private enforcement of the EU antitrust laws, whilst at the same time stressing that it should not adversely impact on public enforcement. It has been facilitated in this task by its unique and unusual position of having separate and central roles within the EU legal order both as a competition enforcement agency and as the EU institution which formulates most legislative proposals (including those to promote the effective application of competition law).

In considering what EU measures should be enacted to overcome the EU barriers to litigation and to stimulate, and harmonise, private damages actions the Commission has had a tortuous path to navigate, both politically and legally. Not only has it had to convince the Parliament¹²¹ and the Council that EU legislation was required which encroaches on traditional national litigation systems and entrenched principles developed within them,¹²² but it has had to reflect on an array of factors when considering what those measure should look like and what they should cover. In addition to seeking to overcome the barriers to litigation identified it has had to consider: what legislative proposals would realistically be accepted, how it should balance the potential deterrent, compensatory and other functions of private actions; how it should balance private and public enforcement; whether it should adopt a more holistic, all-encompassing, or a more gradual, sequential approach; and how to encompass lessons emerging from the US experience and to safeguard against an unleashing of some of the excesses connected with the litigation culture developed there.¹²³ It has therefore had to exercise caution to ensure that, in seeking to bolster and encourage private enforcement in the EU, rules are not made so claimant friendly that antitrust litigation gets out of control and encourages undeserving claims to be commenced (creating the risk of false positives).¹²⁴ Were that to occur, courts might become inclined to adopt narrow constructions of substantive and procedural rules making it harder for public enforcement agencies,¹²⁵ as well as private litigants, to establish violations.

A brief examination of the package of EU measures illustrates how the Commission and the legislature have resolved some of these difficult issues presented. A first

¹²¹ A first Directive proposed by the Commission in 2009 was based on Art 103 TFEU and would have excluded the Parliament from the legislative procedure. In the end the Directive was adopted under Arts 103 and 114, so requiring use of the co-decision procedure.

¹²² In some Member States, eg Germany, there has been resistance to the introduction of disclosure rules on the basis that litigation proceeds on the basis that it is for the claimant to prove its case, see A Howard, 'Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions' (2013) 4 *Journal of European Competition Law & Practice* 455, 460. The author is suspicious that the extent of compromises in the Directive and the rather timid selection of the procedural issues is linked to political concerns regarding the sanctity of national procedural autonomy, *ibid* 464.

¹²³ See, eg, the responses to the Commission's Green Paper (n 12).

¹²⁴ A choice may have to be made as to whether false positives or negatives are worse.

¹²⁵ See eg, WE Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (London, May, 15, 2003), available at <<http://www.ftc.gov/speeches/other/030514biicl.shtml>>.

point is that the Commission has taken the view that legislation governing damages action was required to clarify and harmonise certain issues (only minimum harmonisation). Although therefore some matters have been dealt with primarily through soft recommendations and guidance, others have been dealt with through harmonising legislation, the Directive, which has to be transplanted into national law by the end of 2016.

Second, the Directive has generally embraced the compensatory approach,¹²⁶ reflecting the Commission's articulated view that, public and private enforcement should pursue different, albeit complementary, objectives and that *all* victims of antitrust violations, including SMEs and consumers, direct and indirect purchasers, should be able to obtain full compensation (but *not* over-compensation). The Directive clarifies that:

- it 'sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking ... can effectively exercise the right to claim full compensation for that harm from that undertaking ...';¹²⁷
- national courts 'shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm';¹²⁸
- full compensation shall 'cover the right to compensation for actual loss and for loss of profit, plus the payment of interest'¹²⁹ but 'shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages';¹³⁰
- indirect, as well as direct, purchasers can sue (and indeed in some cases overcharges are presumed to be passed on to them by direct purchasers);¹³¹ and
- as overcompensation must not ensue, national courts must ensure the passing on defence is available to defendants.¹³² Recognising the complexity that is likely to follow for national courts in applying a passing-on defence, the Directive provides that '[t]he Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser'.¹³³

Third, the Directive has sought to tackle some (but not all) of the practical difficulties which have been confronting victims of EU antitrust infringements, to encourage damages actions and to establish certain minimum standards for litigation throughout the EU. It addresses the problem of information asymmetry and that disclosure is not widely available in some Member States by providing that, subject to certain conditions, national courts must be able to order a defendant (or claimant) to disclose relevant evidence under its control where a request is accompanied by a reasoned justification sufficient to support its plausibility.¹³⁴ National courts must however limit disclosure of evidence to that which is

¹²⁶ But see also nn 142 and 143 and text.

¹²⁷ Directive 2014/104/EU (n 15) Art 1(1).

¹²⁸ *ibid* Art 3(1).

¹²⁹ *ibid* Art 3(2). The basis is tortious – to ensure that the compensation puts the person who suffered harm in the position that it would have been had the infringement of competition law not been committed, *ibid*.

¹³⁰ *ibid* Art 3(3).

¹³¹ *ibid* Arts 12 and 14.

¹³² *ibid* Art 13.

¹³³ *ibid* Art 16.

¹³⁴ *ibid* Art 5. It also provides for disclosure from third parties and competition agencies.

proportionate and must protect confidential information and give full effect to legal professional privilege.

The Directive also clarifies that: a finding of an infringement by a NCA or a review court should be irrefutably established for the purposes of damages' claims based on it before a national court in that state (so in these follow-on actions a claimant will have to establish only causation, loss and the quantum of damages,¹³⁵ not the existence of the breach);¹³⁶ national limitation periods must not be less than five years and cannot commence to run before the infringement has ceased and the claimant knows, or can reasonably be expected to know of it (it must also be suspended or interrupted until public enforcement proceedings are terminated);¹³⁷ and undertakings responsible for an infringement through joint behaviour, should (except for certain SMEs and immunity recipients) be jointly and severally liable for the infringement.¹³⁸ Further, it establishes a rebuttable evidential presumption of harm in cartel cases¹³⁹ and empowers national courts to estimate the amount of harm in cases where precise quantification is impossible or excessively difficult.¹⁴⁰ The Commission's practical guide on the quantification of harm for damages is specifically designed to assist national courts in this sphere.¹⁴¹

Fourth, in order to ensure that such actions do not disrupt public enforcement, the Directive overrides the case-law of the ECJ¹⁴² and limits national rules governing disclosure by providing an absolute bar on the disclosure of leniency statements and settlement submissions.¹⁴³ Finally, the Directive incorporates provisions relating to consensual dispute resolution.

This brief summary (see also the table set out in the Annex below) indicates that over-enforcement cannot be anticipated as a consequent of the current reforms. The US 'toxic cocktail', consisting of, in particular, class actions, contingency fee arrangements, favourable attorneys' fees rules, treble damages, broad discovery, jury trials and the rule of joint and several liability, with no right of contribution, are not provided for in the Directive.¹⁴⁴ Rather, it prohibits over-compensation, seeks to avoid fishing exercises by restricting disclosure to scenarios where a request for evidence is plausible, provides for joint and several liability (with some limits but a general right to contribution from other infringers) and does not deal

¹³⁵ Although these are formidable obstacles to overcome

¹³⁶ Directive 2014/104/EU (n 15) Art 9 (although currently in some Member States decisions of their NCAs bind their national courts in a majority of states NCA decisions do not have any binding effect). The Commission's original proposal that decisions of NCAs were to constitute full proof, before any EU civil court, that an infringement occurred provoked considerable debate and was not adopted in the final Directive. Final decisions of an NCA may, however, be presented before the national courts of another member state as at least prima facie evidence of a competition law infringement.

¹³⁷ *ibid* Art 10 (this means in practice that proceedings may commence many years after an infringement has ended).

¹³⁸ *ibid* Art 11.

¹³⁹ *ibid* Art 17(2), pushing the burden onto the defendant to rebut the presumption by providing evidence to establish there was in fact no overcharge.

¹⁴⁰ *ibid* Art 17(1). The Directive also incorporates provisions on consensual dispute resolution.

¹⁴¹ SWD(2013) 205 (n 14). See also, eg, an external study prepared for the Commission, Oxera, 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission' (Publications Office of the European Union 2010); and Commission, 'Draft Guidance Paper - Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (June 2011), available at http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf.

¹⁴² In both *Pfleiderer* (n 112) paras 23-24 and *Donau Chemie* (n 118) paras 25-27 the ECJ recognised that national courts could only apply, subject to EU law and particularly the principle of effectiveness, their national rules on the right of access to documents, if no binding regulation under EU law on the subject applied.

¹⁴³ Directive 2014/104/EU (n 15) Art 6(6).

¹⁴⁴ See eg, Gavil (n 2).

with attorney fees, jury trials or class actions (the latter being dealt with only by a recommendation). Although one concern could be that as substantive EU antitrust laws are interpreted more broadly than their US counterparts in some areas, such as vertical restraints and unilateral conduct, there is a danger that greater volumes of private action will create a risk of false positives, the EU package, does not provide huge additional incentives to the launch of these types of claim. Rather, many of its more detailed provisions focus on measures designed to stimulate actions in cartel damages cases; indeed, its provisions seem likely to have greatest impact in follow-on cases. Further, it could be argued that these are areas where litigation *should* be encouraged, as few competition agencies have sufficient resources to dedicate towards enforcement in these spheres.

Greater concern may thus centre on the question raised at the beginning of this chapter as to whether the reforms have done enough to overcome the impediments to litigation and to achieve the Commission's objectives of increasing, and harmonising, private damages actions across the EU. Three core problems seem potentially to exist. First, because the Commission has not adopted a holistic approach, attempting to introduce a completely harmonised framework,¹⁴⁵ a number of significant obstacles to national actions and areas of legal ambiguity appear to remain. For example, the Directive does not contain provisions dealing with the admissibility of economic evidence, causation, remoteness and quantification of damages (dealt with only in the form of a non-binding practical guide). These rules will consequently continue to be governed by national law, subject to their compliance with the principles of effectiveness and equivalence. Further, although the Commission hopes that the introduction of a set of common principles in the field of collective redress will help to ensure that effective compensation is obtained by final consumers and SMEs in mass harm situations, its ability to bolster the position of such consumers is uncertain. Not only does the Recommendation on collective redress take the form of 'soft law', but the recommendation is simply that collective redress systems should, as a general rule, be based on the 'opt-in' principle (under which claimant parties are formed through directly expressed consent of their members). A valid concern may therefore be that such classes will encompass only a small percentage of antitrust victims.¹⁴⁶

Second, even where harmonising rules have been adopted, there still seems to be significant scope for divergence in national rules in some areas. For example, given diverse national approaches to disclosure it seems possible that different interpretations will be adopted to the Directive's requirements relating to the plausibility and proportionality of a request for disclosure. Further, the Directive leaves Member States the opportunity to introduce more favourable national rules in some situations. It seems likely that, a number of Member States will take opportunities to facilitate private actions, for example, by adopting more generous rules relating to disclosure, limitation periods and class actions. The existence of national differences is therefore likely to continue to affect where litigants choose to commence their actions and to result in forum-shopping.

¹⁴⁵ Howard (n 122) 456 ('At first glance, the proposed Directive appears to be a random selection of minimum procedural requirements that lack coherence or structure. This is not a blueprint set of procedural rules that govern damages actions from start to finish.') Although the Directive is based on both Arts 103 and 114 TFEU (n 121) (to ensure that the differences in the liability regimes applicable in the Member States do not negatively affect both competition and the proper functioning of the internal market), arguably it simply provides a guarantee that a minimum set of rules will govern actions across the EU rather than providing a set of harmonised rules.

¹⁴⁶ See Lande (n 7) 6 (recovery in the EU will also be severely limited if lawyers are not allowed to receive contingency fees; 'the vast majority of consumer-victims and small business-victims' may therefore 'continue to be uncompensated').

Third, a legitimate anxiety may be that the working of a number of the Directive's provisions will introduce considerable complexities into national proceedings (for example, as the courts grapple with the complex rules applicable to limitation, joint and several liability and passing on) so detracting from its goal of facilitating them.

Despite some concerns, it is clear that the Commission and the EU legislature have taken a bold first step in the journey towards encouraging damages claims throughout the EU and the development of a coherent EU system governing them. Indeed, it arguably constitutes the 'most complete vertical example of European tort law to date'.¹⁴⁷ The Commission has worked hard to avoid the pitfalls experienced in the US and the new framework lays the foundations for the law in this area to develop sequentially as the EU and national courts interpret and assess the full implications of the provisions in cases arising before them. It is to be expected, therefore, that private actions in Europe will gradually become more commonplace. Whether the package of reforms will be a significant success, however, and/or whether further measures will be required, remains to be seen

¹⁴⁷ Dunne (n 86), 19 (although the author notes that completeness is not exactly a characteristic of European tort law as such).

Annex: Factors impacting on antitrust litigation in the US and EU respectively

	United States	European Union (current)	European Union (once the Directive is implemented)
Statutory provision governing private rights of action?	Statutory provisions governing damages and injunction (Clayton Act, §§ 4 and 16)	Principles developed by the ECJ. Essentially EU right to compensation/injunction governed by national law <i>subject to it being compatible with EU principles of equivalence and effectiveness (in particular rules must not render exercise of rights practically impossible or excessively difficult)</i>	Directive: requires Member States to set out rules necessary to ensure that anyone who has suffered harm caused by a competition law infringement can obtain full compensation (Art 1) Directive does not deal with right to an injunction
Compensatory principle? Punitive or multiple damages?	Treble Damages (Clayton Act, § 4)	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i> (punitive damages must be available if available in equivalent situations under national law, <i>Manfredi</i>)	Compensation for action loss and loss of profit, plus interest. Full compensation shall not lead to over compensation whether by means of e.g., punitive or multiple damages (Art 3)
Standing and remoteness	Vigorous rules governing antitrust injury, standing and remoteness	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i>	Compensation for any person that has suffered harm but no provision as to how rules of remoteness to be applied
Passing on and indirect purchasers	Neither passing on defence nor claims by indirect purchasers generally permitted under federal law	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i>	Indirect purchaser actions expressly permitted and passing on defence mandated (Arts 12&14)
In pari delicto doctrine	Not a defence to an antitrust action (unless perhaps a plaintiff equally and voluntarily participated in the challenged	Governed by national law but principle of effectiveness requires damages unless claimant bears significant responsibility for the breach (<i>Crehan</i>)	

Follow-on cases: weight of public law finding	misconduct) Judgment – prima-facie evidence (Clayton Act, § 5(a))	Commission decisions binding but impact of NCA decisions governed by national law (Reg 1/2003, Art 16)	Commission decisions binding and decisions of NCA or review court binding on national courts in that Member State (Art 9)
Causation, harm and quantification	After injury and causation shown tendency is to apply favourable burden of proof and allow estimation of damage	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i>	Evidential presumption of harm in cartel cases – national courts to estimate harm (Art 17)
Limitation periods	Four years from when the cause of action accrues but tolling in certain circumstances (eg during government action or for fraudulent concealment) (Clayton Act §§ 4B and 5(i))	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i> – much litigation in some Member States (eg UK) as to when limitation periods start to run	Limitation periods must not be less than 5 years – stipulation of when periods can start to run (Art 10)
Availability of class actions	Opt-out class actions	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i> but Recommendation for Member States to adopt opt-in class actions	
Legal Costs	Successful plaintiff gets costs and reasonably attorney fees – otherwise each pay own (Clayton Act, § 4)	Governed by national law – some Member States apply loser pays principle	
Disclosure of evidence	Broad discovery rules	Governed by national law – disclosure not widely available in civil systems although recognised by common law systems (eg UK/Ireland)	Subject to some exceptions, provision for disclosure of evidence supported by plausible claim (Art 5)
Impact on leniency	Damages for leniency applicants reduced to single damages	National court must balance competing interests of claimant and defendant when deciding when to order disclosure of leniency documents – no absolute rule against or in favour of disclosure permitted	Absolute bar on disclosure of leniency documents and settlement decisions (Art 6) Modification of rules governing joint and several liability for leniency applicants

Joint and Several Liability	Joint and several liability for co-infringers with no right of contribution	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i>	Joint and several liability for co-infringers with exceptions for certain SMEs and leniency applicants
Admissibility of expert evidence	Admissibility of expert evidence	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i>	
Motions to dismiss and summary judgment	Courts now more willing to reject claim and/or grant summary judgment (<i>Matsushita</i> and <i>Twombly</i>)	Governed by national law <i>subject to EU principles of equivalence and effectiveness</i>	
Impact of substantive rules	Since end of 1970s reach of substantive law narrowed and shift away from reliance on per se rules - significantly impacted on ability of plaintiffs to win antitrust cases outside of cartel cases	Broader scope to rely on presumptions of illegality (or assumptions of anticompetitive effects) under both Article 101 and 102 (than under Sherman Act, sections 1 and 2).	