Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future

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This paper provides a short history of private enforcement of EU antitrust law and its relationship with public enforcement, from the 1957 EEC Treaty over Regulation 17 and Regulation 1/2003 until Directive 2014/104 and the current outlook.

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I. INTRODUCTION

This article provides a short history of private enforcement of EU antitrust law and its relationship with public enforcement, from the 1957 EEC Treaty over Regulation 17 and Regulation 1/2003 until Directive 2014/104 and the current outlook.

EU antitrust law refers to the prohibition of cartels and other restrictive agreements and the prohibition of abuse of a dominant position contained initially in Articles 85 and 86 of the Treaty establishing the European Economic Community (EEC), subsequently in Articles 81 and 82 of the Treaty establishing the European Community (EC) and currently in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Private enforcement refers to the use of Articles 101 and 102 TFEU in litigation between private parties in the courts of the EU Member States, as opposed to public enforcement, the latter referring to proceedings conducted or brought by competition authorities (either the European Commission or the competition authorities of the EU Member States), including such proceedings that are triggered by complaints from private parties to such authorities.

Three types of private enforcement can be distinguished, corresponding to three ways in which Articles 101 and 102 TFEU can be invoked in litigation between private parties:

1. Throughout this paper, I will use the current Article numbers and Treaty name, even when referring to times when earlier versions were in force.

2. Private enforcement actions can equally be brought by public bodies that, as buyers of goods or services, suffer harm as a result of an antitrust infringement. For instance, the European Commission, as a purchaser of elevators for its office buildings, has brought an action for damages against some companies involved in the elevators and escalators cartel; see judgment in Europese Gemeenschap v Otis, C-199/11, EU:C:2012:684. Private enforcement of Articles 101 and 102 TFEU could also take place in foreign courts or before arbitration panels that have jurisdiction to hear the case.

• Articles 101 and 102 TFEU may be used as a "shield", that is as a defence against a contractual claim for performance or for damages because of non-performance or against some other claim, for instance in an intellectual property infringement action;

• Articles 101 and 102 TFEU may be used offensively, as a "sword", as a basis for claims for injunctive relief, including interim relief;

• Articles 101 and 102 TFEU may be used offensively, as a "sword", as a basis for claims for damages.4

Private actions may be brought concerning alleged infringements that neither are nor have been the object of public enforcement proceedings (stand-alone actions).

Private actions may also run in parallel with or follow upon public enforcement proceedings concerning the same alleged infringement. The two most common types of such links between private actions and public enforcement proceedings appear to be the following:

– Claims for interim relief pending public enforcement proceedings: A private party may bring a complaint concerning an alleged antitrust infringement before a competition authority and, while the authority is investigating the complaint or once the authority has opened proceedings with a view to adopting a prohibition decision, the complainant may in a private action request interim relief pending the outcome of the public enforcement proceedings.

For instance, in the Dutch Crane-Hire case, the complainant, whose complaint against certain rules of two Dutch associations of crane-hire firms triggered the European Commission's investigation under Article 101 TFEU, sought and indeed obtained, once the European Commission had sent a statement of objections, an injunction in a private action in the Dutch courts against the two associations, suspending the application of the contested rules until the European Commission had adopted a decision on the matter.5

– Follow-on actions for damages: After a competition authority has concluded its proceedings with the finding of an infringement of Article 101 or Article 102


5 See Commission Decision of 29 November 1995 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.179, 34.202, 216 – Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven), [1995] OJ L 312/79, paragraph 13. For another example of a similar situation, see Judgment in Postbank v Commission, T-353/94, EU:T:1996:119. The frequency of this type of cases depends of course on the availability, in law and in practice, of interim measures granted by the competition authority investigating the main case; see further text accompanied by notes 143 and 144 below.
TFEU, private parties may bring an action for damages in national court against the undertakings found to have committed the infringement so as to obtain compensation for the damage suffered as a result of that infringement.

Actions for damages that do not directly rely on a finding of infringement made in public enforcement proceedings are considered to be **stand-alone actions for damages**. Such stand-alone actions may however be related in a less direct way with public enforcement proceedings. For instance, in the first stand-alone damages case heard by the UK Competition Appeal Tribunal, the supermarket Sainsbury's was recently awarded 68.6 million pounds in damages from MasterCard resulting from the multilateral interchange fee (MIF) as set and applied by MasterCard for transactions in the UK (UK MIF) as from December 2006. Sainsbury's could not rely on any public enforcement decision covering the same MIF and the same time period, but its private action had been preceded by a decision of the European Commission, confirmed by the EU General Court and Court of Justice, finding an infringement of Article 101 TFEU in relation to MasterCard's MIF for cross-border transactions between EEA countries (intra-EEA MIF) during the December 1992 – December 2007 period.

### II. BEFORE REGULATION 1/2003

#### A. The Treaty provisions

The provisions on antitrust initially laid down in Articles 85 to 89 of the 1957 Treaty establishing the European Economic Community have remained essentially unchanged through the successive Treaty changes, and are currently contained in Articles 101 to 105 TFEU. In the remainder of this paper, I will use the current Article numbers and Treaty name, even when referring to times when earlier versions were in force.

In these Treaty provisions, the focus is clearly on public enforcement.

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8 The main change has been the addition, through the 2007 Lisbon Treaty, of the third paragraph of Article 105 TFEU, which confirms the Council's and Commission's respective powers with regard to block exemption regulations, as already recognised in practice since the 1960s.
Article 105(1) TFEU provides that the European Commission "shall ensure the application of the principles laid down in Articles 101 and 102", and that it must act "in cooperation with the competent authorities in the Member States".

Article 103 TFEU provides that the Council adopt implementing regulations, and lists a number of issues which these implementing regulations should cover in particular, including "provision for fines and periodic penalty payments", "detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest extent possible on the other", and a definition of "the respective functions of the Commission and of the Court of Justice".

For a transitional period, until the implementing regulations adopted by the Council pursuant to Article 103 TFEU have entered into force, Article 104 TFEU entrusts the authorities of the Member States with applying Articles 101 and 102.

The only reference to private enforcement is contained in Article 101(2) TFEU, which provides that "any agreements or decisions prohibited pursuant to this Article shall be automatically void". This points to the first of the three types of private enforcement identified above, more specifically to the use of Article 101 TFEU as a defence in contractual litigation.

The text of the Treaty provisions is silent on other types of private enforcement (private actions for injunctive relief and for damages, as well as the use of Article 102 TFEU as a defence in private litigation), as well as on the relationship between public and private enforcement.

B. Regulation 17

In 1962 the Council adopted, pursuant to Article 103 TFEU, Regulation 17, the first regulation implementing Articles 101 and 102 TFEU, which has governed the application of Articles 101 and 102 TFEU until it was replaced by Regulation 1/2003 on 1 May 2004.

Regulation 17 focused exclusively on public enforcement.

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9 As the General Court has pointed out in its judgment in Automec v European Commission, T-24/90, EU:T:1992:97, paragraph 74, Article 105(1) TFEU constitutes the specific expression in the antitrust area of the general supervisory role conferred on the European Commission by Article 17(1) TEU.

10 See text accompanied by notes 3 and 4 above.


12 See note 25 below.
The European Commission was given exclusive competence to apply Article 101(3) TFEU through exemption decisions, and the grant of such decisions was made dependent on the agreement having been notified by the parties to the European Commission.\(^\text{13}\)

The European Commission was empowered to find infringements of Articles 101 and 102 TFEU and to order their termination, either on its own initiative or upon complaints from the EU Member States or from private parties showing a legitimate interest, as well as to impose fines and periodic penalty payments.\(^\text{14}\)

Regulation 17 also recognised the competence of the competition authorities of the EU Member States to apply Articles 101(1) and 102 TFEU, but provided that they lost their competence to deal with a specific case once the European Commission had initiated proceedings in that case.\(^\text{15}\)

In the memorandum accompanying its proposal for what became Regulation 17, the European Commission had mentioned, when discussing fines and periodic penalty payments, that in addition to these penalties may be added the publicity of the decision and the risks inherent in the nullity of the agreement and in claims for damages that third parties might raise.\(^\text{16}\) Neither the Commission nor the Council did however see fit to include any reference to private enforcement in the articles or recitals of Regulation 17.

C. The case-law of the EU Court of Justice

In a series of cases, starting relatively soon after the entry into force of the Treaty in 1958, the EU Court of Justice was called upon to clarify the possibility of private enforcement of Articles 101 and 102 TFEU as well as the relationship between public and private enforcement. Indeed, the very first case reaching the Court of Justice through the preliminary reference mechanism from a national court concerned a dispute between private parties before the Dutch civil courts in which Article 101 TFEU was invoked as a defence.\(^\text{17}\)

In its case-law the Court of Justice progressively clarified that Article 101(1) and Article 102 TFEU produce direct effects between individuals and create rights for these individuals, and that the national courts whose task it is to apply the provisions of EU law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals, by granting injunctive relief,

\(^\text{13}\) Articles 4 to 9(1) of Regulation 17, as note 11 above.

\(^\text{14}\) Articles 3 and 15 of Regulation 17, as note 11 above.

\(^\text{15}\) Article 9(3) Regulation 17, as note 11 above.

\(^\text{16}\) Premier règlement d'application des articles 85 et 86 du Traité (Proposition de la Commission au Conseil) (1960), at 3.

\(^\text{17}\) De Geus v Bosch and Van Rijn, 13/61, EU:C:1962:11.
including interim relief, as well as compensation for harm suffered, under conditions that may not be less favourable than those governing the protection of comparable rights under national law and that ensure the effective protection of the rights conferred by Articles 101(1) and 102 TFEU.  

As to the relationship between public and private enforcement, the case-law has emphasized the primary role of the European Commission, and thus of public enforcement, as resulting from Article 105 TFEU and Regulation 17, and the correspondingly supplemental role of private enforcement. In particular:

- Under the "provisional validity" doctrine, the Court of Justice effectively prohibited private enforcement of Article 101 TFEU in relation to agreements that predated Regulation 17 and had been notified to the European Commission under that regulation until they had been the subject of a decision by the European Commission rejecting the request for an exemption under Article 101(3) TFEU.

- As to complaints brought by private parties before the European Commission, the case-law has clarified that, unlike civil courts, whose task is to safeguard the individual rights of private persons in their relations inter se, the European Commission as an administrative authority must act in the public interest; that, consequently, the European Commission is entitled to refer to the EU interest in order to determine the degree of priority to be applied to the various cases brought to its notice; and that, where it finds insufficient EU interest and the national courts can protect the complainant's rights, it may refer the complainant to the national courts.

- As to the relationship between the European Commission and national courts in those instances where they share competence, the Court of Justice held in Masterfoods that national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the European Commission, avoid giving decisions which could conflict with a decision contemplated by the European Commission in the implementation of Articles 101(1) and 102 and Article 101(3) TFEU; that when national courts rule on agreements or practices which are already the subject of a European Commission decision they cannot take decisions running counter to that of the European Commission, even if the latter's decision conflicts with a prior decision given by a national court; and, conversely, that the European Commission cannot be bound by a decision given by a national court in the application of Articles 101(1) and

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19 See text accompanied by note 9 and text accompanied by notes 11 to 14 above.


102 TFEU, and that the European Commission is entitled to adopt at any time individual decisions under Articles 101 and 102 TFEU, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the European Commission conflicts with that national court's decision.22

D. The practice of private enforcement before Regulation 1/2003

Looking at the practice of EU antitrust enforcement before Regulation 1/2003, it is clear that public enforcement, mainly by the European Commission, played the central role. Private enforcement played however a supplementary role.

It is notoriously difficult to obtain precise figures about private enforcement. Commercial disputes are routinely settled, often before they reach the courts. Many of the cases that reach the courts are settled before they reach final judgments. Even those cases that reach final judgment are not necessarily reported.

On the basis of the available evidence,23 it would appear that, in the last years before the replacement of Regulation 17 by Regulation 1/2003 on 1 May 2004, Articles 101 and 102 TFEU were invoked in at least several dozen private cases per year.

Private enforcement appears to have been particularly well-established in Germany and in the Netherlands, but also substantial in Belgium, the United Kingdom, Austria, Italy, France and Spain.

Most of the cases involved the use of Articles 101 and 102 TFEU as a defence or their offensive use to obtain injunctive relief, sometimes combined with an additional claim for damages. These cases were mostly stand-alone cases, and mostly concerned either vertical agreements or abuse of dominance.24


24 As note 23 above; see also (text accompanied by) note 39 below.
III. **REGULATION 1/2003**

A. Abolition of the notification system and accompanying changes

As from 1 May 2014, Regulation 17 was replaced by Regulation 1/2003.  

The main change consisted in the abolition of the centralised notification and authorisation system for Article 101(3) TFEU and its replacement by a directly applicable exception system.

Both the competition authorities of the Member States and the national courts are thus empowered to apply not only Articles 101(1) and 102 TFEU, but the whole of Articles 101 and 102 TFEU.

Whereas Regulation 17 did not mention national courts, their role is explicitly recognised in Regulation 1/2003, recital 7 of which reads as follows:

"National courts have an essential part to play in applying the [EU] competition rules. When deciding disputes between private individuals, they protect the subjective rights under [EU] law, for example by awarding damages to the victims of infringements. The role of national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply [Articles 101 and 102 TFEU] in full."

In order to avoid that the abolition of the European Commission's monopoly to apply Article 101(3) TFEU would lead to a renationalisation of competition policy, Article 3 of Regulation 1/2003 obliges both the competition authorities of the Member States and national courts to apply also Articles 101 or 102 TFEU whenever they apply national competition law to agreements or practices that fall within the scope of Articles 101 or

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26 The power to withdraw the benefit of exemption regulations in individual cases remains however reserved for the European Commission and, within certain limits, the competition authorities of the Member States; see Article 29 of Regulation 1/2003.
102 TFEU, and precludes the application of national competition laws that are stricter than Article 101 TFEU to agreements falling within the scope of Article 101 TFEU.  

B. Relationship between private and public enforcement

Regulation 1/2003 contains four provisions concerning the relationship between private enforcement and public enforcement, two of which codify previous case-law of the Court of Justice and two of which were new:

- Article 16(1) codifies the Masterfoods case-law, mentioned above, confirming that, when national courts rule on agreements or practices under Articles 101 or 102 TFEU which are already the subject of a European Commission decision, they cannot take decisions running counter to the decision adopted by the Commission; and that they must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated;

- Article 15(1) provides that, in proceedings for the application of Articles 101 or 102 TFEU, national courts may ask the European Commission to transmit to them information in its possession or its opinion on questions concerning the application of the EU antitrust rules. This provision also reflects previous case-law;

- Article 15(3) provides that the competition authorities of the Member States, acting on their own initiative, may submit observations to the national courts of their Member State on issues relating to the application of Articles 101 or 102 TFEU, and that, where the coherent application of Article 101 or 102 TFEU so requires, the European Commission may similarly intervene as amicus curiae in cases before courts of the Member States.

Whereas the case-law predating Regulation 1/2003 only concerned the relationship between the European Commission and national courts, this provision also empowers, even primarily, the competition authorities of the Member States in relation to their national courts. This reflects the fact that under Regulation 1/2003, most of the public enforcement of Articles 101 and 102 TFEU is done by the national competition authorities, in close cooperation with the

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27 On the genesis of this provision, see my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 Journal of European Competition Law & Practice 293, also accessible at http://ssrn.com/author=456087, at footnotes 12 to 17.

28 See (text accompanied by) note 22 above.

European Commission and with each other inside the European Competition Network.  

– Finally, Article 15(2) provides that Member States shall forward to the European Commission a copy of any written judgment of national courts deciding on the application of Article 101 or 102 TFEU.

This information could possibly lead the European Commission to make use of its power under Article 15(3) to intervene as *amicus curiae* if the case reaches a higher national court on appeal, or to initiate itself proceedings, as allowed under the *Masterfoods* case-law.  

### C. The impact of Regulation 1/2003 on the practice of private enforcement

The main effect of Regulation 1/2003 has been in the sphere of public enforcement.

Indeed, the empowerment of national competition authorities to apply Article 101(3) TFEU, the obligation under Article 3 of Regulation 1/2003 to apply also Articles 101 and 102 TFEU whenever national competition law is applied to agreements or practices falling within the scope of Articles 101 and 102 TFEU, and the close cooperation between the European Commission and the national competition authorities within the European Competition Network have quickly led to a major increase in the public enforcement of Articles 101 and 102 TFEU by the national competition authorities.

This large increase in public enforcement of Articles 101 and 102 TFEU at the level of the EU Member States has also very substantially increased the role of the national courts that act as competition authorities (in those (relatively few) Member States in which the national competition authority does not adopt decisions finding infringements of Articles 101 or 102 TFEU and imposing fines, but rather brings the case before a national court that acts as first-instance decision-maker) as well as (in all Member States) the role of the (higher) national courts that act as review courts before which appeals or applications for judicial review against the decisions of national competition authorities can be brought.

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30 See Article 11(1) and recital 15 of Regulation 1/2003; Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C101/43; and (text accompanied by) note 32 below.

31 See (text accompanied by) note 22 above.

32 See the figures in my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at [http://ssrn.com/author=456087](http://ssrn.com/author=456087), at footnotes 21 and 22, showing that the national competition authorities have become, in quantitative terms, the primary public enforcers of Articles 101 and 102 TFEU, adopting 88% of all decisions, and that, since the European Commission's output remained constant, the overall number of public enforcement decisions ordering termination of infringements of Articles 101 or 102 TFEU, imposing fines or accepting commitments has undergone an eightfold increase.

33 See 'Ten Years of Regulation 1/2003 – A Retrospective', as note 32 above, at footnotes 26 to 30.
As to the impact of Regulation 1/2003 on private enforcement, three effects can be distinguished:

- The first effect concerns the defensive use of Article 101 TFEU in contractual litigation. Regulation 1/2003 has brought to an end the phenomenon of agreements falling under Article 101(1) TFEU and fulfilling the conditions of Article 101(3) TFEU but not covered by a block exemption regulation being unenforceable simply because they had not been notified to the European Commission. In all situations where in a contractual dispute before a national court the defendant invokes Article 101(2) TFEU, the claimant can now fully rely on Article 101(3) TFEU and the national court can itself decide on the matter.\textsuperscript{34}

  This change is likely to have caused a reduction in the number of cases in which Article 101 TFEU is invoked as a defence in contractual litigation. From the perspective of the optimal enforcement of Article 101 TFEU, this reduction does however not constitute a loss, as the enforcement of the substantive rule laid down in Article 101 TFEU, namely the prohibition on restrictive agreements without redeeming virtue, cannot possibly be served by rendering agreements that do not violate this prohibition unenforceable.\textsuperscript{35}

- The second effect concerns the offensive use of Article 101 TFEU, in particular in actions for injunctive relief. The abolition of the European Commission's exclusive competence to apply Article 101(3) TFEU removed the possibility for defendants to delay the national court procedure, in particular in cases where injunctive relief is sought, by notifying the agreement to the European Commission.

  This change is likely to have caused an increase in private actions seeking injunctive relief.

- The third effect concerns all types of private enforcement (defensive use, actions for injunctive relief and actions for damages) of both Article 101 and Article 102 TFEU. As a result of the obligation under Article 3 of Regulation 1/2003 for national courts to apply also Articles 101 and 102 TFEU when applying national competition law to agreements or practices falling within the scope of Articles 101 and 102 TFEU, in a number of cases in which before Regulation 1/2003 only national competition law would have been applied Articles 101 or 102 TFEU will now be applied.

The available evidence appears to confirm the above analysis, showing a decrease of the use of EU antitrust law as a defence relative to its offensive use to obtain injunctive relief in the years following the entry into application of Regulation 1/2003 compared to the

\textsuperscript{34} See 'Ten Years of Regulation 1/2003 – A Retrospective', as note 32 above, at footnote 31.

\textsuperscript{35} See Principles of European Antitrust Enforcement, as note 25 above, section 1.1.4.1.1.
preceding years, as well as an overall increase (though not a dramatic one) in the private enforcement of Articles 101 and 102 TFEU.

As to the relationship between public and private enforcement, the overall picture appears to have remained largely the same in the first years following the entry into application of Regulation 1/2003 as before Regulation 1/2003:

Public enforcement still played the central role in the application of Articles 101 and 102 TFEU, indeed even more than before, as the increased involvement of the national competition authorities, working together with the European Commission in the European Competition Network, led to a major increase in public enforcement.

Private enforcement still played a supplementary role. Most of the private cases still involved the use of Articles 101 and 102 TFEU as a defence or their offensive use to obtain injunctive relief, sometimes combined with an additional claim for damages. These cases were still mostly stand-alone cases, and mostly concerned either vertical agreements or abuse of dominance.

IV. A BRIEF FLIRTATION WITH THE US AMERICAN MODEL

A. Private enforcement in the USA

In marked contrast with the situation in Europe (and indeed in the rest of the world), private actions for damages and, to a much lesser extent, for injunctive relief, based on the antitrust provisions of the Sherman and Clayton Acts, are very common in the United States. Indeed, 95% of antitrust cases in the United States are private actions.

Already in 1890, Section 7 of the Sherman Act, since replaced by Section 4 of the Clayton Act, provided for private enforcement of the antitrust laws. Section 4 of the Clayton Act currently provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in [a]

36 See B. Rodger, Competition Law Comparative Private Enforcement and Collective Redress across the EU (Wolters Kluwer, 2014), Part I, Chapters 3 and 4, in particular Chapter 4, at footnote 28.

37 See text accompanied by note 23 above.

38 See text accompanied by note 32 above.

39 See text accompanied by note 24 above.

district court of the United States […]], and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney’s fee”.

This provision thus not only creates the possibility to bring actions for damages, but specifically encourages such actions by providing in addition for treble damages and, as an exception to the normal US American rule that each party bears its own costs, irrespective of whether the suit is successful, provides for a right for the successful plaintiff to recover its costs, including expert fees, and attorney’s fees.

The provision of treble damages and the asymmetric cost rule reflect a conception of private actions for damages as an instrument of deterrence and punishment.

This conception of private actions for damages as an instrument of deterrence rather than compensation is also apparent in the case law of the US Supreme Court, which excludes the passing-on defence in actions brought by direct purchasers and denies standing to indirect purchasers.

This American conception of private actions for damages as an instrument of deterrence and punishment can be understood in the light of the specific history of US antitrust enforcement.

While the 1890 Sherman Act made antitrust violations misdemeanours, punishable by fines and imprisonment, no budgetary appropriation was made for public enforcement.

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42 The cost rule is asymmetric, in that the successful defendant cannot claim recovery of his costs from the plaintiff. In Europe, cost rules are a matter of national law. The normal rule in most Member States is the symmetrical rule that the successful litigant (plaintiff or defendant) can recover costs from the other party.


46 See D.I. Baker, 'Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) 16 Loyola Consumer Law Review 379 at 382. The idea of treble damages came from the now repealed English Statute of Monopolies of 1623, 21 Jac. I, c. 3 (1623), repeated, S.L. (Repeals) (1969). Outside the antitrust area, other historical examples exist in Europe of multiple damages, including in ancient Roman law, but these examples always appear to correspond to time periods or situations were public enforcement was non-existent or weak; see also D.
Private treble damages actions were thus a substitute for public enforcement. Also later, when criminal enforcement by the Department of Justice had started, potential fines were until 1974 limited to $50,000, thus leaving a deterrence gap to be filled by follow-on treble damages actions. Still today, while the Department of Justice has statutory authority to prosecute all violations of Sections 1 and 2 of the Sherman Act criminally, the scope of criminal enforcement has in fact been narrowed over time to "hard-core" price-fixing, bid-rigging or market allocation cartels. For other antitrust violations, US public enforcement is in practice limited to prospective injunctive relief, leaving a deterrence gap to be filled by follow-on treble damages actions.

The public antitrust enforcement of Articles 101 and 102 TFEU does not suffer from similar deficiencies. Indeed, the European Commission and the competition authorities of the EU Member States, working together in the European Competition Network, have a large capacity to deter and punish infringements of Articles 101 and 102 TFEU by imposing fines on the companies that commit such infringements. There would thus not

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48 See US Antitrust Modernization Commission, as note 44 above, at 296-297 (and footnote 19).

49 See US Antitrust Modernization Commission, as note 44 above, Chapter III.C ‘Government Civil Monetary Remedies'; OECD, Remedies and Sanctions in Abuse of Dominance Cases, DAF/COMP(2006)19 (15 May 2007); S. Calkins, ‘Civil Monetary Remedies Available to Federal Antitrust Enforcers’ (2006) 40 University of San Francisco Law Review 567; H. First, 'The Case for Antitrust Civil Penalties', NYU Law & Economics Working Paper No. 08-38 (August 2008); and section 6.3.4.5 of my book Efficiency and Justice in European Antitrust Enforcement (Hart Publishing 2008). In a few cases, the Federal Trade Commission has used its power to seek disgorgement of unlawful profits; see § 13(G) of the FTC Act and FTC v Mylan Labs Inc, 62 F Suppl 2d 25, 36 (DCC 1999), and US Antitrust Modernization Commission, as above.

50 The public enforcement of Articles 101 and 102 TFEU has undoubtedly suffered from other kinds of deficiencies, and in my view still suffers today in the cartel area from a too exclusive focus on monetary penalties on undertakings and a lack of punishment for individuals, including imprisonment; see my paper 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 World Competition 117, also accessible at http://ssrn.com/author=456087, and chapter 6 of my book Efficiency and Justice in European Antitrust Enforcement (Hart Publishing 2008) and F. Wagner-von Papp, ‘Individual sanctions for competition law infringements: Pros, cons and challenges — Introduction’. Concurrences N°2-2016, 14. This problem can however not be solved by developing private actions for damages as an instrument of deterrence.
appear to be any need to import into Europe the specifically American conception of private actions for damages as an instrument of deterrence and punishment.

B. The inherent superiority of public enforcement for deterrence and punishment

More fundamentally, as far as deterrence and punishment are concerned, public antitrust enforcement is inherently superior to private actions for damages.\footnote{See my paper ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ (2003) 26 World Competition 473, also accessible at http://ssrn.com/author=456087; Chapter 4 of my book Principles of European Antitrust Enforcement (Hart publishing 2005); and W. Möschel, ‘Should Private Enforcement of Competition Law Be Strengthened?’, in D. Schmidtchen, M. Albert and S. Voigt (eds), The More Economic Approach to European Competition Law, Conferences on New Political Economy 24 (Mohr Siebeck 2007), 101.}

Follow-on actions for damages do have some additional deterrent effect in that the damages add a cost to the fines or other penalties imposed in the preceding public enforcement. However, if additional monetary penalties were indeed required for optimal deterrence, these could be provided for in an administratively much cheaper and more reliable way by increasing the fines imposed in the public enforcement proceeding.\footnote{See also M. Handler, ‘The Shift from Substantive to Procedural Innovations in Antitrust Suits- The Twenty-Third Annual Antitrust Review’ (1971) 71 Columbia Law Review 1 at 9.}

Stand-alone actions for damages can contribute to deterrence, but public enforcement appears superior for at least two reasons.\footnote{A third reason is that private actions for damages appear more costly than public enforcement. Indeed, in private actions for damages many resources have to be spent in the determination and allocation of the damages, more than those which would be spent in the setting of the sanction in public enforcement; see K.G. Elzinga and W. Breit, The Antitrust Penalties: A Study in Law and Economics (Yale University Press 1976), at 95. Public enforcement may also generally be cheaper because of the higher degree of specialisation of the actors involved and the generally lower cost of administrative procedures compared to civil litigation; see also W. Möschel, as note 51 above, at 106.}

First, public enforcement, through its reliance on state power, benefits from more effective investigative and sanctioning powers. Competition authorities are generally better at discovering and proving antitrust infringements than private parties, because the authorities have wider investigative powers, allowing them to collect not only the information detained by the victims of the infringements, but also by the infringers and any other source. This advantage for public enforcement exists even in the US, where private plaintiffs benefit from liberal discovery rules.\footnote{K.G. Elzinga and W. Breit, as note 53 above, at 142-143. American-style discovery appears undesirable because of its high cost and the risk of discovery being abused to obtain competitors’ business secrets; see F.G. Jacobs and T. Deisenhofer, as note 3 above, J.H. Langbein, ‘The German Advantage in Civil Procedure’ (1985) 52 University of Chicago Law Review 823, and F. Wagner-von Papp, ‘Access to Evidence and Leniency Materials’ (18 February 2016), accessible at}
Public enforcement is also superior because more effective sanctions are available and because the level of the sanctions can be better controlled. As to the type of sanctions available, private actions for damages can only lead to the imposition of monetary sanctions in the form of damages. Public enforcement allows not only for the imposition of monetary sanctions in the form of fines, but also other types of sanctions, such as director disqualifications and prison sanctions. As I have argued in detail elsewhere, effective deterrence of cartels requires a combination of monetary sanctions on companies and individual penalties, in particular imprisonment.

As to the level of the monetary sanctions (fines or damages), public enforcement has the additional advantage of allowing better control in setting the optimal amount of the sanction. In principle, the amount of monetary sanctions should exceed the expected gain from the violation multiplied by the inverse of the probability of a monetary sanction being effectively imposed. Calculating the optimal amount of the sanction is always difficult in practice, but with public enforcement at least one can attempt to target the optimal amount. When the sanction consists of damages awarded as a result of private litigation, it becomes virtually impossible to target the optimal amount. Indeed, damages will be calculated not by reference to the offender’s gain, but by reference to the losses which those plaintiffs who happen to bring claims manage to prove. Furthermore, single damage awards fail to incorporate the necessary multiplier inversely reflecting the probability of detection and punishment.

http://ssrn.com/abstract=2733973 In Europe, private plaintiffs have additional difficulties in gathering evidence on a transnational basis in several Member States, whereas the European Commission’s investigatory powers cover the whole of the European Union, and national competition authorities are able to obtain the help of their colleagues from other Member States within the European Competition Network set up under Regulation No 1/2003; see my paper ‘Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law’ (2006) 29 World Competition 3, also accessible at http://ssrn.com/author=456087, and chapter 1 of Efficiency and Justice in European Antitrust Enforcement, as note 50 above.


57 See my paper ‘Optimal Antitrust Fines: Theory and Practice’, as note 56 above, at footnotes 105 to 114; my paper ‘The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis’ (2007) 30 World Competition 197, also accessible at http://ssrn.com/author=456087, at footnotes 51 to 63 and 76 to 86; and sections 3.4, 4.3.2 and 4.4.3 of Efficiency and Justice in European Antitrust Enforcement, as note 50 above.

58 The trebling of damages in the US could be considered as trying to address this problem, but it does so in a very crude way. Indeed, there is no reason to assume that trebling is the right multiplication, and it is certain that the multiplier should be variable, reflecting the fact that some types of antitrust violations are difficult to hide, thus necessitating a low multiplier or even no multiplier at all, whereas other types
Secondly, private actions for damages are inevitably driven by the private gains and expenses of the parties concerned. These private interests will often diverge from the general interest. Cases that should be brought to clarify the law and generate deterrence in the general interest may never arise through private litigation, because no private party has a sufficient interest to bring an action, or because cases are settled without any clarification of the law. Conversely, private plaintiffs will try to obtain interpretations of the law that are to their financial or commercial benefit, irrespective of their general merit, or to win cases in which they have large financial or commercial stakes, irrespective of the merit of the interpretation of the law on which the case is won. As Judge Posner has observed in relation to the US experience:

"Students of the antitrust laws have been appalled by the wild and woolly antitrust suits that the private bar has brought – and won. It is felt that many of these would not have been brought by a public agency and that, in short, the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one. The concern is not limited to the class action".

Competition authorities are not perfect. They can and occasionally do make mistakes. But at least they try, or can be led (by the public scrutiny their behaviour is subjected to and by the finite budgets they are allocated), to decide on case selection and priority setting with a view to maximizing respect for the antitrust prohibitions, while minimizing the costs of antitrust enforcement. The same cannot be said about private plaintiffs. Indeed,

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59 The general problem is that there are significant externalities in private actions for damages, and that deterrence and punishment and clarification of the law are public goods; see generally S. Shavell, The Fundamental Divergence between the Private and the Social Motive to Use the Legal System' (1997) 26 Journal of Legal Studies 575. Specifically on settlements, see F.G. Jacobs and T. Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules', in C.D. Ehlermann and I. Atanasiu (eds), European Competition Law Annual 2001: Effective Private Enforcement of EC Competition Law (Hart Publishing 2003), 187-227, at 196: "it must be remembered that settlements are based on considerations of convenience and not necessarily on considerations of legality. And they are rarely published. Thus, settlements cannot contribute to the clarification and a better understanding of the competition rules to the same extent as judgments."); on the use of settlements in public enforcement, see my papers 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles (2008) 31 World Competition 335, also accessible at http://ssrn.com/author=456087, and 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003' (2006) 29 World Competition 345, also accessible at http://ssrn.com/author=456087, and chapter 2 of Efficiency and Justice in European Antitrust Enforcement, as note 50 above.

60 R.A. Posner, as note 58 above, at 275.

61 See, with regard to the US antitrust agencies, W.H. Page, ‘Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury’ (1980) 47 University of Chicago Law Review 467 at 503 ("Although there are some random, even perverse, elements in the criteria for case selection by the Department of Justice and the Federal Trade Commission, those organizations have no clear incentive to bring anticompetitive cases, and seem to consider the efficiency consequences of their enforcement policies"), R.A. Posner, as note 58 above, at 275-276 ("The tight budget constraint has forced the agencies to be selective in their choice of cases. Although they might select the silliest cases to bring, there is no reason in theory why they should and no evidence that they do.") and K.G. Elzinga and W. Breit, as note 53 above, at 141.
there is no reason whatsoever why they would care about optimal enforcement. The only consideration which drives private enforcement is the private gains and expenses of the different potential plaintiffs. This leads to at least three problems: inadequate investment, unmeritorious suits and undesirable settlements. The problem of inadequate investment results from the fact that, for many of the most meritorious antitrust enforcement actions, the social benefit of successfully bringing the action far exceeds the damages award a potential private plaintiff can hope for. Private plaintiffs thus have insufficient incentives to invest in detecting and litigating meritorious cases. The problem of unmeritorious actions results primarily from the difficulty in drawing the borderline between anticompetitive and procompetitive behaviour, especially in cases of alleged exclusionary practices, combined with the fact that competitor plaintiffs have as much or arguably even more of an incentive to bring actions against strong legitimate competition by their rivals as against anticompetitive behaviour. In the US, the problem of unmeritorious actions has been identified as a major problem by many observers. Just as private cost/benefit calculations drive the bringing of suits, they also determine their eventual settlement. Settlements may be desirable in that they save administrative cost, but the private incentive to settle risks again fundamentally diverging from the general interest.

62 See generally S. Shavell, 'The Fundamental Divergence between the Private and the Social Motive to Use the Legal System' (1997) 26 Journal of Legal Studies 575, and further 'Should Private Antitrust Enforcement Be Encouraged in Europe?', as note 3 above, at 482-483, and section 4.3.2 of Principles of European Antitrust Enforcement, as note 25 above.

63 The reason why the incentive appears even stronger is that anticompetitive behaviour tends toward raising prices, which also benefits competitors, whereas legitimate competitive behaviour reduces the price level.


Finally, the fact that competition authorities may not detect and punish all antitrust violations does not justify the conclusion that private actions for damages would be needed to fill a deterrence gap. It is in all likelihood not in the general interest that all antitrust violations are prosecuted. Indeed, antitrust enforcement always has a cost.\textsuperscript{66} How much antitrust enforcement is desirable depends of course on how much value society attaches to the avoidance of antitrust violations, but that value is certainly not infinite, given the multitude of other societal concerns. Moreover, effective deterrence does not require that each and every violation is detected and punished, but rather that the expected penalty, which is a function both of the probability of detection and punishment and of the size of the penalties imposed, exceeds the expected gains of antitrust infringements.\textsuperscript{67} In any event, if there is a need to increase the existing level of deterrence and punishment, this should be done by strengthening public enforcement, which, for the reasons explained above,\textsuperscript{68} is the superior instrument as far as the objective of deterrence and punishment is concerned.\textsuperscript{69}

C. The 2005 Green Paper on damages actions

In December 2005, the European Commission published a Green Paper,\textsuperscript{70} in which it put forward for discussion a number of possible measures to facilitate damage claims for breach of EU antitrust law.

This Green Paper was to a significant extent infused with the US American conception of private actions for damages as an instrument of deterrence and a potential replacement for public enforcement.\textsuperscript{71}

Indeed, the Green Paper started out by stating that "public and private enforcement […] serve the same aims: to deter anti-competitive practices forbidden by antitrust law […]".\textsuperscript{72} Shortly after the publication of the Green Paper, the then Director General of the


\textsuperscript{67} See further 'Optimal Antitrust Fines: Theory and Practice', as note 56 above, and chapter 3 of Efficiency and Justice in European Antitrust Enforcement, as note 50 above.

\textsuperscript{68} Text accompanied by notes 53 to 65.

\textsuperscript{69} See further Should Private Antitrust Enforcement Be Encouraged in Europe?, as note 3 above, at 485-486, and section 4.4.2 of Principles of European Antitrust Enforcement, as note 25 above.


\textsuperscript{72} Idem, at 3.
European Commission's Directorate General for Competition further explained that "compensation of victims should not be seen as an end in itself, but part of an overall strategy to enhance deterrence".\(^{73}\)

Among the possible measures put up for discussion in the Green Paper figured the introduction of double damages for cartel infringements and the exclusion of the passing-on defence, clearly inspired by the US American example.\(^{74}\)

These proposals were not well received, and the European Commission subsequently abandoned the US American approach in the 2008 White Paper and in the 2013 legislative proposal and recommendation on collective redress, discussed hereafter.


In April 2008, the European Commission published a **White Paper** on damages actions for breach of the EU antitrust rules,\(^{75}\) which contained proposed measures focussing on the compensation function of private actions for damages (rather than the deterrence function) and the preservation of strong public enforcement.

Indeed, the White Paper set out its objectives as follows:

"The primary objective [...] is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle. [...] Another important guiding principle of the Commission's policy is to preserve strong public enforcement of [Articles 101 and 102 TFEU] by the Commission and the competition authorities of the Member States. Accordingly, the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement".\(^{76}\)

In June 2013, the European Commission adopted a **proposal for a Directive** of the European Parliament and of the Council on actions for damages.\(^{77}\)

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\(^{74}\) Green Paper, as note 70 above, at 7 and 8.


\(^{76}\) Idem, at 3.

According to its Explanatory Memorandum, the proposal sought:

"to ensure the effective enforcement of EU competition rules by

(i) optimising the interaction between the public and private enforcement of competition law; and

(ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered".\(^{78}\)

As is apparent from the Explanatory Memorandum,\(^{79}\) the first of these two objectives concerned in particular the protection of the competition authorities' leniency programmes.\(^{80}\) Following the 2011 judgment of the Court of Justice in \textit{Pfleiderer},\(^{81}\) it was feared that, in the absence of EU legislation, uncertainty about the possible disclosure of leniency documents in follow-on damages actions might discourage cartel participants from applying for leniency to the competition authorities.

The accompanying press release explained more generally that the proposal "fully takes into account the key role played by competition authorities (at EU or national level) to investigate, find and sanction infringements. Contrary to the US system, the proposal does not seek to leave the punishment and deterrence to private litigation".\(^{82}\)

Simultaneously with the proposal for a Directive on antitrust damages actions, the European Commission also adopted a \textbf{Recommendation on collective redress}.\(^{83}\)

This Recommendation is not limited to damages actions for infringements of Articles 101 and 102 TFEU. It covers both injunctive and compensatory collective redress, and concerns violations of all rights granted under EU law, including in particular consumer rights.

\(^{78}\) Idem, at 2-3.

\(^{79}\) Idem, at 3.


\(^{82}\) European Commission, Press release IP/13/525 at 2.

\(^{83}\) Commission Recommendation 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 L201/60. This Recommendation was accompanied by a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a European Horizontal Framework for Collective Redress', COM(2013)401 of 11
With respect to compensatory collective redress, it recommends that the claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (‘opt-in’ principle), that contingency fees should not be permitted, and that punitive damages should be prohibited.84

In a press memorandum accompanying this Recommendation, it was further explained that "the European approach to collective redress clearly rejects the US style system of "class actions"".85

V. DIRECTIVE 2014/104 ON ACTIONS FOR DAMAGES


A. Subject matter and scope

As apparent from its Article 1 and Article 2(1) and (3), the Directive covers actions for damages relating not only to infringements of Articles 101 and 102 TFEU but also to parallel infringements of similar provisions of national competition law.88

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84 Commission Recommendation, as note 83 above, paragraphs 21, 30 and 31.


86 See (text accompanied by) note 77 above.


88 This broader scope allowed the adoption of the Directive on the joint legal bases of Articles 103 and 114 TFEU and hence the use of the ordinary legislative procedure rather than the special legislative procedure foreseen in Article 103 TFEU, under which the European Parliament would merely have been consulted.
The Directive covers only actions for damages, not other forms of private enforcement.\textsuperscript{89} This could simply be understood as a result of path dependency, given that the 2005 Green Paper and the 2008 White Paper also only concerned actions for damages.\textsuperscript{90} It has been pointed out, however, that this exclusive focus on damages actions, and in particular the exclusion of actions for injunctive relief, has never been properly explained.\textsuperscript{91}

**B. Full compensation but no punishment**

Reflecting the case law of the Court of Justice,\textsuperscript{92} Article 3(1) and (2) of the Directive confirms that any natural or legal person who has suffered harm caused by an infringement of antitrust law is entitled to full compensation of that harm, covering compensation for actual loss and for loss of profit, plus the payment of interest.

Article 3(3) adds that full compensation "shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages".

In its 2007 judgment in *Devenish etc. v Vitamin cartellists*,\textsuperscript{93} the English High Court already held that the principle of *ne bis in idem*,\textsuperscript{94} which is a fundamental principle of EU law, precludes the award of exemplary or punitive damages in an action for damages following a fining decision by the European Commission, even if the fine has been commuted to zero as a result of the application of the European Commission's Leniency

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\textsuperscript{89} See however text accompanied by note 141 below as to Commission Regulation 2015/1348.

\textsuperscript{90} See (text accompanied by) note 70 and (text accompanied by) note 75 above.

\textsuperscript{91} See F.G. Wilman, 'The End of the Absence? The growing body of EU legislation on private enforcement and the main remedies it provides for' (2016) 53 *Common Market Law Review* 887 at 911-912, and C. Cauffmann, 'Injunctions at the request of third parties in EU competition law' (2010) 17 *Maastricht Journal of European and Comparative Law* 58 at 58-60; see also P.C. Müller-Graf, General Report - Private enforcement of EU competition law, XXVII FIDE Congress (Budapest, 18-21 May 2016), at 91-94, and text accompanied by notes 24 and 39 above as to the frequency in practice of the different types of private enforcement. At the time of the 2005 Green Paper, the focus on damages actions could be understood as resulting from the comparison with the US American model; see text accompanied by notes 71 to 74 above.

\textsuperscript{92} See (text accompanied by) note 18 above, and judgment in *Manfredi*, C-295/04 to 298/04, EU:C:2006:461.

\textsuperscript{93} *Devenish etc. v Sanofi-Aventis etc.*, [2007] EWHC 2394 (Ch), 19 October 2007 (Mr Justice Lewison). The High Court also held that restitutionary remedies are not available in cartel damages actions, compensatory damages being an adequate and appropriate remedy. On the issue of restitutionary remedies, the judgment was appealed, and was confirmed by the Court of Appeal in *Devenish v Sanofi-Aventis etc.*, [2008] EWCA Civ 1086, 14 October 2008.

Notice. The English High Court added that the award of such damages is also precluded by Article 16 of Regulation 1/2003. The principle of *ne bis in idem* would appear to preclude equally the award of exemplary or punitive damages in an action for damages following a decision of a competition authority of an EU Member State under Articles 101 or 102 EU.

In the light of the *Masterfoods* judgment of the EU Court of Justice, according to which the European Commission, because of the role assigned to it by the Treaty in the application of Articles 101 and 102 TFEU, is "entitled to adopt at any time individual decisions under [Articles 101 and 102 TFEU], even where the agreement of the practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision", it could be argued that the award of punitive damages in stand-alone actions under Articles 101 and 102 TFEU was also already precluded before the Directive, as this would prevent the European Commission from later imposing fines for the same infringement without breaching the principle of *ne bis in idem*.

**C. Passing-on of overcharges**

In line with the Directive's general focus on compensation and the rejection of the US American conception of private actions for damages as an instrument of deterrence and punishment, Articles 12 to 14 of the Directive provide that defendants must be able to invoke the passing-on defence, that indirect purchasers also have a right to full compensation, and that at any level of the supply chain overcompensation must be avoided.

**D. Joint and several liability**

Article 11(1) and the first sentence of Article 11(5) of the Directive provide that, as a general rule, undertakings which have infringed Articles 101 or 102 TFEU or the

95 See also the judgment of the EU General Court in *Archer Daniels Midland v Commission*, Case T-59/02, EU:T:2006:272, paragraphs 349-352.

96 See text accompanied by note 28 above.

97 In *Manfredi*, as note 92 above, the EU Court of Justice held that the principle of effectiveness does not require punitive damages. The *ne bis in idem* issue was not raised in this case.

98 *Masterfoods* judgment, as note 22 above, paragraph 48.


100 See text accompanied by notes 43 and 82 above.
corresponding provisions of national competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement. Injured parties have the right to require full compensation from any infringer. The infringer may however recover a contribution from the other infringers, the amount of which shall be determined in the light of their respective responsibility for the harm caused by the infringement.

These general provisions essentially confirm the law as it already existed under the national laws of the EU Member States. They also confirm another difference with the law in the USA, which provides for joint and several liability but does not allow for contribution. This difference further illustrates the broader difference between US American law on antitrust damages actions, which focuses on deterrence, and EU law, which focuses on compensation.

The Directive provides however also for three exceptions to the general rules on joint and several liability:

i) An undertaking or person that has been granted immunity from fines by a competition authority under a leniency programme (immunity recipient) is only joint and severally liable to its direct or indirect purchasers or providers, and to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement. The amount of contribution which other infringers can recover from the immunity recipient shall also not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

Recital 38 provides the following reasoning for this exception in favour of immunity recipients:

"Undertakings which cooperate with competition authorities under a leniency programme play a key role in exposing secret cartel infringements and in bringing them to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have


103 See text accompanied by notes 40 to 50 and 75 to 82 above.

104 Article 11(4), second sentence of Article 11(5) and Article 2(19) of the Directive. On leniency, see note 80 above.
not received immunity, thus potentially making the immunity recipient the preferential target of litigation. It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make vis-à-vis co-infringers not exceed the amount of the harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers”.\textsuperscript{105}

ii) Small or medium-sized enterprises (SMEs) as defined in European Commission Recommendation 2003/361/EC\textsuperscript{106} are only liable for their own direct and indirect purchasers if their market share in the relevant market was below 5% at any time during the infringement and the application of the normal rules of joint and several liability would irretrievably jeopardise their economic viability and cause their assets to lose all their value. The exception does however not apply if the SME has led the infringement or has coerced other undertakings to participate therein, or if the SME has previously been found to have infringed Articles 101 or 102 TFEU or the corresponding provisions of national competition law.\textsuperscript{107}

Somewhat surprisingly,\textsuperscript{108} no reasoning for this exception can be found in the recitals of the Directive. The exception did not figure in the European Commission's legislative proposal,\textsuperscript{109} so no reasoning can be found there either.

This second exception for SMEs has been the subject of strong criticism,\textsuperscript{110} also by the delegations of three Member States at the time of the adoption of the Directive by the Council of the European Union.\textsuperscript{111}

As explained hereafter,\textsuperscript{112} a possible justification for this second exception for SMEs is that it limits a negative side-effect of the first exception for immunity

\begin{itemize}
\item \textsuperscript{105} See further text accompanied by notes 166 to 185 below.
\item \textsuperscript{107} Article 11 (3) and (4) of the Directive.
\item \textsuperscript{108} See Article 296 TFEU.
\item \textsuperscript{109} See note 77 above.
\item \textsuperscript{110} See H. Schweitzer, as note 87 above, at 344.
\item \textsuperscript{111} See Council of the European Union, Statement by the Polish, Slovenian and German delegations, 14680/14 ADD 1 (3 November 2014).
\item \textsuperscript{112} See also my paper 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) 39 World Competition 327, also accessible at http://ssrn.com/author=456087, at footnote 95.
\end{itemize}
recipients.footnote-ref{113}

Already before the Directive, there were grounds for concern about the impact on the market structure of the imposition of high fines in cartel cases in which immunity is granted to the largest competitor in the market.

Indeed, as Advocate General Geelhoed has pointed out, "in the event of a collective infringement like a cartel as opposed to an infringement by a single offender, the [European] Commission must also consider the subsequent effects of the fines and take into account the size of a given company. [...] The example [...] is a cartel consisting of one big player and several small players. The big player cooperated with the Commission and receives immunity under the Leniency Notice. In such cases very high fines could have put the smaller players out of business, in which case the Commission's intervention would have resulted in a monopoly".footnote-ref{114}

As I have shown elsewhere,footnote-ref{115} it appears that in 46 % of the cartel cases in which the European Commission granted immunity in the past ten years the immunity recipient was the cartel participant with the highest turnover in the market affected by the cartel, whereas on average there were 7 participants per cartel, and the undertaking with the highest turnover should thus have been the immunity recipient in only 15 % of the cases if there had been no correlation between being the undertaking with the largest turnover and being the immunity recipient.footnote-ref{116}

On the reassuring side, it should be pointed out that, whereas in 46 % of the cases the immunity recipient has the largest turnover affected by the cartel, in many of these cases the other cartel participants are also large companies that cannot easily be fined out of business. Moreover, and most importantly, the European Commission has a policy of capping fines so as to avoid undertakings going out of business because of a fine. Indeed, in addition to the 10 % of total turnover cap laid down in Article 23(2) of Regulation 1/2003,footnote-ref{117}


footnote-ref{113} See text accompanied by notes 104 and 105 above.


footnote-ref{115} See Table 4 of my paper 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years', as note 80 above.

footnote-ref{116} Given that under the European Commission's Fining Guidelines (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C210/2) fines are calculated as a percentage of each undertaking's turnover in the goods or services affected by the cartel, this result should not come as a surprise: The undertakings with the largest affected turnover can expect the highest fine, and hence have the most to gain from applying for leniency.

footnote-ref{117} See note 25 above.
the European Commission reduces fines on the ground of inability to pay.\footnote{118}

On the other hand, in the absence of perfect capital markets, high fines can have a negative effect on the competitiveness of smaller companies, even below the level of inability to pay, and may thus negatively affect the market structure.\footnote{119}

Damages awards, or the combination of fines and damages awards, can have the same negative effects on the market structure. The Directive's exception for immunity recipients from full joint and several liability increases the risk of such negative effects. The second exception for SMEs mitigates this negative side-effect of the exception for immunity recipients. To the extent that SMEs have more difficulty accessing finance than larger enterprises, the focus on SMEs appears cogent.\footnote{120}

iii) A third exception to the general rules on joint and several liability concerns the situation where an injured party has reached a \textit{consensual settlement} with one of the co-infringers.\footnote{121} Article 19(2) and (3) of the Directive provide that non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer,\footnote{122} except where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party. The latter possibility may however be expressly excluded under the terms of the consensual settlement.

\section*{E. Binding effect of public enforcement decisions}

Article 9 of the Directive provides that an infringement of Articles 101 or 102 TFEU or of corresponding provisions of national competition law found by a final decision of a national competition authority or by a court reviewing the decision of the national

\begin{footnotes}

\item[119] See my paper 'Optimal Antitrust Fines: Theory and Practice', as note 56 above, at footnotes 67 to 71.

\item[120] See European Commission, 'An action plan to improve access to finance for SMEs', Communication from the Commission to the Council, to the European Parliament, to the Committee of the Regions, and to the Social and Economic Committee, COM(2011)870 of 7 December 2011.

\item[121] See text accompanied by note 147 below.

\item[122] Article 19(1) of the Directive provides that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the antitrust infringement inflicted upon the injured party.
\end{footnotes}
competition authority must be deemed to be irrefutably established for the purposes of an action for damages brought before a court in the same EU Member State. Where the action for damages is brought in another EU Member State, the finding of infringement must constitute at least *prima facie* evidence.

As mentioned above, the binding effect of a finding of infringement by the European Commission in follow-on actions for damages in the national courts of all EU Member States already flows from Article 16 of Regulation 1/2003 and the *Masterfoods* case law of the Court of Justice.123

As explained in recital 34 of the Directive, the binding effect in follow-on actions for damages of a finding of infringement made in public enforcement proceedings "cover[s] only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction".124

Specifically for cartel infringements,125 Article 17(2) of the Directive adds a rebuttable presumption that cartel infringements cause harm.

**F. Disclosure of evidence**

Article 5 of the Directive provides that, upon request of claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts must be able to order the defendant or a third party to disclose relevant evidence which lies in their control. The disclosure of evidence must be limited to that which is proportionate. Disclosure of evidence containing confidential information must be possible where relevant to the action for damages, but such information must be effectively protected. Those from whom disclosure is sought must have an opportunity to be heard before the national court orders disclosure.126

In damages actions relating to an antitrust infringement that is or has been the object of public enforcement proceedings, the competition authority's file is an obvious location for potentially relevant evidence. Competition authorities are thus an obvious addressee of disclosure orders. However, competition authorities have limited resources, and these resources should primarily be devoted to their core task of detecting and prosecuting

123 See text accompanied by notes 22 and 28 above.

124 See also the judgment of the English House of Lords in *Inntrepreneur Pub Company (CPC) et al v Crehan* [2006] UKHL 38.

125 As defined in Article 2(14) of the Directive; see note 129 below.

infringements.\textsuperscript{127} For this reason, Article 6(10) of the Directive provides that national courts may request the disclosure from a competition authority of information in its file only where no party or third party is reasonably able to provide that evidence.

\textbf{G. Protection of leniency statements and settlement submissions}

Article 6(6) of the Directive provides that national courts can never order any party or third party (including competition authorities) to disclose leniency statements or settlement submissions.\textsuperscript{128}

Article 7(1) of the Directive adds that leniency statements and settlement submissions cannot be used in actions for damages if they have been obtained solely through access to the file of a competition authority.

Leniency statements are defined in Article 2(16) of the Directive as oral or written presentations voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentations were drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information.\textsuperscript{129}

\textsuperscript{127} See 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', as note 43 above.


\textsuperscript{129} Article 2(14) of the Directive defines "cartel" as "an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quota, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors".

Article 2(15) of the Directive defines "leniency programme" as "a programme concerning Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel".

Article 2(17) of the Directive defines "pre-existing information" as "evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority".
Settlement submissions are defined in Article 2(18) of the Directive as voluntary presentations by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of Articles 101 or 102 TFEU or corresponding provisions under national law and its responsibility for that infringement, which were drawn up specifically to enable the competition authority to apply a simplified or expedited procedure.

Recital 26 of the Directive adds that the protection of leniency statements and settlement submissions "should also apply to verbatim quotations from leniency statements or settlement submissions in other documents".130

Recitals 26 and 27 contain the following justification for the protection of leniency statements and settlement submissions:

"Leniency programmes and settlement submissions are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Furthermore, as many decisions of authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from these decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. […]

The rules in this Directive on the disclosure of documents other than leniency statements or settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages."

As I have argued elsewhere,131 denying damages claimants access to leniency statements appears fully justified. There is indeed an important difference between, on the one hand, leniency statements, and, on the other hand, most other documents in the competition authority's file, including other (pre-existing) documents submitted as part of a leniency application: The leniency statement would not have existed (and could thus never have been obtained by the competition authority, either through the use of its compulsory


investigation powers or from an informer or any other source, nor ever have been obtained by the damages claimant, through discovery or any other means), but for the cartel participant's voluntary act of making a leniency application, thereby facilitating the discovery and punishment of the cartel by the competition authority, as well as subsequent follow-on actions for damages. In such a situation, it does not appear unfair to deny damages claimants the right to obtain or use the leniency statement, whereas allowing such use risks deterring cartel participants from making leniency applications.

A similar reasoning justifies the protection of settlement submissions: unlike most other documents in the competition authority's file, the settlement submission would not have existed (and could thus never have been obtained by the competition authority, either through the use of its compulsory investigation powers or from an informer or any other source, nor ever have been obtained by the damages claimant, through discovery or any other means), but for the infringer's voluntary act of acknowledging to the competition authority its participation in and responsibility for the infringement, thereby allowing the competition authority to save time and resources, which may allow the competition authority to reach sooner a final decision in the case at hand, thus allowing also sooner follow-on actions for damages, as well as to redirect resources to detecting and punishing more other infringements, or to do so more quickly, again also possibly allowing for more and earlier follow-on actions for damages in those other cases. In such a situation, it does not appear unfair to deny damages claimants the right to obtain or use the settlement submission, whereas allowing such use risks deterring infringers from making settlement submissions to the competition authorities.

The question has been raised whether the apparently absolute protection of leniency statements and settlement submissions established by Articles 6(6) and 7(1) of the Directive is compatible with the FEU Treaty, which, according to the case law of the Court of Justice, grants victims of infringements of Articles 101 or 102 TFEU a right to compensation, and requires the effective protection of this right.\textsuperscript{132}

The case law of the Court of Justice would indeed appear to imply that, in a situation where, in order to ensure effective protection of the right to compensation enjoyed by a claimant, it would be necessary for the claimant to be able to use a leniency statement or settlement submission, there should be a possibility for a weighing-up and reconciliation on a case-by-case basis of the respective interests in favour and against protection of the leniency statement or settlement submission.\textsuperscript{133}

I do not think that this poses a major problem, for two reasons.

First, the situation in which, in order to ensure effective protection of the right to compensation enjoyed by a claimant, it would be necessary for the claimant to be able to obtain access to a

\textsuperscript{132} See H. Schweitzer, as note 87 above, at 341-343, and judgments in BRT and SABAM and in Courage v Crehan, as note 18 above, in Pfleiderer, as note 81 above, in Donau Chemie and Others, C-536/11, EU:C:2013:366 and in European Commission v EnBW Energie Baden-Württemberg, C-365/12 P, EU:C:2014:112; see also judgment in AXA Versicherung v European Commission, T-677/13, EU:T:2015:473, paragraph 133.

\textsuperscript{133} As note 132 above.
use a leniency statement or settlement submission, is highly unlikely to arise, as there are all kinds of other documents that can be used, including in particular the competition authority's final decision.  

Secondly, as far as leniency statements and settlement submissions in the European Commission's files are concerned, Articles 6(6) and 7(1) of the Directive do not really establish an absolute protection against the use of such leniency statements or settlement submissions, because they concern only two of the avenues through which access to such leniency statements or settlement submissions could possibly be obtained, namely primo disclosure orders by national courts and secundo access to the file in the course of the competition authority's antitrust enforcement proceedings.

Another avenue, which is unaffected by the Directive, is tertio requests from national courts to the European Commission under Article 15(1) of Regulation 1/2003.

If ever the situation were to arise in which a national court considers that, in order to ensure effective protection of the right to compensation enjoyed by a claimant, it would be necessary for the claimant to be able to use a leniency statement or settlement submission in the European Commission's files, the national court could make a request to the European Commission to transmit this document pursuant to Article 15(1) of Regulation 1/2003 and the Zwartveld case-law on which this provision is based. The European Commission may then have to weigh up in the specific case the respective interests in favour and against transmitting the document. If the European Commission decides against transmitting the document, this decision could be submitted to the EU Courts for judicial review either through a preliminary reference by the national court pursuant to Article 267 TFEU or through an application for annulment brought by the claimant pursuant to Article 263 TFEU.


135 See text accompanied by note 29 above. See however also the European Commission's Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/54, as amended by Communication from the Commission – Amendments to the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2015] OJ C256/5, paragraphs 26 and 26a.

A fourth possible avenue, equally unaffected by the Directive (see Article 6(2) of the Directive and AXA Versicherung v European Commission, as note 132 above, paragraph 135), is requests from claimants to the European Commission under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L145/43; see European Commission v EnBW Energie Baden-Württemberg, as note 132 above. This avenue is however fundamentally unsuited for this purpose, because Regulation 1049/2001 concerns public access, irrespective of the purpose for which access is sought, and hence does not allow for the proper weighing of the claimant's specific private right to compensation.

136 See note 29 above.
H. Temporary protection of information from public enforcement proceedings

Article 6(5) of the Directive provides that, until the competition authority has closed its proceedings, national courts cannot order disclosure of (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority and (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings.

Article 7(2) of the Directive adds that, until the competition authority has closed its proceedings, such information cannot be used in actions for damages if it has been obtained solely through access to the file of a competition authority.

Recital 25 of the Directive explains these provisions as follows:

"An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of Union or national competition law or sent to the parties to those proceedings (such as a 'Statement of Objections') or prepared by a party thereto (such as replies to requests for information of the competition authority or witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 or under Chapter III of Regulation (EC) No 1/2003, with the exception of decisions on interim measures."

The practical effect of this temporary protection of information from public enforcement proceedings is to discourage actions for damages that run in parallel with public enforcement proceedings, and to encourage instead follow-on actions that only take place after the closure of the competition authority's proceedings.137

Waiting until after the closure of the public enforcement proceedings should not be too problematic for damages claimants, because Article 10(4) of the Directive provides for the suspension of limitation periods during public enforcement proceedings and until one year after the termination of those proceedings.138 In addition, if the public enforcement proceedings terminate with an infringement decision, the damages claimants will be able to rely on this decision.139

Following the adoption of the Directive, the European Commission in 2015 amended Regulation 773/2004,140 its implementing regulation of Regulation 1/2003, so as to

137 See text accompanied by note 150 below.

138 See however P. Roth, as note 87 above, at 55.

139 See also text accompanied by notes 123 and 124 above as to the binding effect of public enforcement decisions.

reflect the provisions of the Directive. Article 16a(3) of Regulation 773/2004, as amended, provides that, until the European Commission has closed its proceedings against all parties under investigation, (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority and (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings obtained pursuant to Regulation 773/2004 "shall not be used in proceedings before national courts". This temporary protection goes beyond the Directive in that it is not limited to actions for damages. It thus appears to cover also, for instance, the situation where a complainant in the European Commission's proceedings, who has obtained a copy of the statement of objections pursuant to Article 6(1) of Regulation 773/2004, wanted to use this statement of objections to seek interim relief in a national court. As mentioned above, this has happened in several cases in the past. Moreover, the possibility of obtaining interim relief in national court during a European Commission investigation appears more important under Regulation 1/2003 than it was under Regulation 17, given that Article 8 of Regulation 1/2003 has abolished the procedural status of complainants with respect to the adoption of interim measures by the European Commission itself. However, Article 16a of Regulation 773/2004, as amended, does not affect Article 15(1) of Regulation 1/2003 and the Zwartveld case-law on which the latter provision is based. The national court before which the complainant seeks interim relief could thus still ask the European Commission to transmit to it the statement of objections pursuant to Article 15(1) of Regulation 1/2003.

I. Encouragement of consensual dispute resolution

Recital 48 of the Directive reads as follows:

is based on Article 33 of Regulation 1/2003, which enables the Commission to adopt implementing provisions for that regulation.

141 Commission Regulation (EU) 2015/1348 of 3 August 2015 amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2005] OJ L208/3. For the same purpose, the European Commission also amended four of its procedural notices; see OJ C256 of 5 August 2015.

142 See (text accompanied by) note 5 above.

143 As notes 11 and 25 above.


145 See (text accompanied by) note 29 above.

146 See similarly text accompanied by note 136 above.
"Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those were a judge can declare a settlement binding), arbitration, mediation and conciliation. [...]"

The Directive contains three provisions that indeed facilitate consensual dispute resolution:

- Article 18(1) and (2) of the Directive provide that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process and that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution;

- as already mentioned above, Article 19(2) and (3) of the Directive protect settling co-infringers against having to pay contribution to non-settling co-infringers; and

- Article 18(3) provides that a competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.

**J. The impact of Directive 2014/104 on the practice of private enforcement**

As mentioned above, both under Regulation 17 and in the first years following the entry into application of Regulation 1/2003, most of the private enforcement of EU antitrust law involved the use of Articles 101 and 102 TFEU as a defence or their offensive use to obtain injunctive relief, sometimes combined with an additional claim for damages. These cases were mostly stand-alone cases, and mostly concerned either vertical agreements or abuse of dominance.

The principal intended and likely effect of Directive 2014/104 on the practice of private enforcement is an increase in the number of (purely compensatory) follow-on actions for damages. Significant change as to the frequency of stand-alone actions for damages was not intended by the legislator and is most unlikely to result from the Directive.

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147 See text accompanied by note 122 above.

148 See further text accompanied by notes 155 to 160 below.

149 See text accompanied by note 24 and 39 above.

150 See P. Van Nuffel, as note 87 above, at 239, and R. Roth, as note 87 above, at 52; see also text accompanied by notes 40 to 85 above as to the rejection of the US American conception of private actions for damages as an instrument of deterrence and punishment.
To some extent the intended effect of Directive 2014/104 appears to have already materialised before the Directive becomes applicable on 27 December 2016. Indeed, it appears that already since 2005 there has been in several EU Member States a marked increase in the number of follow-on actions for damages.\(^{151}\) In part this increase may be the result of increased awareness as a result of (the discussions surrounding) the European Commission's 2005 Green Paper, 2008 White Paper and 2013 legislative proposal.\(^{152}\)

In the last few years, in Germany, the Netherlands and the UK, practically every infringement decision of the European Commission or of the national competition authority already appears to have triggered follow-on actions for damages.\(^{153}\) Directive 2014/104 may lead to a similar development in the other EU Member States.

VI. OUTLOOK

Directive 2014/104 has brought to an end a decade long discussion about the role of private actions, or at least private actions for damages, in the enforcement of Articles 101 and 102 TFEU. The US American conception of private actions for damages as an instrument for deterrence and punishment, and thus a substitute for public enforcement, has been clearly rejected. Instead, the central role of public enforcement, by the European Commission and the national competition authorities, working together in the European Competition Network, has been reaffirmed, with private actions for damages performing a supplementary, purely compensatory role.

This basic orientation is most unlikely to change in the foreseeable future. It is however not unlikely that discussion will continue or will emerge on various more specific issues concerning the interaction between public and private enforcement. The following could be mentioned in particular:\(^{154}\)

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\(^{151}\) See B. Rodger, as note 36 above.

\(^{152}\) See text accompanied by notes 70 to 77 above. In part the increase may also be a consequence of legislative initiatives at the national level, some of which may have reflected competition between jurisdictions to attract legal business; see C.-D. Ehlermann, 'Foreword', in A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, 2008), at x.

\(^{153}\) See P.-C. Müller-Graf, as note 91 above, at 94.

\(^{154}\) See also, on the relationship between private enforcement and the so-called 'more economic approach', U. Böge and K. Ost, as note 23 above, at 203-205, and my paper 'The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37 *World Competition* 405, also accessible at [http://ssrn.com/author=456087](http://ssrn.com/author=456087), at footnotes 84 to 89.
A. Voluntary compensation as a ground for reducing fines

As the OECD Secretariat has recently pointed out:

"An emerging issue in the interplay between public and private enforcement is how and to what extent should courts or competition authorities pro-actively support and encourage out-of-court settlements with the victims (or opt-in/opt-out collective settlements) and voluntary redress/compensations of the victims within the administrative proceeding. The rationale for encouraging a voluntary redress scheme or consensual dispute resolution systems is related to the costs and uncertainty of litigation. Competition-related damage claims can be particularly costly, time-consuming and more complex than other civil actions. Alternative dispute resolution (or consensual dispute resolution) mechanisms allow victims to settle cases quickly and easily on a voluntary basis".\(^{155}\)

As mentioned above,\(^ {156}\) Article 18(3) of Directive 2014/104 provides that a competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.

It has been argued that the European Commission should take inspiration from this provision in Directive 2014/14 to amend its own Fining Guidelines, which do not list compensation paid as a mitigation factor,\(^ {157}\) and that it should develop a practice of granting fine reductions on this ground, so as to contribute to a harmonized approach within the European Competition Network.\(^ {158}\)

In two cases in 1998 and 2002, \textit{Pre-Insulated Pipes Cartel} and \textit{Nintendo}, the European Commission granted reductions of the fines imposed on respectively ABB and Nintendo for violations of Article 101 TFEU in recognition of the fact that ABB had paid "substantial compensation to Powerpipe and its previous owner" and that Nintendo had "offered substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm as a result of [Nintendo]'s violation".\(^ {159}\)


\(^{156}\) See also text accompanied by note 148 above.

\(^{157}\) European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C210/2, paragraph 29. It should be noted however that the list of mitigating circumstances in this paragraph 29 is not exhaustive, as is apparent from the wording "such as".

\(^{158}\) C. Prieto, 'Incitations aux réparations spontanées dans le cadre du public enforcement', Concurrences N° 2-2016, paragraph 19.

For the UK, see the Competition & Markets Authority's \textit{Guidance on the approval of voluntary redress schemes for infringements of competition law} (CMA40, 14 August 2015).

European Commission has refused to grant such reductions in other cases, and the EU General Court has confirmed that the European Commission is under no obligation to grant such reductions.160

B. The cumulative financial impact of fines and damages


Article 20(2)(a) of the Directive specifies that this report shall in particular include information on "the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law".

As already mentioned above,161 in cartel cases in which the largest competitor receives immunity under the competition authority's leniency programme - a relatively frequent occurrence162 -, the cumulative financial impact of fines and damages may also negatively affect the market structure.163

This raises the broader question whether the EU antitrust enforcement system is not too exclusively focused on monetary penalties on undertakings, as opposed to a combination of such penalties and sanctions on individuals.164


161 See text accompanied by notes 114 to 120 above.

162 See (text accompanied by) note 115 above.


C. The continued attractiveness of leniency programmes

Leniency programmes have been a very useful instrument for the European Commission and the competition authorities of the EU Member States to detect and punish cartels. As explained above, the desire to safeguard the continued success of leniency programmes has led the EU legislator to include in Directive 2014/104 not only provisions to protect leniency statements from disclosure and use in actions for damages but also provisions limiting the joint and several liability of immunity recipients to their own direct and indirect customers and providers.

In a recent survey of 30 practitioners with extensive leniency experience, 83% of participants indicated that they sensed a decrease in interest from their clients and in incentives for their clients to apply for leniency in recent years. The factor most often mentioned as explaining this sensed decrease was the increased exposure in civil damages claims.

In the academic literature, some authors have argued that Directive 2014/104 did not go far enough in reducing the civil liability of leniency recipients, and that the optimal system would be one in which the immunity recipient would also be granted immunity from damages, or one in which not only the immunity recipient would receive immunity from damages but also the civil liability of the other leniency recipients would be reduced in the same proportion as their fines are reduced, leaving the burden of compensation to the non-cooperating members of the cartel.

165 For a full analysis of both the positive effects and the possible negative effects of leniency, see my recent paper 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) 39 World Competition 327, also accessible at http://ssrn.com/author=456087.

166 See text accompanied by notes 128 to 131 and text accompanied by notes 104 to 105 above.


168 Idem. This factor was mentioned by 36% of the 83% of participants that sensed a decrease in interest and incentives; other factors (with the percentage of the 83% of participants mentioning them) were: perceived uncertainty resulting from the publication of parallel enforcement proceedings (in Europe and beyond) (26%), perceived uncertainty in how authorities will grant leniency reductions (19%), perceived uncertainty in how authorities will calculate fines (14%), and perceived uncertainty in how authorities will deal with requests for access to file for leniency submissions (12%).


I do not think that it would be wise to reduce the civil liability of leniency recipients any further than the limitation of the joint and several liability of immunity recipients that Directive 2014/104 has already introduced, for several reasons:

- Granting immunity recipients not only immunity from fines but also immunity from damages risks creating negative moral effects, which may reduce spontaneous compliance with the cartel prohibition.

As I have explained elsewhere,171 corporate managers are not necessarily just maximizers of profits for themselves and their principals. They may feel a moral responsibility to live within the law whether or not they are likely to be caught, and this normative commitment could trump their interest calculus. The public punishment of those who violate the antitrust prohibitions has thus not only a deterrent effect, in that it helps creating a credible threat of punishment for those who would be willing to commit violations on the basis of a profit calculation, but also has moral effects, in that it sends a message to the spontaneously law-abiding, reinforcing their moral commitment to the rules.172

For people to have such moral commitment to the law, however, it is important that the law and its enforcement are perceived to be fair.173

Leniency, in particular in its strongest form of immunity, may raise two (closely related) concerns in this respect.174 First, there may be concerns about the retributive injustice of an antitrust offender escaping punishment. A second (closely related) concern focuses on the unequal treatment between the beneficiary of immunity or leniency and the other cartel participants, who receive full punishment for the same antitrust violation.175

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171 See my paper ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’, as note 165 above, at footnotes 74 to 80.


173 See T.R. Tyler, Why People Obey the Law (Yale UP, 1990), as well as the literature listed in note 172 above.


175 See also D. Voillemot, Gérer la clémence (Bruylant, 2005), at 99-100.
The main response to these concerns is to design and apply leniency programmes in such a way as to ensure that no more leniency is granted than strictly necessary to obtain the positive enforcement effects, to stress the condition for any beneficiary of leniency, and in particular of immunity, to provide genuine and full cooperation to the enforcement authorities, and to ensure that leniency policies are applied in a transparent and consistent way, thus providing an equal chance for all cartel participants to benefit from them.\textsuperscript{176}

In the USA, these concerns are also addressed through the requirement, as one of the conditions for obtaining immunity from prosecution under the Department of Justice Corporate Leniency Policy, that, "where possible, the corporation makes restitution to injured parties".\textsuperscript{177}

Going to the opposite extreme of exempting immunity recipients of all civil liability risks seriously undermines the perceived fairness of leniency programmes. Indeed, it would go against the widely held notion that, while public enforcement authorities can waive public sanctions, they have no right to waive private rights to compensation. As John Locke already wrote more than three centuries ago:

"From these two distinct rights (the one of punishing the crime, for restraint and preventing the like offence, which right of punishing is in everybody, the other of taking reparation, which belongs only to the injured party) comes it to pass that the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority, but yet cannot remit the satisfaction due to any private man for the damage he has received. That he who hath suffered the damage has a right to demand in his own name, and he alone can remit".\textsuperscript{178}

- The effective detection and punishment of cartels often requires that the competition authority grants not only immunity from fines to the first cartel participant cooperating with its investigation but also fine reductions to other cooperating parties. Indeed, cartelists often avoid leaving written traces of their activities. Competition authorities can then only rely on the immunity applicant's leniency statements, but such statements may on their own not constitute

\textsuperscript{176} See my paper 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years', as note 165 above, at footnotes 75 to 80.


\textsuperscript{178} J. Locke, \textit{The Second Treatise on Civil Government} (1690), Chapter II, paragraph 11.
sufficient evidence to convict other cartel participants that do not cooperate.\textsuperscript{179} Competition authorities will thus often need leniency statements from further leniency applicants. In the case of cartels that have only two participants or cartels that operate through bilateral contacts,\textsuperscript{180} it may even be necessary to offer some degree of leniency to all cartel participants in order to establish the full extent of the cartel.

If the immunity recipient were to receive also immunity from damages, potential second-in leniency applicants may refrain from applying for leniency because they would bear the full burden of civil liability, whereas without their leniency application the competition authority would not be able to prove the infringement.

If not only the immunity recipient were to receive immunity from damages but also further leniency recipients were to be relieved of their full civil liability, there may be no parties left that could compensate the damage caused.

- If the immunity recipient were to receive not only immunity from fines but also immunity from damages, the evidentiary value of its leniency statements would be reduced.

Indeed, if a potential immunity applicant could expect immunity not only from fines but also from damages, it may be tempted to exaggerate the real scope and extent of the cartel, so as to harm its competitors.

The immunity recipient's civil liability is an important safeguard against such exaggerations, thus enhancing the evidentiary value of the immunity recipient's leniency statements,\textsuperscript{181} and hence the effectiveness of the leniency programme.

- Finally, as mentioned above,\textsuperscript{182} there are already today grounds for concern about the impact on the market structure of the imposition of high fines in cartel cases in which immunity is granted to the largest competitor in the market. If immunity recipients were to receive also immunity from damages, this problem would be aggravated.

If there were a problem today with the continued attractiveness of the leniency programmes of the European Commission and the national competition authorities, or if

\begin{footnotesize}
\begin{enumerate}
\item See judgment in \textit{Aragonessas Industrias y Energía v European Commission}, T-348/08, EU:T:2011:621, paragraphs 206 to 2013. As explained below (text accompanied by note 181), this problem would be aggravated by the reduction in evidentiary value of the immunity recipient's leniency statements resulting from the immunity from damages.


\item See text accompanied by notes 114 to 120 and 161 above.
\end{enumerate}
\end{footnotesize}
such a problem were to arise in future,\textsuperscript{183} there are several other possible measures that could be taken, given that the attractiveness of applying for leniency depends on many factors.

As I have argued in more detail elsewhere,\textsuperscript{184} one particularly important way for competition authorities to maintain the attractiveness of leniency programmes is to continue detecting cartels without leniency, in particular by inviting information from informants, including of course anonymous informants.\textsuperscript{185}

\textbf{*****}

\textsuperscript{183} I am not aware of statistics that would indicate a decline in the number of leniency applications. It should also be kept in mind that, while the introduction or strengthening of a leniency programme can be expected to lead to an increase in leniency applications during a first period, a successful leniency programme should in the medium to longer term lead to a decline in leniency applications, as fewer cartels are formed or continued.

\textsuperscript{184} See my paper 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years', as note 165 above, at footnotes 96 to 103. See also M.E. Stucke, 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?', in in C. Beaton-Wells and C. Tran (eds), \textit{Anti-Cartel Enforcement in a Contemporary Age Leniency Religion} (Hart 2015), 209.

\textsuperscript{185} See for example the "Cartels never go unnoticed" campaign launched by the Netherlands Authority for Consumers and Markets (ACM) in June 2016, \url{https://www.acm.nl/en/publications/publication/15873/ACM-launches-offensive-against-illegal-cartel-agreements/}. 