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Private Enforcement of Competition Law and the Directive 2014/104/EU on Action for Damages for Infringements of Competition Law Provisions: The Impact on Albanian Legal System compared with the Implementation in some selected EU-Member States

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Abstract

After CJEU's 44 years of continuous application of the EU competition rules, the *Courage Ltd v Crehan* (2001) recognised the right of the individuals to claim compensation for damages resulting from anti-competitive behavior. Furthermore, Regulation 1/2003 suggested, *inter alia*, the possibility of the individuals to claim compensation for damages according to the infringement of Articles 101 and 102 TFEU. From then on, the Commission has been actively committed to foster the debate and encourage the establishment of a genuine European private enforcement system. The adoption of the Directive 2014/104/EU 'On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union' represents a significant step towards the minimum harmonisation of the key substantive and procedural rules among the EU Member States.

This thesis argues that the European integration process (Europeanisation) is pushing the Member States and candidate countries towards a greater convergence with the EU competition *acquis*. Through the transposition of the Directive 2014/104/EU, the Member States have harmonised substantive and procedural rules which is beneficial to individuals and enterprises because it provides a minimum protection across all Member States. In addition, it is commonly agreed, in academia, that the prospect of the EU membership brings domestic changes in the candidate countries. At the moment, Albania is waiting to open the negotiations for the chapters of the EU *acquis*. Due to the EU membership obligations stemming from the Stabilisation and Association Agreement, Albania has to transpose the Directive 2014/104/EU into the domestic legal system. Law 9121/2003, as amended, sets out the possibility of private persons taking action against an obstacle to competition in the District Court of Tirana. The existence of this right could and should be an incentive to encourage private enforcement in Albania. However, in practice, no case has been referred to so far.

In this context, in order to assess the development of private enforcement and its impact on the Albanian legal system compared with the implementation in some selected EU Member States, this thesis addresses: firstly, the evolution of private enforcement at European level by examining the objectives, modalities, and actors that contributed to the development of private enforcement; secondly, the thesis analyses the Directive 2014/104/EU and how the three selected EU Member States have transposed the directive into their domestic legal system considering the discretion margin left by Article 288 TFEU and a minimum harmonisation level set out by the directive; thirdly, the thesis provides a historical development of private enforcement in Albania and how the Albanian Competition Authority addressed the transposition of the Directive 2014/104/EU. The thesis concludes that the EU private enforcement of competition law is far from being completed. More decisive steps are required to be taken at the EU level for issues that fall under the national legal system of EU Member States. Moreover, Albania, as a candidate country, should properly transpose the Directive 2004/104/EU and, most importantly, raise the awareness of the private enforcement culture.

Keywords: EU Competition Law; Private Enforcement of EU Competition law; Directive 2014/104/EU; Europeanization of Albanian Competition Law; Albanian Private enforcement of Competition Law

Riassunto

Dopo 44 anni di applicazione continua delle regole di concorrenza dell'UE da parte della CGUE, la Courage Ltd contro Crehan (2001) ha riconosciuto il diritto delle persone a chiedere il risarcimento dei danni derivanti da comportamenti anticoncorrenziali. Inoltre, il regolamento n. 1/2003 ha suggerito, tra l'altro, la possibilità per le persone di chiedere il risarcimento del danno ai sensi degli articoli 101 e 102 TFUE. Da allora in poi, la Commissione si è impegnata attivamente a promuovere il dibattito ed a incoraggiare l'istituzione di un vero sistema europeo di applicazione a livello privatistico. L'adozione della Direttiva 2014/104 / UE 'relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea' rappresenta un passo significativo verso l'armonizzazione minima delle principali norme procedurali tra gli Stati membri dell'UE.

Questa tesi sostiene che il processo di integrazione europea (europeizzazione) sta spingendo gli Stati membri e i paesi candidati verso una maggiore convergenza con l'acquis sulla concorrenza dell'UE. Attraverso il recepimento della Direttiva 2014/104 / UE, gli Stati membri hanno armonizzato le norme sostanziali e procedurali che sono vantaggiose per le persone e le imprese poiché offrono una protezione minima in tutti gli Stati membri. Inoltre, è universalmente concordato, in ambito accademico, che la prospettiva dell'adesione all'UE porti a cambiamenti interni nei paesi candidati. Al momento, l'Albania è in attesa di aprire i negoziati per i capitoli dell'acquis dell'UE. A causa degli obblighi di adesione all'UE derivanti dall'accordo di stabilizzazione e di associazione, l'Albania deve recepire la direttiva 2014/104 / UE nell'ordinamento interno. La legge 9121/2003, cosi come modificata, stabilisce la possibilità per i privati di agire contro un ostacolo alla concorrenza presso il tribunale distrettuale di Tirana. L'esistenza di questo diritto potrebbe e dovrebbe essere un incentivo per incoraggiare l'applicazione a livello privatistico del diritto della concurrenza in Albania. Tuttavia, in pratica, nessun caso è stato finora citato.

In questo contesto, al fine di valutare lo sviluppo dell'applicazione a livello privatistico e il suo impatto sul sistema giuridico albanese rispetto all'attuazione in alcuni Stati membri dell'UE selezionati, questa tesi affronta: in primo luogo, l'evoluzione dell'esecuzione privata a livello europeo esaminando gli obiettivi, le modalità e gli attori che hanno contribuito allo sviluppo dell'applicazione privata; in secondo luogo, la tesi analizza la Direttiva 2014/104 / UE e il modo in cui i tre Stati membri dell'UE selezionati hanno recepito la direttiva nel loro ordinamento giuridico nazionale considerando il margine di discrezionalità creato dall'articolo 288 TFUE e un livello minimo di armonizzazione stabilito dalla Direttiva; in terzo luogo, la tesi fornisce uno sviluppo storico dell'applicazione a livello privatistico in Albania e il modo in cui l'autorità albanese della concorrenza ha affrontato il recepimento della Direttiva 2014/104 / UE. La tesi conclude che l'applicazione a livello privatistico dell'UE del diritto della concorrenza è lontana dall' essere completata. Sono necessarie misure più decisive a livello dell'UE per le questioni che rientrano nel sistema giuridico nazionale degli Stati membri dell'UE. Inoltre, l'Albania, in quanto paese candidato, dovrebbe recepire correttamente la Direttiva 2004/104 / UE e, soprattutto, sensibilizzare l'opinione pubblica sulla cultura dell'applicazione a livello privatistico.

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List of Abbreviation

ACA	Albanian Competition Authority
CEEC	Central and East European Countries
CJEU	Court of Justice of European Union
EA	European Agreement
EEC	European Economic Community
EC	European Community
ECSC	European Coal and Steel Community
EU	European Union
IMF	International Monetary Fund
NCA	National Competition Authorities
SAA	Stabilisation and Association Agreeement
SAP	Stabilisation and Association Process
SCPA	Slovenian Competition Protection Agency
TFEU	Treaty on Functioning of European Union
USA	The United States of America
WB	World Bank

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Green Paper

Commission, 'Green Paper: Damages actions for breach of the EC antitrust rules' (Green Paper presented by the Commission) COM(2005) 672 final (Green Paper)

Guideline

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Notices

Commission Notice on cooperation between national courts and the Commission in applying Arts 85 and 86 of the EEC Treaty [1993] OJ C39/5

Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/13

Commission Notice on Cooperation Within the Network of Competition Authorities [2004] OJ C 101/43

Commission Notice on the Co-operation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC [2004] OJ C 101/54

Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/65

Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters) [2004] OJC 101/78

Commission Notice - Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81

Communication from the Commission - Notice - Guidelines on the Application of Article 81(3) of the Treaty, [2004] OJ C 101/97

Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17

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Commission, 'White Paper on Modernisation of the Rules Implementing articles 85 and 86 of the EC Treaty' [1999] Commission Programme No 99/027

Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (White Paper) COM(2008) 165 final (White Paper on damages)

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modificazioni, del decreto-legge 12 settembre 2014, n. 132, recante misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile, [2014] GU n. 261

Legge 9 luglio 2015, n. 114, Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2014 [2015] GU 176

Decreto Legislativo 25 maggio 2016, n. 97, Revisione e semplificazione delle disposizioni in materia di prevenzione della corruzione, pubblicita' e trasparenza, correttivo della legge 6 novembre 2012, n. 190 e del decreto legislativo 14 marzo 2013, n. 33, ai sensi dell'articolo 7 della legge 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche [2016] GU 132.

Decreto Legislativo 19 gennaio 2017, n. 3, Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea [2017] GU 15

Legge 12 aprile 2019, n. 31, Disposizioni in materia di azione di classe [2019] GU 92

Slovenian Legislation

Obligacijski zakonik (Code of Obligation) – OZ [2001] OJ 83/01

Zakon o preprečevanju omejevanja konkurence (Prevention of the Restriction of Competition Act) – ZPOmK-1 [2008] OJ 36/08.

Zakon o alternativnem reševanju sodnih sporov (Act on the Alternative Resolution) – ZARSS [2009] OJ 97/09

Zakon o spremembah in dopolnitvah Zakona o sodiščih (The Slovenian Courts Act) – ZS-L [2015] OJ 17/15

Zakon o spremembah in dopolnitvah Zakona o pravdnem postopku (Code of Civil Procedure) – ZPP-E [2017] OJ 10/17

Zakon o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence (Act Amending the Prevention of the Restriction of Competition Act) – ZPOmK-1G [2017] OJ 23/17

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UK Legislation

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Portugese Legislation

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1. Introduction

1.1. Public and Private Enforcement: Definition and Goals

EU competition rules are enforced by public and private enforcement. Public enforcement means enforcement of the EU competition rules by the Commission or the National Competition Authorities (NCAs) of the Member States. According to the Regulation 1/2003, public authorities are vested with special power and special procedure to conduct proceedings against a party or parties suspected to have infringed competition law, Articles 101 and 102 TFEU, respectively. The procedure may either be commenced by the authority on its initiative or as a complaint issued by a victim. If the violation is found, the public authority may order to end the infringement and impose fines. In addition, national courts shall have the power to apply Articles 101 and 102 TFEU.

Another form of enforcement of antitrust rules is private enforcement, which could be defined from a broader or narrow perspective. From a broader perspective, private enforcement means enforcement of competition rules through the initiative or intervention of private parties. This definition would include cases where private parties act as complainants by reporting an undertaking behaviour to the competition enforcement agencies (Commission or NCA) or where an individual is conferred the role of intervening in a public proceeding against an anti-competitive agreement. According to Komninos, a well-known antitrust lawyer, this situation can be defined 'as privately triggered public enforcement, not as private enforcement' since individuals bring complaints about anti-competitive conduct to the Commission or the NCAs to boost the overall level of enforcement of the competition rules and the deterrent effect which these have on would-be infringers.[1] In a narrow meaning, private enforcement can be defined as a situation where private parties advance independent civil claims or counterclaims based on competition law provisions before a national court.[2] This mode of private enforcement can take different forms such as: actions for damages, actions for nullity of contract or actions for injunctive relief, such as,

[1] Assimakis P Komninos, 'Introduction' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) xxiii.
[2] Assimakis P Komninos, *EC Private Antitrust Enforcement: Decentralised Applications of EC Competition Law by National Courts* (Hart Publishing 2007) 2.

actions to stop anti-competitive behaviour or actions for enforcement of a contract.[3] The second definition is the most commonly accepted in academia and by the Commission. Throughout this thesis, private enforcement refers to the narrow meaning.

The majority of antitrust scholarship argues that the optimal antitrust enforcement model should combine both public and private elements.[4] Both systems are different and do not mean to substitute each other. The primary objective of public enforcement is to cease and desist orders and negative or positive injunctions ordered by competition authorities during the proceedings. Additionally, by using punitive objective, public enforcement imposes fines on wrongdoers purposely to punish and deter other persons from entering into or continuing infringement. On the contrary, the primary objective of private enforcement is to compensate for the damage suffered as a result of the infringement of antitrust rules. However, even in the case of private enforcement, the role of public enforcement is not inexistent. For instance, countries like France or the United States provide legal standing for certain public authorities to seek damages on behalf of their citizens.[5] Thus, public and private enforcement are no alternatives, instead, they are complementary to each other for successful enforcement of the competition law.

Such an approach has been adopted by the CJEU and affirmed by the Commission.[6] In the seminal decision, *Courage,* the CJEU has recognised that private enforcement of competition rules can make a significant contribution in strengthening the working of the EU competition rules and discourages agreements or practices that are liable to restrict or distort competition.[7] The same

[3] Commission, 'European Commission Green Paper on damages actions for Breach of EC Treaty anti-trust rules – frequently asked questions) (Press Release MEMO/05/489, 20 December 2005) <http://europa.eu/rapid/press-release_MEMO-05-489_en.htm?locale=en> accessed 11 July 2019.

[4] Clifford A Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' [2004] World Competition 13; Spencer Weber Waller, 'Towards a Constructive Public-Private Partnership to Enforce Competition Law' [2006] World Competition 367; Assimakis P Komninos, *EC Private Antitrust Enforcement: Decentralised Applications of EC Competition law by National Courts* (n 2) 9; Assimakis P Komninos, 'Introduction' (n 1) xxv.

[5] Assimakis P Komninos, 'Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari' in Philip Lowe and Mel Marquis (eds), *European Competition Law Annual 2011: Integrating Public and Private Enforcement. Implications for Courts and Agencies* (Hart Publishing 2014) 142; Kit Barker, 'Modelling Public and Private Enforcement: the Rationality of Hybridity' [2018] University of Queensland Law Journal 9, 19.

[6] According to Article 19 of TEU, Court of Justice of the European Union (CJEU) includes: i) Court of Justice; ii) The General Court and iii) specialised courts established by Law. To avoid confusion, in this thesis 'CJEU' is used when referring to the courts of the EU in a 'collective sense'. 'ECJ' is used to refer specifically to the Court of Justice as the highest court of the CJEU.

[7] Judgement of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, ECLI:EU:C:2001:465, para 27; Judgement of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico*

position has been maintained by the Commission acknowledging that 'private action should not and cannot replace public enforcement' and competition authorities will continue to be of critical importance in detecting anti-competitive practices.[8]

Private enforcement of competition rules provides important benefits for the enforcement of competition rules. Firstly, private enforcement can ensure a high level of compliance since court sanctions and competition authorities have similar effects.[9] In a nutshell, if, additionally to public enforcement, individuals pursue their rights for the breach of Articles 101 and 102 TFEU, the result would be a considerable increase of private actions that contribute to further developing a culture of competition amongst market participants[10] and leave minor infringement to NCAs and national courts.[11] Secondly, private enforcement complements public enforcement and is more beneficial in terms of economic cost compared to public enforcement, which requires financial allocation and human resources to detect and enforce competition rules. In the case of private enforcement, the financial burden lies on the parties, not to the government as the case of public enforcement. Thirdly, private enforcement ensures the stability of legal norms by interpreting competition law independently from the attitude of public authorities. Business and citizens are put in a similar position to exercise their right to damages.[12] Fourthly, private enforcement brings competition law closer to the citizens by raising awareness of the benefits of the effective competition policy and their right to claim damage compensation.[13] Finally, private enforcement has a macroeconomic impact in terms of contributing to competitiveness, growth, and jobs. In

Assicurazioni SpA and others, joined C-295/04 to C-298/04, ECLI:EU:C:2006:461, para 91; Judgment of 14 March 2019, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, C-724/17, ECLI:EU:C:2019:204, para 45.

[8] Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (Commission Staff Working Paper) SEC(2005) 1732, 8.

[9] Christian Diemer, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules' [2006] European Competition Law 309, 311.

[10] Mario Monti, 'Private Litigation as a key complement to public enforcement of Competition rules and the first conclusions on the implementation of the new Merger Regulation' (8th Annual Competition Conference Fiesole, 17 September 2004) <http://europa.eu/rapid/press-release_SPEECH-04-403_en.htm?locale=en> accessed 20 September 2018, 2; Mario Monti, 'Competition for Consumers' (Benefit' Speech, Amsterdam, 22 October 2004) <https://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf> accessed 24 September 2018, 6.

[11] Carlo Fulvio Petrucci, 'The Harmonisation of the Law of Damages and its Procedural Rules for Breach of European Competition Law: A Critical Analysis' (DPhil thesis, University of Birmingham 2013) 5.

[12] Andrea Renda, *et al.*, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios* (Final Report, Brussels, Rome and Rotterdam 21 December 2007) 31; John C Coffee Jr, 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working' [1983] Maryland Law Review 215, 227.

[13] ibid 31.

more competitive markets, allocative inefficiency is reduced by leading to greater output, lower prices, and better quality.[14]

1.2. Background: Introduction to Research

Since the establishment of the EC/EU, enforcement of the EU competition law has been mainly enforced by public enforcement. Regulation 17, adopted three years later, after the EEC treaty entered into force, curtailed incentives to use the national legal system to vindicate the rights provided by the EU Competition Law.[15] NCAs and national courts did not have a significant role in the application of Articles 101 and 102 TFEU. Consequently, the role of individuals to seek redress for damages for infringement of competition rules was inexistent.

Comprehensive and reliable information on the use of Article 101 and 102 as a 'sword' by the national courts has been difficult to obtain. According to the findings of Ashurst study, for about 40 years the EU private enforcement was entirely underdeveloped with only 60 adjudicated damage cases since the establishment of the EU, and only in 23 cases were the damages rewarded.[16] Two main reasons may be attributed to the slow development of EU private enforcement. The first important reason for the absence of private enforcement relates to the significant differences of the substantial and procedural rules across the EU Member States governing actions for damages. The EU Member States have different national institutions - whether a specialised court or a general one. Also, the substantial and procedural rules vary considerably and this diversity has affected the failure of private litigation.[17] Secondly, Regulation 17 favoured a centralised system where the Commission had a monopoly in applying Article 85 (3) of the EEC Treaty [101 (3) TEFU], thus, excluding national courts from public enforcement of the Treaty provisions. In the 'White Paper on Modernisation of the Rules Implementing Articles

[14] ibid 31.
[15] David J Gerber, 'The Transformation of European Community Competition Law' [1994] Harvard International Law Journal 113.
[16] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (Comparative Report, Ashurst 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 15 March 2017. Throughout the thesis, this study will be cited as Ashurst Study.
[17] Alison Jones, 'Competition Law Enforcement' in Damian Chalmers and Anthony Arnull (eds), *The Oxford handbook of European Union Law* (OUP 2015) 664-665.

85 and 86 of the EC Treaty', the Commission acknowledged that centralised system prevented the development of private enforcement. The Commission explicitly says:

> Since national competition authorities and courts have no power to apply Article 81 (3), companies have used this centralised authorisation system . . . to block private action before national courts and national competition authorities. This has undermined efforts to promote decentralised application of EC competition rules. As a result, the rigorous enforcement of competition law has suffered and efforts to decentralise the implementation of Community law have been thwarted.[18]

While some authors have opposed private enforcement claiming to be 'costly', 'ineffective' and 'not to serve the interest of public enforcement', [19] or that the Commission is 'already legally empowered to award compensation to victims of antitrust violations',[20] private enforcement has become one of the most debated topics in the EU. The development of private enforcement of competition rules at EU level has been characterised by: i) an important role played by the CJEU in providing a remedy in damages established by case laws (*Courage v Crehan* and by *Manfredi*); and ii) the persistent role of the Commission aiming to establish a common European antitrust private enforcement system.

In 2001, after almost 40 years of application of the EU competition rules, the ECJ dealt with competition damages recognising the right of individuals to claim compensation for damages for actions resulting from the anti-competitive behaviour of companies. In the seminal case, *Courage Ltd v Crehan*, the ECJ emphasised that the actions for damages before a national court strengthen the working of the EU competition rules and discourage the agreement or practices which are liable to restrict or distort competition.[21] The *Courage* principles were reaffirmed in *Manfredi* judgment, again, recognising the right of individuals to claim damages for actions resulting from the anti-competitive behaviour of companies. However, the ECJ failed to harmonise further the rules on limitation periods and types of compensation for damages awarded, leaving the process to the discretion of the Member States. In both cases, the ECJ stressed that, in the

[18] Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (White Paper) Commission Programme No 99/027, para 6.
[19] Wouter P J Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' [2003] World Competition 473.
[20] Daniel Simon Reed, 'Private Enforcement of Art 101 and 102 of the Treaty on the Functioning of the European Union' (DPhil thesis, University of Southampton 2015) 3.
[21] *Courage and Crehan* (n 7) para 27.

absence of Community rules, the domestic legal system of Member States shall designate the rules governing the actions for safeguarding the rights that the individuals derive from the EU law, subject to the principles of effectiveness and equivalence. The ECJ cases contributed to: i) the codification of existence of the right to damages under the EU law for infringement of competition law and ii) the consolidation of the general principle of national procedural autonomy for individuals claiming damages for harm suffered in the light of the EU competition law.

On the other hand, following the adoption of Regulation 1/2003, in October 2003, the Commission commissioned a Law firm to assess the conditions of damage claims in the Member States. The study, known as Ashurst Study, found: i) a low level of private enforcement in the national courts and ii) an inconsistent application of national procedures rules among the Member States.[22] Stressing the importance of the private enforcement, in 2005 the Commission published a Green Paper titled 'Damages actions for breach of the EC antitrust rules'[23] aiming to identify obstacles to a more efficient system of damages claiming. The publication of the Green Paper led towards 'third devolution of European Competition law' recognising private enforcement as a 'substantial factor in EU competition law enforcement'.[24] In 2008, the Commission issued a White Paper on damages actions for breaches of the EC antitrust rules.[25] The primary objective of the White Paper was to improve the legal conditions for victims to exercise their right under the Treaty to redress all damages suffered as a result of a breach of the EC antitrust rules. The Commission recognised full compensation as the foremost guiding principle.

Following the White Paper on damages, on June 11, 2013, the Commission published a proposal for a directive on antitrust damages actions for breaches of the EU competition law. In November 2014, the Council and the European Parliament, according to the ordinary legislative procedure, adopted the Directive 2014/104 'On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the

[22] Waelbroeck (n 16).
[23] Commission, 'Green Paper: Damages actions for Breach of the EC antitrust rules' (Green Paper) COM(2005) 672 final.
[24] Clifford A Jones, 'After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement' [2006] The Competition Law Review 1, 2.
[25] Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (White Paper) COM (2008) 165 final (hereafter cited as White Paper on Damages).

European Union'. Member States had to transpose the Directive 2014/104/EU by 27 December 2016. The implementation has been a daunting task for the Member States due to the amendments required to make in their national legal systems. For instance, three months after the deadline expired, on 17 March 2017, only 10 Member States had fully transposed the Directive 2014/104/EU and reported to the Commission. Six months later, as of 27 September 2017, a good number of 23 Member States had fully transposed the Directive 2014/104/EU. Portugal was the last Member State to transpose the Directive 2014/104/EU into its domestic legal system, on June 5, 2018.[26]

The Directive 2014/104/EU contains broad and far-reaching provisions that will have a significant impact in harmonising substantial and procedural rules governing action for damages in the Member States. The Directive 2014/104/EU introduces the principles that claimants are entitled to full compensation for actual loss suffered and loss of profits, and sets out a rebuttable presumption of harm of cartel.[27] In addition, the Directive 2014/104/EU incorporates provisions relating to the disclosure of evidence; the limitation period; joint and several liabilities; the effects of NCAs' decisions; passing-on and consensual dispute resolutions. Particularly, the Directive 2014/104/EU does not address the question of causation, collective redress, and technical issues like litigation costs and funding. The latter are essential because they make some Member States' jurisdiction more attractive compared to others. Additionally, the Directive 2014/104/EU has no provision regarding the competent court to deal with the action for damages.

On the other hand, the harmonisation sought by the Directive 2014/104/EU is limited. First, the Directive 2014/104/EU covers only the actions for damages, while interim relief continues to be governed by national rules of Member States. Secondly, the Directive 2014/104/EU addresses only certain issues for the exercise of the right to damages, and offers a combination of different

[26] Law 23/2018, 'Direito a indemnização por infração ao direito da concorrência, transpõe a Diretiva 2014/104/UE, do Parlamento Europeu e do Conselho, de 26 de novembro de 2014, relativa a certas regras que regem as ações de indemnização no âmbito do direito nacional por infração às disposições do direito da concorrência dos Estados-Membros e da União Europeia, e procede à primeira alteração à Lei n. 19/2012, de 8 de maio, que aprova o novo regime jurídico da concorrência, e à quarta alteração à Lei n. 62/2013, de 26 de agosto, Lei de Organização do Sistema Judiciário' [2018] Diário da República n. 107/2018, Série I de 2018-06-05.

[27] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Text with EEA relevance) [2014] OJ L 341/1, Art 3.

harmonisation techniques within the core section of the Directive, which partake the attribution of minimum harmonisation model, uniform principles and national procedural rule.[28] Issues such as the use of expert and collective redress are left outside. Regarding the latter issue, the Commission has issued a Recommendation[29], but, since the Recommendation does not have a legal character, its effects are unforeseeable. Last but not least, regarding the matter which the Directive 2014/104/EU is silent on, the Member States' national rules will continue to apply subject to the principle of equivalence and effectiveness. It is questionable, though, how the Directive 2014/104/EU ensures effective private enforcement, where only one element has been harmonised and national rules are still applicable. By 27 December 2020, the Commission shall review the impact of the Directive 2014/104/EU into the EU Member States and submit a report to the European Parliament and the Council on whether to propose other legislative measures.[30]

While the EU Member States have transposed the Directive 2014/104/EU into the domestic legal system, the perspective of the EU membership has been proven successful for candidate countries which have an obligation to approximate their existing and future legislation and ensure effective implementation.[31] Evidently, the competition rules constitute a substantial part of the EU *acquis* exported to candidate countries, which must gradually converge their national competition rules upon EU competition *acquis* to create and maintain equal conditions for economic operators.[32] As the Commission explains:

> Competition could be distorted if undertakings in one part of the Community had to bear much heavier costs than in another and there would be a risk of economic activity migrating to locations where costs were, lower, […] The implementation of high common standards of protection is among the Union s objectives and at the same time helps to ensure this 'level playing field.[33]

[28] Albertina Albors-Llorens, 'Antitrust Damages in EU Law: The Interface of Multifarious Harmonisation and National Procedural Autonomy' [2018] University of Queensland Law Journal 139, 145-149.
[29] 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 L 201/60.
[30] Directive 2014/104/EU, Art 20.
[31] Commission, 'Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Communication from the Commission to the Council and the European Parliament) COM (2003) 104 final, 5.
[32] Umut Aydin, 'Promoting Competition: European Union and the Global Competition Order' [2012] Journal of European Integration 663, 674-678.
[33] Commission 'Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union' (White Paper) COM (1995) 163 final, para 2.13

As Albania established contractual relations with the EU, the approximation of the Albanian legislation with the EU requirement is the cornerstone for the successful integration into the EU. Albania has to show the fulfilment of: i) political criteria - stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; ii) economic criteria - the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; and iii) legal criteria - ability to take on the EU *acquis*, divided into 35 chapters.[34] The EU *acquis* comprises around 80, 000 pages of the EU law which candidate countries have to adopt.[35]

This momentum provides a real opportunity for Albania, as a candidate country wishing to become a member of the EU, to undertake profound legislative changes, *inter alia*, in the protection of competition. From a comparative assessment based on National Plans for European Integration 2016-2019,[36] 2017 – 2020,[37] 2018 – 2020[38], most of the competition legislation in force is aligned with the EU legislation and Commission soft laws. The last measure transposed in the Albanian legal system by the Albanian Competition Authority (ACA) was the Directive 2014/104/EU. During 2019 – 2021, the Albanian legislator or ACA has not scheduled any EU legal or soft instrument to transpose.[39]

1.3. Research Purpose

This thesis considers how the Europeanisation process can contribute to the achievement of optimal private enforcement in Albania by transposing substantial and procedural rules laid down in the Directive 2014/104/EU as a requirement stemming due to the EU membership

[34] European Council, 'Conclusion of the Presidency' (SN 180 / 1 / 93 Rev 1, 21-22 June 1993) <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf> part 7A (iii), accessed 31 January 2018.
[35] Mark Leonard, *Why Europe will Run the 21st Century* (PublicAffairs 2005) 45.
[36] Decision of Council of Ministers 74/2016, 'On approval of National Plan for European Integration 2016-2019' [2016] OJ 17, 60.
[37] Decision of Council of Ministers 42/2017, 'On approval of National Plan for European Integration 2017-2020' [2017] OJ 12, 540.
[38] Decision of Council of Ministers 246/2018, 'On approval of National Plan for European Integration 2018-2020' [2018] OJ 69, 56.
[39] Decision of Council of Ministers 201/2019, 'On approval of National Plan for European Integration 2019-2021' [2019] OJ 54, 78.

obligation. Law 9121/2003, as amended, sets out the possibility of private persons to take action arising from an obstacle to competition to the District Court of Tirana.[40] While Article 65 sets out the possibility of private persons to take actions for damages for infringement of competition law, it is uncertain its interaction with the general liability rules foreseen in Albanian Civil Code or Albanian Code of Civil Procedure with regards to the access to evidence, the limitation period, collective redress and passing-on defence.

In this context, to assess the impact of the Europeanisation on Albanian competition policy focusing especially on the private enforcement and damages caused by antitrust practices, this thesis addresses; firstly, the evolution of private enforcement at European level by examining the objectives, modalities, and actors that contributed to the development of private enforcement; secondly, the thesis analyses the Directive 2014/104/EU and how the three selected EU Member States have transposed the directive considering the discretion margin left by Article 288 TFEU and a minimum harmonisation level; thirdly, the thesis provides a historical development of private enforcement in Albania and how the ACA addressed the transposition of the Directive 2014/104/EU. The thesis concludes that the EU private enforcement of competition law is far from being completed. More decisive steps are required to be taken at the EU level for issues that fall under the national legal system of Member States. Moreover, Albania, as a candidate country, should properly transpose the Directive 2004/104/EU and, most importantly, raise the awareness of the private enforcement culture.

1.4. Key Concepts and Delimitations of the Thesis

The Treaty of Lisbon renumbered Article 81 of the EC Treaty[41] as Article 101 TFEU, and Article 82 of the EC Treaty becomes Article 102 TFEU. The second chapter refers to the EEC Treaty and competition provisions contained in Articles 85 and 86 of the EEC. Reference to Articles 85-89 of the EEC Treaty and Articles 81-85 of the EC Treaty must be read interchangeably

[40] Law 9121/2003, 'For Competition Protection' [2003] OJ 7.1 as last amended by Law 10 317/2010, 'For some additions and changes in the law no 9121 dated 28. 07. 2003 'For Competition Protection' [2010] OJ 135 (Law 9121/2003 as amended), Art 65.
[41] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Final Act [1997] OJ C 340, 01.

with Articles 101 and 102 TFEU.[42] The main reason to rely on the original numbering consists of the Treaties, cases, and materials used, which refer to the original version. Table 1 shows the renumbering of the provisions dealing with the competition laws.

Table 1: The numbering and renumbering of the rules on competition under the founding treaty and amendments

Treaty of Rome (EEC) 1957	Treaty of Amsterdam (ToA) 1997	Treaty of Lisbon (TFEU) 2007
Article 85	Article 81	Article 101
Article 86	Article 82	Article 102
Article 87	Article 83	Article 103
Article 88	Article 84	Article 104
Article 89	Article 85	Article 105
Article 90	Article 86	Article 106
Article 91	Article 87	Article 107
Article 92	Article 88	Article 108
Article 93	Article 89	Article 109

Source: Data compiled by the author.

Throughout this thesis, the terms *antitrust* and *competition* are used as synonyms. The word antitrust is commonly used in the United States as well within and outside of the EU. The term antitrust is commonly used even by the EU official.[43] It refers to rules and regulations aiming at ensuring competition in the market.

Private enforcement of EU competition law is too broad and can take different forms such as actions for damages, actions for injunctive relief, and the use of competition rules as a defence. Throughout this thesis, private enforcement indicates only the actions for damages, unless otherwise stated.

[42] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/01. Throughout this thesis will be referred to consolidated 2016 version OJ C 202/1.

[43] Joaquín Almunia, 'Antitrust damages in EU law and policy' (College of Europe GCLC annual conference, 7 November 2013) <https://europa.eu/rapid/press-release_SPEECH-13-887_en.htm> accessed 28 August 2019; Joaquín Almunia, 'Public and Private damages actions in Antitrust' (SPEECH/11/598, 22 September 2011) <https://europa.eu/rapid/press-release_SPEECH-11-598_en.htm?locale=en> accessed on 28 September 2018; Neelie Kroes, 'The Green Paper on antitrust damages actions: empowering European citizens to enforce their rights' (Opening Speech at the European Parliament Workshop on damages actions for Breach of EC antitrust rules, 6 June 2006) <https://ec.europa.eu/competition/speeches/text/06062006_en.pdf> accessed on 28 August 2019.

As the Directive 2014/104/EU limits its scope only to the actions for damages for infringement of competition law, this thesis focuses only on the impact of the Directive 2014/104/EU on the selected EU-Member States. The choice of selection of these countries was because of academic affiliation with the University of Graz and the University of Ferrara and to observe how a post-communist country like Slovenia, which joined in 2004, modelled its competition policy and enforcement mechanism in line with EU competition *acquis*.

Finally, a comparison with USA private enforcement system in the first chapter would also have been interesting, since the US has been considered as one of the most private enforcement systems in the world, where 95% of antitrust cases are filed by private plaintiffs who seek treble damages.[44] However, I have restricted myself only to the EU level and its impact on the selected EU-Member States and Albania.

1.5. Methods of Research

The focus of this research is on the private enforcement of the EU competition law and the impact of the Directive 2014/104/EU on Albania as a candidate country obligated to harmonise its legislation before the accession into the EU.

This thesis is based upon the primary legal sources from the EU, selected EU-Member States – Austria, Italy and Slovenia – and Albania; the jurisprudence of the CJEU and national courts; secondary sources of the EU institutions; soft laws prepared in the framework of the Commission's persistence to encourage private enforcement[45] and, above all, secondary European antitrust legal doctrine such as books, journals, articles and national reports. The author will explore all relevant issues of private enforcement of competition law from different methods.

[44] David S Evans, 'Why Different Jurisdiction do not (and should not) adopt the same antitrust Rules' [2009] Chicago Journal of International Law 161, 169.

[45] Senden defines soft law as 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.' Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112.

The core methodology is that of traditional legal doctrine, which is based on analyses and interpretation of the EU competition provisions, the Directive 2014/104/EU, national instruments for transposition of the Directive 2014/104/EU in three respective EU Member States and the Albanian legislation. The analysis is enriched by a reference to the case laws of the CJEU and non-binding soft laws documents of the Commission. The case laws of the CJEU are important legal sources. As will be seen, the CJEU has played an important role in establishing the regime of private enforcement of EU competition law. Several principles of these cases have been codified in the Directive 2014/104/EU. For this reason, the CJEU cases will be at the center of the analysis. In addition, references have been made to preparatory documents of the Commission, which are non-binding, with the intention to explain the Commission's role in fostering the debate and establishing the system of private enforcement of competition rules in the EU.

In addition to the traditional legal method, a comparative method has to be added. What the Judge Joliet had to say about comparative antitrust law retains its force today: 'the comparative method has a more useful function to perform than merely to describe what is the applicable law in different countries without questioning why it is so. […] Comparative law in this area is more than a fascinating intellectual game; it is a valuable tool; and, indeed, to the European lawyer an essential one.'[46] The analysis considers three EU Member states - Austria, Italy and Slovenia – from an EU perspective: how the Directive 2014/104/EU has been transposed into their domestic legal system. Legal issues identified in the White Paper on damages and later codified in the Directive 2014/104/EU shall serve as a point of departure for comparative analyses. This method is important since it allows to determine how and to what extent Albania has to amend its domestic legislation in transposing the Directive 2014/104/EU into the domestic legal system. Furthermore, the experience of these countries will serve as a blueprint for Albania to adopt the best solutions.

The last method is the historic method, which allows the assessment of EU private enforcement of competition law from a historical perspective. Such an analysis is crucial to determine: i) the way the EU private enforcement of competition law evolved in time since the

[46] René Joliet, *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective* (Liège 1967) 191.

establishment of the EEC/EU; and ii) the current place of private enforcement in the system of competition law enforcement.

Also, the author has held meetings with judges, lawyers and other stakeholders. The main objective was to understand properly problems and challenges encountered during the enforcement process.

The citations in this thesis have been made in accordance with the guidelines of the Oxford University Standard for the Citation of Legal Authorities – OSCOLA.[47] The National legislation has been cited in accordance with the national guidance system. Alternatively, case-laws of the Court of Justice of the European Union have been cited in accordance with the methodology based on the European Case-Law Identifier – ECLI.[48]

1.6. Significance of the Thesis

The EU private enforcement is relatively a new issue in the EU which has gained increased attention because of 'modernisation package' of the law enforcement system and the adoption of the Directive 2014/104/EU. Recently, academics have focused on the impact of the transposition of the Directive 2014/104/EU in the domestic legal system of the EU Member States.[49] However, none of them studied with the impact on the candidate countries. Therefore, besides providing a comprehensive study of private enforcement after the Directive 2014/104/EU entered into force in the selected EU-Member States, the significance of this study will be helpful in two aspects.

Firstly, the outcome of this study will have a theoretical contribution in the field of Europeanisation through providing a detailed analysis of the effect of the European Integration

[47] Faculty of Law, 'Oxford University Standard for the Citation of Legal Authorities – OSCOLA' (fourth edition, 2012) < https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf> accessed 13 September 2018.
[48] Council conclusions of 29 April 2011 inviting the introduction of the European Case-law Identifier (ECLI) and a minimum set of uniform metadata for case-law [2011] OJ C 127, 1.
[49] Anna Piszcz (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Warsaw, University of Warsaw Faculty of Management Press 2017); Pier Luigi Parcu, Giorgio Monti and Marco Botta, *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Edward Elgar Pub 2018); Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos, *The EU Antitrust Damages Directive* (OUP 2019).

process onto Albania's competition policy and, particularly, the private enforcement of competition rules.

Secondly, this study contributes to undertake a systematic investigation on private enforcement, its role and perspectives ahead. The results of this study will be useful for the Albanian government and the Albanian Competition Authority to amend current competition law with the intention to speed up the process of negotiation of the EU *acquis*.

1.7. Outline of the Thesis

The thesis consists of this introduction and five further chapters.

Chapter 2, titled 'Evolution of a General Framework of EU Law on Private Enforcement', provides a historical overview of the evolution of the EU private enforcement. The chapter begins with the competition law ideas developed in Austria, in the same period when the US adopted the Sherman Act (1890), which stands to the core of European competition law tradition not only for addressing the rise of the cartel but also as an inspiration model for other European countries. The second section describes the challenges and trajectories of the competition policy in European countries from the end of the 20th until the mid-21st century. Then, a historical development of competition law, the origin of the main competition provisions and its relevance from the European Coal and Steel Community (ECSC) to the Treaty of Lisbon are discussed (section 3), followed by an analysis of the enforcement system established by Regulation 17 and later the Regulation 1/2003 (section 4). Theoretically, Regulation 17 foresaw the possibility of private enforcement, but, due to centralised enforcement system, for around 40 years, private enforcement at European level was inexistent. A determinant role in the development of private enforcement can be attributed to the CJEU. Through its principles and decisions, the CJEU has played an important role in shaping the private enforcement regime, codified later in the Directive 2014/104/EU (section 5).

Chapter 3, titled 'The Role of the Commission in Facilitating and Encouraging the Right to Damages', focuses on the role played by the Commission's policy to facilitate and encourage

the right to damages in the EU. The chapter begins by noting that the action for damages was not a 'forgotten issue' during the debate of approval of Regulation 17. Although acknowledged by 2(two) comparative reports, for almost 40 years, the Commission hesitated to act. Only in 2005, following the Ashusrt Study, which successfully identified the obstacles of the antitrust damages actions at the national level (section 2), the EU started a consultation by adopting a Green Paper on how to stimulate private actions across the Member States (section 3). Three years later, in 2008, the Commission issued a White Paper by bringing to the fore of academic discussion the private enforcement which was in limbo until that time (section 4). Both the Green Paper and the White paper paved the way toward a genuine European private enforcement system of competition rules with the publication of the 2013 package (section 5). The chapter concludes that the Commission's role in facilitating and encouraging private enforcement in the EU reflects the CJEU position and its desire to establish a private enforcement culture different from the US.

Chapter 4, titled 'Directive on Right to Damages: Legal Aspects and Implications', provides a legal analysis of the directive and the main substantial and procedural rules introduced. The Directive 2014/104/EU represents a novelty in the EU competition law. It is the first time that the Commission submits draft EU legislation in the area of antitrust rules. Secondly, it is the first time as well that the European Parliament is involved as a co-legislator under the ordinary legislative procedure. In this context, being a novel instrument in EU competition law, the second section discusses the legal basis of the Directive 2014/104/EU and if there is any conflict between Articles 103 and 114 TFEU. Third section analyses the subject matter; the scope of the directive and substantive and procedural rules as introduced in the Directive 2014/104/EU. Section 4 assesses whether harmonisation has achieved its goal. Furthermore, an overview of the transposition process and problems encountered by the EU Member States is given in section 5.

Chapter 5 analyses the transposition of the Directive 2014/104/EU into the domestic legal systems of Austria, Slovenia and Italy. According to Article 288 TFEU, Directive leaves the choice of form and method of transposition to the discretion of national authorities as long as enacted national legislation is in line with the content of the transposed Directive 2014/104/EU. The chapter consists of 3 sections, corresponding to the implementation of the Directive 2014/104/EU in Austria, Slovenia and Italy. To ensure uniformity and to observe the transposition process in the

EU selected countries, the same structure follows. In each country, the analyses proceed: i) with the manner of implementing the Directive 2014/104/EU into the domestic legal system whether through a new law or by amending current legislation on competition law; ii) the scope of implementation of Directive 2014/104/EU whether these countries choose a minimal harmonisation as set out in the Directive 2014/104/EU or have implemented broadly; iii) competent court to deal with the action for damages since Directive 2014/104/EU remains silent on the institution design; and iv) substantive and procedural rules identified in the Directive 2014/104/EU.

Chapter 6, titled 'Europeanisation of Albanian Competition Law: Roles and Perspectives of Private Enforcement', analyses the impact of the EU law on the Albanian competition law with a specific reference to the private enforcement mechanism. The chapter opens with the role of EU as a legal exporter of the *acquis* in third countries and discusses the status of the Stabilisation and Association Agreement (SAA) in the Albanian legal system (second section). The third section provides an overview of the Europeanisation of Albanian competition law from a top-down approach. The harmonisation of existing and future legislation in compliance with EU *acquis* has become a precondition for EU membership. In light of the EU law, this section addresses how Albanian competition law has changed to comply with the EU competition *acquis*. The fourth section focuses on the current regime of private enforcement of competition law. The analysis follows the same structure of substantive and procedural issues identified in the Directive 2014/104/EU and Chapter 4 of this thesis. Section 5 deals with some missed opportunities and obstacles for the development of private enforcement followed by the Guideline on damages issued by ACA, which transposes the Directive 2014/104/EU. Besides novelties introduced by the Guideline on the damages, the final section discusses whether the Guideline on Damages is an appropriate instrument for transposition of the Directive 2014/104/EU into the Albanian legal system and the roles and the perspective of private enforcement.

The last chapter provides a conclusion.

CHAPTER

2. Evolution of a General Framework of EU Law on Private Enforcement

2.1. Introduction

This chapter provides an evolution of a general framework of the EU law on private enforcement. Since early 1960s, the ECJ emphasised the importance of private enforcement of the EU law stating that 'the vigilance of individuals to protect their rights amounts to an effective supervision in addition to the supervision entrusted to the diligence of the Commission and of the Member States'.[50] However, it took around 40 years for the first case where the ECJ articulated the right to damages for infringement of the EU antitrust rules. The chapter begins with the competition law ideas developed in Austria, in the same period when US adopted Sherman Act (1890), which stands at the core of the European competition law tradition not only for addressing the rise of cartel but also served as an inspiration model for other European countries. The second section describes the challenges and trajectories of competition policy in European countries from the end of the 20th until the mid-21st century in the European countries. Then, section three discusses a historical development of competition law, its origin and nature from the ECSC to the Treaty of Lisbon, followed by an analysis of the enforcement system established by Regulation 17 and later the Regulation 1/2003 (section 4). A determinant role in the development of private enforcement can be attributed to the CJEU. Through its principles and decisions, the CJEU has played an important role in shaping the private enforcement regime, codified later in the Directive 2014/104/EU (section 5).

2.2. Competition Policy in the European Countries: from the end of 20th Century until 21st Century

Competition policy constitutes one of the most important policies of the internal market and its development in the European continent is a post-1945 phenomenon.[51] Prior to 1945,

[50] Judgement of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* C-26/62, ECLI:EU:C:1963:1, 13.
[51] Umut Aydin and Kenneth P. Thomas, 'The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century' [2012] Journal of European Integration 531, 533-534.

competition policy was underdeveloped. Several states had attempted to establish a competition framework mainly to address the rise of the cartels. The later had become a dominant force in the economy by controlling the production and the prices in certain heavy sectors.[52]

Austria is the first European country recognising the Legislation on invalidating cartel agreement back in 1803. The Legislation on invalidating cartel agreement intended to prevent merchants from profiting from the shortages caused by the Napoleonic wars. However, it lacked to deter illegal behaviour.[53] Later on, in an academic conference, Adolf Menzel (1894) outlined for the first time the solution to combat cartels. Such proposal led the Austrian government, in June 1897 with minor amendments in October 1897 and March 1898, to propose the cartel legislation. According to the Official Explanation, the cartel legislation intended to prevent competitors from agreeing to eliminate competition among themselves.[54] Recognising the threat from the cartel, the government proposed to establish an office within the Ministry of Finance with a central task to 'secure, evaluate and publicise information about cartels and to regulate their conduct'.[55] The Ministry of Finance had the authority to impose both criminal and civil sanctions. The proposal did not provide a judicial review of the administrative decision. Additionally, not all cartels were subject to this administrative authority, but only those concerned in the production of goods such as sugar, spirits, beer, mineral water and salt. This limitation was considered temporarily, which would allowed the government to take further actions in other sectors.[56] The Cartel legislation never passed the legislative process due to the parliamentary tensions among nationality groups erupted in 1896, when the government sought to increase other foreign languages as official languages.[57] Such tensions lead to the disruption of the Parliament, which remained paralysed until it was dissolute.

[52] Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Edward Elgar 2010) 44-67.
[53] David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 1998) 53.
[54] ibid 58.
[55] ibid 58.
[56] ibid 60.
[57] David J Gerber, 'The Origins of European Competition Law in Fin-de-Siècle Austria' [1992] American Journal of Legal History 405; David J Gerber, 'Private Enforcement of Competition Law: a comparative Perspective' in Thomas M J Möllers and Andreas Heinemann (eds) *The Enforcement of Competition Law in Europe* (CUP 2007) 442; Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 60-62.

During the First World War, governments recognised the industrial production as a key element for the military process and extended their control over the industrial production. In Germany, the control was even more extensive by merging all independent firms under the control over a small number of cartels. In this way, cartels became a symbol of nationalism.[58] In 1923, the high rate of inflation after the First World War increased the pressure on the German government to enact the first cartel law in Europe intended to protect competition.[59] The 1923 decree did not prohibit cartels *per se* but rather introduced the principle of cartel control by the administrative agencies. Accordingly, the administrative agencies had the authority to interfere in the business practice of the cartels on their own initiative for the common interest of the economy and welfare.[60] By 1936, in Germany, 3,000 cartels and independent firms had lost their right to stay out of a cartel.[61]

The German ideas of competition law flourished in other countries. In 1925 and 1926, Sweden and Norway enacted their competition law. In Sweden, the competition law empowered the government to investigate cartels and monopolistic firms to determine their influence on prices and competition. The government had the authority to impose fines on cartels that did not provide the necessary information.[62] Whereas, Norway adopted legislation was broader in scope compared with the German 1923 Cartel Act, more elaborated and consistent with damages caused by cartels and monopolies. The enforcement was entrusted to the Control Office and the Control Council. The former was an independent institution entrusted with administrative functions such as maintaining cartel register, investigate complaints, and prepare cases for the Control Council and applying the substantive provision of the competition law. The Control Council was an independent body composed of five members who had final decision-making authority.[63]

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[58] Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 116.
[59] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (OUP 2003) 73; Ernst Joachim Mestmäcker, 'The Development of German and European Competition Law with special Reference to the EU Commission's Article 82 Guidance of 2008' in Lorenzo Federico Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011) 35-37.
[60] Ivo E Schartz, 'Antitrust Legislation and Policy in Germany-A Comparative Study' [1957] University of Pennsylvania Law Review 617; 636-637.
[61] Clifford A Jones, *Private Enforcement of Antitrust Law in EU, UK and USA* (OUP 1999) 24.
[62] Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 155.
[63] Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 156-157.

During the 1930s, other European countries adopted the competition legislation. The Italian fascist government adopted *Legge 834/1932* on consortia.[64] Pursuant to this law, the government had the power to establish an obligatory consortium without even being requested by those concerned.[65] Czechoslovakia (1933), Poland (1933), Yugoslavia (1934) and Denmark (1937) - adopted a sort of competition law which was never used in practice, and its application was little known outside of these countries.[66]

After the Second World War, competition law evolved in two main straits: one at the national level and the other at the European level. At the national level, the development of the competition law can be ascribed due to the influence of US political pressures linked with the financial assistance to be given for the reconstruction and the economic development.[67] Such influence was more visible in the case of West Germany, where the US experts, *inter alia,* aided to establish the competition regime. Until 1958, only French (1953) and former West Germany (1957) had adopted the national competition laws but the enforcement mechanism was 'virtually – non-existent';[68] whereas the Dutch government adopted the first competition law in July 1958.[69] The other European countries did not either have competition law regimes or had a couple of vagueness provisions on competition included in the Civil Code.[70]

[64] Legge 16 giugno 1932, n.834, Disposizioni riguardanti la costituzione ed il funzionamento di Consorzi fra esercenti uno stesso ramo di attivita' economica [1932] GU 170.
[65] According to Amato, this law never came into effect. Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 40.
[66] Anestis S Papadopoulos, *The International Dimension of EU Competition Law and Policy* (CUP 2010) 12-13; Andrej Fatur, Klemen Podobnik and Ana Vlahek, *Competition Law in Slovenia* (Wolters Kluwer 2016) 27.
[67] Kai R Pedersen, 'Re-educating European Management: The Marshall Plan's Campaign against Restrictive Business Practices in France 1949 - 1953' [1996] Business and Economic History 267.
[68] Barry E Hawk and Laraine L Laudati, 'Antitrust Federalism in the United States and Decentralisation of Competition Law Enforcement in the European Union' [1996] Fordham International Law Journal 18, 21.
[69] Katja Seidel, 'DG IV and the Origins of a Supranational Competition Policy: Establishing an economic Constitution for Europe' in Wolfram Kaiser, Brigitte Leucht and Morten Rasmussen (eds), *The History of the European Union: Origins of a trans- and Supranational polity 1950-72* (UACES Contemporary European Studies Series, Routledge 2009) 130.
[70] It should be noted that, in early 1950s, various draft laws had been presented before Italian Parliament. One of them was drafted by well know Italian competition lawyer, Tullio Ascarelli which was in the same line with Franz Böhm's ideas – the person and a leader of Freiburg School who drafted German Competition Law 1957. Amato (n 65) 42 – 43; Clifford A Jones, 'Foundation of Competition Policy in the EU and USA: Conflict, Convergence and Beyond' in Hanns Ullrich (ed) *The Evolution of European Competition Law: Whose Regulation, Which Competition?* (Edward Elgar 2006) 26-27.

At the European level, the well-known Schuman declaration laid the roots of competition regime. In the early 1950s, the European integration process was seen as 'the real way to solve the German problem'.[71] The failure of the European Defence Community Treaty and the European Political Community Treaty to get approval from the French National Assembly in 1954[72] showed that integration in these areas was difficult. As Gerber argued, 'if there was to be a new Europe, it would have to be built on economic cooperation and integration'.[73] This shift, from political and defence policies toward the economic integration, coincided with the interest of founding members of the ECSC. At that time, economies of these countries were recovering from the legacies of the Second World War and the idea of a common market was perceived 'as necessary for rapid economic growth'.[74] Furthermore, economic integration was seen as a rapprochement with the United States as a 'means of regaining independence, power and status *vis – à – vis* the country that had assumed world leadership in the wake of two worlds wars'.[75]

2.3. Evolution of the Competition Law in the ECSC and the EC/EU

2.3.1. The Origins and the Nature of Competition Rules in the ECSC

On 9 May 1950, the former French Minister for Foreign Affairs Robert Schuman launched the concept of European integration. Schuman proposed to pool the coal and steel of French and German industries under the supervision of the supranational joint authority in order to regulate this market distorted by trade barriers; cartels influence and price discriminations.[76] Having in mind the period prior to the Second World War, where cartels and monopolies dominated industrial production and limited economic competition,[77] Schuman vaguely hinted the need to rule out cartels arguing that:

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[71] Hannah L Buxbaum, 'German Legal Culture and the Globalisation of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement' [2005] Berkeley Journal of International Law 474, 481.
[72] Simon Duke, *The Elusive Quest for European Security* (Palgrave Macmillan 2000) 12 – 37.
[73] Gerber, 'The Transformation of European Community Competition Law' (n 15) 101.
[74] ibid, 102.
[75] ibid, 102.
[76] Robert Schuman, 'Declaration of 9th May 1950 delivered by Robert Schuman' (European Issue No 204, 10 May 2011) <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf> accessed on 14 June 2018.
[77] Jeffrey Fear, 'Cartels and Competition: Neither Markets nor Hierarchies', (Working Paper Harvard Business School 07-011, 2006) < https://www.hbs.edu/faculty/Publication%20Files/07-011.pdf> accessed 18 May 2018; Wyatt Wells, *Antitrust and the Formation of the Postwar World* (Columbia Studies in Contemporary American History 2002) 201.

> In contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organisation will ensure the fusion of markets and the expansion of production.[78]

In 1951, the first 6 Member States signed the ECSC Treaty which entered into force in 1952 for 50 years.[79] The ECSC Treaty represented a new type of international institution designed to establish and maintain a common and competitive market for coal and steel.[80] For the first time, the ECSC Treaty included provisions on competition law that had no precedent in Europe. Robert Bowie, an American Professor of Antitrust Law at Harvard University, drafted competition provisions, which represented a 'fundamental innovation' for Europe.[81] The strong US influence to include competition provisions linked with financial allocation conditionality was strong political leverage.[82] According to a report of the State Department, the ECSC received a 100 million US$ loan conditional, to establish a common market and abolish national barriers that obstruct competition.[83] It gave the competition policy a constitutional cornerstone of reconstructing the post-war economy and subsequently, 'setting in the motion of the European economic integration project'.[84]

However, the US authorities realised that the institutional reconstruction and development in post-war Germany deemed to fail without the German cooperation. A failure of this kind would, therefore, open an opportunity for the ordoliberals[85] to exert their influence in drafting competition

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[78] Robert Schuman, 'Declaration of 9th May 1950 delivered by Robert Schuman' (n 76).
[79] ECSC Treaty, Art 97, with the expiration of the ECSC Treaty in July 2002, coal and steel sectors became subject of the EC market rules, now TFEU.
[80] For a political, economic and legal analyses of the ECSC Treaty see Gerhard Bebr, 'The European Coal and Steel Community: a Political and Legal Innovation' [1953] The Yale Law Journal 1, Stephen Martin, 'Coal and Steel: First Steps in European Market Integration' (February 2004) <https://krannert.purdue.edu/faculty/smartin/vita/EI5060D.pdf> accessed 23 July 2019.
[81] Jean Monnet, *Memoirs* (Richard Mayne tr, Doubleday & Company 1978) 352-353.
[82] Angela Wigger, 'Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime' (PhD Thesis, Vrije Universiteit 2008) 116 – 131; Hubert Buch – Hansen and Angela Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (Routledge/RIPE Studies in Global Political Economy 2011) 31-35.
[83] Wells (n 77) 202.
[84] Wigger, 'Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime' (n 82) 101.
[85] Ordoliberalism, often call as the Freiburg School, is an intellectual development composed by lawyers and economist, emerged during 1920s and 1930s with a clear vision: to establish order after the political turmoil in the time of the Weimar Republic, the Great Depression and latter, the excess of the Nazi Regime. Their central concept 'economic constitution' consisted on the formal and informal institution framework in order to protect economic

rules and shaping the competition model in Germany and later at European level.[86] As Harding and Joshua argue, the German competition model 'evolved into European norm, travelling first to the EC and then in due course back to other national systems from there'.[87]

Articles 1 and 2 of the ECSC Treaty set out the objectives and the Community had the task 'to contribute, in harmony with the general economy of the Member States and through the establishment of a common market [...], to economic expansion, growth of employment and a rising standard of living in the Member States'. The duties of the Community institutions, as set out in Article 3, were as follows: i) to ensure an orderly supply to the common market; ii) to ensure the establishment of the lowest prices under certain conditions; iii) to promote improvement of working conditions and standard of living for the workers; iv) to promote the expansion and modernisation of production and the rational use of raw materials available within the Community; and v) to promote international trade in those products. Article 4 continued by listing the following practices as incompatible with the common market for coal and steel and, accordingly, to 'be abolished and prohibited' within the Community:

> a) import and export duties, or charges having equivalent effect, and quantitative restrictions on the movement of products
> b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates

liberty and competition from state interference and accumulation of powers by cartels. For more on Ordoliberalism, their intellectual discussion see: Walter Eucken, *The Foundation of Economics: History and Theory in the Analysis of Economic Reality* (T W Hutchinson tr, Springer-Verlag 1992); Heinz Rieter and Matthias Schmolz, 'The Ideas of German Ordoliberalism 1938-45: Pointing the Way to a new Economic Order' *The European Journal of Economic Thought* [1993] 87; Nils Goldschmit, 'Alfred Müller and Ludwig Erhard: Social Market Liberalism' (Working Paper No 04/11, Freiburg Discussion Papers on Constitutional Economics 2004); Viktor J Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism' (Working Paper No 04/11, Freiburg Discussion Papers on Constitutional Economics No 04/11, 2004); David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Comparative Law and the 'New' Europe' [1994] American Journal of Comparative Law 25.

[86] Brigitte Leucht, 'Transatlantic Policy Networks in the creation of the first European anti – trust Law: Mediating between American anti-trust and German ordo-liberalism' in Wolfram Kaiser, Brigitte Leucht and Morten Rasmussen (eds), *The History of the European Union: Origins of a trans- and Supranational polity 1950-72* (UACES Contemporary European Studies Series, Routledge 2009) 68; Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 263 – 265. Recently, some commentators have challenged the ordoliberalism influence in EU competition law as exaggerated; myth or theoretically unconvincing. For more on this issue see Pinar Akman and Hussein Kassim, 'Myths and Myth-Making in the European Union: The Institutionalisation and Interpretation of EU Competition Policy' [2010] Journal of Common Market Studies 111; Pinar Akman, 'Searching for the Long-Lost Soul of Article 82EC' [2009] Oxford Journal of Legal Studies 267; Yannis Karagiannis, 'The Origins of European Competition Policy: Redistributive versus Ideational Explanations' [2013] Journal of European Public Policy 776.

[87] Harding and Joshua (n 59) 99.

and conditions, and measures or practices which interfere with the purchaser's free choice of supplier

c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever

d) restrictive practices which tend towards the sharing or exploiting of markets.

Article 5 referred to the protection of competition in Article 4 (d) stipulating positive obligation upon the institutions of the Community 'to ensure the establishment, maintenance and observance of normal competitive conditions and exert a direct influence upon the production or upon the market only when circumstances so require'.

Articles 65 and 66 of the ECSC Treaty contained a detailed legislative provision for the enforcement of the restrictive practices that tend towards the sharing or exploiting of markets.[88] Article 65 of the ECSC Treaty drafted in line with *per se* prohibition of the US Sherman Act and the French proposal, in the first paragraph prohibited all agreement among enterprises, all decisions of associations of enterprises, and all concerted practices that would tend, directly or indirectly, to prevent, restrict or impede the normal operation of competition within the common market, particularly through the prices fixes or influence; restriction of production, technical development and allocation of markets, products or sources of supply. Any agreement or decision prohibited shall be automatically void and cannot be invoked before any court of the Member States.[89] However, upon the High Authority authorisation, enterprises may come to a mutual agreement to specialise in the production or be engaged in joint buying and selling if the High Authority finds that: i) such specialisation or joint buying and selling contributes substantially to the improvement in the production or marketing of the products; ii) such agreement is essential to achieve the afore-mentioned effects; and iii) no susceptible concern exists that enterprises will either influence prices or control the production or marketing of the products within the common market.[90] According to Article 65 (5) of the ECSC Treaty, the High Authority may pronounce fines and daily penalty payments against enterprises that have concluded an agreement which is automatically void, or have obtained authorisation through false information or the object of agreement is to restrict the production, technical development or investment.

[88] John Gillingham, *Coal, Steel, and Rebirth of Europe, 1945 -1955: The Germans and French from Ruhr Conflict to Economic Community* (Cambridge University Press) 283.
[89] ECSC Treaty, Art 65 (4).
[90] ECSC Treaty, Art 65 (2).

Article 66 of the ECSC Treaty reflected the German position over the distrust of big companies.[91] According to Walter Eucken, a leading scholar of ordoliberalism, not only the abuses of economic power had to be prosecuted but as well excessive economic power in itself because it will always try to get hold of political power.[92] Article 66 of the ECSC Treaty is the longest provision in the Treaty and its length was proportional to the significance of economic power. According to Article 66 (1) of the ECSC Treaty, any transaction bringing effect directly or indirectly to a concentration, such as mergers and acquisitions, and the prohibition of restrictive business practice shall be submitted for prior authorisation to the High Authority. The authorisation was obligatory despite the operation being carried out by individuals or an enterprise or whether it concerns a single product or different products. The High Authority shall grant authorisation if the transaction in question will be found to not be giving the interested individuals or enterprises power: i) to influence, control or restrain production or marketing and ii) infringe rules of competition rules.[93] However, an exemption from High Authority authorisation has been made only for some classes of transactions, due to the size of assets taken together with the nature of concentration.[94] Consequently, many followers of ordoliberalism 'tended to view economic concentrations with suspicion' and 'sought an economy composed to the extent possible of small and medium-sized firms and thus a society with a minimum of 'big business'.[95]

The ECSC began operating in August 1952. Monnet was the first President of the High Authority. Looking at the power of the High Authority, the expectations against cartels were too high. By mid-1952, the High Authority scored an important success, persuading the German government to break GEORG into three separate entities and forced several smaller cartels to reorganise themselves in compliance with the ECSC Treaty provision.[96] However, in time, ECSC competition rules were hardly enforced for two main reasons. Firstly, as Gerber argued, the High Authority 'did not prohibit any concentrations, and its enforcement of other provisions was quite

[91] Hansen and Wigger (n 82) 47.
[92] ibid 35.
[93] ECSC Treaty, Art 66 (2).
[94] ECSC Treaty, Art 66 (3).
[95] Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 240 – 241.
[96] GEORG was a cartel composed by six different sales organizations for Ruhr coal. In April 1954, the vice-president of the HA, Etzil, announced in the press conference that GEORG had been found to violate the Treaty provision and therefore, would have to be reformed or abolished. Henry L Mason, *The European Coal and Steel Community: Experiment in Supranationalism* (Springer Science + Business Media Dordrecht 1955) 75-79.

limited'.[97] The High Authority approached a 'policy' with no enforcement mechanism. Entrusted with the task to review concentrations in compliance with ECSC Treaty provisions,[98] as of 1958, of more than a hundred agreements submitted for review, the High Authority did not prohibit any of them.[99] The second reason relates to the interference of the Member States in the High Authority's decision. In his working paper based on archival research, Warzoulet revealed several examples of Member States' interference and bargaining.[100] For instance, in 1959, the German Minister of Economics, Ludwig Erhard, sent a letter to the French Minister of Industry aiming to persuade him to protect a concentration in the German steel sector. Another example is the case where the French Member of High Authority, assumed to act in the Community's interest but who neither solicited nor accepted instructions from their government (Art 9 of the ECSC Treaty), informed regularly the French government on the sensitive cases.[101]

In conclusion, the ECSC experience left three legacies for the European competition policy. Firstly, it included competition rules in a Treaty designed to start a process of European integration through the opening of markets. Competition regimes were among the key objectives to be achieved in order to create a common market. Secondly, the ECSC Treaty laid down a formally strong institutional framework in the paper, but the experience of the High Authority revealed weak implementation. Thirdly, the ECSC Treaty competition provisions served as a blueprint for the EEC Treaty.

2.3.2. Origin and Nature of Competition Rules in the EEC Treaty

During the intergovernmental deliberations of the Spaak report published in April 1956, competition provisions took a particular interest. Among other issues, the Spaak report addressed the problem of a monopolist that would hamper the common market, and provided actions to be

[97] Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 342.
[98] ECSC Treaty, Art 66.
[99] Hans A Schmitt, 'The European Coal and Steel Community: Operations of the First European Antitrust Law, 1952 – 1958' 1964 Business History Review 102; Gillingham (n 88) 340.
[100] Laurent Warlouzet, 'The rise of European competition policy, 1950–1991: A cross-disciplinary survey of a contested policy sphere (2010) EUI Working Paper RSCAS 2010/80 <http://cadmus.eui.eu/bitstream/handle/1814/14694/RSCAS_2010_80.pdf?sequence=1&isAllowed=y> accessed 12 June 2018, 7.
[101] ibid 7 -8.

taken for the establishment of a common market.[102] Representatives of France and Germany had different attitudes on competition law based on their history and society.[103] In Germany, the economic order was based on the concept of the social market economy and Germany was concerned more with the creation of a common market that would be in the same vein with the German ordoliberalism philosophy based on the principles of a market economy and a liberal trade policy. Whereas in France, the state played a more active role through the 'Planning Program', a program for the reconstruction of France after the Second World War. Such a 'Planning Program' was in line with the economic tradition of France build on the political direction of economic policies. Consequently, the French government proposed a competition policy based on the abuse principle. Furthermore, having in mind the failure of the High Authority, they proposed a weak enforcement authority. The German government, influenced by ordoliberalism philosophy, took the reverse position, insisting on *per se* prohibition and strong enforcement authority. In the end, a compromise was reached to include rules to prevent competition in order that the future common market would not be distorted.[104]

On 25 March 1957, six founding Members of the ECSC signed a treaty instituting a European Economic Community (the EEC Treaty) which entered into force on 1 January 1958. Accordingly, the EEC Treaty established a common market and laid down the commitment to progressively adjust economic policies of the founding members with the aim 'to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States'.[105] Establishing a common market and adjusting economic policies could not be achieved without establishing a system where competition is not distorted in the common market[106] and the obligation of the Member States to approximate its

[102] Hans von der Groeben, *Policy on Competition in the EEC* (Nr. 7/8, Secretariat of the Commission of the European Economic Community 1961) 5; Akman (n 86) 278-283.
[103] Ivo Maes, 'On the Origins of the Franco – German EMU Controversies' [2004] European Journal of Law and Economics 21, 22.
[104] Paul-Henri Spaak, 'Intergovernmental Committee on European Integration. The Brussels Report on the General Common Market (June 1956, Annex, Tittle II, Chapter I, Section I' <http://aei.pitt.edu/995/1/Spaak_report.pdf> accessed on 25 June 2018.
[105] Treaty Establishing the European Economic Community [EEC Treaty] OJ special edition, 1957, Art 2 (hereafter cited as EEC Treaty).
[106] EEC Treaty, Art 3 (f).

domestic legislation to the extent for the functioning of the common market.[107] The competition policy was given a central position in the creation and the functioning of the common market.[108]

The EEC Treaty provisions on competition law were drafted in a broad perspective, and, according to Motta, it was 'difficult to see exactly what the objectives of competition policy were for those who drafted the Treaty of Rome'.[109] The EEC Treaty contained competition rules from Article 85 to Article 94 covering four main areas: restrictive practices (Art. 85); abusive monopolies (Art. 86); state aids (Art-s. 92 – 94) and the possibility to open public undertaking to which Member States grant special rights toward a greater competition (Art. 90). Articles 85 and 86 of the EEC Treaty came to be the most important provisions on the competition regime by having a 'constitutional' function in the sense that they would have to be given content in practice.[110]

Article 85 (1) of the EEC Treaty prohibited any agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, particularly those consisting in: i) the direct or indirect fixing of purchase or selling prices; ii) the limitation or control of production, markets, technical development or investment; iii) market sharing or sharing sources of supplies; iv) application of rules that place one party in the competitive disadvantage; and v) cases where the conclusion of a contract subject to the acceptance by the other party of additional supplies have no connection with the subject of the contract either by their nature or according to commercial usage. Any agreement or decisions prohibited shall be null and void.[111] However, Article 85 (3) of the EEC Treaty laid down the possibility of inapplicability of *per se* prohibition in the cases where cartels and concerted practices contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress. At the same time, Article 85 (3) of the EEC Treaty reserves to users an equal share of profits that neither imposes restrictions on the enterprises nor

[107] EEC Treaty, Art 3 (h).
[108] Claus-Dieter Ehlermann, 'The Contribution of EC Competition Policy to the Single Market' [1992] Common Market Law Review 257; Aydin and Thomas (n 51) 531.
[109] Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 14.
[110] Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 345.
[111] EEC Treaty, Art 85 (2).

enables enterprises to eliminate competition.

On the other hand, Article 86 of the EEC Treaty laid down rules focusing only on the misuse of the dominant position. Accordingly, if the trade between any Member States may be affected by the action of one or more enterprises, aiming to take advantage of the dominant position within the common market or a substantial part of it, such trade shall be considered incompatible with the common market, and, consequently, shall be prohibited. Improper practices with the purpose to abuse with the dominant position may consist in i) the direct or indirect imposition of any inequitable purchase or selling prices; ii) the limitation or control of production, markets, technical development or investment; iii) application of rules that place one party in the competitive disadvantage; and iv) cases where the conclusion of a contract subject to the acceptance by the other party of additional supplies have no connection with the subject of the contract either by their nature or according to commercial usage.

The inclusion of competition laws in the EEC Treaty provided a 'constitutional basis' for the competition regime. Secondary legislation acts of the EEC Treaty or national legislation of Member States could not overrule the Treaty provisions. Furthermore, the socio-economic policies of Member States had to be adjusted with treaty provisions of competition policy, especially price stability and preventing economic fluctuation. This, in turn, provides an instrument of economic integration.[112]

The EEC Treaty has been amended several times - the last amendment occurred in 2007 with the Lisbon Treaty that entered into force on 1 December 2009. The Lisbon Treaty consists of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), both having the same legal effect. Recital 4 TFEU states that the 'removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition'. 'A highly competitive social market economy' is among the objectives of the EU listed in Article 3 of the TEU, whereas, Article 3 (1) (b) TFEU lists among exclusive competence 'establishing of the competition rules necessary for the functioning of the internal market', to put

[112] Wigger, 'Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime' (n 82) 146.

it shortly, only the Union may legislate and adopt legally binding acts. The Member States can legislate only if so empowered by the Union or implement Union acts. The previous formulation of Article 3 (1) (g) of the EC Treaty, referring to 'a system ensuring that competition in the internal market is not distorted', has been relegated to Protocol 27 'on the Internal Market and Competition' attached to the Treaties upon the initiative of France. Following the negotiations leading to the Lisbon Treaty, Nicolas Sarkozy, the French President at the time, declared: 'We have obtained a major reorientation of the objectives of the Union. Competition is no longer an objective of the Union, or an end in itself, but a means to serve the internal market.'[113] The removal does not downgrade the status of competition rules in the EU legal order since, according to Article 51 of the TEU, protocols and annexes shall form an integral part of the Treaty. This position has been maintained as well by the ECJ in the judgment *Konkurrensverket v TeliaSonera Sverige AB*, where, for the first time, the Court of Justice observed that 'Article 3 (3) of the TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon […], is to include a system ensuring that competition is not distorted.'[114] In another judgement, *Commission v Italian Republic*, the ECJ considered again Protocol 27 to be an essential constituent of Article 3 (3) of the TEU.[115]

2.4. Competition Enforcement System: from Centralised toward a Decentralised System

Since the establishment of the ECSC and later the EEC, competition provisions were included to ensure competition in the common market shall not be distorted. That being said, the success in achieving its goal depends on the effective application of the Treaty provision in the

[113] Ben van Rompuy, 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case-law of the EU Courts' (CPI Antitrust Chronicle, December 8, 2011) <https://ssrn.com/abstract=1970081> accessed 22 July 2019, 2.

[114] Judgement of 11 February 2011, *Konkurrensverket v TeliaSonera Sverige AB.*, C-52/09, ECLI:EU:C:2011:83, para 20.

[115] In determining the amount of the infringement, the CJEU emphasized the vital nature of the Treaty rules on competition which are the expression of one of the essential tasks with which the European Union is entrusted. At the time of the Court's assessment of the appropriateness and the amount of the present penalty payment, *that vital nature is apparent from Article 3(3) TEU*, namely the establishment of an internal market, *and from Protocol No 27 on the internal market and competition*, which forms an integral part of the Treaties in accordance with Article 51 TEU, and *states that the internal market includes a system ensuring that competition is not distorted*.' (emphasize added by author).
Judgment of 17 November 2011, Commission v Italian Republic, C-496/09, ECLI:EU:C:2011:740, para 60.

Member States. As stated by the Commission, 'laws do not serve their full purpose unless they are properly applied and enforced'.[116] Therefore, an enforcement mechanism to enforce competition provision is essential; otherwise, its objective risks not to be attained. The most appropriate goal of antitrust enforcement is to deter the violations of competition rules and to punish the perpetrators through criminal penalties, civil or administrative penalties, and to some extent private damages.[117] The second goal of antitrust enforcement is the corrective justice. Pursuant to the corrective justice, the injured party who has suffered the consequences of the violation is entitled to request compensation for the damage suffered.[118]

Comparing the enforcement mechanism of competition rules, the ECSC and the EEC Treaties opted for different types of enforcement regime. The ECSC Treaty was a *traité-loi,*[119] specifying to the proper extent the regulatory content of the enforcement regime. The decision-making power was conferred to a supranational institution named the High Authority, a formally independent institution from the Member State governments which echoed the ordoliberalism notion of a strong state controlling the market. The High Authority enjoyed a far-reaching power, empowered to prohibit all types of agreements that prevented, restricted or impeded the normal operation of the common market.[120] High Authority shall authorise specialisation agreements or joint-buying or joint-selling agreements regarding particular products if: i) makes a substantial improvement in the production or distribution of those products; ii) is essential to achieve these results and is not more restrictive than is necessary for that purpose; and iii) such agreements do not provide to the undertakings concerned the power to determine the prices, control or restrict the production.[121] According to Article 58 of the ECSC Treaty, whenever the High Authority deems that the Community faces economic crises, the Authority was entrusted with the right to differentiate between harmful and harmless commercial agreements by establishing a system of production quotas. Moreover, the High Authority was authorised to assess the legal character of

[116] Commission, 'Communication from the Commission: A Europe of Results – Applying Community Law' (Communication) COM (2007) 502 final, 2.
[117] Wils, 'Should Private Enforcement be Encouraged in Europe?' (n 19) 478.
[118] ibid 479; Komninos, 'Relationship between Public and Private Enforcement: *quod Dei Deo*, *quod Caesaris Caesari*' (n 5) 141.
[119] Simon Bulmer, 'Institutions and Policy Change in the European Communities: The Case of Merger Control' [1994] Comparative and International Administration 423, 427.
[120] ECSC Treaty, Art 65.
[121] ECSC Treaty, Art 65 (2).

the concentrations declaring them unlawful or order the separation of the enterprises or assets wrongly concentrated or the cessation of common control or to re-establish the independent operation of the enterprises, and to restore normal conditions of competition.[122]

In contrast to the ECSC Treaty, the Treaty of Rome was *traité-cadre.*[123] Neither did the EEC Treaty elaborate on how competition provisions will be applied nor dit it foresee the institutional framework responsible for the development of the enforcement system. Instead, the EEC Treaty referred to the necessity of a secondary legislation to implement these rules.[124] According to Article 87 of the EEC Treaty, the Commission, within three years after the entry into force of the EEC Treaty, had to propose a Regulation or Directives to the Council to provide a framework to implement Articles 85 and 86 of the EEC Treaty. Until the enactment of the Regulation or Directives from the Council, the national competition law of the Member States along with Article 85 (3) of the EEC Treaty would apply for any misunderstanding and any disadvantage taken of a dominant position in the Common market.[125]

Three years later, the Council adopted Regulation 17, which marked an important milestone in the development of the European competition policy. Its enactment has been described as 'one of the most important ever enacted'.[126] Regulation 17 aimed to 'establish a system ensuring that competition shall not be distorted in the common market' and be applied in 'a uniform manner in the Member State'.[127] To achieve such objective, Regulation 17 designed an *ex ante* administrative enforcement system where the supranational institution, the Commission, had exclusive power to deal with issues of the enforcement system of competition provisions.[128] Member States restricted their competences in the area of competition enforcement in favour of the Commission. Each Member State had designed an NCA to ensure its enforcement of national

[122] ECSC Treaty, Art 66 (5).
[123] Bulmer (n 119) 427.
[124] Laurent Warlouzet, 'The Centralisation of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control (1956-1991)' [2016] Journal of Common Market Studies 725, 729-730.
[125] EEC Treaty, Art 88.
[126] Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' [2002] West European Politics 148, 164.
[127] Regulation 17, Rec 6.
[128] Claus – Dieter Ehlermann, 'The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) EUI Working Paper RSC 2000/17 <http://cadmus.eui.eu/bitstream/handle/1814/1657/00_17.pdf;sequence=1> accessed on 18 July 2018, 5-8.

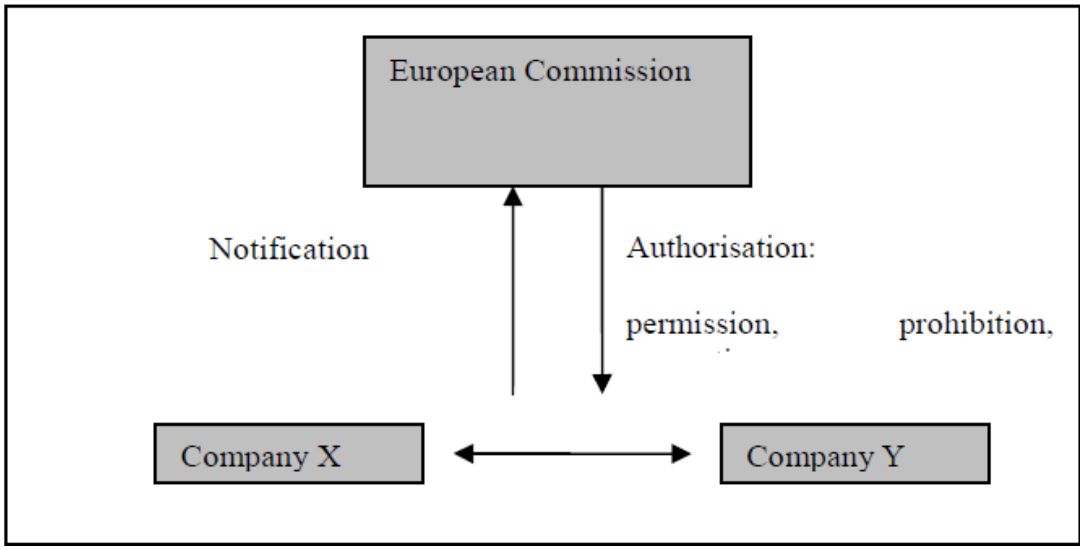
competition law. Articles 85 (1) and 86 of the EEC Treaty empowered NCAs to apply competition rules as long as the Commission has not initiated any procedure under Article 2 'Negative Clearance'; Article 3 'Termination of infringements' and Article 6 'Decision pursuant to Article 85 (3)'.[129] While the right of the NCAs was limited, Regulation 17 excluded national courts from the application of Articles 85 and 87. In the case *Postbank v Commission*, the Court of First Instance (General Court renamed after Lisbon Treaty) explicitly emphasises that:

> Cooperation between the Commission and the national courts falls outside the scope of Regulation No 17. That regulation governs only relations between the Commission and the authorities of the Member States referred to in Article 88 of the Treaty, which exercise powers in parallel with those of the Commission.[130]

Regulation 17 designed an enforcement regime characterised by a centralised system where 'the Commission enjoyed a *de facto,* and, in some instances, notably the granting of individual exemptions under Article 81 (3) of the EC Treaty, a *de jure* enforcement monopoly, while [...] the role of national legal systems and courts was marginalised'.[131] Companies, prior to concluding a commercial agreement, had to announce their plans to the Commission's Directorate General Competition, who reviewed the notification in an administrative manner, and controlled whether the intended deal had the object or the effect of 'prevention, restriction or distortion of competition within the common market' as spelled out in Article 81 (1) of EC Treaty. The College of Commission could either accept or prohibit the deal or grant exemptions based on the conditions laid down in Article 81 (3) of the EC Treaty.[132] The latter could be granted on the case-by-case basis (individual block exemption) or could be in a form of block exemptions specifying the types of agreements considered as anti-competitive (Figure 1).

[129] Regulation 17, Art 9.
[130] Judgment of 18 September 1996, T-353/94, *Postbank v Commission*, ECLI:EU:T:1996:119, para 66.
[131] Assimakis P Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap' [2006] Competition law Review 5.
[132] Angela Wigger, 'The Political Role of Transnational Experts in Shaping EU Competition Policy: Towards A Pan-European System of Private Enforcement' [2009] Legisprudence 251, 259.

Figure 1: The Centralised Administrative *ex ante* Notification Regime of Regulation 17



Source: Wigger (n 132) 259.

The Commission was in the centre of the enforcement system with a wide power to enforce competition provisions.[133] According to Komninos, the adoption of a centralised system 'was a conscious choice to construct a European competition law enforcement system'.[134] The centralised system was well-suited for a Community with 6 Members States where the enforcement of the competition law was inexistent. Wish, a prominent author in competition law, argues that 'at that time, competition law was little known or understood in Europe, and it seemed natural that the complex issues raised by Article 81 (3) of the EC Treaty should be decided upon 'at the centre' rather than in the member states themselves'.[135] According to Forrester and Norall:

> The Commission's preoccupation [with centralizing enforcement in its own hands] was understandable. The principles embodied in the competition rules were novel and almost revolutionary. They required fundamental changes in deeply ingrained habits of thought and patterns of economic conduct. The officials of the new competition Directorate - General did not trust businessmen, lawyers and judges to apply the rules correctly (or even as the case might be, in good faith).[136]

[133] Akman and Kassim (n 86) 115 – 116.
[134] Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap' (n 131) 6.
[135] Richard Wish, 'The Enforceability of Agreements under E.C. and U.K. Competition Law' in Francis D Rose (ed), *Lex Mercatoria: Essays on International Commercial Law* in Honour of Francis Reynolds (LLP 2000) 297 - 302.
[136] Ian Forrester and Christopher Norall, 'The Laicisation of Community Law: Self Help and the Rule of Reason: How Competition Law is and could be Applied' [1984] Competition Market Law Review 11, 13.

Several elements contributed in the consolidation of a centralised system that operated for 40 years and framed the Commission as a 'formidable enforcement agency'.[137] Firstly, Article 9 (3) of Regulation 17 required NCAs to cease their own enforcement activities if the Commission began an investigation based on the Treaty provision. Until the enactment of Regulation 17, the NCA had applied competition law provisions. From then on, the NCA was discouraged and did not have incentives for proper enforcement of competition provisions at national level. Secondly, the Commission and its Directorate General IV had the only authority to grant block exemptions under Article 85 (3) oft the EEC Treaty.[138] The Commission had the discretion to decide on the fulfilment of block exemptions conditions. At the same time, the powers conferred upon the Commission eliminated incentives to bring suit in national courts. Thirdly, the notification procedure provided a central role to the Commission. According to Article 4 (1) of Regulation 17, the Commission must be notified for the agreements, decisions and concerted practice violating Article 101 TFEU. Fourthly, Articles 3, 15 and 16 empowered the Commission, where it finds that the infringement of Articles 81 and 82 of the EC Treaty, to require the undertakings concerned to bring such infringement to an end and to impose periodic penalty payment and fines up to ten percent of the company's annual turnover.[139] Finally, Regulation 17 gave to the Commission an extensive investigatory and enforcement powers. Article 14 vested the Commission with the powers to 'undertake all necessary investigations into undertakings and associations of undertakings'. Accordingly, the Commission officials were empowered to enter any premises of undertaking to examine the books and other business records, make copies of them and ask for explanations. The Commission's decisions were reviewable only by the CJEU which could cancel, reduce or increase fines or penalties imposed by Commission.[140]

For about forty years the enforcement system did not change. With the fall of the Soviet Union, the European Union entered into a new era that necessitated for a revision of the enforcement system of competition law. The desire of Central and East European countries (CEECs) to join the Union, *inter alia*, had an impact on the enforcement mechanism of the competition rules. As the desire of these countries grew, in June 1993, the European Council took

[137] Gerber, 'The Transformation of European Community Competition Law' (n 15) 106.
[138] Regulation 17, Art 9 (1).
[139] Regulation 17, Arts 3, 15 and 16.
[140] Regulation 17, Art 17.

the commitment that 'accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required'.[141] Henceforth, through the enlargement process, candidate countries developed competition laws modelled in line with the EU competition *acquis* and established the enforcement mechanism to ensure effective implementation. The legal basis for aligning domestic competition laws with the EU competition *acquis* was laid down in various accession agreements, named Europe Agreements (EA), between the EU and their Member States and the candidate countries from Central and Eastern Europe.[142] Also, a significant pressure came from the 'Transatlantic competition law group', comprising competition law officials from the United States and Europe and few academicians arguing the need for the Commission to review its discriminatory approach toward the US firms.[143]

As the EU opened the prospect of membership for CEECs, criticism over Regulation 17 flourished in several aspects: the notification requirement for agreements that might violate Article 101 TFEU;[144] the Commission's monopoly on exemptions under Article 101 (3) TFEU;[145] and the necessity to develop a new set of procedural mechanism for the application of the competition law as the workload of the DG Comp would be increased. [146] To address these pressures, a reform on enforcement mechanism was necessary, which might allow more collaboration and co-operation between the Commission and the Member States[147] and to encourage private enforcement litigation.[148]

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[141] European Council, 'Conclusion of the Presidency' (n 34) part 7A (iii).
[142] Andre Fiebig, 'The Introduction of European Union Competition Law and Policy in the new Member States' [2003] Loyola University Chicago International Law Review 61; Frank Emmert, 'Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice' [2004] Fordham Journal of International Law 642; Jens Hölscher and Johannes Stephan, 'Competition Policy in Central Eastern Europe in the Light of EU Accession' [2004] Journal of Common Market Studies 321.
[143] David J Gerber, 'Two Forms of Modernisation in European Competition Law' [2008] Fordham International Law Journal 1235, 1240; Wigger (n 132) 266 – 271.
[144] David J Gerber, 'Modernising European Competition Law: A Development Perspective' [2001] European Competition Law Review 122, 122-123.
[145] Jürgen Basedow, 'The Modernisation of European Competition Law: A Story of Unfinished Concepts' [2007] Texas International Law Review 429, 430.
[146] Claus – Dieter Ehlermann, 'Implementation of EC Competition Law by National Anti-Trust Authorities' [1996] European Competition Law Review 88, 89.
[147] Hawk and Laudati (n 68) 18.
[148] Ehlermann (n 146) 89.

The formal process of modernisation of competition regime started in 1999 with the publication of the Commission's White Paper on the modernisation of the implementation rules of Articles 101 and 102 TFEU[149] which had 'a marginal impact on the operation of the EC competition rules'.[150] The White Paper triggered a broad debate on the future enforcement system of the competition law and identified two major deficiencies.[151] Firstly, the Commission pointed out that the current system was not effective and the Commission's monopoly on the application of Article 101 (3) TFEU was a major obstacle in the application of the competition law by the national court and NCAs.[152] Secondly, the notification system established by Regulation 17 imposes an excessive burden of work and expense on companies.[153] According to Claus–Dieter Ehlermann, the White Paper is 'the most important policy paper the Commission has ever published in more than 40 years of the EC Competition policy' and represents 'a legal and cultural revolution in proposing the fundamental reorganisation of the existing responsibilities between the Commission's national anti-trust authorities and national courts'.[154]

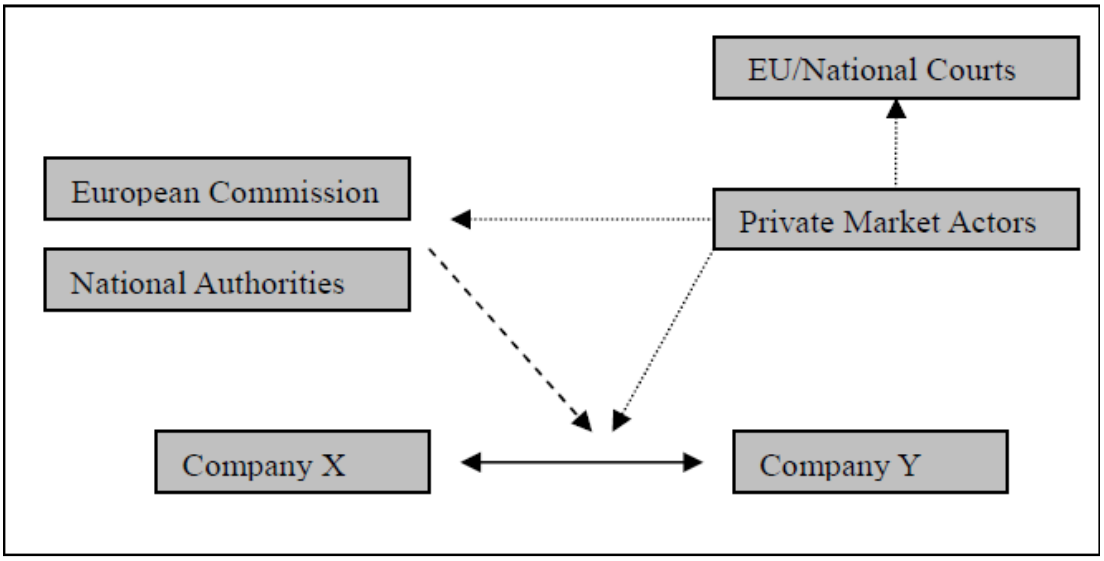
Concluding, the need to replace the centralised system with a directly applicable system in which NCAs and national courts of the Member States have the power to apply fully Articles 101 and 102 TFEU, all Member States endorsed the White Paper suggestions. Soon, the White Paper evolved in a draft regulation and became Regulation 1/2003 which entered into force on 1 May 2004, the same day as the EU expanded toward Central and East European countries. As is apparent from Recitals 2 to 4, the Regulation 1/2003 aimed to address the challenges of an integrated market and enlarged Union by ensuring effective supervision of the competition rules and simplifying the administration to the greatest possible extent. Regulation 1/2003 modernised the procedural rules of antitrust enforcement and replaced the centralised system of authorisation

[149] Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (n 18).
[150] Alan Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely-Thank You! Part One: Regulation 1 and the Notification Burden' [2003] European Competition Law Review 604, 604.
[151] Jürgen Basedow, 'Who will Protect Competition in Europe? From Central Enforcement to Authority Network and Private Litigation' [2001] European Business Organisation Law Review 443.
[152] Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (n 18) 11.
[153] ibid 29.
[154] Claus-Dieter Ehlermann, 'The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) EUI Working Paper RCS 2000/17 <http://cadmus.eui.eu/bitstream/handle/1814/1657/00_17.pdf;sequence=1> accessed 16 July 2018, 3.

and notification established by Regulation 17 with a decentralised system of direct applicability of the EU competition rules by national courts.[155]

Regulation 1/2003 introduced four novelties, which were portrayed as 'a revolution in the way competition rules are enforced in the European Union'.[156] Firstly, it abolished the notification system established by Regulation 17 and now follows the US style of the enforcement system, *ex-post* model. With the new model, business community are obliged to recognise themselves with competition rules as all 'agreements, decisions and concerted practices caught by Article 101 (1) TFEU which satisfy the conditions of Article 101 (3) TFEU shall not be prohibited, no prior decision to that effect being required'.[157] Figure 3 explains the decentralised *ex-post* private enforcement regime established by Regulation 1/2003.

Figure 2: The Decentralised *ex post* Private Enforcement Regime of Regulation 1/2003



Source: Wigger (n 132) 261.

[155] Bogdan M Chirițoiu, 'Convergence Within the European Competition Network: Legislative Harmonisation and Enforcement Priorities' in Adriana Almășan and Peter Whelan (eds), *The Consisten Application of EU Competition Law: Substantive and Procedural Challenges'* (Springer 2017) 3.
[156] Mario Monti, 'The EU gets new competition powers for the 21st century' [2004] Competition Policy Newsletter Special Edition 1.
[157] Regulation 1/2003, Art 1 (2).

Secondly, Regulation 1/2003 relinquished the Commission as a primary enforcement mechanism of the EC competition rules. Recital 6 of Regulation 1/2003 states that 'to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application'. Article 5 of Regulation 1/2003 gives to NCAs of Member States the power to apply Articles 101 and 102 TFEU in individual cases. For this purpose, NCAs may take the following decisions: i) requiring the termination of an infringement; ii) ordering interim measures; iii) accepting commitments; and iv) imposing fines and periodic penalty payments.

For Member States that did not have NCAs, Articles 35 of Regulation 1/2003 required the designation of competition authorities or authorities responsible for the application of Articles 101 and 102 TFEU. The designed competition authorities may include courts and must have the right to participate as a defendant or respondent in a judicial proceeding against a decision that the authority has taken in relation to Articles 101 and/or Article 102 TFEU.[158] Also, Article 6 of Regulation 1/2003 empowers national courts to apply fully Articles 101 and 102 TFEU. To ensure coherent application of competition rules in an enlarged Union, Article 11 of Regulation 1/2003 introduced the need for cooperation between the Commission and the competition authorities of the Member States. 'Modernisation Package' provided a number of coordination and cooperation mechanism for national courts, NCAs and the Commission.[159]

A third characteristic is that the powers of investigation for the Commission have been increased. In contrast to the powers of the Commission stipulated in Articles 11, 12 and 14 of Regulation 17, Regulation 1/2003 introduced three main changes enhancing the powers of the

[158] Regulation 1/2003, read jointly Arts 11 (6) and 35.

[159] 'Modernisation package' is a series of documents completing the landmark modernisation of the European Union's antitrust enforcement rules and procedures. It comprises the following documents: Commission Regulation 773/2004 of 7 April 2004 Relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18; Commission Notice on Cooperation Within the Network of Competition Authorities [2004] OJ C 101/43; Commission Notice on the Co-operation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC [2004] OJ C 101/54; Commission Notice on the Handling of Complaints by the Commission Under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/65; Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters) [2004] OJC 101/78; Commission Notice - Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81; Communication from the Commission - Notice - Guidelines on the Application of Article 81(3) of the Treaty, [2004] OJ C 101/97.

Commission. Articles 20 (7) - (8) and 21 (3) of Regulation 1/2003 codify rules related to obtaining judicial orders at the national level. These provisions clarify the position of national judges in cases dealing with competition law and the powers given to them. Also, Article 21 Regulation 1/2003 empowers the Commission, subject to judicial authorisation, to conduct inspections even of an individual home. Pursuant to Articles 23 and 24, fines and periodic penalties were strongly increased compared with Regulation 17.

Finally, for the first time, Regulation 1/2003 introduced the possibility for individuals to seek and obtain relief before national courts. The legal literature identifies two application modalities in which competition rules can be used in the civil courts.[160] Prior to Regulation 1/2003, private enforcement was used mainly as a 'shield', a defence against actual or potential contractual claims for performance or damages by the other side for the harm already done. The use of Articles 101 and 102 TFEU as a 'shield' did not lead to compensation and often was invoked by the participants thereof, not by the victims.[161] Its legal basis stemmed either from Article 101 (2) TFEU stipulating that 'any agreements [...] prohibited pursuant to this Article shall be automatically void' or the CJEU decision which held that 'as the prohibitions of Articles 81 (1) and 82 of the EC Treaty tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must be regarded'.[162] On the other hand, Article 6 of Regulation 1/2003 providing that 'national court shall have the power to apply Articles 81 and 82 of the EC Treaty' opened the opportunity to use both Article 101 and 102 TFEU as a 'sword'. Recital 7 of Regulation 1/2003 recognises the importance of national courts in the enforcement of the EU competition rules stating that: 'When deciding disputes between private individuals, they protect the subjective rights under the Community law, for example by awarding damages to the victims of infringements'. Thus, Articles 101 and 102 TFEU may be used as a 'sword', on the basis for claims for injunctive relief, including interim

[160] Komninos, *EC Private Antitrust Enforcement: Decentralised Applications of EC Competition law by National Courts* (n 2) 2; Francis G Jacobs and Thomas Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 189; Wouter P J Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' [2017] World Competition 3, 4.
[161] Jacobs and Deisenhofer (n 160) 190.
[162] Judgment of 30 January 1974, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior,* C-127/73, ECLI:EU:C:1974:6*,* para 16.

relief and right to damages in order to compensate and/or put an end to the harms caused by the infringements. According to Jacobs and Deisenhofer the use of Articles 101 and 102 TFEU as a 'sword' may: i) lead to full compensation for the harm caused; ii) have a prevent deterrent effects on the undertakings; iii) prevent an anti-competitive behaviour at the early stages; and iv) most importantly, if it is publicised, to a better understanding and clarification of the competition law.[163]

The Commission's first review of Regulation 1/2003 suggested as a success the decentralisation of the enforcement system. The report states that 'work sharing between the enforcers in the network has generally been unproblematic' and the enforcement of the EU competition rules has been increased.[164] However, despite the adoption of the Regulation 1/2003 and the possibility of private enforcement, a determinant role in the promotion and safeguarding of the private enforcement is attributed to the CJEU. The following section discusses the role of the CJEU in developing and codifying private enforcement in the European Union.

2.5. CJEU as a Promoter and Safeguard of Private Enforcement

The CJEU is attributed an important role as an initiator and actor in determining the current shape of the EU private enforcement of competition rules. The ability to use Articles 101 and 102 as a 'sword' came not as a single decision of the CJEU but evolved gradually from the principles of direct effects[165] and effectiveness.[166] The CJEU laid down the minimum standards for the application of competition law by the national courts and developed the general principles of the entitlement of damages.[167] In the first seminal case *Van Gend en Loos*, the ECJ held that the Community Law not only imposes obligations on individuals but it also intended to confer rights upon the individuals to rely on the proceedings before the national law.[168] Thus, the CJEU viewed private enforcement of the Community (EU) law as complementary to the public enforcement and,

[163] ibid 190.
[164] Commission, 'Communication from the Commission to the European Parliament and the Council: Report on the functioning of the Regulation 1/2003' (Communication) COM (2009) 206 final, paras 24-25.
[165] *Van Gend en Loos v Administratie der Belastingen* (n 50); Judgment of 4 December 1974, *Yvonne van Duyn v Home Office*, C-41/74, ECLI:EU:C:1974:133.
[166] Judgment of 16 December 1976, *Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland,* C-33/76, ECLI:EU:C:1976:188.
[167] Georg Berrisch, Eve Jordan and Rocio Salvador Roldan, 'E.U. Competition and Private Actions for Damages: The Symposium on European Competition Law' [2004] Northwestern Journal of International Law and Business 585, 589.
[168] *Van Gend en Loos v Administratie der Belastingen* (n 50).

at the same time, laid down the possibility of individuals to become enforcement actors for the benefit of the EU Law.[169] One year later, in *Costa v ENEL* case the ECJ established the principle of supremacy of the Community law over the Member States law.[170] In subsequent cases, the ECJ held the obligation of national courts to interpret the national law in the light of the requirements of Community law 'in so far as it is given discretion to do so under national law'[171] and set aside any national rule that infringes Community law.[172] In the *BRT v Sabam* case, the ECJ clarified that Articles 85 (1) and 86 EEC Treaty [Arts 101 (1) and 102 TFEU] produce direct effects between individuals, and these Articles create direct rights for individuals concerned which the national courts must safeguard.[173]

While the ECJ set out the minimum standard for the application of competition rules by the national courts, the issue of damages remained unclear whether it was a subject of national procedural autonomy or there existed an EU law right to damages which somehow flows from the direct effects of Article 101 (1) TFEU. In contrast to the nullity expressively mentioned in Article 101 (2) TFEU, compensation, as a remedy for contracting parties or third parties for loss suffered as a result of an infringement of Articles 101 and 102 TFEU, was not expressively mentioned.[174] The lack of any reference to damages for infringement of the EU competition law incited a traditionalist and integrationist approach to damages.[175] The traditionalist approach represented by the French and German governments supported the idea that damages were a matter of national and procedural autonomy of the Member States.[176] Accordingly, it is upon the national courts to

[169] On the rational and benefits of private enforcement of EU law see Paul Craig, 'Once upon a Time in the West: Direct Effect and the Federalisation of EEC Law' [1992] Oxford Journal of Legal Studies 453.
[170] Judgement of 15 July 1964, *Flaminio Costa v E.N.E.L.,* C-6/64 [1964] ECLI:EU:C:1964:66.
[171] Judgment of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, C-14/83, ECLI:EU:C:1984:153, para 28.
[172] Judgement of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, ECLI:EU:C:1978:49, para 21.
[173] *BRT v SABAM* (n 162) para 16.
[174] Walter van Gerven, 'Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcment of EC Antitrust Law* (Hart Publishing 2003) 57-58.
[175] Assimakis P Komninos, 'Civil Antitrust Remedies between Community and National Law' in Catherine Bernard and Okeoghene Odudu (eds) *The Outer Limits of European Law* (Hart 2009) 378.
[176] Francis G Jacobs, 'Civil Enforcement of EEC Antitrust Law' [1984] Michigan Law Review 1364, 1366.

decide, under their national law, whether compensation can be obtained and, if so, the conditions and the kind of damages applied.[177]

The integrationist approach argued that the principle of liability of private persons for loss and damage caused as a result of the infringement of the EU competition law is inherited in the Treaty.[178] *Francovich* and *Brasserie du Pêcheur* served as a starting point for integrationist. In the *Francovich* judgment, a case concerning the failure of Italy to implement a Directive which sought to guarantee a minimum level of protection to employees of companies which become insolvent, the ECJ articulated the principle of state liability for 'loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty'.[179] *Francovich's* judgment laid down for the first time, that the right of individuals to obtain compensation is directly based on the Community law, not on the national law. In the latter case, *Brasserie du Pêcheur*, the ECJ reaffirmed the principle of state liability to make compensation to parties for infringement of Community law subject to three conditions: i) the rule of law infringed must be intended to confer rights upon individuals; ii) the breach must be sufficiently serious; and iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[180]

Motivated by these cases, Advocate General (A-G) van Gerven, in his opinion in *Banks* case, extended the liability not only vertically but also horizontally in relation to private parties. A-G van Gerven advocated that a general basis established in *Francovich* judgment applies even in cases where individuals infringe the EU law and cause damages to others.[181] He observes that:

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[177] Komninos, 'Civil Antitrust Remedies between Community and National Law' (n 175) 378; Anna Piechota, *The Private Enforcement of Competition Law: Recent Development, Problems and Prospects* (Uniwersytet Jagielloński 2011) 39; Veljko Milutinović, *The 'Right to Damages' Under EU Competition Law: from Courage v. Crehan to the White Paper and Beyond* (Wolters Kluwer 2010) 306 -312.

[178] Komninos, 'Civil Antitrust Remedies between Community and National Law' (n 175) 378 - 379; Piechota (n 177) 39.

[179] Judgement of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic,* joined Cases C – 6/90 and C - 9/90, ECLI:EU:C:1991:428, para 35.

[180] Judgement of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Other,* joined Cases C-46/93 and C-48/93, ECLI:EU:C:1996:79, para 51.

[181] Judgement of 13 April 1994, *H. J. Banks & Co. Ltd v British Coal Corporation,* C-128/92, ECLI:EU:C:1993:860, Opinion of AG Van Gerven delivered on 27 October 1993, para 43.

> The general basis established by the Court in the *Francovich* judgment for State liability also applies where an *individual* infringes a provision of Community law to which he is subject, thereby causing loss and damage to another individual. The situation then falls within the terms stated by the Court in paragraph 31 of the *Francovich* judgment (and even earlier in *Van Gend en Loos* 109), namely breach of a right which an individual derives from an obligation imposed by Community law on another individual. Once again, the full effect of Community law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law — all the more so, evidently, if a directly effective provision of Community law is infringed: in that regard the Court has already pointed out in *Simmenthal* that such provisions are: 'a direct source of […] duties *for all those affected thereby*, whether Member States or individuals, who are parties to legal relationships under Community law.[182]

However, in the final decision, the ECJ did not address the arguments raised by A-G van Gerven.[183] In the aftermath, various academicians supported the idea of a horizontally-extended liability for breaches of the EU law.[184] In his Article, Komninos argues that:

> there was no compelling reason to differentiate between State and individual liability for damage caused by infringement of Community law, since the basis for such liability, which is the principle of [..] effectiveness of Community law, is not affected by the identity of the perpetrator, i.e. whether it is the State or individuals.[185]

The dilemma whether the rights of damages stems from the EU law or it is a matter of national law was finally addressed in the *Courage v Crehan* (2001) and later in *Manfredi* (2005) where ECJ confirmed the constitutional roots of damages actions in the EU law.[186] Besides the confirmation of the EU right to damages deriving as a result of the infringement of the EU competition rules in a number of the recent decision – *Pfleiderer, Otis, Donau Chemie, Kone*, *Cogeco* and *Skanska* - the ECJ consolidated the general principle of national procedural autonomy for individuals claiming damages for a harm suffered in the light of the EU competition law. As various authors have rightly pointed out, the ECJ became an important actor in determining the shape of the EU private enforcement system.[187]

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[182] ibid para 43 (emphasis by the A-G Van Gerven).
[183] Judgement of 13 April 1994, *H. J. Banks & Co. Ltd v British Coal Corporation,* C-128/92, ECLI:EU:C:1994:130
[184] Jones, *Private Enforcement of Antitrust Law in EU, UK and USA* (n 61) 72; Assimakis P Komninos, 'New prospects for private enforcement of EC Competition Law: *Courage v. Crehan* and the Community Rights to Damages' [2002] Common Market Law Review 447, 454.
[185] Komninos, 'New prospects for private enforcement of EC Competition Law: *Courage v. Crehan* and the Community Rights to Damages' (n 184) 454.
[186] Till Schreiber, 'Private Antitrust Litigation in the European Union' [2010] The International Lawyer 1157, 1158
[187] Eddy de Smijter and Denis O'Sullivan, 'The Manfredi Judgment of the ECJ and how it relates to the Commission's Initiative on EC Antitrust Damages Actions' [2006] Competition Policy Newsletter 23; Michele Carpagno, 'Private Enforcement of Competition Law Arrives in Italy: Analyses of the Judgment of the European Court of Justice in

2.5.1. EU Right to Damages for Infringement of Competition Law

As the Member States approached the public enforcement of competition law codified in Regulation 17, the CJEU was the first catalyst in articulating and developing private enforcement. In 1974, in the case *BRT v SABAM,* the ECJ held that both Articles 101 and 102 TFEU produce direct effects between individuals, conferring upon them the direct right to invoke and defend before civil courts.[188] In its decision, the ECJ relied on the settled principles laid down in the *Van Gend en Loos* case,[189] and held that national courts were not only empowered to apply EU competition rules but also entrusted with an obligation to safeguard the individual's right stemming from them. However, in the following years, the lack of clarity seized on the issue of the right conferred upon the individuals in the light of Articles 101 and 102 TFEU and the remedies available to protect them.[190]

The ECJ decided on whether there is any EU right to damages in the case *Courage Ltd v. Crehan* that marked a new 'Euro Tort' along the lines of *Francovich* judgment.[191] The *Courage Ltd v Crehan* case arose as a preliminary procedure in front of the ECJ by the Court of Appeal (England and Wales, Civil Divisions) referring to Article 267 TFEU. The case concerned two leases of a public house concluded for 20 years between Inntrepreneur Estates Ltd – IEL, a company owned in equal shares by Courage and Grand Met and Mr Crehan. According to the agreement, Mr Crehan had to purchase a fixed minimum quantity of beers for resale from the Courage with the same prices sell to all the pubs leased by IEL. The business did not go well, and after two years, Mr Crehan surrounded the lease. Courage brought an action for the recovery from Mr Crehan of the sum of GBP 15.266 for unpaid deliveries of beer. On the other hand, Mr Crehan contested the action arguing that Courage had sold its beers to other pubs at substantially lower prices than those in the price list imposed on IEL tenants subject to a beer tie. He alleged that such price difference reduced profitability and drove him out of business. Mr Crehan contended that the

Joined Cases C-295 – 289/04' [2006] The Competition Law Review 47; Maciej Gac, 'The Influence of CJEU Case-law on the Development of Private Enforcement Doctrine in the Area of Polish and European Competition Law'(The Milestones of Law in the Area of Central Europe, Bratislava, 2014) 739, 740-744.

[188] *BRT v SABAM* (n 162) para 16.

[189] *Van Gend en Loos v Administratie der Belastingen* (n 50).

[190] Alison Jones and Brenda Sufrin, *EU Competition Law: Text. Cases, and Materials* (6th edn, OUP 2016) 1055.

[191] Niamh Dunne, 'Antitrust and the Making of European Tort Law' [2015] Oxford Journal of Legal Studies 1, 3.

beer tie was contrary to Article 85 of the EEC Treaty and counterclaimed for damages. According to the Court of Appeal, the English Law did not allow a party to an illegal agreement to claim damages from the other party.[192] Thus, even if Mr Crehan defence is upheld arguing that agreement was contrary to Article 101 TFEU, English law would bar to claim damages. The Court of Appeal in its previous judgment recognised that Article 101 (1) TFEU intended to protect third parties, whether competitors or consumers, and not parties to the prohibited agreement.[193] What is more, the Court of Appeal pointed out to the practice of the Supreme Court of the United States of America where it had recognised the right to damages if a party to an anti-competitive agreement was in an economically weaker position.[194] Being in this situation, the Court of Appeal persisted for a preliminary ruling procedure asking whether the EU law required the national court to provide remedies for damages to claimant injured by Article 101 TFEU, even where there was a party to a prohibited agreement.

In its ruling, the ECJ re-stressed the importance of Article 101 TFEU as a fundamental provision for the accomplishment of the tasks entrusted to the Community and in particular, the functioning of the internal market.[195] The ECJ reiterated that Articles 101 (1) and 102 TFEU produce direct effects and individuals can rely on a breach of Article 101 (1) TFEU before national courts[196] and emphasises that:

> the full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[197]

The existence of such right, the ECJ argued, 'strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition' so that 'actions for damages before the national courts can

[192] *Courage and Crehan* (n 7) para 11.
[193] Daniel Beard and Alison Jones, 'Co-contractors, damages and Article 81: The ECJ Finally Speaks' [2002] European Competition Law Review 246, 248.
[194] Case, *Penna Life Mufflers Inc.* v *International Parts Corp.* 392 [1968] U.S. 134.
[195] Judgment of 1 June 1999, *Eco Swiss China Time Ltd v Benetton International NV*, C-126/97, ECLI:EU:C:1999:269, para 36.
[196] *Courage and Crehan* (n 7) paras 23-24.
[197] ibid, para 26.

make a significant contribution to the maintenance of effective competition in the Community'[198] The ECJ concluded that no absolute bar to damage actions should there be, even one brought from a party to the prohibited agreement. Finally, the ECJ pointed out that in absence of the Community rules governing the matter, it is up to the Member States, firstly, to designate court and tribunals having jurisdiction, and, secondly, to lay down procedural rules governing actions for safeguarding the rights stemming from the EU law respecting the principle of equivalence and the principle of effectiveness.

Around one year after the *Courage* case, the ECJ decided on a dispute between private parties concerning whether compliance with the provisions of Regulations 1035/72 and 2200/96 on quality standards applicable to fruits or vegetables confers upon a trader the rights to bring a claim against a competitor.[199] In the ECJ view, the full effectiveness of the Community rules on quality standards implies the possibility to enforce such obligation through civil proceedings instituted by a trader against a competitor.[200] The Court reaffirmed that the possibility of bringing civil proceedings before national courts would strengthen the Community on rules and standards and, at the same time, would substantially contribute 'to ensuring fair trading and transparency of markets in the Community'.[201]

In 2006, the ECJ expanded its case-law concerning private enforcement elaborating further the procedural autonomy of the EU Member States and clarifying some silent points as the kind of damages compensation would include.[202] *Manfredi's* judgment relates to the request compensation from insurance companies involved in unlawful cooperation infringing the EU competition law and causing *Manfredi and others* to pay excessive premium for their insurances. The claim follows on the decision of the Italian Competition Authority (*Autoritá garante per la Concorrenza e del Mercato* – hereafter cited as AGCM) holding that the insurance companies had implemented an unlawful agreement by exchanging information with each other. The AGCM monitored the market of insurance companies during 1994–1998 and observed an unusual and

[198] ibid, para 27.
[199] Judgement of 17 September 2002, *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*, C-253/00, ECLI:EU:C:2002:497.
[200] ibid para 30.
[201] ibid para 31.
[202] *Manfredi* (n 7).

sustained increase in the cost of the premiums for civil liability compared with other countries of the Union and considerable barriers to enter the market for civil liability auto-insurance premiums. In the course of the proceedings, the AGCM consulted the obtained documentation and found out that various civil liability insurance companies have exchanged extensive information related to the insurance market such as prices, discount, receipts, cost of accidents and distribution cost. Insurance companies challenged the AGCM's decision, but both the *Tribunale Amministrativo Regionale per il Lazio* (Regional Administrative Court of Latium) and the *Consiglio di Stato* (Council of State) upheld AGCM's decision.

Pursuant to the final decision, the interested parties submitted an application before *Giudice di pace di Bitonto* requesting to obtain damages against respective insurance companies for the excessive prices imposed as a result of an unlawful agreement. Insurance companies defended claiming firstly, that *Giudice di pace di Bitonto* lacked jurisdiction under Article 33 (2) of *Legge 287/90* and secondly, the claimants have brought the lawsuit too late for the right of restitution or compensation for damages. *Giudice di pace di Bitonto* took the view that alleged agreement infringed not only Article 2 of *Legge 287/90*[203] but also Article 101 (2) TFEU. *Giudice di pace di Bitonto* considered that individuals may rely on the invalidity of an agreement prohibited under Article 101 TFEU and can claim damages for compensation if there is a casual link between the harm suffered and the prohibited agreement. Another uncertain issue pointed out by *Giudice di pace di Bitonto* was whether the limitation period for bringing actions for damages and the amount to be paid as has been foreseen in the national law are compatible with Article 101 TFEU. In this situation, *Giudice di pace di Bitonto* decided to ask the ECJ for a preliminary ruling concerning the interpretation of Article 101 TFEU in connection with some procedural aspects of the national regulation of damages actions. The first question concerned whether an anti-competitive conduct infringing the national rules constituted, at the same time, an infringement of Article 101 TFEU. The other questions submitted focused on: i) the entitlement of third parties to rely on the invalidity of an agreement or concerted practice under the EU competition law and the concomitant to claim damages; ii) the compatibility of Article 33 (2) of *Legge 287/90* with the EU law; iii) the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101; and iv) the ability of the national court to award punitive damages.

[203] Legge 10 Ottobre 1990, n. 287, Norme per la tutela della concorrenza e del mercato [1990] GU 240.

In its ruling concerning the first question, whether Article 101 TFEU could be infringed at the same time as the national competition law could be breached, the ECJ held that an agreement or concerted practice may similarly infringe both the national and the EU competition rules, depending on specific circumstances whether such agreement or concerted practice may influence the national market.[204] The ECJ left the competence to the national court to determine whether such prohibited agreement may have an influence, direct or indirect, actual or potential on the sale of insurance policies or if this influence is irrelevant.[205]

The second question concerned the entitlement of third parties to rely on the invalidity of an agreement or concerted practice under the EU competition law and the concomitant to claim damages. The ECJ reiterated the direct effects of Article 101 TFEU and the obligation of a national court to safeguard individual rights deriving from the EU law[206] and reconfirmed the right of an individual to rely on a breach of Article 101 TFEU.[207] Regarding the possibility of seeking compensation for loss caused by an agreement that limits or distorts competition, the ECJ held that any individuals can claim compensation for the harm suffered where there exists a causal link between the harm and the prohibited agreement.[208] The ECJ left to the Member States' discretion to designate courts or procedural rules governing actions for safeguarding the individuals' rights stemming from the EU law in due respect of the principle of equivalence and effectiveness.

The third question submitted for a preliminary ruling concerned the compatibility of Article 33 (2) of *Legge 287/90* with the EU law. Through such question, the national court enquired whether Article 101 TFEU must be interpreted as precluding a national provision, like Article 33 (2) of *Legge 287/90* under which third parties must bring their actions for damages for infringement of the Community and national competition rules before a court other than to another which usually has jurisdiction over actions for damages of similar value, thereby involving a considerable increase in costs and time. According to Article 33 (2) of *Legge 287/90*, action for nullity, an action for damages and interim relief must be brought to the *Corte d'Apello* having

[204] ibid. paras 33-52.
[205] ibid. paras 47.
[206] *BRT v SABAM* (n 162) para 16.
[207] *Manfredi* (n 7) para 59.
[208] ibid para 61.

territorial jurisdiction. This exclusive jurisdiction provided in Article 33 (2) of *Legge 287/90* constitutes an exception to the ordinary civil procedures rule on jurisdiction and reflects the legislator intention to avoid judicial fragmentation and secure uniformity and specialisation by referring action for damages to a small number of courts within regional jurisdiction.[209] Article 33 (2) of *Legge 287/90* was not clear regarding the determination of jurisdiction for actions for damages as a result of the infringement of Article 101 and Article 102 TFEU. In the *Axa* decision, the Italian *Corte di Cassazione*, *inter alia*, reasoned that Article 33 (2) of *Legge 287/90* applies only to actions for damages based on the infringement of the national provisions protecting competition.[210] Conversely, since the legal provision does not express territorial jurisdiction on actions for damages based on the infringement of Article 101 and Article 102 TFEU, ordinary courts will have the proper competence to deal with such actions. In answering the question of the compatibility of Article 33 (2) of *Legge 287/90* with the EU law, the ECJ emphasised lack of competence to interpret the national law or to assess its application in the present case. The ECJ stated that in the Community's absence rules, it is upon the domestic legal system of the Member States: i) to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and ii) to describe the detailed procedural rules governing those actions. Those provisions shall not be less favourable than those governing actions for damages based on an infringement of national competition rules, and shall not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 101 TFEU.[211]

The next question concerned the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 TFEU. Through such question, the national court enquired whether Article 101 TFEU must be interpreted as precluding a national rule which provides that limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 TFEU begins to run from the day on which that prohibited agreement or practice was adopted. In answering this question, the ECJ analysed the prescription rules in Italy, and, pursuant to the Italian government observation submission, it then

[209] Carpagno (n 187) 49.
[210] Judgment of 9 December 2002, Corte di Cassazione, No 17475.
[211] *Manfredi* (n 7) para 72.

found out that the limitation period begins to run from the day on which the agreement decision or concerted practice was adopted. In the Court's view, this rule would make practically impossible the exercise of the right to seek compensation for the harm caused by that prohibited agreement or practice, especially if the national rule imposes a short limitation period during which it cannot be suspended.[212] The ECJ concluded that, in the absence of the Community rules, it is upon the domestic legal system of the Member States: i) to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and ii) to describe the detailed procedural rules governing those actions, with the condition that the principle of equivalence and effectiveness are observed.[213] The ECJ added that it is upon the national court to determine whether a national rule which provides the commencement of the limitation period on that day when the prohibited agreement or practice was adopted, or, if a short limitation period is imposed, it is practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.[214]

Concerning the final issue whether national courts can award punitive damage greater than the advantage obtained by the infringer, the ECJ held that in the absence of the Community rules, each Member State has to set the criteria for determining the extent of the damages with the condition that both the principles of equivalence and effectiveness are observed.[215] The Court ruled that, in accordance with the principle of equivalence, punitive damage can be awarded if they are available in the domestic legal system. The Court held that any injured persons must be able to seek compensation not only for the actual loss (*damnum emergens*) but as well for loss of profit (*lucrum cessans*) plus interest.[216] In the Court's view, the total exclusion of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of breach of the EU competition law because 'such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible'.[217] For the payment of interest, the Court ruled that it 'constitutes an essential component of compensation'.[218]

[212] ibid, para 78.
[213] ibid, para 82.
[214] ibid, para 81.
[215] ibid, para 92.
[216] ibid, para 95.
[217] ibid, para 96.
[218] ibid, para 97.

Manfredi established that as long as it can be a causal link between the harm suffered and the prohibited agreement, the right to damages is not restricted to the claimant in a vertical chain with the defendant. This view was upheld in the *Kone AG v ÖBB-Infrastruktur AG* judgment.[219] The ECJ addressed a preliminary ruling from *Oberster Gerichtshof* (the last Court of Appeal in Austria) asking whether civil liability in damages of the members of a cartel also extends to 'umbrella effects' or 'umbrella pricing'. Relying on the 'umbrella effect or pricing', *ÖBB-Infrastruktur* claimed from *Kone AG and others* compensation for loss assessed to the amount of EUR 1 839 239.74, as a result of market sharing of the cartel at issue in the elevators and escalators market which had enabled suppliers to raise their prices. Such a claim, in accordance with Austrian law, was not admissible because the alleged loss resulted from an independent business of the non–cartel.

In the Court's view, the market price was one of the main factors taken into consideration by an undertaking when it determines the price of the goods or services to offer. Consequently, where the cartel at issue maintains artificially high prices, the competing undertaking might choose to set out prices higher than under normal conditions of competitions. In such a situation, the ECJ argued that although the determination of an offer might be considered as purely autonomous, the market price has been distorted due to price reference established by the cartel.[220] Arguing that full effectiveness of Article 101 TFEU would be put at risk if the right to claim compensation for harm suffered were subjected by national law,[221] the ECJ concluded civil liability for the victims relying on umbrella pricing for the loss caused by the member of cartel even if there is no contractual link to them:

> where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel.[222]

[219] Judgement of 5 June 2014, *Kone AG and Others v ÖBB-Infrastruktur AG,* C-557/12, ECLI:EU:C:2014:1317.
[220] ibid, para 29.
[221] ibid, para 33.
[222] ibid, para 34.

The ECJ left the national court discretion to determine whether the cartel at issue set prices higher than would otherwise have been expected under competitive conditions.[223]

In the *Otis and others* case*,* the ECJ granted to the Commission standing to appear before the national court on behalf of the EU seeking damages for a loss caused as a result of an infringement of an agreement of a practice prohibited by Article 101 TFEU which may have affected certain public contracts awarded by various institutions and bodies of the EU.[224]

Recently, the ECJ addressed a preliminary ruling concerning the interpretation of Article 101 TFEU and the principle of effectiveness of the EU law regarding the rules in Finnish law applicable to actions for damages in respect of the infringements of the EU competition law.[225] The claimant *(Vantaan kaupunki)* brought a private action for damages against the acquiring companies. Companies involved in the prohibition under Article 101 TFEU were voluntarily dissolved and their respective sole shareholders, known as Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy, have acquired their subsidiaries' assets and continued their economic activity. While the acquiring companies contested the action, *inter alia,* on the grounds that they could not be held liable for harm allegedly caused by legally independent companies, the Supreme Court (*Korkein oikeus*) made a preliminary ruling asking whether Article 101 TFEU must be interpreted as the acquiring companies may be held liable for the damage caused by that cartel.

In this decision, the ECJ clarified whether the successor to an undertaking inherited its liability for damages. The ECJ recalled that the concept 'undertaking' was chosen to designate the perpetrator of infringement of the prohibition laid down in Article 101 TFEU[226] and this definition is confirmed in the Directive 2014/104/EU, which entitles 'undertakings' responsible for damage caused by an infringement of the EU competition law.[227] According to settled case-law, an

[223] ibid, para 37; For a critical analysis of Kone judgment see Jens-Uwe Franck, 'Umbrella Pricing and Cartel Damages under EU Competition Law' (Working Paper Law 2015/18, EUI 2015); Vlatka Butorac Malnar, 'The *Kone* Case: A Missed Opportunity to Put Standard of Causation under the Umbrella of the EU' in Vesna Tomljenović *et al* (eds), *EU Competition and State Aid Rules: Public and Private Enforcement* (Springer 2017) 175-195.
[224] Judgment of 6 November 2012, *Europese Gemeenschap v Otis NV and Others,* C-199/11, ECLI:EU:C:2012:684, para 36.
[225] Judgment of 14 March 2019, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, C-724/17, ECLI:EU:C:2019:204.
[226] para 29.
[227] para 36; Directive 2014/104/EU, Art 2 (2).

'undertaking' covers any entity engaged in economic activity, irrespective of its legal status and the way in which it is financed.[228] In line with the opinion of AG Wahl,[229] the ECJ adopted a broader consideration about the parent company concluding that:

> Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares in the companies which participated in a cartel prohibited by that Article were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question.[230]

2.5.2. The Principle of National Procedural Autonomy

The principle of national procedural autonomy holds that, unless otherwise provided by EU law, the national law determines the procedural rules and remedies to enforce the EU rights.[231] The ECJ articulated the principle of national procedural autonomy in the case *Rewe v Landwirtschaftskammer für das Saarland.*[232] In the previous case,[233] the ECJ found that charges for phytosanitory inspection for the payment on the importation by the appellants of French apples from Italy are deemed charges having an effect equivalent to customs duties.[234] Pursuant to this decision, *Rewe* applied to *Landwirtschaftskammer für das Saarland* the decision imposing the charges and to refund the amounts paid plus interest. The claim was dismissed on the ground of time expiry based on the national law. Two companies brought the action to Saarland Administrative Court (*Verwaltungsgericht für das Saarland*) which dismissed the case as was the appeal to the Higher Administrative Court (*Oberverwaltungsgericht*). Then, two companies brought the action to the Federal Administrative Court (*Bundesverwaltungsgericht*) which took

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[228] para 36.
[229] Opinion of Advocate General Wahl delivered on 6 February 2019, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, C-724/17, ECLI:EU:C:2019:100, para 81.
[230] *Skanska* (n 225) para 51.
[231] It has been suggested by several authors that instead 'national procedural autonomy' the term 'procedural competence' or 'national procedural responsibility' to be used since both case-law and Article 19 (1) TEU emphasize the responsibility of the Member States. Nevertheless, the term 'national procedural autonomy' is widely used even by CJEU. John S Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' [2003] European Law Journal 599; 601–603; Walter van Gerven, 'Of Rights, Remedies and Procedures' [2000] Common Market Law review 501, 501-502; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edition, OUP 2015) 227.
[232] *Rewe v Landwirtschaftskammer für das Saarland* (n 166).
[233] Judgement of 11 October 1973, *Rewe-Zentralfinanz eGmbH v Direktor der Landwirtschaftskammer Westfalen-Lippe,* C-39/73, ECLI:EU:C:1973:105.
[234] ibid para 5.

the view whether individuals can rely on Community law irrespective to the expiry of the time-limit laid down in the national law required an interpretation by the ECJ. In its ruling, the ECJ argued that the Treaty provision in this dispute produced direct effects and confered upon individuals the right which the national courts are obliged to ensure legal protection. The Court went on stating that:

> in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.[235]

In this judgment, the ECJ limited the principle of national autonomy to two requirements. The first requirement refers to the principle of equivalence according to which the remedies and the procedural rules applicable to the national action must be equally applicable to similar action brought to enforce the EU rights. The second is the principle of effectiveness, according to which national procedural rules must not make the exercise of the EU rights impossible in practice or excessively difficult. [236] In *Weber's Wine World and Others*, the ECJ concluded that in so far as the principle of equivalence precludes national rules which lay down less favourable procedural rules, the national court has the task to assess the similarity between the domestic and the EU law.[237] National courts must consider both the purpose and the essential characteristics of similar domestic actions.[238] Although the terms 'purpose' and 'essential characteristics' are too vague and not been defined by the ECJ, in the case of the competition law, the situation is less problematic since the national competition law of the Member States mirrors the EU competition law.[239]

In the *Courage* case, the ECJ articulated in general terms the principle of national procedural autonomy with regard to the right to damages for infringement of the EU competition

[235] *Rewe v Landwirtschaftskammer für das Saarland* (n 166) para 5.
[236] Craig and de Búrca (n 231) 227–228.
[237] Judgment of 2 October 2003, *Weber's Wine World Handels-GmbH and Others v Abgabenberufungskommission Wien*, C-147/01, ECLI:EU:C:2003:533, para 108.
[238] Judgment of 1 December 1998, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, C-326/96, ECLI:EU:C:1998:577, para 43; Judgment of 10 July 1997, *Palmisani v INPS,* C=261/95, ECLI:EU:C:1997:351, paras 34–38.
[239] Hans Vedder, 'Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law' [2004] The Competition Law Review 5.

rules.[240] Then, in the *Manfredi* case, the ECJ elaborated further certain procedural issues such as: a) jurisdiction of the national courts to address action for damages; and b) the limitation periods. In all these issues, the ECJ concluded that in the absence of the Community rules is up to the Member States to: i) designate the courts or tribunal that have jurisdiction for the right to damages and ii) to draw procedural rules governing all actions for safeguarding the rights deriving from the EU legal system providing that such rules respect the principle of equivalence and effectiveness, and do not make the right to damages practically impossible or excessively difficult to exercise.[241] On the other hand, with regard to the limitation period, the ECJ went further stating that the national courts are entitled to determine whether the limitation period started the day the prohibited agreement was adopted, particularly in the cases where there is a short limitation period that makes 'practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered'.[242]

In the *Pfleiderer* case, a preliminary ruling reference made by the *Amtsgericht Bonn* between Pfleiderer AG (Pfleiderer) and the *Budeskartellamt* (German Competition Authority), the main dispute concerned an application for full access to the file related to the imposition of a fine as a result of a cartel in a décor paper. The ECJ emphasised the importance of the leniency program as a useful tool to uncover and to bring to an end the infringement of competition rules.[243] Then, the ECJ reiterated the individual rights to claim damages for loss caused as a result of the infringement of the EU competition rules and emphasised that such claimants before the national courts contribute to the maintenance of effective competition in the European Union.[244] In the end, the ECJ reinforced the principle of procedural autonomy deciding to leave to the national courts or tribunals to decide only on a case-by-case to weigh the respective interests in favour of the disclosure of the information and the protection of the information provided voluntarily by the applicant for leniency.[245]

[240] *Courage and Crehan* (n 7) para 29.
[241] *Manfredi* (n 7) paras 72; 82.
[242] ibid para 82.
[243] Judgement of 14 June 2011, *Pfleiderer AG v Bundeskartellamt,* C-360/09, ECLI:EU:C:2011:389, paras 20-25.
[244] ibid paras 28-29.
[245] ibid para 30.

In 2013, in the case *Donau Chemie and others,*[246] the ECJ, besides upholding the EU right to damages established in previous cases, elaborated further the role of national courts in weighing up exercise.[247] On 26 March 2010, the *Oberlandesgericht Wien* sitting as a Cartel Court fined several undertakings, including *Donau Chemie,* for an anticompetitive agreement affecting the Austrian market. An association grouping together companies affected by the anti-competitive agreement applied to the Cartel Court for the access of evidence. The Cartel Court denied such a request arguing that the disclosure of requested evidence is the subject of the consent of all parties in the proceedings. In this context, the Cartel Court referred a question to the ECJ asking the compatibility with the EU law of an Austrian law prohibiting the disclosure to third parties of the judicial case file in a competition case without the consent of all parties to proceedings. According to the Court's view, the weighing-up exercise is necessary because in the competition law especially, any rule that is rigid, either by providing for an absolute refusal or for granting access to documents in question, is liable to undermine, *inter alia*, the effective application of Article 101 TFEU.[248] The ECJ concluded that in the course of the assessment of weighing up exercise, the national courts, firstly, have to appraise the interest of the requesting party seeking to obtain full access to leniency documents in order to prepare an action for the damages.[249] Secondly, the national courts must take into consideration the actual harmful as a result of access given on the basis of public interests or the legitimate interests of other parties.[250]

[246] Judgement of 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG and others,* C-536/11, ECLI:EU:C:2013:366.
[247] ibid paras 30-48.
[248] ibid para 31.
[249] ibid, para 44.
[250] ibid, para 45.

CHAPTER

3. The Role of the Commission in Facilitating and Encouraging the Right to Damages

3.1. Introduction

Besides the CJEU, the Commission has played an important role in fostering the debate and establishing the system of EU private enforcement of competition rules. Since the presentation of the first draft Regulation 17, the issue of damage actions for infringement of the EU competition policy was not a 'forgotten issue'; however, no comprehensive legislation was initiated. Following the publication of the White Paper on the modernisation and the ECJ landmark decisions (*Courage* case 2001), the issue of private enforcement came at the fore of the Commission. At various conferences, the Commissioners for DG Competition stressed the importance of private enforcement regime as complementary to the public enforcement,[251] and the intention to foster a 'competition culture' rather than a 'litigation culture'.[252] Widely recognising its importance, this chapter analyses the Commission's concerns on how to increase private enforcement efficiency and ensure greater practical significance. The absence of an effective legal framework for antitrust damages actions at EU level causes uncertainties for the victims of the antitrust infringement regarding the amount of compensation to be rewarded. Moreover, the legal uncertainty puts into question the full enforcement of antitrust rules.[253]

[251] Monti (n 10); Neelie Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' (Dinner Speech at the Harvard Club, 22 September 2005) <http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm?locale=en> accessed 20 September 2018; Alexander Italianer, 'Public and Private Enforcement of Competition law' (5th International Competition Conference, 17 February 2012) <https://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf> accessed 28 September 2018; Almunia. 'Public and Private damages actions in Antitrust' (n 43).

[252] Neelie Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' (n 251); Neelie Kroes, 'Damages Actions for Breaches of EU Competition Rules: Realities and Potentials' (Opening speech at the conference '*La reparation du prejudice cause par une pratique anti-concurentielle en France et à l'étranger : bilan et perspectives*', *Cour de Cassation*, 17 October 2005) (https://europa.eu/rapid/press-release_SPEECH-05-613_en.htm?locale=en) accessed 28 September 2018.

[253] Mario Siragusa, 'Private Damage Claims: Recent Developments in the Passing-on Defence' in Kai Hüschelrath and Heike Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives* (Center for European Economic Research, Springer 2014) 229.

This chapter sets out a historical overview of the Commission's policy to facilitate and encourage the right to damages in the EU. The chapter begins by noting that the action for damages was not a 'forgotten issue' during the debate of the approval of Regulation 17. Although acknowledged by 2 comparative reports, for almost 40 years, the Commission hesitated to act. Only in 2005, following the Ashusrt Study, which successfully identified the obstacles of antitrust damages actions at national level (section 2), the EU started a consultation by adopting a Green Paper on how to stimulate private actions across the Member States (section 3). Three years later, in 2008, the Commission issued a White Paper by bringing to the fore of academic discussion the private enforcement which was in limbo until that time (section 4). Both the Green Paper and the White paper paved the way toward a genuine European private enforcement system of competition rules with the publication of the 2013's package (section 5).

3.2. Commission Rhetoric for Right to damages: from Deringer Report to Regulation 1/2003

In 1962, Arved Deringer, known as the mastermind of Regulation 17, submitted his report to the Internal Market Committee of the European Parliament concerning the former draft Regulation. Regarding the action for damages, Deringer emphasises that:

> Your committee has queried, among other things, *whether it would be advisable to stipulate already, in the first regulation an obligation to pay damages for infringements of Articles [101 (1)] and [102]*. Although the committee *was unanimous in thinking that such a solution would be necessary in order to counter infringements*, it nevertheless *found it impossible to resolve the issue at this point*. Indeed, *the law on compensation varies so greatly among the Member States, both as a matter of statutory text and as a matter of case law, that in the absence of a comparative law study it is not deemed possible to adopt a uniform regulation*. Nevertheless, your committee invites the Commission of the [EU] to examine the problem with special attention and to make timely recommendation in this regard.[254]

In 1966, upon the request of the Internal Market Committee, the Commission published a comparative study prepared by the experts of the 6 Member States. The study revealed significant differences in terms of procedure between the legal systems of the 6 Member States. The

[254] *Rapport fait au nom de la commission du marché interieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européene par le Conseil de la Communaute économique européene sur un premier réglement d'application des Articles 85 et 86 du traite´ de la C.E.E.* (Document 104/1960-1961- 'Deringer Report') para 123. Quoted in Milutinović (n 177) 27 – 28 (emphasize added by author).

comparative report acknowledged that all Member States allowed actions for damages analogous to those provided in Articles 101 and 102.[255] In France, Belgium and Luxembourg the plaintiff could recover damages for a breach of a duty set up by the statute regardless of the fact whether the duty had been imposed for the benefit of the plaintiff. In the other two countries, the Federal Republic of Germany and the Netherlands, the plaintiff could recover damages only if the duty was imposed for his benefit. In Italy, views were divided, and the position was not clear.[256] The study found that the term damage had broad definitions, with a major divergence of the principle of fault requirement. Nevertheless, the Commission did not act further either to propose a binding instrument or issue a soft law instrument.

In the 'Thirteenth Report on Competition Policy' published in 1984, the Commission contended a misunderstanding which can enforce competition rules stating that 'there is a widespread misconception among members of the public in Europe that only the Commission can enforce Articles 85 and 86 of EEC Treaty. This is not the case.'[257] Recalling ECJ's judgment in *BRT v SABAM* cases, the Commission emphasised that:

> The Court has also established that 'as the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.' This has confirmed the direct effect of the prohibitions of Articles 85 and 86 and the responsibility of national courts for the enforcement of Community competition law.[258]

It appears clearly that back in 1984 the Commission was already studying 'how to encourage actions before national courts for enforcement of the prohibitions contained in Article 85 and 86.'[259] Particularly, the Commission was looking 'what steps could be taken to facilitate damages actions' and how to improve the relationship between the national courts and the Commission to enforce the competition rules.[260]

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[255] Commission, *La réparation des conséquences dommageables d'une violation des Articles 85 et 86 du Traité instituant la CEE*, Série Concurrence No 1 (Brussels, 1966); Komninos, *EC Private Antitrust Enforcement: Decentralised Applications of EC Competition law by National Courts* (n 2) 163; Milutinović (177) 28.
[256] Jacobs (n 176) 1366.
[257] Commission, 'Thirteenth Report on Competition Policy' (1984) <https://publications.europa.eu/en/publication-detail/-/publication/161bd425-29e6-4ac0-9b3d-0766ecdda8cd/language-en> accessed 8 July 2019, point 217.
[258] ibid, point 217.
[259] ibid, point 218.
[260] ibid, point 218.

In *Delimitis* judgment, the ECJ stated that it is always open to a national court 'within the limits of the applicable national procedural rules and subject to Article 214 of the Treaty' to seek information from the Commission on the state of any procedure which the Commission may have set in motion. Most importantly, in the ECJ view, the national court 'may contact the Commission where the concrete application of Articles 85 (1) or of Article 86 raises particular difficulties, in order to obtain the economic and legal information which that institution can supply to it'.[261] Following ECJ *Delimitis* judgment, the Commission issued its first Notice on Cooperation with the national court.[262] The purpose of this Notice on Cooperation with the national court was to spell out how Commission can assist the national court to increase awareness in the application of Articles 101 and 102 TFEU. Discussing in general terms the division of competences between the Commission and the national courts, the Commission encouraged litigants to enforce their rights before the national courts.[263] At the same time, the Commission commissioned another comparative study to examine the application of the EU competition rules by the national courts in 12 Member States.[264]

Yet again, the Braakman Report found the possibility of damages in the Member States. However, the Commission remained reluctant to act. The Commission's hesitation to act on the action for damages is related to the centralised system established by Regulation 17. Acknowledging the possibilities that the Member States' laws allow the action for damages for breach of Articles 101 and 102, the Commission waited for an ECJ case-law to decide on the effects of the right to damages under the EU law.[265]

Although in 1999 the Commission published the White Paper on Modernisation recognising the importance of the decentralisation system of enforcement, a major turn came by

[261] Judgment of 28 February 1991, *Delimitis v Henninger Bräu,* C-234/89, ECLI:EU:C:1991:91, para 53.
[262] Commission Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty [1993] OJ C 39/05.
[263] 'In this way, national courts are able to ensure, at the request of the litigants or on their own initiative, that the competition rules will be respected for the benefit of private individuals. In addition, Article 85 (2) enables them to determine, in accordance with the national procedural law applicable, the civil law effects of the prohibition set out in Article 85'. Commission, 'Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty' [1993] OJ C39/05, point 6.
[264] Commission, 'The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States' (Office for Official Publications of the European Communities 1997 – known as Braakman Report).
[265] Milutinović (n 177) 29.

the ECJ *Courage* judgment, which recognised the right to damages in the EU law. In the meantime, the Commission proposed a new enforcement regulation, what then became Regulation 1/2003, which brought formally national courts into the enforcement of competition rules. Inevitably, despite the ECJ judgment, damages actions were not specifically addressed.

3.3. Ashurst Study: Astonishing Diversity and total underdevelopment of Private Enforcement

The *Courage* judgment (2001) and the enactment of Regulation 1/2003 provided a new impetus for the national courts of the Member States, which would, therefore, play an important role in the enforcement regime. The ECJ recognised the right to damages for any individual harm and left considerable discretion to the national courts to apply procedural rules of their domestic legal systems subject to the principles of equivalence and effectiveness. While the rule of the substance establishes whether or not an infringement is common to all Member States (Arts 101 and 102 TFEU), the conditions of liability vary from one Member State to another due to the absence of a European Civil Code or Code of Civil Procedure which would guarantee coherent rules for the action of damages across the EU. The substantive and procedural rules fall under the domain of the national law. In other words, there are potentially 27 different national laws which do not aid to establish the EU private enforcement as a credible alternative to public enforcement. Hence, since substantive and procedural rules vary from one EU Member State to another, different levels of protection exist among Member States.[266]

To gain a clear picture of the private enforcement landscape among the 25 Member States, the Commission commissioned Ashurst's law firm to carry out a study on the conditions of claims for damages in case of the infringement of the EU competition rules.[267] Through the Ashurst Study,

[266] Neelie Krooes, 'Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe' (speech given at Commission/IBA Joint Conference on EC Competition Policy, Brussels 8th March 2007) <http://europa.eu/rapid/press-release_SPEECH-07-128_en.htm?locale=en> accessed on 22 October 2018.

[267] Waelbroeck (n 16); Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Analysis of Economic Models for the Calculation of Damages' (Ashurst 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf> accessed 31 July 2018.

the Commission aimed to identify real obstacles of private enforcement and obtain suggestions on how to facilitate the actions for damages.

Published on 31 August 2004, the Ashurst study provided a comparative analysis of the national rules and case-laws regarding the enforcement of national and EU competition rules in 25 Member States. The study was structured in two documents consisting of three parts. The first part comprises 25 national reports compiled by the representatives of different Member States pursuant to the questions prepared by the Commission. The second part consists of a comparative study carried out by the Ashurst law firm. This comparative report, divided into two sections, provides: i) a comparative presentation of the main data gathered from the national reports; and ii) an analysis of the obstacles identified and how damages claims could be facilitated both at the national and European levels. The third part, compiled by Ashurst law firm, provides an overview of the damage cases reported by the representatives of the Member States and reviews the economic methodology used to calculate the damages awarded.

The Ashurst Study found out that in an enlarged EU, including the countries that joined in 2004, the panorama for actions on damages for infringement of national and the EU competition law was 'astonishing diversity and total underdevelopment'.[268] The legal basis for bringing competition base damages claims was diverse. The Ashurst Study found out that only 12 Member States had a specific national statutory basis for damages claims and only 3 Member States had a specific statutory basis for bringing the EU competition law. The other 13 Member States used the national Civil Code or the Commercial Code as a legal basis for bringing competition base damages claims.[269] Moreover, the diversity among the Member States appeared even in the competent court to hear an action for damages. Only the UK had a specialised court dealing with the competition based damages action, whereas in some Member States different courts were competent to hear national law and EU law-based claim.[270] Also, non-specialised courts or NCA resulted competent in some Member States to hear damages actions as well.[271]

[268] Waelbroeck (16) 1.
[269] ibid 27-29.
[270] ibid 103.
[271] ibid 31-32

On the other hand, the Ashurst Study revealed the domination of public enforcement of competition rules, both national and European. Actions on damages were totally underdeveloped at national level. In total, 61 judged cases for damages actions were gathered; 12 cases were based on the EU law, around 32 cases were based on the national law and 6 on both. Of these judgments, 28 cases were granted an award, that is: 8 cases based on the EC competition law, 16 cases on national law and 4 on both.[272]

The findings that actions for damages were 'underdeveloped' have been criticised. Various authors have stressed that 'the argument of underdevelopment', to some extent, misinterpreted the number of damages actions been brought due to lack of in-depth empirical evidence from most Member States or due to the fact that damages cases are settled out-of-court on the basis of confidentiality.[273] The Ashurst Study identified the following principal obstacles to private enforcement of the EU competition law existing in the EU Member States.

i. Collective Actions, Class Actions and Public Interest Litigation

The Ashurst Study pointed out that all Member States recognised the existence of joint actions with regard to public interest either by claims being brought jointly between two or more individuals or claims pending before the court joined for the procedure.[274] Only three Member States - Portugal, Sweden and Spain, respectively - had in their legal texts class actions or collective claims. The other Member States lacked a legal framework in their domestic legal system. This figure shows that class actions and collective claims were not recognisable and almost

[272] ibid 99 – 100.
[273] Barry Rodger (ed), *Competition Law Comparative Private Enforcement and Collective Redress Across the EU* (Kluwer Law International 2014); Barry Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000 – 2005' [2008] European Competition Law Review 96; Barry Rodger, 'Private Enforcement of Competition Law, the Hidden Story Part II: Competition Litigation Settlements in the United Kingdom, 2008 – 2012' [2015] Global Competition Litigation Review 89; Ulf Böge and Ost Konrad, 'Up and Running, or Is It? Private Enforcement - The Situation in Germany and Policy Perspectives' [2006] European Competition Law Review 197; Sebastian Peyer, *Myths and Untold Stories – Private Antitrust Enforcement in Germany* (Center for Competition Policy Working Paper 10 -12, University of East Anglia 2010); Sebastian Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence ' [2012] Journal of Competition Law and Economics 331; Francisco Marcos, 'Competition law private litigation in the Spanish courts (1999-2012)' [2013] Global Competition Law Review 167.
[274] Waelbroeck (n 16) 44.

never used in the Member States in private actions.[275] The Ashurst study identified class actions and collective claims as an obstacle to private actions in so far as it reduces the litigation options open to potential claimants.

ii. Fault

Most of the Member States, except Cyprus, the Czech Republic, Ireland, Slovakia and the United Kingdom, required fault in non-contractual damages actions. In some Member States, besides fault, the proof of negligence and intent were sufficient.[276] For the Member States requiring fault, the situation was diverse whether: i) fault must be shown in relation to the violation of competition law or effects; ii) violation of competition rules will automatically imply that the fault element is fulfilled; and iii) fault is rebuttably presumed.[277] The Ashurst Study emphasised that proof of negligence or intent constituted an additional hurdle to be overcome by the claimant.

iii. Burden and Standard of Proof

The Ashurst study noted that in most legal systems of the Member States, in order to bring a successful damages action based either on national or the EU competition law, a plaintiff must prove five different elements such as: i) violation of competition law, ii) fault, iii) damage, iv) causation, and v) the rule violated was for the protection of the plaintiff. Since the burden of proof for each of these elements stands on the claimant, it constituted an obstacle to private actions. Regarding the standard of proof, some Member States required a high standard of proof; others maintained a lower threshold for a reasonable assessment of damages. The Ashurst Study identified that maintaining either a higher or a lower standard of proof constituted an obstacle to private actions.[278]

[275] ibid 45.
[276] ibid 50.
[277] ibid 50-51.
[278] ibid 106-107.

iv. Collection and Presentation of Evidence

Regarding the collection and presentation of evidence, the Ashurst study found that the rules on discovery vary considerably among the Member States. Except for the UK, Ireland and Cyprus, the other 22 EU Member States did not have rules on discovery in their legal systems. In all Member States, judges had the power to order production of documents either by request of one of the parties or in some cases the request can be done *ex officio.*[279] Only in Poland and Spain, courts had a relatively wide power to allow parties to request categories of documents. Whereas in other Member States, parties must more or less specify the documents that want to be disclosed. The Ashurst Study concluded that the lack of rules of the discovery of evidence constituted an obstacle to private enforcement because the plaintiffs had less possibility to demand the production of documents.[280]

v. Evidential Value of National Competition Authorities and National Court Decisions

In most Member States, NCAs' decisions were considered being generally as having high evidential value. The Ashurst study found that NCAs' decisions and courts' decisions of other Member States did not have a binding effect on the courts in most Member States. According to Ashurst study, this constituted an obstacle to private actions because claimants were obliged to prove certain elements of the claim in order to be taken as proven.[281]

vi. Quantification of Damages

All Member States had in their legal systems the possibility to claim monetary compensation for a loss caused as an infringement of competition law. Moreover, in all countries, the reduction in the value of assets (*damnum emergens*) and the loss of profits (*lucrum cessans*) could be claimed.[282] One of the key difficulties in bringing damage actions relates to the quantification of damages. A number of Member States had recognised explicitly that quantifying

[279] ibid 62.
[280] ibid 108.
[281] ibid 109.
[282] ibid 105.

damages was a 'key difficulty' in bringing successful private actions, and noted the lack of generally recognised models for quantification.[283] Some Member States had opted out for a reduction in the standard of proof required when the damages were difficult to quantify. Furthermore, differences in approach in the calculation of lost profits resulted in different awards among the EU Member States. A restriction approach could be a disincentive to the damages claim.

vii. Passing on Defence and Indirect Purchaser Claims

All the Member States recognised the possibility of the passing on defence and indirect purchasers under the application of general principles and general rule. In practice, only Denmark, Germany and Italy had reported case-law regarding passing on. None of the Member States had reported any case-law on indirect purchaser claims. The Ashurst study identified that the passing on defence could constitute an obstacle for damages actions on one hand, to the extent that it complicates damages actions, therefore, a successful passing on defence reduces the award paid to the direct purchaser decreasing the latter's incentive to bring a claim.[284] On the other hand, despite the recognition of the indirect purchaser's right to claim damages, the need to prove a causal link between the infringement and final damages may constitute obstacles and decreases the incentives to bring claims by indirect purchasers.[285]

viii. Amount of Damages

In all the Member States, damages were assessed on the level of injury sustained by the claimant rather than profits made by the defendant. Consequently, damages awarded in private enforcement were compensatory in most Member States, and only some of them had awarded punitive damages.[286] The Ashurst study noted that the main obstacle related to the lack of a generally-recognised model in assessing damages and the absence of punitive damages.

[283] ibid 109; Clark, Hughes and Wirth (n 267) 17-30.
[284] Waelbroeck (n 16) 110.
[285] ibid 111.
[286] ibid 112-113.

ix. Time Limitations

The limitation periods vary considerably among the Member States between 1 to 30 years. The Ashurst study noted that the limitation period constitutes obstacles to private actions. A short limitation period could time-bar parallel actions brought after an original successful test case or in private actions brought in the wake of an administrative infringement decision. Furthermore, in the cases on access to evidence coupled with an obligation to present on filing a claim, the short limitation period could as well be problematic.[287]

x. Costs

The Ashurst Study noted, as a general rule in all Member States, that the loser pays costs, although in practice, fees are usually not fully recoverable. The risk and cost of private enforcement actions were also found to be hard to predict, as it was not fully recoverable.[288]

xi. Applicable Law

The Ashurst Study found that only 3 Member States – Finland, Lithuania and Sweden, respectively - have a specific statutory basis for bringing damages actions under the EU competition law. Conversely, 12 Member States did have a national statutory basis for damages actions and 13 Member States did not have a statutory provision that applies either to the EU law-based claims or only to claims based on the national law.[289] The lack of a clear legal basis coupled with the complexity of a substantive law of the Member States constitutes an obstacle to private actions. The Commission has presented a proposal for a Regulation on the law applicable to non-contractual obligations (the so-called 'Rome II' proposal) and addresses the issue of applicable law to the damages claims for breach of the Community antitrust law.[290]

[287] ibid 114-115.
[288] ibid 115-117.
[289] ibid 27-30.
[290] ibid 118.

In the end, the Ashurst Study suggested harmonising the legal basis on the right to damages between the EU law and the national law and stipulating a competent court to hear the damages actions. Removing limitations on standing and allowing national courts to rule on the infringement of the competition law without prior NCAs decision or final decision enhances the individual to have more access to courts to claim damages. The key areas to facilitate the private enforcement were as follows: measures in proving the elements of infringements; rules on obtaining the evidence; evaluation of damages; and giving a greater value to the NCA decision. Last but not least, facilitating private enforcement requires transparency and publicity. Potential claimants must be aware of their rights to claim damages, scope of the competition law and information on previous cases been brought.[291]

3.4. Green Paper on the Damages Actions for Breach of the EC Antitrust Rules

The Ashurst Study found that private enforcement at national and European level was astonishingly diverse and entirely underdeveloped. Very few damages actions for breach of the EU competition law were reported. The lack of transparency and publicity refrained many of the victims of the antitrust infringement to bringing damages actions. For this reason, on 19 December 2005, the Commission published the Green Paper on the 'Damages actions for breach of the EC antitrust rules'[292] accompanied by the Commission Staff Working Paper.[293]

Generally, the Commission issues the Green Paper to provide an overview of the present situation and the regulatory framework in a particular area to be able to decide on the next step: whether to propose legislation and other kinds of actions.[294] Thus, it does not contain any legally-binding rules of conduct, but only stimulates the future development in a particular area. The adoption of the Green Paper on damages and the Commission Staff working paper aimed to expose the main obstacles toward a more efficient system of damages actions and in the same time, to set out different options for further reflection and possible actions to improve the damages actions

[291] ibid 118-131.
[292] Commission, 'Green Paper: Damages actions for Breach of the EC antitrust rules' (Green Paper presented by the Commission) COM(2005) 672 final (hereafter cited as Green Paper on Damages).
[293] Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (Commission Staff Working Paper) SEC (2005) 1732.
[294] Senden (n 45) 124.

both for follow-on actions and for stand-alone actions.[295] In Commission's view, the facilitation of an action for damages would not allow victims of competition law infringement to be compensated (compensation aim), rather, it would be an incentive for undertakings to respect the EU competition rules (deterrence aim).[296] Moreover, the Commission Staff Working Paper recognised the importance of private enforcement especially in cases where the public enforcement authorities cannot manage due to the resources constraints and prioritisation, and, further acknowledged the private action as complementary to pubic enforcement.[297]

According to the Commission, private enforcement would bring the competition law closer to the citizens. Individuals and businesses will have the opportunity to enforce directly their rights in the area of competition. Consequently, the role of the national court to apply civil sanctions of nullity to contractual relationships and at the same time as hearing damages claim would be an advantage to the private parties, because, unlike irrecoverability of legal cost in the case of a complaint before the NCA, national courts can order the defendant to pay legal costs. Furthermore, private enforcement can play an important role in a wider context of enhancing Europe's competitiveness and in ensuring a level-playing field for companies in the EU.[298]

After giving a general overview of the private enforcement and laying down the obstacles identified in the Ashurst Study, the Commission addressed action for damages on an issue-by-issue basis and provided options for the facilitation of the action for damages in relation to each of the issues identified. The main highlighted points were as follows.

i. Access to Evidence

The Green Paper on damages noted the importance of access to evidence to make damages claims effective. Access to evidence in the action for damages identified requires an investigation of a broad set of documents. The particular difficulty is that the relevant documents are in

[295] Green Paper on damages final, 4.
[296] Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 6-7.
[297] Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 8; Kroes, 'The Green Paper on antitrust damages actions: empowering European citizens to enforce their rights' (n 43).
[298] Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 7.

possession of the party committing the infringement or third parties and, consequently, are not easily accessed by the injured party. The obligation to turn over the documents or the right of access to evidence for the injured party would make damages claims effective. In the same vein, the Commission emphasised that obligation must also be put to the defendant to disclose the documents submitted to a competition authority. The Green Paper on damages invited interested parties to discuss the following issues regarding the access to evidence whether: i) special rules on disclosure of documentary evidence should be introduced in civil proceedings for damages under Articles 101 and 102 TFEU and if so, in which form; ii) special rules should be helpful regarding access to documents held by a competition authority for antitrust damages claims; iii) the claimant's burden of proving the antitrust infringement in damages actions should be reduced and, if so, how.[299]

ii. Fault Requirement

As the Ashurst Study emphasised the proof of negligence and intent were required in addition to proof of infringement. Most Member States required fault to be proven for damages actions. In some Member States, the fault was presumed if an action was illegal under antitrust law, whereas, in other Member States, such presumptions did not exist. The Green Paper on damages invited comments on the issue of whether there should there be a fault requirement for antitrust-related damages actions.[300]

iii. Damages

The Green Paper on damages invited comments on the issue of definition and quantification of damages. Among the proposed options, the Green Paper on damages brought attention to adopt a definition based on either compensatory damages or recovery of illegal pain. Furthermore, the Commission introduced, as options to define damages, the double damages for horizontal cartels and called for reflection whether any damages awards should include interests,

[299] Green Paper on damages, 5-6; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 18-29.
[300] Green Paper on damages, 7; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 31-33.

and the level of the interest to be paid. Awards on double damages for horizontal cartels could be automatic, conditional, or at the discretion of the court. Regarding the quantification of damages, the Green Paper on damages invited interested parties to submit comments on whether there should be published a guideline on the quantification of damages, since the Member States use different economic models and introduced the 'idea of split' proceedings between the liability of the infringer and the quantum of damages to be awarded.[301]

iv. Passing – on Defence and Indirect Purchaser's Standing

All Member States recognised the passing-on defence but none of them had reported any case. The Green Paper on damages asked for comments on whether there should be rules on the admissibility and operation of the passing-on defence and, if so, under which form these rules take will take place. Similarly, the Green Paper on damages addressed the issue of standing for the indirect purchasers.[302]

v. Defending Consumers Interest

The Green Paper on damages addressed even the situation of the claimant, especially the situation of consumers with small claims. As one option to defend consumer interest, the Green Paper on damages proposed collective actions as a way to protect the rights of the consumer with small claims. Collective actions can serve to consolidate a large number of smaller claims into one large action saving time and money. The Commission asked for comments on whether special procedures should be available for bringing collective actions and protecting consumer interests.[303]

[301] Green Paper on damages, 7; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 34-44.
[302] Green Paper on damages, 7 – 8; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 45-51.
[303] Green Paper on damages, 8 – 9; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 52-56.

vi. Cost of Actions

Alike the Ashurst Study, which identified the cost of actions as an obstacle to private actions, the Commission agreed that the cost of actions play an important role as incentives or disincentives for bringing action for damages. The Green Paper on damages considered whether special rules should be introduced to reduce the cost risk for the claimant and facilitate access to courts.[304]

vii. Coordination of Public and Private Enforcement

According to the Green Paper on damages, both public and private enforcement complement each-other. The Green Paper stated that the optimum coordination between public and private enforcement was required especially regarding the coordination of leniency applications in public enforcement and damages claims. The Green Paper on damages presented various options to reconcile the importance of private enforcement via damages claims and preserving the effectiveness of leniency programs in public enforcement. One option put forward was the exclusion of discoverability of the leniency applicants, in other words, protecting the confidentiality of submission to the competition authority as part of leniency applications. The second option introduced the conditional rebate on any damages claims against the leniency applicant. Finally, the Commission proposed the removal of joint liability from the leniency applicant, thus, limiting the applicant's exposure to damages.[305]

viii. Jurisdiction and Applicable Law

The Ashurst study found diversity of procedural rules among the Member States regarding the damages claims. To reduce the forum shopping that may result from such diversity, the Commission suggested the need of rules on jurisdiction and applicable law. The Green Paper on damages invited comments on which substantive law should be applicable to the antitrust claim

[304] Green Paper on damages, 9; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 57-62.
[305] Green Paper on damages, 9-10; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 63-66.

and whether the general rule contained in Article 5 of the Commission's proposal for a Regulation on the law applicable to non-contractual obligations (Rome II Regulation)[306] was satisfactory.[307]

ix. Other issues

Finally, the Green Paper on damages addressed few technical issues considered necessary to guarantee effective damage claims such as: i) the use of experts in court; ii) suspension or limitation periods; and iii) causation. The Green Paper on damages invited comments on whether experts should be appointed by the court or by parties to reduce cost and time. In addition, the Green Paper on damages asked when the suspension and limitation period shall start. In the Commission's view, the suspension period should start on the date the proceedings were instituted by the Commission or any of the NCAs, whereas, the limitation period could start once the high court has decided on the issue of infringement. Finally, the Green Paper on damages invited comments on whether the clarification of legal requirements of causation was necessary to facilitate the damages actions.[308]

The Green Paper on damages launched a reflection on how to improve the level of successful actions for damages caused by an infringement of the EU antitrust rule, and to stimulate the debate on whether measures can or should be adopted to harmonise national rules of the Member States related with the remedies and procedures governing damages actions.[309] The publication of the Green Paper on damages received broad interest within the antitrust community: various round tables and conferences have been organised in Europe and abroad, which, eventually, stimulated debate at the OECD[310], the European Parliament, the European Economic and Social Committee, and in the parliaments of various EU Member States.[311] Pursuant to the consultation procedure, the Commission received a total of 147 submissions from diverse groups;

[306] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (ROME II) COM (2003) 427 final
[307] Green Paper on damages, 10-11; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 67-72.
[308] Green Paper on damages, 11; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 73-77.
[309] Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 15-16.
[310] OECD, 'Private Remedies' [2011] The OECD Journal of Competition Law and Policy 7.
[311] de Smijter and O'Sullivan (n 187) 23.

respectively, 49 submissions from industry, 44 from law firms, 8 from academics, 5 from Member States' governments, 7 from consumers' groups, 6 from NCAs, and 5 from judicial organisations and individual citizens.[312] Responses varied widely from broad opposition[313] to broad endorsement.[314] Overall, all responses acknowledged the complementary role of private enforcement in the overall enforcement system of the EU competition law.[315] A widespread agreement existed among respondents whose victims of the infringement of the EU competition law are entitled to damages, and national procedural rules shall guarantee that this right be exercised effectively.[316]

Both the European Economic and Social Committee and the European Parliament contributed to the debate and provided incentives for further measures to be taken at the EU level. Pursuant to Commission's request for a consultation of the Green Paper on damages under Article 262 of the EC Treaty [Article 304 TFEU], on 26 October 2006, the European Economic Social Committee considered that adoption of the Green Paper on damages 'opened up a broad debate' and called on 'the need for Community guidelines' to facilitated damages actions.[317]

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[312] ibid 23

[313] Freshfields Bruckhaus Deringer, 'Response to Commission of the European Communities DG Competition Green paper on damages actions for Breach of the EC antitrust rules' <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/freshfields_bruckhaus_deringer.pdf>; Bundesverband der Deutschen Industrie e. V. <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/bdi.pdf>; Confindustria, 'Azioni di risarcimento del danno per violazione delle norme antitrust comunitarie. Osservazioni della Confindustria sul Libro Verde della Commissione UE' <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/confindustria_it.pdf> accessed 5 July 2019.

[314] Amsterdam Center for Law and Economics, 'Reply to selected questions and options in the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules' (21 April 2006) <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/acle.pdf> accessed 5 July 2019; BEUC, 'Damages Actions for Breach of EC antitrust rules: BEUC position on the Commission's Green Paper' (21 April 2006) <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/beuc.pdf>; James O' Reilly SC, Observations on Aspects of Commission Green Paper on Damages Action for Breach of EC Anti-Trust Rules and the Accompanying Commission Staff Working Paper' <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/oreilly_james.pdf>; Which?, <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/which.pdf> accessed 5 July 2019.

[315] Milutinović (n 177) 77-78.

[316] de Smijter and O'Sullivan (n 187) 23.

[317] European Economic and Social Committee, 'Opinion of the European and Social Committee on the Green Paper – Damages Actions for Breach of the EC Antitrust Rules' (Preparatory Acts, 430th Plenary Session held on 26 October 2006) OJ C 324/1.

Acknowledging its broad interest, on 25 April 2007, the European Parliament adopted a Resolution[318] calling on the Commission:

> to prepare a White Paper with detailed proposals to facilitate the bringing of 'stand-alone' and 'follow-on' private actions claiming damages (...) which addresses in a comprehensive manner, the issues raised in [its] resolution and gives consideration, where appropriate, to an adequate legal framework.[319]

Encouraged by the responses received during the consultation period of the Green Paper on damages, the comments of the European Parliament and the European Economic and Social Committee and especially *Courage* and *Manfredi* settled case-law, the Commission decided to adopt a White Paper to foster further the discussion on how to enhance private enforcement system in Europe by setting out concrete measures.

3.5. White Paper on Damages Actions for Breach of the EC Antitrust Rules

Unlike the Green Paper, which analyses the current situation and provides future actions to be taken, the White Paper 'set[s] out general proposal on an issue and is a document presenting a detailed and debated policy both for discussion and political decision'.[320] This definition makes clear that the White Paper has two objectives. On the one hand, the White Paper constitutes a document for discussion and consultation; on the other hand, the White Paper aims to lay down the main lines or strategy of actions. Usually, certain concrete proposals are foreseen.[321]

In this context, the publication of the White Paper 'on Damages Actions for breach of the EC Antitrust Rules'[322] brought, again, the private enforcement in the forefront of the discussion, moving the Commission's rhetoric from the question '*should* we have a more effective system of antitrust damages actions?' to '*how* a damages action system can be made effective in an

[318] European Parliament, 'Competition: damages actions for Breach of the EC antitrust rules. Green paper' (Resolution 2006/2207(INI), 25 April 2007)
<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=537836> 9 August 2018.
[319] quoted in Commission, 'Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' (Commission Staff Working Paper) SEC(2008) 404, 7.
[320] Senden (n 45) 126.
[321] Senden (n 45) 127.
[322] Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (White Paper) COM(2008) 165 final (hereafter cited as White Paper on damages).

appropriate manner'.[323] It marked a 'ground-breaking development'[324] since it foresaw the establishment of the system of private enforcement at EU level with its 'European' conception, origin, and main parameters.[325] Furthermore, the White Paper on damages showed that 'even if the whole initiative to introduce the Community measures for private actions were abandoned, the existing *acquis* itself was a community minimum from which there can be no departure'.[326]

The White Paper on damages is accompanied and has to be read in conjunction with by two Commission Staff working documents: i) a Commission staff working paper on the EC antitrust damages actions which provides a concise overview of the already existing EU *acquis* and laid down measures to be taken for each obstacle identified;[327] and ii) an Impact Assessment Report analysing the potential benefits and costs of various policy options.[328] The former provides a concise overview of the already existing EU *acquis* and the later analyses the potential benefits and costs of various policy options. The Impact Assessment Report draws, *inter alia,* on the findings of the external impact study undertaken by the *Centre for European Policies Studies,* in association with *Erasmus University Rotterdam* and *Libera Università Internazionale degli Studi Sociali Guido Carli* as a result of a tender awarded by the Commission.[329]

The primary objective of the White Paper on damages was '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'.[330] Since 1962 until 2004, the Ashurst Study found that private enforcement picture in the EU was underdeveloped and the legal situation was astonishing. Only

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[323] Neelie Kroes, 'Consumers at the heart of EU Competition Policy' (Address at BEUC, 22 April 2008) <https://europa.eu/rapid/press-release_SPEECH-08-212_en.htm?locale=en> accessed 29 September 2018.
[324] Assimakis P Komninos, 'The Road to the Commission's White Paper for Damages Actions: Where we Came from' [2008] Competition Policy International 81.
[325] For more see on the uniqueness 'European' character of the private enforcement see: Karmen Ellermaa, *The Genuine European Model of Private Competition Law Enforcement* (LL.M. Master Thesis, Tallin University of Technology 2014) 18-25; 66-69.
[326] Komninos, 'The Road to the Commission's White Paper for Damages Actions: Where we Came from' (n 324) 98.
[327] Commission, 'Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules {COM (2008) 165 final} {SEC (2008) 405} {SEC (2008) 406}' (Commission Staff Working Paper) SEC (2008) 404.
[328] Commission, 'Commission staff working document accompanying document to the White paper on damages actions for Breach of the EC antitrust rules - Impact assessment {COM(2008) 165 final} {SEC(2008) 404} {SEC(2008) 406}' (Impact Assessment) SEC(2008) 405.
[329] Andrea Renda, *et al.*, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios* (Final Report, Brussels, Rome and Rotterdam 21 December 2007).
[330] White Paper on damages, 3.

a few EU Member States had a legal framework for damages actions and, in total, only 60 cases were reported to be involving damages claims based on both national and EU competition law.[331] After the publication of the Ashurst Study and the Green Paper on damages, some EU Member States reacted positively by enacting the domestic legislation to facilitate the damages action.[332] Moreover, during that time, there was a growing number of national cases dealing not only with the question of the existence of the remedy but also with a clarification of some controversial issues on private enforcement of antitrust rules.[333] As the Impact Study showed, between the 1st May 2004 and the third quarter of 2007, a good amount of 96 antitrust damages actions for 27 EU Member States were identified.[334] Despite limiting the growth of private antitrust cases across Europe, the antitrust damages actions were found only in 10 EU Member States and the distribution of cases according to the type of allegation was uneven. The most common were litigation on vertical restraint with 61 cases out of 96 cases, followed by 22 cases involving abuses of dominance and 13 cases concerning horizontal agreement.[335] The amount of harm done to consumers by the infringement of the EU competition law ranges of several billion euros a year.[336] In the other Member States, still, antitrust damages actions were inexistent.

The guiding principle of the White Paper on the damages was, first and foremost, the full compensation. It was supposed that an improved compensatory justice would produce beneficial

[331] Waelbroeck (n.16) 1.
[332] UK Enterprises Act 2002; Stefan Thomas, 'Damage claims under the revised German Act against restraints of competition' [2005] e-Competitions, n 12706; Dessislava Fessenko, 'The Bulgarian Parliament adopts a new act on the protection of competition' [2008] e-Competitions, n 23076; Robert Pelikan and Jan Poevratil, 'The Czech NCA circulates a draft amendment to the Act on the Protection of Competition aimed at a harmonisation with substantive EC competition law, inclusion of specific procedural rules and launch of private enforcement' [2008] e-Competitions, n 19852; Bálint Bassola, 'Modernisation of the Hungarian Competition Act' [2005], e-Competitions, n 406; Gusztav Bacher, 'The Hungarian Parliament adopts an amendment limiting the liability of leniency applicants and introducing new calculation of amount of damages' [2009] e-Competitions, n 26235; Cristina Poncibo, 'The Italian Law providing for a group action has entered into force permitting collective enforcement of competition Law in Italy ("Azione di classe")' [2009] e-Competitions, n 26730; Wolfgang Wurmnest, 'A New Era for Private Antitrust Litigation in Germany? A critical Appraisal of the Modernized Law against Restraints of Competition' [2005] German Law Journal 1173.
[333] Assimakis P Komninos, 'Private Enforcement: An Overview of EU and National Cases Law'(e-Competitions Special Issue June 2012) <http://awa2013.concurrences.com/business-Articles-awards/Article/private-enforcement-an-overview-of> accessed 12 November 2018.
[334] Renda (n 334) 39.
[335] ibid 40.
[336] Commission, 'Commission staff working document accompanying document to the White paper on damages actions for Breach of the EC antitrust rules - Impact assessment' (n 328) 13-16.

effects, both, in deterring future infringement and greater compliance of the EU antitrust rules.[337] The second principle was to design a legal framework for antitrust damages actions based on balanced measures rooted in 'European legal culture and traditions'.[338] The final guiding principle relates to preserving strong public enforcement by the Commission and the competition authorities of the Member States.

The White Paper on damages proposed the creation of an effective system of private enforcement 'that complements, but does not replace or jeopardise, public enforcement'.[339] In the Commission's view, the notion of complement covers two categories of cases: stand-alone and follow-on actions.[340] Stand-alone actions are litigations in which a private party sues another party for violation of competition rules in the absence of any breach found by a public authority – either the Commission or NCAs. The burden of proof of the violation relies on the claimant. Whereas follow-on actions take place pursuant to the NCA's decision condemning the anticompetitive behaviour. Private parties may bring an action for damages in a national court against the undertakings found to have infringed competition rules by the NCA's decision with the purpose to obtain compensation for the damage suffered as a result of that infringement.[341] Wils argues that there exists another situation parallel with the follow-on action where a private party may bring a complaint concerning an alleged antitrust infringement before the NCA and may run in parallel with the public enforcement proceedings concerning the same alleged infringement. While the NCA investigates the complaint, the complainant may in a private action request interim relief pending the NCA's decision.[342]

As a non-binding document, the White Paper on damages contained broad measures to stimulate the debate of antitrust damage actions by calling on the combination of national and European rules to guarantee the minimum protection to the victims and adopting a binding instrument rooted in the 'European legal culture' to guarantee such minimum protection across all

[337] White Paper on damages, 3.
[338] White Paper on damages, 3.
[339] White Paper on damages, 3.
[340] Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 11.
[341] Wils, 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future' (n 160) 4.
[342] ibid 4.

Member States. In the Commission's view, a European legal framework would have several advantages. Firstly, the enactment of a Community's instrument would provide all direct and indirect purchasers, who are victims of a competition law infringement, a clear picture of their rights under the EU law. Secondly, it would serve as a point of reference for the Member States to know the minimum standard of protection deriving from the EU law. Such steps, in turn, would guide to national legislatures or judges to adopt or apply the national legislation to render damages actions effective or not to adopt or apply the national legislation being contrary to the Community's legislation. Thirdly, the existence of the basic European legal framework would enhance both awareness and deterrence. Finally, a European legal framework would contribute to the objectives of the European single market.[343]

The White Paper on damages addresses issues concerning all categories of victims, all types of breaches of Articles 101 and 102 TFEU to all sectors of economy.[344] The following part provides a brief overview of the measures proposed by the Commission in the White Paper on damages for each obstacle identified in the Green Paper on damages except two obstacles - causation and involving experts – things that were not reflected.

i. Standing: Indirect Purchaser and Collective Redress

With regard to legal standing to bring an action for damages, the Commission endorsed the ECJ decision in *Manfredi's* judgment 'that any individual can claim compensation for the harm suffered where there is a casual relationship between that harm and an agreement or practice prohibited under Article 81 of the EC'.[345] Despite the judgment refers to Article 101 TFEU, the reasoning applies also to Article 102 TFEU. Secondly, the wording used by the ECJ – *any individual* who has suffered harm caused by an antitrust infringement - encompasses the indirect purchaser as well. Accordingly, there is no limitation on legal standing to bring an action for damages.[346]

[343] Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 97-98.
[344] White Paper on damages, 3.
[345] *Manfredi* (n 7) para 61.
[346] White Paper on damages, 4; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 14-15.

Furthermore, the Commission considered the necessity to provide a means of collective redress for all categories of victims of competition law, including individual consumers or small businesses who have suffered relatively low-value damage as an opportunity to obtain the compensation. Accordingly, the Commission suggested that a combination of two complementary mechanisms of collective redress such as the representative action and opt-in collective action would address the issues of uncertainty, high cost and procedural rules that victims face.[347] The representative actions were to be brought by qualified entities that were either designed in advance or certified on an *ad hoc* basis by a Member State for a particular antitrust infringement.[348] While the opt-in collective actions were to be brought by victims who decided expressly to combine their individual claims into a single action for the harm suffered.[349]

ii. Access to Evidence: Disclosure inter partes

Antirust damages cases are particularly fact-intensive. Much of the key evidence often lies in the hand of the infringer who often puts too much effort into concealing relevant information. According to the Commission, the current system of civil procedure in many Member States did not offer an effective means to have access to the evidence. Consequently, the infringers were able to keep the information secretly, while victims were discouraged to bring a damage action for compensation since they lacked sufficient evidence.[350] The Commission suggested a minimum level of harmonisation of disclosure *inter partes* for the EU antitrust damages cases that derives from the disclosure regime stipulated in the Intellectual Property Directive.[351] Article 6 of the Intellectual Property Directive provided the right of the disclosure of evidence upon the judicial decision respecting the protection of confidential information. Article 7 (1) of the Intellectual

[347] White Paper on damages, 4; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 15-16.
[348] White Paper on damages, 4; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 18-19.
[349] White Paper on damages, 4; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 20-21. On the difference between opt-in, opt-out see European Parliament, *Collective Redress in the Member States of the European Union* (Policy Department for Citizens' Rights and Constitutional Affairs 2018) 23.
[350] Rainer Becker, Nicolas Bessot and Eddy de Smijter, 'The White Paper on Damages Actions for Breach of EC Competition Rules' [2008] Competition Policy Newsletter 4, 9.
[351] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectually Property Rights [2004] OJ L 195/16, Arts 6-7.

Property Directive addressed the issue of ensuring the preservation of evidence. Both these provisions provided a useful point of reference to improve further the access to evidence in the competition cases. The proposed solution by the Commission was that the access to evidence should be based on a fact-pleading and strict judicial control of the plausibility of the claim. Disclosure of evidence should be done only by the judges specifying the categories of relevant evidence to be disclosed. In turn, judges would be subject to strict and active judicial control 'as to their necessity, scope and proportionality'.[352]

Moreover, the White Paper suggested that the civil procedure of the Member States should allow, as a minimum level of harmonisation of disclosure in antitrust cases, the fulfilment of the following conditions by the claimant for obtaining a disclosure order. Firstly, the claimant had to present all the reasonably available facts and evidences sufficient to make out a plausible claim.[353] The second condition related to the inability of claimant despite applying all efforts that can reasonably be expected to access relevant evidence in another manner than through a disclosure order.[354] Thirdly, the disclosure order should specify sufficiently precise categories of evidence to be disclosed in order to be limited only in what is relevant to the case and proportionate with, on the one hand, to the burden of the disclosure, and on the other hand, the nature and value of the claim. [355] The final condition called on the court *ex officio* to verify the relevance, necessity and proportionality of the disclosure.[356]

Additionally, the White Paper on damages addressed further issues related to the scope of the disclosure of evidences. The Commission suggested that disclosure orders should include all types of evidences admissible in the Member States concerned. Moreover, adequate protection should be given to confidential information as well, and in so doing to corporate statements by

[352] Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 31.
[353] White Paper on damages, 5; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 31-32
[354] White Paper on damages, 5; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 32-33.
[355] White Paper on damages, 5; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 32-33.
[356] White Paper on damages, 5; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 33-34.

leniency applicants and to the investigations of competition authorities.[357] Finally, national courts should be equipped with appropriate powers to impose sufficiently deterrent sanctions in order to prevent the destruction of relevant evidence or refusal to comply with the disclosure orders.[358]

iii. Binding Nature of Competition Authorities' Decisions

The binding nature of competition authorities' decisions was another issue addressed in the White Paper on damages. Article 16 (1) of Regulation 1/2003 provides that victims can rely on the decision of the Commission for breaching of EU antitrust rules as binding proof in follow-on civil proceedings for damages. In the Commissions' view, a binding decision of NCA before the national courts for infringement of Articles 101 or 102 TFEU would enhance the consistent application of the EU antitrust law and increase legal certainty.[359] Therefore, the White Paper on damages suggested that national courts dealing with the damages claim must not take a decision contrary to the decision taken by the NCA within the European Competition Network or a final ruling by a review court upholding the NCA decision or has itself given out a judgment finding an infringement of Articles 101 and 102 TFEU.[360]

iv. Fault

Another obstacle addressed in the White Paper on damages was the fault. The Commission acknowledged the diverse approaches existing among the Member States on the interaction between the competition law and the general rule of liability, in particular the question of fault. Regarding fault requirement, the Member States were divided in three groups and the Commission provided a suggestion for each. The first group included the Member States that did not require any fault at all, as a condition for an antitrust damages claim. The second group comprised Member States that irrebuttably presumed the existence of fault once an infringement of their national

[357] White Paper on damages, 5; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 34-37.
[358] White Paper on damages, 5; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 39.
[359] White Paper on damages, 5; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 44.
[360] White Paper on damages, 5 – 6; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 44-45.

antitrust laws has been shown. The third group included the Member States where claimants either had to demonstrate the existence of a fault without the facilitation of any presumption, or they could draw only on a rebuttable presumption of fault once they had established the existence of an infringement of antitrust law.

For the first and second group, the Commission suggested applying the same standard for damage claims based on infringements of Articles 101 or 102 TFEU. Therefore, once a breach of the EU antitrust law has been established, no elements of fault have to be proven or fault is irrebuttably presumed in civil proceedings for antitrust damages.[361] For the third group, the Commission considered taking measurse for more legal certainty in terms of fault requirement in the national law in order not to undermine the effective exercise of the right to reparation. According to the Commission's proposal, the victims should be liable for damages caused once there was a breach of Articles 101 or 102 TFEU, unless they show that the infringement was the result of a genuinely excusable error. In the Commission's view, an excusable error has to be understood as 'if a reasonable person has applied a high standard of care that could have not been aware that the conduct restricted competition'.[362]

v. Definition of Damages

The White Paper on damages endorsed the ECJ settled case-law broad definition of the harm caused and suggested accepting the EU *acquis* as a minimum standard. With regard to the quantum of damages, the White Paper on damages recognised that even when the scope of damages is clear, the victim of the antitrust infringement may face difficulties in proving the extent of the harm suffered. The Commission proposed to produce a non-binding guidance on the calculation of damages in antitrust cases for benefit of both national courts and the parties.[363] The

[361] White Paper on damages, 6-7; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 52-54.
[362] White Paper on damages, 7; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 52-54.
[363] White Paper on damages, 7; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 59-61.

latter was submitted by the DG Competition for public consultation in June 2011, on the basis of an external study prepared by legal and economic practitioners as well as academics.[364]

vi. Availability of the Passing-on overcharges

While the Green Paper on damages left open the issue of whether the defendant should be able to invoke the passing-on defence,[365] the White Paper on damages recalled the compensatory principle settled by the ECJ that damages should be available to any individual who can show a causal link with the infringement. The White Paper on damages laid down three scenarios for discussion. The first scenario was related to the passing-on shield against an action brought by a purchaser other than the final consumer. The Commission considered that denying the passing-on could result in unjust enrichment of purchasers who might have passed on overcharges due to antitrust practices of the infringers to the others in the supply who may get multiple compensations. Therefore, the Commission suggested the possibility for the defendants be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. Moreover, the Commission imposed the standard of proof for this defence alike the one of the claimants trying to prove damages.[366]

The second scenario was related to the passing-on sword in an action brought by indirect purchasers, who are willing to invoke passing-on of overcharges to show the harm suffered. The Commission proposed to lighten the burden of proof due to their position at the end of the supply, and distance itself from the infringement to produce sufficient proof. Hence, the Commission suggested that an indirect purchaser should be able to rely on the rebuttable presumption that the unlawful overcharge was passed on to them entirety.[367]

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[364] Commission, 'Draft Guidance Paper − Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty' <http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html> access 23 October 2018.
[365] Green Paper on damages, 8; Commission, 'Annex to the Green Paper: Actions for breach of the EC antitrust rules' (n 293) 45-50.
[366] White Paper on damages, 7-8; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 63-65.
[367] White Paper on damages, 8; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 65-67.

The final scenario discussed the situation of the passing-on shield and sword in case of joint, parallel or consecutive actions brought by the purchasers at different levels in the distribution chain. Accordingly, the Commission encouraged the national courts to use whatever mechanism under the national or the EU law at their disposal in order to avoid either under-compensation or over-compensation of the harm caused by a competition law infringement.[368]

vii. Limitation Periods

Regarding the issue of the limitation period, the White Paper on damages suggested adopting a uniform limitation period in all Member States for a more legal certainty both in stand-alone and follow-on cases. The Commission proposed measures to ensure effective antitrust damages on the following issues: a) commencement date of the limitation period; b) the duration of the limitation; and c) the effect of public antitrust proceedings on the limitation period.

The Commission proposed that in the case of a continuous or repeated infringement, the limitation period should not start runnning before the day the infringement ceases. In cases where the infringement remained 'covert during and after lifespan', the limitation period should not start runnning before the victim of the infringement can reasonably be expected to be informed about the infringement and harm caused to him.[369] Concerning the duration of the limitation, the Commission did not determine a minimum duration. The Commission recalled that duration cannot be short to render the right to seek compensation practically impossible or excessively difficult.[370] Finally, to enable claimants to bring their claim effectively, the Commission proposed a new limitation period of a minimum of two years. Such a period would ensure the potential claimants to have enough time to prepare their claim. The limitation period would start runnning once the infringement decision on which the claimant relies has become final.[371]

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[368] White Paper on damages, 8; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 67-69.
[369] White Paper on damages, 8; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 71-72.
[370] Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 72.
[371] White Paper on damages, 9; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 72-73.

viii. Cost of Damages Actions

The White Paper on damages acknowledged that the cost associated with antitrust damages actions and the cost allocation rules can be a decisive disincentive to bringing damage actions for infringement of competition rules. For this purpose, the Commission encouraged the Member States to reflect on certain issues like: i) designing procedural rules to foster a mechanism for early resolution cases, as a way to reduce costs; ii) setting up court fees that would not be an obstacle for bringing antitrust damages claims; and iii) giving the national courts the possibility of issuing cost orders in certain justified cases to guarantee the claimant that even when the claim is unsuccessful, the claimant shall not bear all the cost incurred by the other party.[372]

ix. Interaction between Actions for Damages and Leniency Programmes

The final topic covered by the White Paper on damages relates to the connection between the leniency programmes and actions for damages. In 2006, the Commission introduced a 'Notice on Immunity from fines and reduction of fines in cartel cases'.[373] Through this Notice, the Commission aimed to encourage a greater detection of cartels by whistleblowing on a cartel and in exchange for the information and evidence given the cartel member may obtain full or partial immunity from fines.

In the White Paper on damages, the Commission addressed two issues: one related to the exclusion of discoverability of corporate statements submitted by the applicants for immunity and reduction of fines, and the other, limiting the scope of civil liability of the successful immunity applicant. Regarding the first issue, the Commission proposed to grant protection to all corporate statements submitted by all applicants for leniency pursuant to the EU Law and the national leniency program where the breach of Article 101 TFEU is at stake.[374] Furthermore, the Commission emphasised the consistent Commission policy to not disclose the corporate

[372] White Paper on damages, 9 – 10; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 75-80.
[373] Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17.
[374] White Paper on damages, 10; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 84-85.

statements to national courts neither before nor after a decision by the competition authority is taken.[375]

Regarding the second issue, the Commission called on the Member States the possibility of limiting the civil liability of the leniency applicant, entitled to immunity from the damages claims of his direct or indirect commercial partners. In the Commission's view, this would make the scope of damages more predictable and limiting, and the leniency applicants would bear the burden of proving the extent of limitation of their liability in this case.[376] Seen from a different viewpoint, even though the White Paper on damages referred to the need to protect the leniency programme, it did not address the ways the private enforcement would take an effective shape in the presence of such strict norms protecting leniency, or the extent of the protection given to leniency programmes if the private enforcement is encouraged optimally in the EU.[377]

Following the publication of the White Paper on damages, the Commission received around 173 comments which were consequently published on the website.[378] Overall, the White Paper on damages received criticism from the Member States, the EU institutions and later legal scholarships. Almost, all Member States raised the question regarding the Commission's authority to propose a Community instrument that would replace the national rules. A wide-spread agreement existed that the Commission went too far in its effort to encourage private enforcement or even some Member States opposed the idea of a legislative measure. For instance, in their joint response, the German Government and *Bundeskartellamt* argued for no need for specific sectorial rules in tort laws and civil procedures[379], whereas the Austrian Government objected the White

[375] White Paper on damages, 86-87.
[376] White Paper on damages 10; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 84-85.
[377] S Nandini Pahari, 'Private Enforcement of EU Competition Law: An Imperative with Differing Consequences' [2017] ICC Global Antitrust Review 7, 22-23.
[378] Commission, 'Comments on the White Paper on Damages Actions for Breach of the EC Antitrust Rules' <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html> accessed on 25 August 2018
[379] 'Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on "Damages actions for Breach of the EC antitrust rules" <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf> 25 August 2018, 3.

Paper's aim as unnecessary, creating a 'special law of damage compensation'.[380] The same concern was raised by the Dutch Retail Association which acknowledged the positive elements of the White Paper on damages, but stressed considerable risks 'if this blueprint for collective redress would be implemented in the European Union' because it would stimulate unmeritorious damages for a claim.[381]

On 9 March 2009, a report by the European Parliament's Economic and Monetary Affairs Committee[382] followed by a resolution of the European Parliament on 26 March 2009[383] expressed little support for the Commission's proposals. In the explanatory statement of the report, *rapporteur* Klaus-Heiner Lehne raised concerns on the Commission's competence for its proposals. Whereas, the resolution of the European Parliament raised some concerns regarding collective redress.[384]

Furthermore, the White Paper on damages received attention by commentators, from those proposing more actions to those criticising the actions. In an editorial comment appeared in June 2008, the issue of the Common Market Law Review called on more action by the Commission toward for enforcement of the EU competition law.[385] In the same vein, Kloub in his Article welcomed the Commission proposal on White Paper on damages and suggested considering the issue of private enforcement on the basis of a more holistic approach to antitrust enforcement.[386] Whereas, others criticised the proposals on damages in the White Paper as insufficient to attain

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[380] Österreichische Stellungnahme zum Weißbuch, 'Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts' <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/oster_de.pdf> 25 August 2018.

[381] Platform Detailhandel Nederland, 'A European-wide system of class action is premature' <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/dutchretail_en.pdf> 25 August 2018, 2.

[382] Klaus-Heiner Lehne, 'Report on the White Paper on damages actions for Breach of the EC antitrust rules (2008/2154(INI))' (Committee on Economic and Monetary Affairs) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0123+0+DOC+PDF+V0//EN> accessed 25 August 2018.

[383] European Parliament, 'European Parliament resolution of 26 March 2009 on the White Paper on damages actions for Breach of the EC antitrust rules' (2008/2154(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0187+0+DOC+PDF+V0//EN> accessed 25 August 2018.

[384] ibid.

[385] Editorial Comment, 'A little more action please! – The White Paper on damages actions for Breach of the EC antitrust rules' [2008] Common Market Law Review 609.

[386] Jindrich Kloub, 'White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement' [2009] European Competition Journal 515.

objectives of providing a framework for an effective enforcement system[387] or even claimed the lack of legal basis of Commission to propose measures.[388] Nebbia and Szyszczak criticism focused on the lack of thinking and elaborating in advance the internal coherence of the national system of private and procedural laws.[389] The national tort law is an integral part of the national private law and minor changes to these rules would affect the coherence of the national laws and run counter the inspiration to develop a unified private law.[390] As the Association of European Competition Law Judges commented in the reply for the White Paper on damages, the creation of special procedures rules in competition law damages, differently from the rules governing other damages action under national law, 'have possible unforeseen effects'.[391]

3.6. 2013 Package: Facilitating Private Enforcement in the EU

Following the positive feedback on the White Paper on damages, the Commission drafted a Directive, but shortly before the draft was to publish on October 2009, it was leaked and soon withdrawn from the agenda. The controversy of withdrawn centred upon two issues: i) the inclusion of a *de facto* opt-out collective action provision contrary to the White Paper on damages suggestions and ii) the Commission's proposal to use as a legal basis Article 103 of the TFEU which excludes the European Parliament from the decision-making process under the ordinary legislative procedure.[392] The lack of insurance to pass the legislation made the Commission withdrow the proposal, and, therefore, the process continued at Commission level.

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[387] Schreiber (n 186) 1163.
[388] J S Kortmann and CH R A Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less Than Enthusiastic' [2009] European Competition Law Review 340, 344.
[389] Paolisa Nebbia and Erika Szyszczak, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' [2009] European Business Law Review 635, 648.
[390] Kortmann and Swaak (n 388) 347.
[391] Association of European Competition Law Judges, 'Comments on the Commission's White Paper on Damages Actions for Breach of the EC Antitrust rules' <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/judges_en.pdf> accessed 31 August 2018.
[392] Patrick Boylan, 'Draft Damages Directive: off the Agenda for now (Practical Law, 28 October 2009) <https://uk.practicallaw.thomsonreuters.com/Document/I6f84d523e82f11e398db8b09b4f043e0/View/FullText.html ?transitionType=SearchItem&contextData=(sc.Search)> accessed on 4 September 2018; Marc A Sittenreich, 'The Rocky Path for Private Directors General: Procedure, Politics and Uncertain Future of EU Antitrust Damage Actions' [2012] Fordham Law Review 2701, 2723; Niamh Dunne, 'The Role of Private Enforcement within EU Competition Law' [2014] Cambridge Yearbook of European Legal Studies 143, 160.

In June 2013, the Commission released a three-part package of measures to facilitate the damages claims by victims of antitrust rules and optimise the interaction between private enforcement and public enforcement.[393] The three-part package included, firstly, the concept of collective redress, viewed particularly preferable by the European Parliament.[394] Following a consultation from 4 February until 30 April 2011[395] and a public hearing held on 5 April 2011,[396] the Commission issued a Recommendation advising the Member States to introduce collective redress system at the national level.[397] The principles laid down in this recommendation, according to Recital 7, applies 'horizontally and equally' in any areas where collective claims for violation of the EU law are relevant. [398]

The second issue of the package was related to the quantification of antitrust damages. The Commission published a non-binding 'Practical Guide' to quantify harm in competition cases to assist both the national court and the parties involved in an action for damages.[399] The Practical Guide gives information on the main methods and techniques available to quantify such harm, followed by an assessment of potential application of these tools to cases of anti-competitive overcharge or exclusion.

[393] Jones and Sufrin (n 190) 1041; Lorna Woods, Philippa Watson, and Marios Costa, *Steiner & Woods EU Law* (13th edn, OUP 2017) 677.
[394] European Parliament, 'European Parliament resolution of 26 March 2009 on the White Paper on damages actions for Breach of the EC antitrust rules' (n 383).
[395] Commission, 'Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress' SEC (2011) 173 final.
[396] For more on the public hearing see Commission, 'Recordings from the 3 sessions of the public hearing' (first session) <http://ec.europa.eu/competition/consultations/2011_collective_redress/05042011_collective_redress_hearing_1.mp3>; (second session) <http://ec.europa.eu/competition/consultations/2011_collective_redress/05042011_collective_redress_hearing_2.mp3>; (third session) <http://ec.europa.eu/competition/consultations/2011_collective_redress/05042011_collective_redress_hearing_3.mp3> accessed 4 September 2018.
[397] 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 L 201/60.
[398] ibid, recital 7.
[399] Commission, 'Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (Commission Staff Working Document) SWD(2013) 205.

The third and the most important issue was the publication of a revised proposal of a directive on damages actions.[400] The proposed draft directive had a two-fold objective. The first objective is related to the optimisation of the interaction between the public and private enforcement of the competition law so that 'the Commission and NCAs can maintain a policy of strong public enforcement, while victims of an infringement of competition law can obtain compensation for the harm suffered'.[401] The primary issue behind the optimisation was related to the question raised in *Pfleider*: whether to allow the disclosure of the document including the leniency documents. In the Commission's view, as expressed in the explanatory memorandum, in the absence of the EU legally binding actions, the effectiveness of the leniency programme and its role in discovering the infringement would be seriously undermined.[402] The second objective was to ensure that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.[403]

Once the draft directive was released, it needed to be adopted following an ordinary legislative procedure pursuant to Article 294 TFEU, where both the European Parliament and the Council had to decide. Despite the objections of the Member States and some members of the European Parliament on issues such as the disclosure of documents relating to whistle-blowers, the compensation for indirect purchasers, and the lack of provisions for collective redress,[404] a final compromise text was approved in April 2014.[405] For the first time, the European Parliament participated in the legislative process on enforcing EU competition rules.[406] Prior to the final adoption by the Council, a corrigendum of the Directive's text was adopted on 21 October 2014

[400] Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' COM(2013) 404 final (Explanatory Memorandum) and (proposal for Directive).
[401] Explanatory memorandum (n 400) 4.
[402] ibid, 3.
[403] ibid, 4.
[404] Anne MacGregor and David Boyle, 'Private Antitrust Litigation in the EU: Levelling the Playing Field' (7 May 2014)
<http://www.mondaq.com/unitedstates/x/311890/Antitrust+Competition/Private+Antitrust+Litigation+In+The+EU+Levelling+The+Playing+Field> accessed on 4 September 2018.
[405] Commission, 'Antitrust: Commission welcomes Parliament vote to facilitate damages claims by victims of antitrust violations' (Press Release 17 April 2014)
<http://europa.eu/rapid/press-release_IP-14-455_en.htm> accessed on 4 September 2018.
[406] Commission, 'The Damages Directive – Towards more effective Enforcement of the EU Competition Rules' [2015] Competition Policy Brief 1.

without a vote at the European Parliament's plenary session.[407] After the final adoption by the Council on 10 November 2014, the Directive on antitrust damages actions was signed into law on 26 November 2014 and published in the Official Journal on 5 December 2014.[408] With the approval of the Directive 2014/104/EU, the Commission 'bridged' what until that time seemed to be 'unbridgeable':[409] the harmonisation of certain aspects of action for damages for infringement of competition rules.

[407] European Parliament, 'Corrigendum to the to the position of the European Parliament adopted at first reading on 17 April 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union'
<http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_corrigendum_en.pdf> accessed on 4 September 2018.
[408] Directive 2014/104/EU of the European Parliament and of the Council of 29 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.
[409] Walter van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie' [1996] International and Comparative Law Quarterly 507.

CHAPTER

4. The Directive on Right to Damages: Legal Aspects and Implications

4.1. Introduction

In June 2013, the Commission proposed a draft directive as part of a three-part package aiming to harmonise certain aspects of private actions across the EU level. Approved and signed in November 2014, the Directive 2014/104/EU represents a novelty in two aspects.[410] Firstly, it is the first time that the Commission submits draft legislation in the area of EU competition law. Secondly, it is also the first time that the European Parliament is involved as a o-legislator under the ordinary legislative procedure.[411] The Directive 2014/104/EU contains 56 recitals in the preamble and 24 Articles structured in 7 chapters. The first chapter explains the subject matter, scope and definitions, followed by the disclosure of evidence (chapter II); the effect of national decisions, limitation periods and joint and several liability (chapter III); the passing-on of overcharges (chapter IV); the quantification of harm (chapter V); consensual dispute resolution (chapter VI) and the final provisions on review, transposition, temporal application and entry into force (Chapter VII). According to Article 21, the Member States had to transpose the Directive 2014/104/EU into their domestic legal system until 27 December 2016.[412]

This chapter provides a legal analysis of the Directive 2014/104/EU and the main substantial and procedural rules introduced. The second section discusses the legal basis of the Directive 2014/104/EU and conflicts between Articles 103 and 114 TFEU, if any. The third section analyses the subject matter; the scope of the Directive and the substantive and procedural rules as introduced in the Directive 2014/104/EU. Section 4 assesses whether the harmonisation has achieved its goal; followed by an overview of the transposition process and the main problems encountered by the EU Member States (section 5).

[410] Directive 2014/104/EU of the European Parliament and of the Council of 29 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1 (hereafter cited as Directive 2014/104/EU).
[411] Joaquín Almunia, 'Antitrust damages in EU law and policy' (n 43).
[412] Directive 2014/104/EU, Art 21.

4.2. Legal Basis of Directive 2014/104/EU: Single or Dual Legal Basis?

As a legal basis for Directive 2014/104/EU, the Commission proposed both Articles 103 and 114 TFEU. Article 103 TFEU grants the Council the power to give effect to the principles set out in Articles 101 and 102 TFEU in a form of Regulation or Directive based on a proposal from the Commission and after consulting the European Parliament. The second paragraph of Article 103 TFEU refers to a non-exhaustive list of potential measures designed for public enforcement[413] and measures aimed to clarify issues of substantive competition law,[414] *inter alia,* 'to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Article'.[415]

Article 114 TFEU confers power to both the European Parliament and the Council acting in accordance with the ordinary procedure and after consultation with the European Economic and Social Committee to adopt measures for the approximation of national laws for the establishing and functioning of the internal market.[416] Article 26 (2) TFEU define internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. However, there are two limits to the use of Article 114 TFEU.[417] First, a reference to Article 114 TFEU is made where no other specific legal basis applies. In *Commission v Council*, the ECJ argued that if the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, that measure must be founded on such provision.[418] Secondly, recourse to Article 114 TFEU must happen only to justify the approximation of laws. Measures that do not harmonise laws cannot be

[413] TFEU, Art 103 (2) (a) and (d).
[414] TFEU, Art 103 (2) (b), (c) and (e).
[415] TFEU, Art 103 (2) (e).
[416] Approximation of laws under Article 114 TFEU and harmonisation of laws are used as synonyms in the EU jargon. The latter has dominated the discourse and is used commonly. Bruno de Witte, A Geelhoed and J Inghleram, 'Legal Instruments, Decision-Making and EU Finances' in Paul J G Kapteyn, A M Mcdonnell, Kamiel Mortelmans and Christiaan W A Timmermans (Eds), *Introduction to the Law of the European Union and the European Communities* (4th edition, Kluwer Law International 2008) 273 - 419; Stephen Weatherill, 'The Several Internal Markets' [2017] Yearbook of European Law 125, 146 – 147; Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP 2013) 635; Craig and de Búrca (n 231) 93-94.
[417] Barnard (n 416) 634 – 635.
[418] Judgment of 26 January 2006, *Commission v Council,* C-533/03, ECLI: EU:C:2006:64, para 45.

adopted pursuant to Article 114 TFEU.[419] In *Tabacco Advertising I,* the ECJ laid down two situations where Article 114 (1) TFEU could be used to adopt the measure.[420] The first is where those measures adopted which contribute to the elimination of obstacles to the exercise of fundamental freedoms. The second situation is where the Union adopts measures to remove distortions of competition arising from the diverse national rules.

Article 114 TFEU does not specify the type of harmonisation to be attained. A vague assumption exists that full harmonisation is the best way to achieve the internal market, if not otherwise stated the type of harmonisation.[421] Barnard identifies different types of harmonisation experienced by the EU.[422] Full harmonisation concerns a situation where diverse national rules are replaced by a single EU rule, leaving no room for manoeuvre to the Member States. Maximum harmonisation seeks greater uniformity with the EU law. The Member States cannot adopt either a lower or a higher level of protection.[423] Optional harmonisation simply sets out a threshold to be met by all the Member States, which have discretion whether or not to apply a higher level of legislative protection. Minimum harmonisation sets out a minimum standard, but the Member States may impose higher standards. This type of harmonisation allows more space for diversity and autonomy for the Member States and is commonly used.

Using a dual legal basis has raised questions whether the combination of both Articles 103 and 114 provides an appropriate legal basis, or the single use of Article 103 TFEU is enough. Various authors have advocated the idea that the single use of Article 103 TFEU would be the most intuitive call.[424] The roots of dual legal basis can be traced in the ECJ's cases stating that:

> full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85 (1) would be put at risk if it were not open to any

[419] Judgment of 2 May 2006, *Parliament v Council*, C-436/03, ECLI:EU:C:2006:277, para 44.
[420] Judgment of 5 October 2000, *Germany v Parliament and Council,* C-376/98, ECLI:EU:C:2000:544, paras 83-84.
[421] Loïc Azoulai, 'The Complex Weave of Harmonisation' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Law* (OUP 2015) 603; Judgment of 8 November 2007, *Gintec,* C-374/05, ECLI:EU:C:2007:93, Opinion of AG Ruiz-Jarabo Colomer delivered on 13 February 2007, paras 22-40.
[422] Barnard (n 416) 656-666.
[423] ibid 658; Stephen Weatherill, 'Maximum versus Minimum Harmonisation: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market' in Niamh Nic Shuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (Oxford, 2012) 175, 176.
[424] Friedrich Wenzel Bulst, 'Of Arms and Armour: The European Commission's white Paper on Damages Action for Breach of EC Antitrust Law' [2008] Bucerius Law Journal 81, 94.

> individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[425]

The ECJ added that the existence of such rights strengthen the working of the EU competition rules and can, therefore, make a significant contribution to maintaining effective competition in the EU.[426] However, in both *Courage* and *Manfredi*, the ECJ recognised the existence of the right to damages but it did not determine the conditions for the exercise of such right. According to Cauffman, discrepancies between the conditions for the exercise of this right across the Member States may undermine the uniform application and the full effectiveness of the EU competition rules.[427] This, in turn, shall empower the EU to adopt measures on antitrust damages actions under the scope of Article 103 TFEU. Most probably, Article 103 (2) (e) TFEU could serve as a justification for provisions in the directive dealing with damages actions for infringement of the national competition rules in the case that these are applied in parallel with the European competition rules.[428]

Furthermore, the EU's competences to legislate on private enforcement of the EU competition rules is reinforced by the fact that Article 3 (1) (b) TFEU confers upon the EU exclusive competences for the establishment of the competition rules necessary to the functioning of the internal market. Both principles of subsidiarity and proportionality do not apply in exclusive competences.[429] Protocol 27 attached to the Lisbon Treaty, which is an integral part of the Treaties and has legal binding effects,[430] considers that the internal market includes a system ensuring that competition is not distorted. In addition, Protocol 27 confers upon the Union the power to take action under Articles 101 and 102 TFEU, and if necessary, may use Article 352 TFEU as a legal base to legislate. In light of the above-mention analysis, it could be argued that a proposal from the Commission and upon consultation with the European Parliament based only on Article 103 (1) TFEU would be enough.

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[425] *Courage and Crehan* (n 7) para 26; *Manfredi* (n 7) para 90
[426] *Courage and Crehan* (n 7) para 27; *Manfredi* (n 7) para 91.
[427] Caroline Cauffman, 'The European Commission Proposal for a Directive on Antitrust Damages: A First Assessment' [2013] Maastricht Journal of European and Comparative Law 623, 628.
[428] ibid 628.
[429] TEU, Arts 4 and 5.
[430] TEU, Art 51.

However, in the Commissions' view, the single use of Article 103 TFEU would not be satisfactory because:

> Approximating national substantive and procedural rules with the aim of pursuing undistorted competition in the internal market and enabling citizens and undertakings the full exercise of the rights and freedoms they derive therefrom is not merely ancillary to the objective of ensuring effective enforcement of the EU competition rules. This conclusion results not only from the aims, but also from the specific provisions of the proposed Directive. The content of the proposed Directive cannot be fully covered by Article 103 of the Treaty because it also modifies the applicable national rules concerning the right to claim damages for infringements of national competition law, even if that is only in respect to anticompetitive behaviour that has an effect on trade between Member States and to which EU competition law thus equally applies. It follows that the scope of the proposed Directive, arising not only from the aims but also from the contents of the instrument, goes beyond giving effect to Articles 101 and 102 of the Treaty and means that the proposed Directive also has to be based on Article 114 TFEU.[431]

Facing setbacks from the leak of a draft directive in 2009, the Commission opted out to recourse on Article 114 TFEU as an additional legal basis. The justification of Article 114 TFEU was motivated by the objective to ensure a more level-playing field for undertakings operating in the internal market and to make it easier for citizens and businesses to make use of the rights they derive from the internal market.[432] The recourse to Article 114 TFEU entails two important implications. First, it allows the EU legislature to harmonise the liability for damages for infringement of national competition law,[433] and secondly, instead of special legislative procedure under Article 103 TFEU where the European Parliament is consulted, measures adopted under Article 114 TFEU require adoption through an ordinary legislative procedure based on Article 294 TFEU. The involvement of the European Parliament in the legislative process strengthens the legitimacy of the measure,[434] and most importantly, increases the chances to be adopted, unlike the 2009 draft proposal which was withdrawn.

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[431] Explanatory memorandum (n 400) 10.

[432] ibid 9 – 10; One of the main reason pursuing 'more level of playing' objective relates to the fact that the Member States with effective enforcement of competition system would be less attractive compared with other Member States whose enforcement system is deficient.

[433] Recital 10 of Directive 2014/104/EU read as follow: 'In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3 (1) of Regulation (EC) No 1/2003'.

[434] Jens-Uwe Franck, 'Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm' (CRC TR 224 Discussion Paper Series No 037, August 2018) <https://www.crctr224.de/en/research-output/discussion-papers/discussion-paper-archive/2018/striking-a-balance-of-power-between-the-court-of-justice-and-the-eu-legislature-the-law-on-competition-damages-actions-as-a-paradigm-jens-uwe-franck> accessed 7 September 2018, 9.

Another argument reinforcing the use of Article 114 TFEU as a legal basis, relates to the fact that the enforcement of competition rules has been considered an issue of the public authorities. The only explicit reference to private enforcement is provided in Article 101 (2) TFEU stipulating that 'any agreements or decisions prohibited pursuant to this Article shall be automatically void'. Jens-Uwe Franck suggests that as long as the Treaty remains silent, it is beyond the Union legislature's power to introduce other types of private enforcement or any actions for damages or injunctive relief.[435]

In the case *United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union,*[436] the ECJ recognised the Union powers to harmonise the national legislation in order to implement effectively the objectives and goals laid down in the Treaty using Article 114 TFEU as a legal basis. In this case, the United Kingdom of Great Britain and Northern Ireland sought to seek the annulment of the Regulation (EC) 2065/2003 of the European Parliament and the Council arguing that Article 95 EC Treaty [Article 114 TFEU] is not an appropriate legal basis for adoption of the Regulation.[437] The ECJ dismissed the actions and pointed out that:

> it should be observed that by the expression 'measures for the approximation' in Article 95 EC the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique most appropriate for achieving the desired result, in particular in fields which are characterised by complex technical features.[438]

In another decision, the ECJ stipulated the criteria for using Article 114 TFEU as a legal basis stating that:

> 32. According to consistent case-law the object of measures adopted on the basis of Article 95(1) EC [114 (1) TFEU] must genuinely be to improve the conditions for the establishment and functioning of the internal market (…). While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental

[435] ibid 9.
[436] Judgment of 6 December 2005, *United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union,* C-66/04, ECLI:EU:C:2005:743.
[437] Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods OJ L 309/1.
[438] *United Kingdom v Parliament and Council* (n 436) para 45.

> freedoms or distortion of competition is not sufficient to justify the choice of Article 95 EC [114 TFEU] as a legal basis, the Community legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (...) or to cause significant distortions of competition (…).
>
> 33. Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[439]

To fulfill requirement stipulated in the ECJ case law, the Commission in the Explanatory Memorandum and draft proposal Directive uses a hesitating language to argue the existence of an abstract risk of distortion of competition.[440] For instance, the Explanatory Memorandum and the preamble of the draft proposal Directive stipulates that 'the result of the discrepancies between national rules may be an uneven playing field as regards actions for damages and may affect competition on the markets in which these injured parties operate'[441] or a more convincing statement such as 'uneven enforcement is a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced',[442] and that:

> applying diverging rules on civil liability for infringements of Articles 101 and 102 TFEU and for infringements of rules of national competition law which must be applied in the same case and in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and constitute an obstacle to the proper functioning of the internal market.[443]

Thus, the abstract risk of distortion of competition combined with the Impact Assessment of the draft directive is probably sufficient to recall Article 114 TFEU as a legal basis.

The Commission's proposal for the combination of Articles 103 and 114 TFEU is likely to be suitable as the ECJ's case-law is. In numerous settled case-laws, the ECJ has ruled the possibility of relying on dual legal basis if it is established that the measure pursues several

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[439] Judgment of 8 June 2010, *The Queen on the application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform,* C-58/08, ECLI:EU:C:2010:321, paras 32 and 33.
[440] Cauffman (n 427) 629.
[441] Explanatory memorandum (n 400) 9; Proposal for Directive (n 400) recital 6.
[442] Explanatory memorandum (n 400) 10; Proposal for Directive (n 400) recital 7.
[443] Proposal for Directive (n 400) recital 9.

objectives, which 'are indissociably linked, without one being secondary and indirect in relation to the other'.[444] In addition, the ECJ practice has distinguished both the measures requiring a single legal base and the ones requiring a dual legal base. Accordingly, where a measure pursues two aims or has two components, and if one of those aims or components is identified as the main one and the latter is incidental, the measure must be found as a single one.[445] If the measure pursues simultaneously a number of objectives or has several components linked with each-other without one being incidental to the other, such measure must be found in various legal bases.[446]

The draft proposal directive falls under the second option and the ECJ practice of whether or not to accept the dual basis is broader. In the seminal *Titanium dioxide* case*,* the ECJ refused the recourse to the dual legal basis of Articles 100a and 130s EC Treaty since the procedures laid down for each legal basis were incompatible with each other. Article 100a EC Treaty required the cooperation procedure provided in Article 149 (2) EC Treaty, whereas Article 130s EC Treaty required the Council to act unanimously after merely consulting the European Parliament.[447] The same position was also maintained in the case C-155-10 *European Parliament v Council of the European Union,* where the ECJ refused to recognise the recourse on dual legal basis due to the incompatibility of procedures for each legal basis. Differently from Article 75 TFEU requiring an ordinary legislative procedure which entails qualified majority voting in the Council and the

[444] Judgment of 19 September 2002, *Republik Österreich v Martin Huber*, C-336/00, ECLI:EU:C:2002:509, para 31; Judgment of 23 February 1999, *European Parliament v Council of the European Union*, C-42/97, ECLI:EU:C:1999:81, paras 38 – 39; Judgment of 6 November 2008, *European Parliament v Council of the European Union*, C-155/07, ECLI:EU:C:2008:605;Judgment of 11 September 2003, *Commission of the European Communities v Council of the European Union*, C-211/01, ECLI:EU:C:2003:452, para 40; Judgment of 20 May 2008, *Commission of the European Communities v Council of the European Union*, C-91/05, ECLI:EU:C:2008:288, para 75; Opinion of the Court of 6 December 2001, *Protocole de Cartagena sur la prévention des risques biotechnologiques*, Avis 2/00, ECLI:EU:C:2001:664, para 23; Judgment of 8 September 2009, *Commission of the European Communities v European Parliament and Council of the European Union*, C-411/06, ECLI:EU:C:2009:518, para 47.

[445] Judgment of 17 March 1993, *Commission v Council*, C-155/91, ECLI:EU:C:1993:98, paras 19 and 21; Judgment of 30 January 2001, *Kingdom of Spain v Council of the European Union,* C-36/98, ECLI:EU:C:2001:64, para 59; Judgment of 29 April 2004, *Commission of the European Communities v Council of the European Union*, C-338/01, ECLI:EU:C:2004:253, para 55; Judgment of 20 May 2008, *Commission of the European Communities v Council of the European Union*, C-91/05, ECLI:EU:C:2008:288, para 73; Judgment of 6 November 2008, *European Parliament v Council of the European Union,* C-155/07, ECLI:EU:C:2008:605, para 35.

[446] Judgment of 11 September 2003, *Commission of the European Communities* v *Council of the European Union,* C-211/01, ECLI:EU:C:2003:452, para 40; Judgment of 20 May 2008, *Commission of the European Communities v Council of the European Union*, C-91/05, ECLI:EU:C:2008:288, para 75; Judgment of 6 November 2008, *European Parliament v Council of the European Union,* C-155/07, ECLI:EU:C:2008:605, para 36.

[447] Judgment of 11 June 1991, *Commission of the European Communities v Council of the European Communities,* C-300/89, ECLI:EU:C:1991:244, paras 18-21. The numbering in this case reflects amendment introduced by Single European Act [1987] OJ No L 169/1, Art 6.

Parliament's full participation, Article 215 (2) TFEU required merely informing the Parliament.[448] In addition, the recourse to Article 215 (2) TFEU required a previous decision in the area of CFSP taken by the Council unanimously.

On the other hand, in the case C-155/07 *European Parliament v Council of the European Union*, the ECJ recognised the recourse on a dual legal basis due to compatibility of procedures laid down for each legal basis. Both Articles 179 and 181a EC Treaty required the Council to act through a qualified majority and the European Parliament to be involved either through a co-decision procedure with the Council under Article 179 EC Treaty or through a consultation procedure of the Parliament and the Council under Article 181a EC Treaty.[449] In another case, the ECJ accepted recourse on the dual legal basis, respectively Article 133 EC and 175 (1) EC Treaty, since both provisions required a qualified majority voting in the Council. Although Article 175 (1) EC Treaty expressly referred to the European Parliament's involvement in the decision-making process, Article 133 EC Treaty did not formally provide such participation.[450] The ECJ concluded that since the measures pursue aims and contents that have indissociably linked components and none of them is considered either secondary or indirect compared with the other, that regulation would therefore have been founded on the two corresponding legal bases.[451]

In light of the settled principles of the case law, the Commission recoursed on Articles 103 and 114 TFEU as a legal basis. The Commission explained in the Explanatory Memorandum that the legal basis for a European measure is chosen based on the aim and content of the measure which are amenable to judicial review. In conclusion, bot Articles are deemed appropriate as legal basis because the Directive 2014/104/EU follows a dual objective: i) to give effect to the principles set out in Articles 101 and 102 of the Treaty; and ii) to ensure a more level-playing field for undertakings operating in the internal market, and making it easier for thhe citizens and businesses the use of the rights deriving from the internal market.[452]

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[448] Judgment of 19 July 2012, *European Parliament v Council of the European Union,* C-130/10, ECLI:EU:C:2012:472, para 47-48.
[449] Judgment of 6 November 2008, *European Parliament v Council of the European Union,* C-155/07, ECLI:EU:C:2008:605, para 76-84.
[450] Judgment of 10 January 2006, *Commission of the European Communities v European Parliament and Council of the European Union*, C-178/03, ECLI:EU:C:2006:4, para 52-59.
[451] ibid paras 52-59.
[452] Explanatory memorandum (n 400) 8-10.

4.3. Content of the Directive 2014/104/EU

a) Subject Matter and Scope of Directive 2014/104/EU

Article 1 of Directive 2014/104/EU endorses two objectives: i) to ensure full compensation for victims of infringements of the EU competition rules for the harm suffered and ii) to achieve effective coordination of the enforcement of the competition rules by competition authorities and through the action for damages before the national courts.

Article 3 crystallises the finding of the case-law setting out who has legal standing to claim compensation, and the extent of the right of compensation. Standing to claim compensation is entitled to any individual who has suffered harm caused by infringement of competition law.[453] This follows the *Courage* and *Manfredi* judgment and, at the same time, allows legal standing for the indirect purchasers as well. Moreover, in *Otis and others,* the ECJ entitled the Commission to bring a claim for damages before the national court.[454] On the other hand, the right of compensation covers actual loss and loss of profit, plus the payment of interest recognised in Recital 12 as 'an essential component of compensation to make good the damage sustained by taking into account the effluxion of time'. Article 3 (3) of Directive 2014/104/EU establishes that full compensation should not lead to overcompensation, whether by means of punitive, multiple or other types of damages.[455] As can be seen, unlike the Green Paper on damages suggestions for double damages for horizontal cartel,[456] Directive 2014/104/EU codifies *Manfredi* judgment in terms of what 'full compensation' include.

Directive 2014/104/EU is applicable not only for the actions for damages for infringement of Articles 101 and 102 TFEU but also to the national competition law, which predominantly

[453] Directive 2014/104, Arts 1 (1) and 3 (1).
[454] The ECJ noted that 'Article 47 of the Charter does not preclude the Commission from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the EU as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU.' *Otis and Others* (n 224) para 77.
[455] Directive 2014/104/EU, Art 3 (3).
[456] Green Paper on Damages, 7; Commission, 'Annex to the Green Paper: Actions for Breach of the EC antitrust rules' (n 293) 43.

pursue the same objectives as Article 101 and 102 TFEU and are applied to the same cases and in parallel to the Union competition law pursuant to Article 3 (1) of Regulation 1/2003.[457] Directive 2014/104/EU does not apply to the breaches of concentrations or state aids. The issue of causation was excluded by the Directive 2014/104/EU, being left to national rules subject to the principles of effectiveness and equivalence.[458] Regarding the existence of harm, Directive 2014/104/EU adopts a minimum harmonisation by creating a uniform presumption that the cartel infringement causes harm. However, the establishment of the harm and quantification were left to the residually rule subject to the principles of effectiveness and equivalence. This is obvious in the approach taken by the Commission issuing a non-binding Communication and practical Guide on the quantification of harm.[459]

Article 4 operates as a residual clause and contains the principles of effectiveness and equivalence. In the absence of the EU law, the actions for damages shall be governed by the national rules and procedures of the EU Member States subject to the principle of effectiveness and equivalence. These two principles were stated firstly in the *Courage* case and later reaffirmed in almost all cases related to action for damages of the EU competition rules. The principle of effectiveness states that the Member States shall not design rules that make it 'practically impossible or excessively difficult the exercise of rights conferred by Community law'.[460] The effects of the principle of effectiveness on domestic rules can be both negative and positive. The negative effect is that the national authorities and national judges cannot apply the national rules if they are incompatible with the principle of effectiveness. The positive effect means that the Member States are obligated to apply the EU rules in a way that such rules are made practically possible and not excessively difficult.[461] The principle of equivalence requires that national rules and procedures designed by the Member States, in the absence of the Union rights, shall be not less favourable than those governing similar domestic actions.[462] Some authors argue that the interpretation of these principles by the ECJ, in particular the principle of effectiveness, shows

[457] Directive 2014/104, Arts 2 (1) and 2 (3).
[458] Directive 2014/104, Art 4 and Rec 11.
[459] Commission, 'Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (n 399).
[460] *Courage and Crehan* (n 7) para 29.
[461] Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327) 25.
[462] *Courage and Crehan* (n 7) para 29.

ECJ willingness to accomplish the minimum harmonisation of procedural rules in an action for damages.[463]

b) Disclosure of Evidence – (Chapter II: Articles 5 -8)

The first objective of Directive 2014/104/EU concerns the optimisation of the interaction between the public and private enforcement of competition law so that 'the Commission and NCAs can maintain a policy of strong public enforcement, while victims of an infringement of competition law can obtain compensation for the harm suffered'.[464] The primary issue behind optimisation relates to the question of whether to allow the disclosure of the document, including the leniency documents. This concern was recognised even by the Green Paper on damages[465] as an obstacle, and has consequently been growing significantly with the cases of *Pfleiderer*[466] and *Donau Chemie.*[467]

In *Pfleiderer*, the Court of Justice held, contrary to the Commission's position, that the EU law contains no absolute rule against the disclosure of documents provided by cartel leniency applicants.[468] In its submission, the Commission maintained the position that the leniency programmes are useful tools to uncover the efforts and bring to an end the infringement, but, the effectiveness of the leniency programs would be compromised if the documents are disclosed to persons wishing to bring an action for damages, even in the case when NCAs were to grant the exemption to the applicant from the fine imposed.[469] Furthermore, the Commission argued that the possibility of such disclosure to the persons involved in an infringement of competition law would deter the opportunity offered in such leniency programs.[470] Contrary to the Commission's submission, the ECJ argued that in considering whether to disclose documents to a person seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is important that, firstly, the national rules are not less favourable than those governing similar

[463] De Smijter and O'Sullivan (n 187) 26.
[464] Explanatory memorandum (n 400) 4.
[465] Green Paper on damages 9-10.
[466] *Pfleiderer* (n 243).
[467] *Donau Chemie and Others* (n 246).
[468] *Pfleiderer* (n 243) para 33.
[469] ibid para 25-26.
[470] ibid para 27.

domestic claims and do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation. The ECJ added that is important 'to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'.[471] Such weighing exercise requires a case-by-case analysis by taking in consideration the national law and other relevant factors in the case, to determine the need for disclosure of information versus the need for protection of that information.[472]

In the subsequent case *Donau Chemie,* the ECJ confirmed the weighing exercise is necessary because, in particular, in the competition law:

> any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals.[473]

The disclosure regime proposed by the Commission has been built on the approach laid down in the Directive 2004/48/EC on the Enforcement of Intellectual Property Rights.[474] The Directive 2014/104/EU introduces a minimum level of harmonisation concerning access to evidence in private enforcement claims. By harmonising heterogeneous disclosure rules that existed in only a few Member States, the Directive 2014/104/EU intends to reduce differences that will be applicable across the EU and to ensure equality treatment of the victim. In the Commission's view, evidence is an important element for bringing actions for damages for infringement of the EU law or the national law, and much of the relevant evidence that the claimants need to prove are in possession of the defendant or third parties. Therefore, this information is either not sufficiently known or accessible to the claimants.[475]

According to Article 2 (13) of the Directive 2014/104/EU, evidence shall mean as 'all types of means of proof admissible before the national court', particularly, 'documents and all other

[471] ibid para 30.
[472] ibid para 31.
[473] *Donau Chemie and Others* (n 246) para 31.
[474] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ L 157/45.
[475] Explanatory memorandum (n 400) 13.

objects containing information' regardless of the medium on which the information is stored. Additionally, Article 2 (17) refers to pre-existing information, defined as evidence existed independently of the proceeding of a competition authority. Pre-existing information, based on Recital 28 of the Directive 2014/104/EU, shall be able to be disclosed by a national court.

The Directive 2014/104/EU does not cover the disclosure of internal documents of the competition authorities. The same prohibition applies to correspondence between competition authorities.[476] As is apparent from the wording of Article 6 (3) of the Directive 2014/104/EU, the EU has to observe the EU law and the national law on the protection of internal documents of competition authorities and of correspondence between the competition authorities.

The disclosure regime follows the tradition of a majority of the Member States' national legal rules relying on the central function of the national court.[477] The national courts must be able to order the defendant or a third party to disclose the relevant evidence only if the claimant has 'presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'.[478] The disclosure of evidence held by the opposing party or a third party can be ordered only upon the court's decision 'as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification'.[479] The National Court's decision is subject to strict and active judicial control as to the necessity, scope and proportionality. According to Article 5 (3) of the Directive 2014/104/EU, in determining whether any requested disclosure is proportionate, the national court has to consider the legitimate interests of all parties and third parties concerned. In particular, national courts shall consider: i) the extent that claim or evidence is supported by facts, and evidence justifying the request for disclosure; ii) the scope and cost of disclosure, especially for any third parties; and iii) whether the evidence sought contains confidential information, especially concerning any third parties.[480]

[476] Directive 2014/104/EU, Rec 21 and Art 6 (3).
[477] Anneli Howard, 'Too little, too late? The European Commission's Legislative Proposals on Anti –Trust Damages Actions' [2014] Journal of European Competition Law and Practice 455, 456; Anthony Maton, Vijaiya Poopalasingam, Marc Kuijper and Timo Angerbauer, 'The Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation' [2011] Journal of European Competition Law and Practice 489; Anthony Maton, Vijaiya Poopalasingam, Marc Kuijper and Timo Angerbauer, 'Update on the Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation' [2012] Journal of European Competition Law and Practice 586.
[478] Directive 2014/104/EU, Art 5 (1).
[479] Directive 2014/104/EU, Art 5 (2).
[480] Directive 2014/104/EU, Art 5 (3).

Regarding the last issue, the national courts are empowered to order the disclosure of the evidence containing confidential information wherever they consider it relevant. At the same time, the national courts must have effective measures at their disposal to ensure the protection of such confidential information and not impede the parties' effective access to justice or the exercise of the right for full compensation.[481] The applicable legal professional privilege under the Union or the national law must be respected.[482] Undertakings from which the disclosure is sought have the right to be heard before that disclosure is ordered.[483] However, the Member States may maintain or introduce rules leading to a wider disclosure of evidence.[484] The Directive 2014/104/EU rejects the strict traditional civil law requirement, which states that a request to disclose the evidence must precisely identify and describe the documents. At the same time, the Directive prevents the adoption of the US style of discovery and, in particular, the so-called 'fishing expeditions' of non-specific searches for information which involves a 'non-specific' and 'overly broad' disclosure evidence.[485]

To prevent the destruction of a relevant document that would jeopardise the public enforcement of the competition rules, Article 6 of the Directive 2014/104/EU establishes common EU-wide limits to the disclosure of evidence contained in the file of a competition authority based upon the national court's order.[486] Article 6 of the Directive 2014/104/EU introduces three categories of evidence: i) leniency statements and settlement submission; ii) information prepared by a natural or legal person specifically for the proceedings of the competition authority or information drawn by the competition authority in the course of proceedings and settlement

[481] Directive 2014/104/EU, Art 5 (4); Rec 18 and 33; On 28 July 2019, Commission launched a consultation on a draft communication to assist national courts in dealing with the request to disclose confidential information in EU antitrust proceedings, particularly dealing with action for damages. Commission invited interested stakeholders to comment on several measures proposed such as: i) confidentiality ring; ii) redaction; iii) appointment of expert, and iv) protection of the confidential information throughout proceedings (camera hearing). Commission, 'Communication on the protection of Confidential information for the private enforcement of EU Competition law by National Courts' (Communication from the Commission)
<https://ec.europa.eu/competition/consultations/2019_private_enforcement/en.pdf> accessed 14 September 2019.
[482] Directive 2014/104/EU, Art 5 (6).
[483] Directive 2014/104/EU, Art 5 (7).
[484] Directive 2014/104/EU, Art 5 (8).
[485] Directive 2014/104/EU, Rec 23; Aleš Galič, 'Disclosure of Documents in Private Antitrust Enforcement Litigation' [2015] Yearbook of Antitrust and Regulatory Studies 99, 105; Anca D Chirita, 'The Disclosure of Evidence under the 'Antitrust Damages' Directive 2104/104/EU' in Vesna Tomljenović *et al* (eds), *EU Competition and State Aid Rules: Public and Private Enforcement* (Springer 2017) 154-173.
[486] Explanatory memorandum (n 400) 14.

submission that have been withdrawn; and iii) other evidence in the competition's file authority.[487] Following this categorisation, the Directive 2014/104/EU provides that only certain documents should benefit from absolute protection. Unlike a settled case-law, the EU legislature recognises that the disclosure of leniency statements or the settlement submission would be acts of disincentive for the leniency applicant, since they will be exposed to civil or criminal liability and, consequently, many cartels will not be discovered.[488] Therefore, the leniency statements and the settlement submissions are immune from the disclosure of the national courts at any time. The second category of evidence can be disclosed once the competition authority has closed its proceedings.[489] As long as a competition authority has not decided on the case, this kind of evidence cannot be disclosed. Additionally, evidence in the file of a competition authority (pre-existing evidence), which can be disclosed at any time, is the one that falls neither in the first nor the second category.[490]

When assessing the proportionality of an order to disclose information in the file of a competition authority, pursuant to Article 5 (3) of the Directive 2014/104/EU, the national courts shall consider, firstly, whether the request has been formulated strictly regarding the nature, subject matter or contents of the documents submitted to a competition authority or contained in the file and, secondly, whether the party requesting the disclosure has filed a case before a national court with reference to an action for damages.[491] Moreover, the competition authority acting upon its initiative may submit an observation on the proportionality of the disclosed request to the national court before which the order for disclosure is sought.[492] Where a party or a third party is unable to or cannot reasonably provide the evidence requested, the national courts must be able to order the competition authority the disclosure of the evidence as the last possible recourse.[493]

[487] Caroline Cauffman, 'The European Commission Proposal for a Directive on Antitrust Damages: A First Assessment' (2013) Maastricht European Private Law Institute Working Paper No 2013/13, 4-5.
[488] Directive 2014/104/EU, Rec 26; cf Judgment *Pfleiderer* (n 243) paras 26 and 27; *Donau Chemie* (n 246) para 37-43
[489] Directive 2014/104/EU, Art 6 (5).
[490] Directive 2014/104/EU, Art 6 (9).
[491] Directive 2014/104/EU, Art 6 (4).
[492] Directive 2014/104/EU, Art 6 (11).
[493] Directive 2014/104/EU, Rec 29 and Art 6 (10).

Article 7 of the Directive 2014/104/EU refers to the limits on the use of evidence obtained solely through the access to the file of a competition authority. The leniencey settlement and the settlement submission obtained by a natural or legal person 'solely through access to the file of a competition authority' in exercise of their right of defence are not admissible in the actions for damages.[494] Evidence of the second category (information prepared during proceedings) obtained by a natural or legal person solely through the access to the file of that competition authority may be used only after the NCA has closed its proceedings or taken a decision pursuant to Article 5 and 7 - 10 of Regulation 1/2003.[495] Finally, evidence obtained by a natural or legal person solely through the access to the file of that competition authority, that fall neither in the first nor the second category, can be used in an action for damages only by that person or by a natural or legal person who succeeded that person's rights, including a person who acquired that person's claim.[496] The introduction of this rule intends to avoid trading the object of the evidence obtained by the competition authority. Also, this rule does not prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.[497]

Article 8 (1) of the Directive 2014/104/EU requires the Member States to introduce penalties to be imposed by national courts on parties, third parties or their legal representatives which: i) fail or refuse to comply with the disclosure order of any national court; ii) destroy relevant evidence; iii) fail or refuse to comply with the obligations imposed by a national court order protecting confidential information; and iv) breach of the limits on the use of evidence as stipulated in this Directive. The penalties imposed should be effective, proportionate, and dissuasive. They shall include the behaviour of a party to the proceedings concerned, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.[498]

c) Effects of National Decisions, Limitation Periods and Joint and Several Liability (Chapter III: Articles 9-11)

[494] Directive 2014/104/EU, Art 7 (1).
[495] Directive 2014/104/EU, Art 7 (2) read jointly with Arts 5; 7-10 of Regulation 1/2003.
[496] Directive 2014/104/EU, 2014/104/EU, Art 7 (3).
[497] Directive 2014/104/EU, Rec 32.
[498] Directive 2014/104/EU, Art 8 (2).

i. Effects of National Decisions, Article 9

Following Article 16 (1) of Regulation 1/2003 where national courts cannot take a decision running counter to the decision adopted by the Commission, - the latter thought to give the NCA similar effects.[499] In the Commissions' view, re-litigation for the same issue would lead to legal uncertainty and unnecessary costs for the parties involved and the judiciary as well.[500] The Directive 2014/104/EU regulates the effects of NCA's decision in Article 9, where the decision is taken within or outside the jurisdiction of a Member State. Article 9 (1) states that in an action for damages brought before the national courts under either Articles 101 or 102 TFEU or the national competition law which pursues the same objectives as Articles 101 or 102 TFEU, the national courts shall not have the authority to take decisions countering the NCA's decision or adopted by a review court. As provided in Recital 34 of the Preamble of the Directive 2014/104/EU, the aim is to avoid re-litigation of decisions that have become final. It also states that the effect of findings should cover only the nature of the infringement and its material, personal, temporal and territorial scope. This indicates that a NCA's decision deems to be irrefutable proof for an infringement occurred, and makes follow-on action for compensation easier. However, some commentators have questioned if the legal act of a NCA can be binding on judiciary,[501] and if Article 9 (1) Directive 2014/104/EU does not violate the principle of the separation of powers and the rules on the protection of fundamental rights codified in the European Convention of Human Rights and the Charter of Fundamental Human Rights.[502]

Article 9 (2) of the Directive 2014/104/EU proposes the Member States to ensure that a final decision taken by the NCA in another Member State be presented before their domestic court as, at least, *prima facie* evidence of breach.[503] The original Proposal for Directive provided for the cross-border a binding effect of the NCA's decision on the national court throughout the EU.[504]

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[499] Explanatory memorandum (n 400) 15.
[500] Explanatory memorandum (n 400) 16.
[501] Luciano Panzani, 'The Effect of Decisions by Competition Authorities in the European Union' [2015] Italian Antitrust Review 98.
[502] Evelin Pärn-Lee, 'Effect of National Decisions on Actions for Competition Damages in the CEE Countries' [2017] Yearbook of Antitrust and Regulatory Studies 177, 181.
[503] Directive 2014/104/EU, Art 9 (2).
[504] Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' (n 400). Article 9 reads as follow: 'Member States shall ensure that, where national courts

The current version which limits the effects of NCAs as a *prima facie evidence,* is a compromise adopted as a result of the reluctance of some Member States to accept that findings of another NCA should be legally binding outside their jurisdictions.[505] This rule intends to eliminate ambiguity and introduce uniformity as a principle of enforcement.[506] However, the future will tell how the Member States are to implement this provision, and how the national courts will react toward the decisions of NCAs by another Member State, whether they would accept such decision as a binding proof of liability without looking into the details of the case or reaching their own conclusion on the issue.

ii. Limitation Period, Article 10

Article 10 (1) of the Directive 2014/104/EU introduces an obligation on the Member States to lay down the rules applicable to the limitation period, specifying when the limitation period begins to run, the duration and the circumstances causing its interruption or suspension.[507]

Article 10 (2) of the Directive 2014/104/EU deals with the beginning of the limitation period. It explains that the limitation period shall not begin to run, first, before the infringement of the competition law has ceased, and, second, the claimant knows or can reasonably be expected to know of: i) the behaviour that constitutes an infringement; ii) the fact that the infringement has caused harm; and iii) the identity of the infringer.[508] If the above criteria are fulfilled, the limitation periods must last at least 5 years.[509] Such a period will allow sufficient time to the victims to be able to claim compensation.[510]

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rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, *decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement*. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty (emphasize added by author).

[505] Euan Burrows and Emile Abdul-Wahab, 'To Shop or not to Shop?: Jurisdictional Differences Following Implementation of the Damages Directive' in Euan Burros (ed), *The International Comparative Legal Guide to: Competition Litigation 2019* (11th edition, GLP and CDR 2018) 3.

[506] Christopher H Bovis and Charles M Clarke, 'Private Enforcement of EU Competition Law' [2015] Liverpool Law Review 49, 50.

[507] Directive 2014/104/EU, Art 10 (1).

[508] Directive 2014/104/EU, Art 10 (2).

[509] Directive 2014/104/EU, Art 10 (3).

[510] Explanatory memorandum (n 400) 16.

Recital 36 of Directive 2014/104/EU allows the Member States the possibility of introducing or maintaining the 'absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.' The absolute limitation period usually begins to run already from the moment the loss occurred.[511] The draft directive did not mention 'absolute limitation period' but, according to Vlahek and Pobodnik, it was asserted in the preamble of the final text on the basis of the opinions of the Council and European Parliament.[512]

Furthermore, Article 10 (4) of the Directive 2014/104/EU requires the Member States to ensure that the limitation period is suspended or interrupted if the NCA takes actions for the purpose of investigation or its proceedings with respect to an infringement of competition law, to which the action for damages relates. If this is the case, the suspension or interruption shall end at least at the earliest year after the decision has become final or the proceedings are otherwise terminated.[513] It has to be noted that, during the transposition process, the Member States are free to choose between the terms 'suspension' and 'interruption'. In addition, Recital 36 of the Directive's Preamble emphasises that 'national rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages.' This is particularly important for the Member States since they shall set forth a regime that guarantees the injured party to keep open the possibility of follow-on actions after the proceedings by a competition authority.[514]

iii. Joint and Several Liability, Article 11

Article 11 of the Directive 2014/104/EU concedes that an undertaking which infringes competition through a joint behaviour is jointly and severally liable for the harm caused. In their article, Bodnár and Szuchy argue that joint and several liability is beneficial to the injured party

[511] Ana Vlahek and Klemen Podobnik, 'Provisions of the Damages Directive on Limitation Periods and their Implementation in CEE Countries' [2017] Yearbook of Antitrust and Regulatory Studies 147, 151.
[512] ibid 151.
[513] Directive 2014/104/EU, Art 10 (4).
[514] White Paper on damages, 9.

for several reasons. First, it facilitates damages actions against infringers, especially if the infringers include foreigners or undertakings of unknown permanent address. Secondly, the injured party does not have to search for every infringer. Thirdly, joint and several liability reduces the risk of the injured party who fails to receive full compensation as a result of the insolvency of one of the infringers. Finally, the legal dispute on the share of the liability does not cause any delay in providing compensation since the co-infringers do not have to decide what share of the harm is each infringer individually liable.[515]

The default rule is that those undertakings which infringe competition law through a joint behaviour are jointly and severally liable to compensate for the harm caused in full, while, the injured party has the right to require full compensation from any of them until he has been fully compensated.[516] While the first paragraph laid down the general rule, Article 11 (2) and Article 11 (4) of the Directive 2014/104/EU introduce certain modifications with regard to the liability regime of immunity recipients. The main reason behind such exception relates to the safeguarding of the attractiveness of the leniency program of the Commission and of the NCAs, which is considered as a key instrument in detecting cartels.[517]

The first exception delves the case where the infringer is a small or medium enterprise (SME), as defined in the Commission Recommendation 2003/361/EC, of fewer than 250 persons and of an annual turnover not exceeding EUR 50 million, or an annual balance sheet total not exceeding EUR 43 million.[518] The SME may be liable only to its own direct and indirect purchaser if its market share were below 5% at any time during the infringement and the application of joint and several liability rules would jeopardise its economic viability and cause its assets to lose all their value.[519] However, Article 11 (3) of the Directive 2014/104/EU stipulates that the exception foreseen in Article 11 (2) of the Directive 2014/104/EU is not allowed if the SME has led the infringement or has been previously found to having infringed the competition law.

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[515] Péter Miskolszi Bodnár and Róbert Szuchy, 'Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States' [2017] Yearbook of Antitrust and Regulatory Studies 85, 88-89.
[516] Directive 2014/104/EU, Art 11 (1).
[517] Explanatory memorandum (n 400) 17.
[518] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36, Annex Article 2 (1).
[519] Directive 2014/104/EU, Art 11 (2).

The second exception investigates the case that the undertaking has been granted immunity from the fines of the Commission or NCAs under the leniency program. Under such conditions, if the undertaking is granted immunity, the undertaking *per se* is jointly and severally liable to its direct or indirect purchasers and to other injured parties only if the full compensation has not been obtained by the other undertakings involved in the infringement.[520]

Article 11 (5) of the Directive 2014/104/EU lays down the possibility of the infringer to recover a contribution from the co-infringers. The amount of the recovered contribution shall be determined in light of the responsibility and harm caused by the infringement. Again, as an exception, the amount of the undertaking which has been granted immunity under the leniency program shall not be liable beyond to its own direct or indirect purchasers or providers.

Article 11 (6) of the Directive 2014/104/EU foresees the situation where the undertaking which has been granted immunity under the leniency program caused harm to the injured party other than the direct or indirect purchasers. Being this the case, the amount of any contribution shall be determined in light of its behaviour.

d) The Passing-on of overcharges (Chapter IV: Articles 12 – 16)

Directive 2014/104/EU entitles 'any individual', who can show the loss caused, to claim compensation for the harm caused. Moreover, the Directive 2014/104/EU recognises the possibility of passing on defence which is a major innovative aspect of the Directive 2014/104/EU and quite a new one for some jurisdictions.[521] Recalling the statement in the *Courage*, Article 12 (1) of Directive 2014/104/EU provides legal standing for 'any individual' – either natural or legal person - who have suffered an infringement of the competition rules to seek compensation for actual loss and for loss of profit, irrespective of them being the direct or indirect purchasers from an infringer.[522] The Directive 2014/104/EU defines the direct purchaser as a natural or legal person

[520] Directive 2014/104/EU, Art 11 (4).
[521] Raimundas Moisejevas, 'Passing-on of Overcharges and the Implementation of the Damages Directive in the CEE Countries' [2017] Yearbook of Antitrust and Regulatory Studies 133.
[522] Directive 2014/104/EU, Art 12 (1).

who acquired directly from an infringer the products or services object of the infringement.[523] Indirect purchaser means a natural or legal person who did not acquire directly from an infringer, but from a direct or subsequent purchaser, any products or services object of the infringement, or products or services containing them or derived therefrom.[524] At the same time, the Directive 2014/104/EU aims to avoid 'overcompensation' with a passing on defence by urging the Member States to lay down procedural rules appropriate to ensure that compensation for actual loss does not exceed the overcharge harm suffered at any level of the supply chain.[525] Regarding the quantification of the passing-on, the Directive 2014/104/EU empowers the national court to estimate which share of the overcharge has been passed on to the level of indirect purchasers in the pending dispute before the national court.[526]

Article 13 of the Directive 2014/104/EU stipulates the possibility to use passing-on as a defence against a claim for damages. Accordingly, the defendant can invoke passing-on defence against a claim for damages passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving the overcharge shall be on the defendant. The latter may require the disclosure of the evidence pursuant to the procedure laid down in this Directive.[527] The indirect affected purchaser can claim damages. In this situation the existence of a claim or the amount of the compensation to be awarded shall be dependent on whether and to what degree an overcharge has been passed on the claimant, considering the price increases down the supply chain.[528] To prove the passing-on defence, the indirect purchaser has to show that: i) the defendant has committed an infringement of the competition law; ii) the infringement has resulted in an overcharge for the direct purchaser and iii) the indirect purchaser bought the goods or services involved in the infringement of the competition law.[529] Only if the defendant trustworthily demonstrates to the court that the overcharge was not partly or entirely passed on to the indirect purchaser, will the three cumulative requirements not apply.[530]

[523] Directive 2014/104/EU, Art 2 (23).
[524] Directive 2014/104/EU, Art 2 (24).
[525] Directive 2014/104/EU, Arts 12 (2) and 13.
[526] Directive 2014/104/EU, Art 12 (5).
[527] Directive 2014/104/EU, Art 13.
[528] Directive 2014/104/EU, Art 14 (1).
[529] Directive 2014/104/EU, Art 14 (2).
[530] Directive 2014/104/EU, Art 14 (2).

Article 15 of the Directive 2014/104/EU regulates actions for damages by claimants from different levels in the supply chain. Whenever the injured parties from different levels of the supply chain bring separate actions for damages, leading to a multiple liability or an absence of the absence of liability of the infringer, the national courts shall assess the action for damages taking into account: i) actions for damages related with the same infringement; ii) judgment resulting from actions for damages related with the same infringement and iii) other relevant information resulting from the public enforcement of competition law.[531] This is to avoid under- and over-compensation of the harm caused by that infringement and, at the same time, to foster consistency between judgements resulting from such linked proceedings.[532]

According to Article 16 of the Directive 2014/104/EU, the Commission should issue guidelines for the national courts on how to estimate the share of the overcharge passed on to the indirect purchaser. In 2016, the final report of a Study on the Passing-on of Overcharges[533] has been submitted to the Commission, who, in turn, is preparing the Guideline for the national courts on the passing-on of overcharges. The study draws upon relevant economic theory and quantitative methods as well as relevant legal practices and rules, and provides the judges, legal practitioners and parties to antitrust damages actions with a practical framework for assessing and quantifying the passing-on effects. However, although 5 years have passed since the adoption of the Directive 2014/104/EU, the Commission has not issued the promised guidelines yet.

e) Quantification of Harm (Chapter V: Article 17)

Quantification of harm has been identified as one of the most significant obstacles for the development of the private enforcement in the EU due to 'overly demanding requirements regarding the degree of certainty and precision of quantification of the harm suffered'.[534] It is impossible to discern how the market has evolved in the absence of the infringement. Furthermore,

[531] Directive 2014/104/EU, Art 15 (1).
[532] Directive 2014/104/EU, read Art 15 (1) in conjunction with Explanatory memorandum (n 400) 17-18 and Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.
[533] RBB Economics and Cuatrecasas, Gonçalves Pereira, 'Study on the Passing-on of Overcharges' (Final Report of a study prepared for the Directorate–General for Competition of the European Commission, European Union 2016) i.
[534] Commission, 'Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (n 399) para 8.

prices, sales volumes, and profit margins are difficult to estimate. For these reasons, a precise quantification of harm cannot be determined but only estimating 'relying on assumptions and approximations'.[535]

Before the implementation of the Directive 2014/104/EU, the Member States have the discretion to quantify harm caused by the infringement of the competition law based on their national legal system provisions. National courts determined the requirements that the claimant has to meet when proving the amount of the harm, methods of quantification of harm and the consequences of not meeting these requirements.[536] However, as the ECJ has reaffirmed in its settled case-law concerning the principle of full compensation for the violation of Articles 101 and 102 TFEU, it is necessary to ensure that the requirements of the national court regarding to quantification of the harm 'should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness)'.[537]

Article 17 (1) of the Directive 2014/104/EU stipulates that the Member States must ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. In addition, the Directive 2014/104/EU introduced and established common principles regarding the quantification of harm.[538] First, based on the findings laid down by an external study prepared for the Commission,[539] the Directive 2014/104/EU introduces a rebuttable presumption that cartel infringement caused the harm, and the infringer has the right to rebut that presumption.[540] As the Recital 47 of the Directive 2014/104/EU emphasises, such a presumption has been established 'to remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages'. Secondly, the Directive 2014/104/EU empowers the national courts to estimate the quantification of harm,

[535] ibid, para 17.
[536] Directive 2014/104/EU, Rec 46.
[537] Directive 2014/104/EU, Rec 46.
[538] Valentina Mikelėnas and Rasa Zaščiurinskaitė, 'Quantification of Harm and the Damages Directive: Implementation in CEE Countries' [2017] Yearbook of Antitrust and Regulatory Studies 111, 114.
[539] Oxera, 'Quantifying antitrust damages — Towards non-binding guidance for courts'<December 2009) <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 8 September 2018.
[540] Directive 2014/104/EU, Art 17 (2).

subject to the conditions.[541] Thirdly, NCAs may guide the national courts on the quantum of the harm.[542] Finally, in order to ensure coherence and predictability, the Commission should provide guidance for this issue at the EU level.[543]

Henceforth, to make it easier for the national court to quantify harm, the Commission adopted a non-binding Communication on the quantification of harm in actions for damages based on breaches of Articles 101 or 102 TFEU[544] accompanied by a more comprehensive and detailed *Practical Guide*.[545] The *Practical Guide* is purely informative and does not have any binding effects on national court or to replace the legal rules applicable in the Member States to damages actions based on infringements of Article 101 or 102 TFEU regarding the quantification of harm.[546] It provides guidance for the national courts on the main methods and techniques available to quantify harm cause as a result of an infringement of the competition law.

f) Consensual Dispute Resolution (Chapter VI: Articles 18 and 19)

In order to avoid costly court action and to shorten the procedures for the victims to obtain full compensation for the harm suffered, the Commission introduced the possibility of a consensual dispute resolution between the parties. The Directive 2014/104/EU considers consensual dispute resolution as a suitable instrument to settle the damages claim. According to Recital 48, 'Achieving a 'once-and-for-all' settlement for defendants is desirable to reduce uncertainty for infringers and injured parties' and 'the provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness'. In this context, de Raad suggests that consensual dispute resolution could be regarded as the third pillar for the enforcement of the competition law, beside public and private enforcement.[547]

[541] Directive 2014/104/EU, Rec 46.
[542] Directive 2014/104/EU Rec 46 and Art 17 (3).
[543] Directive 2014/104/EU, Rec 46.
[544] Communication from the Commission on quantifying harm in actions for damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C 167/19.
[545] Commission, 'Practical Guide: Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (n 399) 205.
[546] ibid, para 7; Communication from the Commission on quantifying harm in actions for damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (n 544) para 11.
[547] Małgorzata Modzelewska de Raad, 'Consensual Dispute Resolution in the Damage Directive: Implementation in CEE Countries' [2017] Yearbook of Antitrust and Regulatory Studies 50, 57.

According to the Directive definition, 'consensual dispute resolution' means any mechanism enabling interested parties to reach an out-of-court resolution of dispute. Moreover, Recital 48 of the Directive 2014/104/EU further explains that consensual dispute resolution shall cover 'arbitration, mediation or conciliation'. Articles 18 and 19 of the Directive 2014/104/EU introduce several instruments to encourage consensual settlement.

Firstly, Article 18 (1) of the Directive 2014/104/EU requires Member States to provide the suspension of limitation periods as the consensual settlement takes place and applies only to the parties concerned in the consensual dispute resolution.[548] If the parties have an agreement with an arbitration clause, they are obliged to use arbitration instead of litigation. The arbitration procedure will result in a final award that may award damages. Thus, Article 18 (1) of the Directive 2014/104/EU deals with the situations when parties attempt to resolve the case primarily through mediation or conciliation without refereeing to arbitration/litigation.[549]

Secondly, the parties should have sufficient time if they decide to go for a consensual dispute resolution. Article 18 (2) of the Directive 2014/104/EU stipulates that without a prejudice to a provision of the national law in matters of arbitration, the Member States shall ensure that a proceeding related with the seized of an action for damages can be suspended for up two years, where the parties are involved in a consensual dispute resolution concerning the claim covered by that action for damages.[550] Most probably, these paragraphs refer to situations where parties have started litigation before the court and afterward decided to proceed either through mediation or conciliation. The third paragraph foresees the discretion of the NCAs to consider whether a consensual settlement prior to a fining decision should be a mitigating factor in setting the level of a fine.[551]

[548] Directive 2014/104/EU, Art 18 (1).
[549] Miriam Driessen-Reilly, 'Private Damages in EU Competition Law and Arbitration – a Changing Landscape' [2015] Arbitration International 567, 580; Raimundas Moisejevas, 'The Damages Directive and Consensual Approach to Antitrust Enforcement' [2015] Yearbook of Antitrust and Regulatory Studies 181, 187.
[550] Directive 2014/104/EU, Art 18 (2).
[551] Directive 2014/104/EU, Art 18 (3).

Finally, an infringer who decides to settle the claim for damages through a consensual dispute resolution should be protected from further claims of injured parties and co-infringers.[552] The Article 19 of the Directive 2014/104/EU deals with the effect of consensual settlements on subsequent actions for damages. Accordingly, Article 19 (1) of the Directive 2014/104/EU provides that following a consensual settlement, the claim of the settling injured party is to be reduced by the co-infringer's share of the harm. The remaining co-infringers are liable only for the remaining share and shall not seek compensation from the settling co-infringer.[553] However, in the case that non-settling co-infringers are unable to pay the damages, the injured party can exercise the remaining claim against the settling co-infringer unless this is excluded from the agreement.[554] The amount of the contribution the co-infringer may recover from any other co-infringer has to be determined in relation to the responsibility for the harm caused.[555]

4.4. Assessment of the Directive 2014/104/EU

After around 10 years of effort, finally, the Commission achieved its aim to facilitate and encourage the action for damages. The adoption of the Directive 2014/104/EU can be considered as the 'third devolution of EU Competition Law',[556] by setting out across the EU Member States a minimum level of harmonisation and providing better protection for individuals who have been harmed as a result of the infringement of antitrust rules. The Directive 2014/104/EU is likely to change the culture of the enforcement system by encouraging the individuals to seek damages for infringements of the EU competition rules or the national competition law applicable in parallel with the EU Competition rules in a different way: through the follow-up to the public enforcement of infringements or through the courts or consensual dispute resolution. Finally, in the light of the 2003 reforms and subsequent developments, the victims of antitrust violations are enlisted as

[552] de Raad (n 547) 65.
[553] Directive 2014/104/EU, Art 19 (2).
[554] Directive 2014/104/EU, Art 19 (3).
[555] Directive 2014/104/EU, Art 19 (4).
[556] Jones, 'After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement' (n 24) 1.

'private attorney generals' pursuing not only protecting their rights for damages, but also to complement the enforcement actions of the European Commission and the NCAs'.[557]

However, many authors have expressed criticism on the Directive 2014/104/EU arguing that it will foster the debate of the private enforcement in Europe rather than bring it over.[558] Firstly, as the name of the Directive 2014/104/EU shows, the scope is limited to only certain damages. Both the Green Paper on damages and the White Paper on damages deduced for other remedies such as declaratory relief and injunctive relief.[559] Nevertheless, the EU legislator decided to narrow the scope of the Directive only to the action for damages.[560] One of the main reasons relates to the political consensus to harmonise only the action for damages. As Ana Piszcz asserts, the Commission opted 'for a bird in the hand' rather than 'two in a bush'.[561] Nevertheless, it should be stressed that despite the Directive 2014/104/EU's limited scope focusing only on damages claims, the Member States may go beyond the minimalistic approach set out in the Directive 2014/104/EU during the transposition procedure. As the recent studies show, some Member States opted out to expand the scope during the implementation process not only for a damages claim but the overall private enforcement.[562]

Second, in contrast to the issues identified in the Green Paper on damages and the White Paper on damages, the Directive 2014/104/EU appears to have lost a lot of tools intending to encourage private enforcement. The Directive 2014/104/EU contains no provision on issues like causation; the availability of multiple or punitive damages; fault requirement; the structure of the competent court and the use of experts. The regulation of such issues has been left to the discretion

[557] Arianna Andreangeli, 'From Complaint to Private Attorney General: The Modernisation of EU Competition Enforcement and Private Antitrust Action before National Courts' in Michael Dougan and Samantha Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2008) 229, 230.
[558] Robert H Lande, 'The Proposed Damages Legislation: Don't Believe the Critics' [2013] Journal of European Competition Law and Practice 123; Howard (n 477) 463-464; Maciej Gac, 'Individuals and the Enforcement of Competition Law: Recent Development of the Private Enforcement Doctrine in Polish and European Antitrust Law' [2015] Yearbook of Antitrust and Regulatory Studies 53, 78.
[559] Green Paper on damages, 3; Commission, 'Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' (n 327) 7.
[560] Dunne (n 191) 25
[561] Anna Piszcz, 'Piecemeal Harmonisation through the Damages Directive? Remarks on what received too little Attention in Relation to Private Enforcement of EU Competition Law' [2015] Yearbook of Antitrust and Regulatory Studies 79, 90
[562] Michal Petr, 'The Scope of the Implementation of the Damages Directive in CEE States' [2017] Yearbook of Antitrust and Regulatory Studies 13, 26.

of the EU Member States, subject to the limitation and upon the principle of effectiveness and equivalence. Conversely, for the collective redress and quantification of harm, the Commission opted in favour of issuing a recommendation, which is a non-binding document. In addition, many of the Directive's provisions that encroach upon Member States' remedial/procedural autonomy are drafted in generic and vague words.[563] This, in turn, would raise the question of interpretation in the future and, therefore, may render difficulties in claiming damages. The only clearest provisions of the Directive 2014/104/EU relate to the safeguarding of public enforcement of the competition law by restricting the access to evidence contained in the files of the competition authorities provided by the recipients of immunity deals or by the third parties that have entered in the agreement.[564]

Third, as one of the core principles of the Directive 2014/104/EU is the full compensation of the victims for the harm caused, the effectiveness of the full compensation will be unlikely achieved since the main elements like fault and causation are not harmonised in the Directive 2014/104/EU. As has been stipulated in the Recital 11 of the Directive 2014/104/EU, in absence of the Community rules, the national rules on remedies, procedure and institution will be applied as long as the principle of equivalence and effectiveness are observed. Both these elements will continue to be governed by the national law[565] and may vary from one EU Member State to another Member State. Consequently, it will depend on national rules whether tort/contract law is available to constitute a legal basis for the claim.[566]

[563] Francisco Marcos, Barry J Rodger and Miguel Sousa Ferro, 'Promotion and Harmonisation of Antitrust Damages Claims by Directive EU/2014/104?' (Center for European Studies, Working Paper IE Law School AJ8-242-I, 13 June 2018) 32; Emmanuela Trulli, 'Will its Provisions Serve its Goal? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition Law Infringement' [2016] Journal of European Competition Law and Practice 1.

[564] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos, 'The Antitrust Damages Directive: Facilitating Private Damages Actions in the EU?' [2019] Journal of Competition Law and Practice 129.

[565] Katri Havu, 'Causation and Damage: What the Directive does not Solve: Remarks on Relevant EU Law and on Finish Implementation' (Paper abstract for the conference 'EU Competition law and the new Private Enforcement Regime: First Experience from its Implementation Uppsala, 13 – 14 June 2017).

[566] David Ashton and David Henry, *Competition Damages Actions in the EU: Law and Practice*, (1st edition Elgar Competition Law and Practice series, Elgar 2013) 32-34; Magnus Strand, 'Labours of Harmony: Unresolved Issues in Competition Damages' [2017] European Competition Law Review 203, 204 -206; Marcos, Rodger and Ferro (n 563) 26.

Fourth, the Directive 2014/104/EU fails to provide a comprehensive treatment of the consensual dispute resolution.[567] Nowadays, the arbitration of commercial disputes with an element of competition, including the action for damages has been increased.[568] Parties prefer to solve their dispute out of the court due to high expenses. For this reason, the Directive 2014/104/EU introduces the consensual dispute resolution as an alternative way for the injured party to seek redress and encourage parties to resolve their dispute through negotiating.[569] Article 9 (1) of Directive 2014/104/EU provides that in cases where a violation of the competition law has been found by a final decision of a national competition authority or by a review court, the courts of the Member States where the decision was issued, will treat such decision as 'irrefutably (...) for the purposes of an action for damages'. On the other hand, a final decision taken in another Member State, in accordance with the national law will be treated 'as at least *prima facie evidence*' than an infringement has occurred and 'as appropriate, may be assessed along with any other evidence adduced by the parties'.[570] The status of an arbitral tribunal in terms of the effect of the national decisions is questionable, whether: i) to consider as irrefutable proof of an infringement the decision issued by an NCA or review court; or ii) to distinguish between the decision issued by an authority located in the seat of the arbitral tribunal and one issued in another Member State. A further complication that araises in the context of international commercial arbitration is whether to provide more legitimacy to one court rather than another.[571] Furthermore, Article 17 of the Directive 2014/104/EU concedes that national courts may request the NCAs to assist in the determination of the quantum of damages. In the case of an arbitral tribunal, the Directive 2014/104/EU remains silent on whether NCAs can assist in the determination of the quantum of damages.

Finally, the Commission's approach to use soft-law instruments in the area of collective redress is disappointed due to the non-binding nature of the European Commission Recommendation 2013/396/EU of 11 June 2013 "On common principles for injunctive and

[567] Ondrej Blažo, 'Institutional Challenges for Private Enforcement of Competition law in Central and Eastern European Member States of the EU' [2017] Yearbook of Antitrust and Regulatory Studies 31, 33.
[568] Vera Korzun, 'Arbitrating Antitrust Claims: From Suspicion to Trust' (S.J.D. Dissertation 2016) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?Article=1005&context=sjd> accessed 5 October 2018.
[569] Bovis and Clarke (n 506) 49; Moisejevas (n 549) 183-184.
[570] Directive 2014/104/EU, Art 9 (2).
[571] Reilly (n 549) 582-583; Moisejevas (n 549) 189.

compensatory collective redress mechanism in the Member States", concerning violations of rights granted under the EU law.[572] The Recommendation 2013/396/EU was accompanied by a Communication to the European Parliament and the Council 'Towards a European Horizontal Framework for Collective Redress'.[573] In the Commission's view, the Recommendation 2013/396/EU along with the Communications set out an appropriate mechanism to enable individuals to obtain effective redress through collective actions. The Recommendation 2013/396/EU applies not only to collective redress for the infringement of competition rules but also for the infringements of, *inter alia*, the consumer protection, environmental protection, protection of personal data, financial services law and investor protection.[574] A series of principles were laid out in the Recommendation 2013/396/EU to be followed by the Member States in order to implement the collective redress mechanism into their national collective redress system by 26 July 2015.

The report published by the Commission on 25 January 2018 showed that the collective redress mechanisms across the Members States were not consistent. The Recommendation urged the Member States to introduce the principle of 'opt-in' in their national he collective redress mechanism. However, five years after, an assessment report on the implementation of the Commission Recommendation on collective redress found that only the Netherlands and Portugal had applied the 'opt-out' principle, while 4 Member States had applied both 'opt-in' and 'opt-out' principles.[575] Regarding the availability of collective redress, only 19 out of 28 Member States did provide collective compensatory mechanism for mass harm situation, but for over half of them the mechanism is limited to a specific sector, mainly to the consumer protection. Contrariwise, 9 out of 28 Member States did not provide any possibility of collective claim compensation for harm

[572] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law (n 397).
[573] Commission, 'Towards a European Horizontal Framework for Collective Redress' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM 2013) 401 final.
[574] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law (n 397) recital 7.
[575] 4 Member States that apply both opt-in and opt-out principles are: Belgium, Bulgaria, Denmark and United Kingdom. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Implementation of the Commission Recommendation of 11 June 2013 on Common Principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law [2018] COM(2018) 40 final, 13.

suffered in their legal system.[576] This heterogeneity of collective redress mechanism among the Member States is problematic since the consumers are not provided with the same level of protection.[577] The assessment concluded that:

> the analysis of the legislative developments in the Member States as well as the evidence provided demonstrate that there has been a rather limited follow-up to the Recommendation. The availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU.[578]

Only the future will tell how such an issue will be addressed, whether through legal initiative or through the same soft non-binding documents.

4.5. Transposition Process and Temporal Application of the Directive 2014/104/EU

Transposition, as defined 'the process of transforming directives into provisions of national law',[579] is a precondition for the proper implementation of the EU policies at the domestic level. In the case of transposition of the Directive, Article 288 (3) TFEU indicates the freedom of Member States to choose the form and method of implementation of the Directive into their national legal system. Prechal underlines two main reasons for discretion on the transposition of the Directive: one was inspired by the principle of sovereignty, especially the role of the national parliament and the other relates to the opportunity of the Member States to consider domestic legal, political, cultural and institutional changes when the Directive is implemented.[580] Nevertheless, such discretion is far from absolute. The content of the Directive 2014/104/EU may curtail this

[576] Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the 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 (2013/396/EU)' (Report) COM(2018)40 final, 3.
[577] For an assessment of collective redress mechanism across the Member States see The British Institute of International and Comparative Law, *State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation* (JUST/2016/JCOO/FW/CIVI/0099, 2017); Policy Department for Citizens' Rights and Constitutional Affairs, *Collective Redress in the Member States of the European Union* (EU 2018).
[578] Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation…' (n 576) 19.
[579] Sacha Prechal, *Directives in EC Law* (OUP 2005) 5-6.
[580] ibid 73.

discretion by being extremely precise and detailed and, in turn, leaves less room for the authorities of the Member States to manoeuver.[581]

According to Article 288 (3) TFEU, a directive is binding as far as the results are achieved and upon each Member States to which it is addressed. Directive 2014/104/EU, addressed to all EU Member States, shall be implemented by 27 December 2016 and communicated to the Commission. The majority of the Member States failed to meet this deadline by hampering the European regulatory framework in which businesses operate and consequently jeopardising market competitiveness.

By 18 January 2017, only 7 Member States had transposed the Directive 2014/104/EU. The delayed transposition raised concerns, and on 24 January 2017, Letters of Formal Notice were sent to the Member States which failed to transpose the Directive 2014/104/EU.[582] By 20 February 2017, three other Member States notified the Commission for the transposition of the Directive. In total, around 2 months after the expiry of the transposition period, 10 Member States had transposed the Directive namely: Denmark, Finland, Ireland, Italy, Lithuania, Luxemburg, the Netherlands, Slovakia and Sweden.[583] By July 2017, the Directive was implemented by 21 Member States. On 23 July 2017, the Commission sent a Reasoned Opinion to seven Member States – Bulgaria, Cyprus, the Czech Republic, Greece, Latvia, Malta and Portugal – that failed to communicate full transposition.[584] The Reasoned Opinion provided two months' time limit to transpose and communicate to the Commission the transposition measures taken for the implementation of the Directive. Otherwise, the Commission warmed to refer them to the Court of Justice of the EU based on Article 258 TFEU. By the end of 2017, other four Member States transposed the Directive into their national law. Bulgaria and Greece implemented the Directive

[581] Sacha Prechal, *Directives in European Community Law: A Study of Directives and their Enforcement in National Courts* (Clarendon Press 1995) 16.
[582] Commission, 'Actions for Damages: Directive on Antitrust Damages Actions' <http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html> accessed 21 September 2018.
[583] Jurgita Malinauskaite and Caroline Cauffman, 'The Transposition of the Antitrust Damages Directive in the Small Member States of EU: A Comparative Perspective' [2018] Journal of European Competition Law and Practice 1, 2.
[584] Commission, 'July infringements package – Part 1: key decisions' (13 July 2017) <http://europa.eu/rapid/press-release_MEMO-17-1935_en.htm> accessed 21 September 2018.

in the early of 2018 whereas Portugal, as the last Member State, adopted the Directive in June 2018.[585]

It is widely recognised in the literature the problems the EU Member States face during the transposition process[586] and the factors influencing the delay.[587] The transposition process induces changes at national level of the Member States. Policy change must be implemented by national transposition actors whose task is to identify those measures that are not in compliance with the EU law and to amend or introduce a new domestic law within the prescribed time. It is a process that requires time and consultation with different stakeholders.

With regard to the Directive 2014/104/EU, a key reason of the delay consists of a divergence between the rules introduced by the Directive 2014/104/EU and the national rules of the Member States on private enforcement. Directive 2014/104/EU contains many new concepts which might be understood differently in separate Member States where private enforcement was inexistent. Since the Directive 2014/104/EU aimed the minimum harmonisation, harmonising only to a certain degree the laws of the EU Member States left several issues to be regulated by the EU Member States' national laws. The novelties introduced by the Directive 2014/104/EU and changes to be done by the EU Member States led towards uncertainty since 'it is not always clear in the EU Member States' legal systems where substance stops and procedure begins, or vice versa'.[588] The Commission did not take into account to what extent the EU Member States have to change their substantive and procedural rules and whether such concepts existed under the national law. For instance, the notion of a 'leniency statement' and 'settlement submission' defined for the purpose of the private enforcement in Article 2 (16) and Article 2 (18) of the Directive 2014/104/EU are borrowed from the public enforcement. Article 6 (6) of the Directive 2014/104/EU provides absolute protection for both 'leniency statement' and 'settlement submission' and its aim is to protect the public interest in relation to the cooperation of the parties

[585] Law 23/2018 of 6 June 2018 (n 26).
[586] Gerda Falkner, Miriam Hartlapp, Simone Leiber and Oliver Treib, 'Non-Compliance with EU Directives in the Member States: Opposition through the backdoor? [2004] West European Politics 452.
[587] Michael Kaeding, 'Determinants of Transposition Delay in the European Union' [2006] Journal of Public Policy 229; Bernard Steunenberg and Mark Rhinard, 'The Transposition of European Law in EU Member States: between Process and Politics' [2010] European Political Science Review 495.
[588] Komninos, 'Civil Antitrust Remedies between Community and National Law' (n 175) 372.

with the competition authorities. Both these definitions were not translated well into the Polish legal system, since Polish leniency program differs from the EU leniency program to a considerable extent. The Polish leniency program covers not only cartels but also other agreements, the decision of associations of undertakings and concerted practice.[589] Another example relates to the personal scope of the Directive 2014/104/EU: how the concept of the undertaking was transposed into different regimes. In the Czech Republic, before the implementation of the Directive 2014/104/EU, several civil courts judgments have interpreted the concept 'undertaking' as a 'competitor', which led to the dismissal of a private enforcement claim. Even after the implementation of the Directive 2014/104/EU, the situation has not changed because the Czech implementing act does not use the term 'undertaking' but the 'person'.[590] A similar problem is encountered in Bulgaria which adopts a broader definition of the economic entity compared to the legal one.[591] Time will tell about the interpretation by ECJ regarding the vague and general words rooted in the Directive itself and other issues that have not been reflected.

Last but not least, the delay has occurred due to the complexity of the Directive 2014/104/EU reflected in the high number of recitals stipulated in the preamble.[592] The Directive 2014/104/EU contains 24 Articles and 56 Recitals. The Recitals in the EU law instruments do not have a legal value but they can expand 'an ambiguous provision's scope'.[593] The inclusion of the recital is a kind of reassurance for the parties which most need a reassurance.[594] Usually, the high number of the recitals reflects the position of the Member States to assert in the preamble the left-over issues rejected by the Commission.[595] Along the legislative process, 12 more recitals were included in the directive compared to the draft proposal.[596] Some recitals include more than mere criteria of interpretation and, therefore, seem to carry out an additional normative force.[597]

[589] Piszcz (n 561) 93.
[590] Petr (n 562) 26.
[591] Andrea Petrov, 'Bulgaria' in Anna Piszcz (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Warsaw, University of Warsaw Faculty of Management Press 2017) 37.
[592] Kaeding (n 587) 236.
[593] Tada Klimas and Jūratė Vaičiukaitė, 'The Law of Recitals in European Community Legislation' [2008] ILSA Journal of International and Comparative Law 1, 3.
[594] ibid, 18.
[595] Kaeding (n 587) 236.
[596] cf preamble of the Directive 2014/104/EU and preamble of the proposal for the Directive (n 400).
[597] Marcos, Rodger and Ferro (n 563) 11 – 12; 14 – 15; cf Directive 2014/104/EU, Recitals 12 and 37.

The final issue relates to *ratione temporis* of the Directive 2014/104/EU. Article 22 sets out a special provision which explicitly states the conditions for *ratione temporis* of procedural and substantive provisions. Although the conditions for *ratione temporis* applications have already been set out, neither the Directive 2014/104/EU nor does Article 22 provide a clear cut of defining substantive and procedural rules. In the absence of such clear-cut rules, the Member States enjoyed some consideration in determining whether the relevant provision has a substantive or procedural character[598] and took different approaches to *ratione temporis* application of Article 22 of the Directive 2014/104/EU.[599]

In particular, firstly, pursuant to Article 22 (1) of the Directive 2014/104/EU, the Member States, in order to comply with substantive provisions of the directive, have to ensure that national measures adopted for transposing the Directive should not apply retroactively. The retroactivity effect is in line with the ECJ case-law. In the *Dik* case, concerning the definition of the temporal scope of the Directive 79/7 of 19 December 1978,[600] the ECJ argued that 'if national implementing measures are adopted belatedly, namely after the expiry of the period in question, the simultaneous entry into force of Directive 79/7 in all Member States is ensured by giving such measures effect retroactively as from 23 December 1984'.[601] The ECJ concluded that the rights the Directive confers on individuals in the Member States must be respected as from the said period.[602]

Secondly, under Article 22 (2) of the Directive 2014/104/EU, the Member States have to ensure that national measures transposing the Directive's procedural provisions do not apply to actions for damages of which a national court was seized prior to 26 December 2014. In *Cogeco Communications*, the ECJ had the opportunity to clarify the *ratione temporis* application of Article 22 of the Directive 2014/104/EU before and after the harmonisation. Cogeco Communications, a shareholder of Cabovisão-Televisão Por Cabo SA ("Cabovisão") between the 3 August 2006 and

[598] Lucio D'Amario and Alice Galbusera, 'The Italian Decree Implementing the Directive on Antitrust Damages: Shades of Light on Temporal Application and Production of Evidence' [2017] Rivista Italiana di Antirust 177, 178.
[599] For a comparative review of the implementing Directive 2014/104/EU with regard to temporal application of the new regime in some Member States see Burrows and Abdul-Wahab (n 505) 1-2.
[600] Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.
[601] Judgment of 8 March 1988, *Dik v College van Burgemeester en Wethouders,* C-80/87, ECLI:EU:C:1988:133, para 13.
[602] ibid para 15.

29 February 2012, brought an action for damage on 27 February 2015 before the *Tribunal Judicial da Comarca de Lisboa* against, *inter alia,* Sport TV Portugal and its parent companies. By a decision of 14 June 2013, the Portuguese Competition Authority held that Sport TV Portugal and its parent companies had abused its dominant position, within the meaning of Article 102 TFEU and the Portuguese national equivalent law for the period 3 August 2006 – 30 March 2011. Sport TV sought to annul the decision appealing to *the Tribunal da Concorrência, Regulação e Supervisão.* The Court partly upheld the action brought arguing that Article 102 TFEU is not applicable on the ground that the business practice has not affected trade effects between the Member States. Even so, Sport TV appealed the decision to the *Tribunal da Relação de Lisboa.* By the judgment of 11 March 2015, the *Tribunal da Relação de Lisboa* upheld the judgment of the court of first instance. In this situation, the Cogeco Communications brought an action for damages seeking compensation for the damages caused by the Sport TV and parent companies' infringement of Article 102 TFEU and the Portuguese national equivalent law for the period 3 August 2006 – 30 March 2011. The *Tribunal Judicial da Comarca de Lisboa* referred 6(six) questions for a preliminary ruling, *inter alia*, the *ratione temporis* application of the Directive.

The Court of Justice noted that Article 22 (1) of the Directive 2014/104/EU required the Member States to ensure that national measures transposing the substantive provisions of that directive do not apply retroactively,[603] while Article 22 (2) of the Directive 2014/104/EU required the Member States to ensure that national measures transposing that Directive's procedural provisions do not apply to actions for damages which a national court seized prior to 26 December 2014. Furthermore, the Court of Justice underlined that, as is apparent from Article 22 (2) of the Directive 2014/104/EU, the Member States enjoy a discretion during the transposition process to decide on *ratione temporis* application of the Directive's procedural provisions whether: i) to apply to actions for damages brought after 26 December 2014 but before the date of transposition of that directive or, ii) at the latest, before the expiry of the period prescribed for its transposition.[604] Consequently, the Court of Justice clarified that:

> 29. where the Member States, in exercising that discretion, have decided that the provisions of their domestic legal system transposing the procedural provisions of Directive 2014/104 are not applicable to actions for damages brought before the date of entry into force of

[603] Judgment of 28 March 2019, *Cogeco Communications Inc.*, C-637/17, ECLI:EU:C:2019:263, paras 26 and 30.
[604] ibid para 28.

those national provisions, *actions brought after 26 December 2014 but before the date of expiry of the period prescribed for the transposition of that* directive *remain governed solely by the national procedural rules that were already in force before the transposition of the directive*.[605]

[605] ibid para 30 (emphasize added by author).

CHAPTER

5. Transposition of the Directive 2014/104/EU in selected EU-Member States: the case of Austria, Italy and Slovenia

5.1. Introduction

According to Article 21, Member States had to transpose the Directive 2014/104/EU into their national legal system by 27 December 2016. Member States have the discretion choose the form and method of the transposition as long as the enacted national legislation is in line with the content of the transposed Directive 2014/104/EU. During the transposition process, the Member States face two choices. The first choice relates to whether to adopt the literal transposition or the elaboration method of transpositions. Secondly, the Member States have the discretion to decide whether to maintain a minimalistic transposition approach by not exceeding the minimum requirements set out in the Directive or go beyond the minimalist approach of transposition, known as the gold plating approach. The latter refers to the situation where the national bodies exceed the scope of the directive by adding some requirements or using domestic wider terms instead of those defined in the Directive.[606]

This chapter provides a legal analysis of the selected EU-Member States - respectively Austria, Slovenia and Italy - on modalities of the transposition of the Directive into their domestic legal systems. The chapter is structured into 3 sections, corresponding to the implementation of the Directive 2014/104/EU in Austria, Slovenia and Italy. In order to ensure uniformity and to observe the transposition process in these Member States, the same structure has been adopted. In each country, the analyses proceed; firstly, with the manner of implementing the Directive 2014/104/EU into the domestic legal system of selected EU-Member States whether through a new law or by amending the current legislation on the competition law. Secondly, the scope of the implementation of the Directive 2014/104/EU is analysed to see whether selected EU-Member States choose a minimal harmonisation as set out in the Directive 2014/104/EU or approach the

[606] Anna Piszcz, 'Room for Manoeuvre for Member States: Issues for the Decision on the occasion of the transposition of the Damage Directive [2017] Market and Competition Law Review 81; Malinauskaite and Cauffman (n 583) 496.

gold plating method. Thirdly, since the Directive 2014/104/EU remains silent on the institution's design to deal with the action for damages, the Member States enjoy the discretion to design the competent court within the meaning laid down in Article 2 (9) of the Directive 2014/104/EU, which considers the national court as a court or tribunal referred to Article 267 TFEU. Finally, the substantive and procedural rules identified in the Directive 2014/104/EU are analysed in selected EU-Member States.

5.2. Austria

In 2005, a new Cartel Act (*KartG 2005*)[607] and an amendment to the Austrian Competition Act (*Wettbewerbsgesetzes*)[608] were adopted entering into force on 1 January 2006. Among other novelties introduced by *KartG 2005* were: i) the ban on cartels (§ 1); ii) legal exception system (§ 2 and 3) and iii) clarification of responsibility for applying EU law (§ 83 – 85) by The Cartel Court and the Federal Cartel Prosecutor. Provisions on abuse of the dominant position and merger remained largely unchanged.[609] The amendment to *Wettbewerbsgesetzes* occurred as a response of the adoption of Regulation 1/2003. *Wettbewerbsgesetzes* regulates the establishment of the Federal Competition Authority, which is responsible: a) to ensure well-working competition and in individual cases prevent distortions or restrictions of competition as defined in the *KartG 2005* or in the European competition rules (§ 4 para 1); and b) to apply the *KartG 2005*, in accordance with EU law and in connection with the decisions of the regulatory authorities (§ 4 para 2).

Austria, as an EU Member State, has significant private antitrust enforcement cases. Such growth is attributed, mainly, to the enforcement activity of the Austrian Federal Competition Authority (FCA) and the Austrian Federal Cartel Prosecutor.[610] Based on *Elevators and Escalators* cartel decisions,[611] the Austrian Supreme Court has, in several occasions, reaffirmed the possibility

[607] Federal Act against Cartels and other Restrictions of Competition, Federal Law Gazette I No. 61/2005 (hereafter cited as KartG 2005).
[608] Federal Act on the Establishment of a Federal Competition Authority adopted in 2002 as amended in 2005, Federal Law Gazette I No. 62/2005 (hereafter cited as Wettbewerbsgesetzes).
[609] Patrick M Lissel, 'Austria: Cartel Law Amendments' <http://merlin.obs.coe.int/iris/2006/2/Article9.en.html> accessed 2 September 2019.
[610] Bernt Elsner, Dieter Zandler and Marlen Wimmer – Nistelberger, 'Austria' in Ilene Knable Gotts (ed), *The Private Competition Enforcement Review* (12th edition, Law Business Research Ltd 2019) 36.
[611] OGH 8 October 2008, 16 Ok 5/08.

of claims for damages for directly damaged parties,[612] as well as for indirectly damaged parties,[613] including cases where the damages were caused by cartel outsiders known as umbrella cases.[614] Moreover, some cases dealing with the action for damages have been adjudicated by the ECJ such as: *Kone* concerning the umbrella pricing effect[615] or *Donau Chemie* related to the access to the file of the competition authority.[616] Recently, after the transposition of the Directive 2014/104/EU, the Austrian Supreme Court addressed a preliminary ruling to the ECJ asking whether individuals can claim damages from cartels which are not active as suppliers or customers on the market, but affected from increased subsidies of grant loans to customers of the products offered on the market affected by the cartel.[617] The damage suffered by the individuals is the granted amount of the loan, in other words, a percentage of the product costs, which was higher than it would have been without the cartel agreement. The Austrian Supreme Court ruled that, under the Austrian legislation, such damages would not be recoverable as the legal connection was not sufficient.[618] Nevertheless, having doubts on whether such a result is in compliance with the EU law and especially the effectiveness of Article 101, the Austrian Supreme Court referred to ECJ for a preliminary ruling.[619]

5.2.1. Manner of Implementing of Directive 2014/104/EU

On 28 February 2017, the Council of Ministers adopted an amendment to the Austrian Cartel and Competition Law aiming, *inter alia,* the incorporation of the Directive 2014/104/EU into the Austrian legal system. The Austrian Parliament approved the amendment on 24 April 2017 and entered into force on 1 May 2017.[620] *KaWeRÄG 2017* amends: i) *KartG 2005*,[621] ii)

[612] OGH 26 May 2014, 8 Ob 81/13i.
[613] OGH 2 August 2012, 4 Ob 46/12m.
[614] OGH 29 October 2014, 7 Ob 121/14s.
[615] *Kone and Others* (n 219).
[616] *Donau Chemie and Others* (n 246).
[617] OGH 17.5.2018, 9 OB 44/17m.
[618] Dieter Hauck, 'Austria' in Euan Burrows (ed), *The International Comparative Legal Guide to: Competition Litigation 2019* (11th edition, Global Legal Group 2018) 37.
[619] The case is registered in the CJEU register under C-435/18, *Otis Gesellschaft and Others.*
[620] Federal Law amending the Cartel Act 2005, the Competition Act and the Act to Improve Local Supply and Competitive Conditions, Federal Law Gazette I No 56/2017 (hereafter cited as KaWeRÄG 2017).
[621] KaWeRÄG 2017, Art 1.

Wettbewerbsgesetzes[622] and iii) the Austrian Act on Improvement of Local Supplies and the Conditions of Competitions.[623]

The transposition of the Directive 2014/104/EU into Austrian domestic legal order was coupled with other amendments in the Austrian Competition regime concerning several issues.[624] First, it transposed the EU Damages Directive 2014/104 into the Austrian legal system to primarily facilitate the private enforcement of cartel damages for consumers and enterprises. Secondly, a limitation period for public enforcement was introduced, where the Austrian Competition Authorities can submit a request to the Cartel Court to impose a fine within five years of the end of infringement.[625] Third, *KaWeRÄG 2017* empowers the Austrian Competition Authorities to impose periodic penalty payments fines not exceeding 5% of the average daily aggregate turnover achieved in the preceding business year, for each day of delay, in case an undertaking or association of undertakings fails to grant access to electronic data available in the course of a search of premises concerned.[626] Fourth, an additional jurisdictional threshold test for merger control was introduced linked not only to the turnover of the undertakings involved but also to the transaction value.[627] Accordingly, the concentrations which are not caught by Section 9 (1) KaWeRÄG 2017 are required to notify to the Federal Competition Authority if: i) the undertakings' combined worldwide turnover exceeds EUR 300 million; ii) their Austrian turnover exceeds EUR 15 million; iii) the value of the transaction exceeds EUR 200 million, and iv) the target undertaking has significance operation in Austrian domestic market.[628] The filing fee for mergers was increased from EUR 1,500 to EUR 3,500.[629] And finally, *KaWeRÄG 2017* provided the possibility for the Federal Competition Authority to establish a web-based whistleblower tool

[622] KaWeRÄG 2017, Art 2.
[623] KaWeRÄG 2017, Art 3.
[624] bpv Hügel, 'Competition Law Amendment 2017' [2017] Newsletter 1; Dieter Hauck, 'Austrian Competition Law Reform and the Value of a Merger in the Digital Worlds' [2018] Journal of European Competition Law and Practice 323; Florian Neumayr, 'Private Enforcement in Austria: The National Competition Legislation has been Amended Again' [2017] Competition Law Insight 12.
[625] KaWeRÄG 2017, § 33.
[626] KaWeRÄG 2017, § 35.
[627] Hauck (n 624) 323.
[628] KaWeRÄG 2017, § 9 (4).
[629] Wettbewerbsgesetzes 2017, § 10a (1).

where anyone can anonymously disclose information on potential competition law infringements.[630]

5.2.2. Scope of new Rules: Material, Territorial and Temporal

The enforcement of the national competition law by private litigators was possible even before the implementation of the Directive 2014/104/EU. The Cartel Act 1993 provided legal standing for private bodies to file for: i) cease or desist orders or ii) decision of finding before the Cartel Court.[631] In a research carried out by Günter Bauer and Paul Hesse for a project on 'Comparative Competition Law Private Enforcement and Consumer Redress in the EU 1999-2012' leaded by Barry Hawk, the authors identified 64 cases related to the private enforcement in the Civil Ordinary Court and the Cartel Court. Bauer and Hesse found only five cases related to the claim for damages for private enforcement; only one of them was successful. The other cases did either not prevail in merits or were time-barred or were dismissed due to lack of jurisdiction.[632]

Similary the Directive 2014/104/EU, which sets out a minimalist harmonisation approach, the Austrian legislators opted out for a minimal level of harmonisation as well. *KaWeRÄG 2017* incorporated the Directive 2014/104/EU in §§ 37a *et seqq*, focusing only on a claim for damages for the harm caused by an infringement of competition law and requiring a domestic effect in the Austrian market, irrespective of whether the infringement arose domestically or abroad.[633] In the case that such domestic effect cannot be established, the claimant may base its claim for damages under the general tort law rules.[634] For the claim of damages under *KaWeRÄG 2017*, the infringement of competition law, shall mean: i) an infringement of the ban on cartels as stipulated in § 1 *KaWeRÄG 2017*; ii) the ban of abuse of a dominant market position provided in § 5 *KaWeRÄG 2017*; iii) the prohibition of retaliatory measures under § 6 *KaWeRÄG 2017*; iv) infringement of Article 101 or 102 TFEU; or v) infringement of national law of a Member State

[630] Wettbewerbsgesetzes 2017, § 11b (1).
[631] Hauck (n 618) 37.
[632] Günter Bauer and Paul Hesse, 'Country Report Austria' (AHRC Project Comparative Competition Law Private Enforcement and Consumer Redress in the EU 1999-2012) <http://www.clcpecreu.co.uk/pdf/final/Austria%20report.pdf> accessed 10 October 2018, 15-16.
[633] KaWeRÄG 2017, § 24 (2).
[634] Bernt Elsner, Dieter Zandler and Molly Kos, 'Austria' in Ilene Knable Gotts (ed), *The Private Competition Enforcement Review* (11th edition, Law Business Research Ltd 2018) 42.

of the European Union or of a State that is a party to the Agreement on the European Economic Area, which pursue the same objective as Articles 101 and 102 TFEU and which are applied to the same case and in parallel to the EU competition law, pursuant to Article 3 (1) of Regulation 1/2003.[635] Provisions of national law which imposes criminal penalties on natural persons are excluded.

As the deadline for the implementation of the Directive 2014/104/EU expired on 26 December 2016, Austria had not yet transposed. § 86 (9) of *KaWeRÄG 2017* provides clarification on the effects of these provisions. As a rule of thumb, the provisions on the disclosure of evidence, regulated by §§ 37j to 37m, shall apply retroactively as of 27 December 2016. However, two exemptions are foreseen. Firstly, the limitation period stipulated in § 37h *KaWeRÄG 2017* shall apply to claims that are not yet statute-barred by 26 December 2016, unless the application of the law in force until this date is more beneficial for the injured party. Secondly, § 37m *KaWeRÄG 2017*, concerning administrative penalties, may be imposed for conduct that took place after 30 April 2017.

5.2.3. Jurisdiction: Competent Courts

According to the Austrian judicial system, the competent court for a claim of damages depends on the amount in dispute. In general, the Ordinary Civil Courts (*Bezirksgericht*) have the competence to decide on civil law cases, including an action for damages, with a maximum amount of the dispute of EUR 15,000. For the claims that exceed EUR 15,000, the competent court to handle the case is the Regional Court (*Landesgericht*).[636] The remedies available in the context of private enforcement are as follows: i) injunction suit or related interim relief; ii) claim for damages; and iii) defence of nullity.

Furthermore, the Cartel Court, which is a specialised division of the Court of Appeals in Vienna (*Oberlandesgericht Wien*), plays an important role in the context of private enforcement

[635] KaWeRÄG 2017, § 37b (1).
[636] The Federal Ministry of Justice, 'The Austrian Judicial System' <https://www.justiz.gv.at/web2013/file/8ab4ac8322985dd501229ce2e2d80091.de.0/broschuere_englisch_downloadversion.pdf> accessed 7 October 2018, 7-8.

'as a specialised forum for a private party litigation'.[637] Accordingly, the Cartel Court may be requested by undertakings: i) to issue an order requesting a competition law infringement to be brought to an end, including by way of interim measures;[638] and ii) to declare where an infringement has been brought to end that (a) the infringement has been committed in the past if there is a legitimate interest in doing so, and/or (b) to determine whether or to what extent a specific circumstance fall at all within the scope of the Austrian competition law regime.[639] The Cartel Court decisions may be appealed to the Austrian Supreme Court sitting as the Cartel Court of Appeals. However, the Cartel Court has no competence to award damages or to decide on the nullity of an agreement and its consequences under the private law.[640]

5.2.4. Relevant Substantive and Procedural Issues of KaWeRÄG 2017

KaWeRÄG 2017 introduces the following provisions for the actions for damages: § 37a Scope and subject matter; § 37b Definitions; § 37c Liability; § 37d Right to full compensation; § 37e Joint and several liability; § 37f Burden of proof in passing-on of overcharges; § 37g Effects of consensual dispute resolution; § 37h Limitation periods; § 37i Effects of proceedings before a competition authority; § 37j Disclosure of evidence; § 37k Disclosure and use of evidence included in the files; § 37l Assistance from the Cartel Court, the Federal Cartel Prosecutor and the Federal Competition Authority and § 37m Administrative penalties. The following section examines the substantive and procedural rules concerning the antitrust damages claims affected by the implementation of the Directive 2014/104/EU into the Austrian legal system.

5.2.4.1. Right to full Compensation

In line with the ECJ settled case-law, *KaWeRÄG 2017* contains an explicit rule on the right to full compensation. Accordingly, any undertakings infringing the competition law affecting the Austrian market, irrespective of whether the infringement occurred domestically or abroad,[641] shall

[637] Bauer and Hesse (n 632) 5; KaWeRÄG 2017, § 58 (1).
[638] KaWeRÄG 2017, § 26.
[639] KaWeRÄG 2017, § 28 (1) and § 28 (2).
[640] Bauer and Hesse (n 632) 5.
[641] KaWeRÄG 2017 § 24 (2).

be liable to compensate for the harm caused by the infringement.[642] The right to compensation includes compensation not only of the actual loss suffered but also loss of profits plus interest from the time at which the harm has occurred by applying § 1333 of the General Civil Code.[643]

5.2.4.2. Limitation Periods

Contrary to the previous Austrian's general three-years limitation period, the *KaWeRÄG 2017* increased the limitation to five years, starting from the time when the claimant knows or can reasonably be expected to know: i) the identity of the infringer; ii) the harm; iii) conduct caused the harms; and iv) the fact that such conduct constitutes an infringement of competition law.[644] The limitation periods shall begin once the infringement of the competition law has ceased. Irrespective of knowing or having to know the facts, the absolute limitation period for bringing in an action for damages is 10 years starting from the time when the damages occurred.[645]

According to § 37h (1) *KaWeRÄG 2017*, the limitation period can be suspended: i) for the duration of the proceedings until Austrian competition authority will issue the decision; ii) for the duration of investigations conducted by the Austrian competition authority against an infringement of competition law; and iii) for the duration of consensual dispute resolution pursuant to § 37g (4) *KaWeRÄG 2017*. The suspension period shall end one year after the infringement decision by the Austrian Competition Authority has become final or after proceedings to bring an infringement of competition law ends or after the termination of investigative measures. Whereas, regarding the suspension period for the duration of consensual dispute resolution, in the case the consensual dispute resolution process has been discontinued, legal action must be taken, within a reasonable period, to avoid the expiry of the limitation period.[646]

The limitation period can be suspended for the duration of proceedings conducted to raise and enforce claims for contributions from the co-infringers in the case the injured party is not a

[642] KaWeRÄG 2017 § 37c (1).
[643] KaWeRÄG 2017 § 37d (1) and (2).
[644] KaWeRÄG 2017 § 37h (1).
[645] KaWeRÄG 2017 § 37h (1).
[646] KaWeRÄG 2017 § 37h (2).

direct or indirect purchaser or supplier of a cooperative witness benefiting from a leniency programme under the § 37e para 3 of *KaWeRÄG 2017*. The suspension will end one year after an unsuccessful attempt of enforcement against the co-infringers.[647]

5.2.4.3. Joint and Several Liability

According to § 37e (1) *KaWeRÄG 2017*, undertakings participating in a competition law infringement are jointly and severally liable for damages towards the injured party. The amount of the compensation to pay shall be determined in the light of the relative responsibility which depends on the circumstances of each case, particularly on: i) the turnover; ii) market shares; and iii) roles of the infringers involved in the infringement of competition law.[648] In the case of immunity and leniency recipients, the amount of contribution to be paid should not exceed the amount of the harm it caused to its own direct or indirect purchasers or suppliers.[649]

However, § 37e (2) and (3) *KaWeRÄG 2017* provide two exemptions from the above-mentioned rule. Firstly, the SMEs with less than 5% market share and which would be in danger of losing the economic viability and devaluation of all their assets will only be liable toward its own direct and indirect purchasers or suppliers. This protection does not apply if the SMEs have either forced other undertakings to participate in the infringement behavior or are found previously by a competition authority as infringers.[650] The second exemption relates to the situation when a person, voluntarily, discloses the information and participation to the competition authority in a secret cartel between competitors. In turn, he/she benefits immunity to be imposed for the infringement. Generally, immunity and leniency recipients will only be liable to their own direct and indirect purchasers or suppliers. This protection is particularly important to safeguard the leniency programmes which are an important tool in the public enforcement. However, if the injured party has been unable to obtain full compensation from the other liable parties, then, the immunity and leniency recipient is entitled to compensate.[651]

[647] KaWeRÄG 2017 § 37h (3).
[648] KaWeRÄG 2017 § 37e (4).
[649] KaWeRÄG 2017 § 37e (4).
[650] KaWeRÄG 2017 § 37e (2).
[651] KaWeRÄG 2017 § 37e (3).

5.2.4.4. Quantification of Harm

As been mentioned above, the right to compensation for damages includes compensation not only of the actual loss suffered but also the loss of profits plus interest from the time the harm has occurred. The Austrian law allows the court to quantum the harm of the damages if the liability has been established and the injured party was able to establish the causal link between the harm suffered and the damages due to an antitrust infringement.[652] However, the Directive's rebuttable presumption that cartel infringements cause harm to consumers, incorporated in § 37c (2) *KaWeRÄG 2017*, is a substantial divergence from the basic Austrian civil rules following which the burden of proof rests with the claimant. This presumption of harm significantly helps the position of the claimants and shifts the burden of proof towards the defendant.[653] The number of damages for compensation is calculated by comparing the actual final situation of the injured party after the infringement with a hypothetical scenario when the damaging infringement has not occurred.[654] In case the court can not determine the amount of compensation, it may request the assistance of the Cartel Court, the Federal Cartel Prosecutor and the Federal Competition Authority.[655]

5.2.4.5. Passing-on of overcharges

§ 37f (1) *KaWeRÄ 2017* provides the defendants the possibility to safeguard themselves against a claim for damages since the claimant passed on the whole or part of the overcharge resulting from the infringement of the competition law. The defendant has the burden of proving that the overcharge was passed. In case the indirect purchaser claims compensation for damages against the infringer who has conducted an antitrust infringement, the burden of proving rest on the indirect purchaser.[656] The latter has to show that: i) the defendant has committed an antitrust infringement; ii) resulting in an overcharge for their direct purchasers; iii) purchased by the indirect

[652] Elsner, Zandler and Kos (n 634) 46.
[653] bpv Hügel (n 624) 2.
[654] ibid 2.
[655] KaWeRÄG 2017 § 37l.
[656] KaWeRÄG 2017 § 37f (2).

purchasers.[657] However, the defendant can rebut the presumption by demonstrating the damages have passed on.

In order to avoid overcompensation, § 37f (4) *KaWeRÄ 2017* allows the defendant to summon the third party - a direct or indirect purchaser for being an infringer to the indirect or direct purchaser - to join the proceedings. If the notice procedure has been respected, the final decision of the court on passing-on of overcharges will be legally binding for the third party irrespective of whether it joined or not the proceedings.[658]

5.2.4.6. Standing

Anyone who has suffered damages as a result of an infringement of the competition law is entitled to seek the right to claim damages. This is in line with the settled ECJ case-law. § 37c (1) *KaWeRÄG 2017* sets out the liability of the undertakings infringing the competition law to compensate anyone for the harm caused.[659]

With regard to the cases of umbrella claims, the Austrian Supreme Court has rejected the legal standing of the claimant against the antitrust infringers under the Austrian law. In addition, the EU law is not applicable due to the lack of an adequate causal link between the infringement and the losses alleged.[660] However, following the *Kone* judgment,[661] it remains to be seen whether the Austrian Supreme Court will change its approach to provide standing for umbrella claims under the Austrian law.[662]

5.2.4.7. Disclosure of Evidence

The most far-reaching change implementing the Directive 2014/104 relates to the rules on the disclosure of evidence. Until the adoption of *KaWeRÄG 2017*, the Austrian law did not have

[657] KaWeRÄG 2017 § 37f (3).
[658] KaWeRÄG 2017 § 37f (4) last sentence.
[659] KaWeRÄG 2017 § 37c (1).
[660] OGH 17 October 2012, 7 Ob 48/12b; Elsner, Zandler and Kos (n 634) 43.
[661] *Kone and Others* (n 219).
[662] Elsner, Zandler and Kos (n 634) 42.

any rule on the disclosure of evidence in the strict sense.[663] Under the Austrian Civil Procedure, upon a request, the court can order the other party to produce documents during the proceedings. The request must specify the list of the documents to be disclosed.[664] The *KaWeRÄG 2017* brought significant changes with regard to the disclosure of evidence to the claim for damages for the harm caused by the infringement of the competition law and the disclosure and use of evidence included in the files of Austrian Competition Authority.

According to § 37j (2) *KaWeRÄG 2017*, upon a justified request, the court can order the defendant or third party to disclose certain documents including evidence that contains confidential information. In assessing the request by the claimant or defendant to disclose specified evidence 'as precisely and narrowly as possible on the basis of reasonably available facts',[665] the Court shall consider: i) the extent to which the claim or defence of the parties is supported by facts and evidence; ii) the scope and cost associated with the disclosure; and iii) whether the request contains any confidential information especially concerning the third parties.[666] In case of confidential information, the court must order effective measures to protect confidential data. Prior to ordering the disclosure, the Court must hear the affected party and then balance the legitimate balance of all parties and third parties. In particular, the Court may request a specific redacted extract not submitted in the file or to conduct hearings in the camera. Also, the Court may restrict the number of persons allowed to have access to the evidence and their legal representatives to the extent of their rights concerned; or the Court can order an expert to prepare a summary of confidential information not included in the file.[667] According to § 37j (7) *KaWeRÄG 2017*, the party obliged to disclose the evidence may request that certain evidence must be disclosed only before the Court due to an obligation of secrecy or its right to refuse to make a statement as foreseen in § 157 para 1 subparagraphs 2 to 5 of the Code of Criminal Procedure.[668] In this situation, the court, after assessing the request, shall decide of whether to disclose or not such confidential information.

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[663] For a general overview of evidence in Austrian civil law see Bettina Nunner-Krautgasser and Philipp Anzenberger, *Evidence in Civil Law – Austria* (lex Localis 2015) 11 – 16.
[664] Hauck (n 618) 41
[665] KaWeRÄG 2017 § 37j (3)
[666] KaWeRÄG 2017 § 37j (4)
[667] KaWeRÄG 2017 § 37j (6)
[668] Basically § 157 (2) subparagraphs 2 to 5 of the Code of Criminal Procedure provides that person who have known something due to their official work are excluded from statement. The 2nd subparagraph list defense lawyers, lawyers, patent attorneys, notaries and public accountants; 3rd subparagraph list specialist in psychiatry, psychotherapists, psychologists, probation officers, registered mediators under the Civil Law Mediation Act Federal Law Gazzete I No

The evidence contained in the files of the courts or competition authorities can be disclosed by a court order if such evidence cannot be reasonably obtained by the parties concerned or by a third party concerned.[669] In this case, the court, besides assessing the proportionality of a request for disclosure, must also consider the effectiveness of public enforcement of the competition law.[670] Prior to the court's decision-taking, the competition authority, either by its own initiative or upon the Court's request, shall submit an opinion on the circumstances.

According to § 37k (3) *KaWeRÄG 2017*, the Competition Authority discloses only the 'grey list documents'. The 'grey list documents' are considered: all i) documents prepared specifically for the proceedings before the competition authority; ii) documents drawn up and sent to the parties in the course of its proceedings; and iii) settlement submissions associated with such proceedings that have been withdrawn. The disclosure of these documents has to be done once the competition authority has closed the proceedings. In the same vein with Article 6 (6) of the Directive 2014/104/EU, leniency submission or settlement submissions – known as the 'black list documents' - must not be disclosed at any time, unless the information is available irrespective of the competition proceedings.[671] In this situation, the Court may order the submission of the requested evidence in order to assess whether and to what extent its contents are subject to a prohibition pursuant to paragraph 4 § 37k (4) *KaWeRÄG 2017*. The author asking for disclosure may have the right to be heard and the court may seek assistance from the Competition Authority to decide whether and, where applicable, which parts of the evidence will be disclosed. Furthermore, the Court decides solely and exclusively whether other parties or third parties may be granted access to such evidence. The decision can only be challenged by the party obliged to disclose the evidence or the author of the evidence.[672]

However, certain restrictions on the disclosure of evidence included in the file of competition authorities may apply. The use of evidence included in the file will not be allowed

29/2003; 4th subparagraph list media owners (publishers), media staff and employees of a media company or media; and 5th subparagraph voters.
[669] KaWeRÄG 2017 § 37k (1).
[670] KaWeRÄG 2017 § 37k (2).
[671] KaWeRÄG 2017 § 37k (4).
[672] KaWeRÄG 2017 § 37k (7).

where its submission cannot be ordered.[673] The evidence obtained by a person solely by inspecting the files of the competition authority may be used by this person only in actions for damages for an infringement of the competition law.[674]

If the parties or their representatives withhold, destroy or make unusable the relevant evidence from the other party bearing the burden of proving, the Court must impose administrative penalties up to EUR 100,000. Also, the Court imposes penalties even in the case where parties or their representatives fail or refuse to comply with the rules applicable to confidential information or when the use of evidence is not admissible pursuant to § 37k paragraphs 5 and 6 *KaWeRÄG 2017*.[675]

5.2.4.8. Effect of National Competition Authority Decisions

§ 37i (1) *KaWeRÄG 2017* provides the possibility of a legal dispute for the harm caused to be interrupted until the proceedings of the competition authority have been discharged. Whereas, § 37i (2) *KaWeRÄG 2017* stipulates that a court on the claim for damages shall be bound by the final decisions of a competition authority or court deciding on the decision of a competition authority, be it in Austria or in other Member States. This rule goes beyond the required level of harmonisation in Article 10 (2) of the Directive 2014/104/EU, stipulating the decision of other Member States' court to be presented as at least *prima facie* evidence of the infringement occurred. In a follow-on scenario, claimants only have to establish the damage incurred and a causal link between the infringement and the damage. In the case of the cartel, pursuant to Article 17 (2) of the Directive 2014/104/EU and § 37c (2) KaWeRÄG 2017, a presumption of harm exists.

5.2.4.9. Collective Redress

In the Austrian legal system, there are no special rules regarding the collective redress. However, despite the absence of specific collective redress mechanisms, several traditional means

[673] KaWeRÄG 2017 § 37k (5).
[674] KaWeRÄG 2017 § 37k (6).
[675] KaWeRÄG 2017 § 37m.

of multi-party proceedings can be used for mass litigation. The first option is through the joinder of claimants or claims. Accordingly, several claimants may join in one single proceeding[676] or one claimant may bring several claimants against one or several defendants even if only of them is domiciled in Austria. [677] The second option is the consolidation of cases by the court only if this serves the interest of justice. The consolidation of the cases is permissible in the case of the actions pending before the same court.[678] The third option is the situation where potential claimants and defendants conclude an agreement according to which only one case will be filed, designed to solve similar controversies.[679] However, these traditional devices are not suitable for all cases, in particular in cases with a large number of parties.

The mechanism which closely resembles a collective redress mechanism is the class actions. The Austrian class action is not a genuine procedural instrument of a class action but rather a mass assignment of claims established by the case-law.[680] It is based on a combination of joinder of litigation and the litigation finance. The potential claimants assign their claim to an association that brings forth a claimant under its own behalf. Under the Austrian class action model, the association can assemble a large number of claimants, allowing the association to use commercial litigation finance.[681] For instance, the Austrian Consumer Protection Law (*KSchG*), in § 29 has introduced the possibility of class actions for a certain association in the case of an injunctive relief pursuant to § 28 *KSchG* relating to commercial dealings, which are contrary to the law or public policy.[682] These class actions might be effective for collective remedies for their specific purpose: the consumer protection. Still, in the case of private enforcement of the competition rules, such actions are unsuitable because these entities are not entitled to ascertain claims for damages.[683]

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[676] ZPO § 227.
[677] Elsner, Zandler and Kos (n 634) 45.
[678] ZPO § 187; Hauck (n 618) 38.
[679] The British Institute of International and Comparative Law, *State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation* (JUST/2016/JCOO/FW/CIVI/0099, 2017) 371.
[680] Lukas Klever and Sebastian Schwamberger, 'Austria' in Policy Department for Citizens' Rights and Constitutional Affairs, *Collective Redress in the Member States of the European Union* (EU 2018) 119; The British Institute of International and Comparative Law (n 679) 11; 120-124.
[681] The British Institute of International and Comparative Law (n 679) 120.
[682] According to Consumer Protection Law – KSchG § 29 (1) 'An action may be brought by the Austrian Economic Chamber, the Federal Chamber of Labour, the Council of Austrian Chambers of Agricultural Labour, the Presidential Conference of Austrian Chambers of Agriculture, the Austrian Trade Union Federation, the Consumer Information Association and the Austrian Council of Senior Citizens.'
[683] KaWeRÄG 2017 § 36 (4).

According to a national report submitted within the framework of a project prepared by the British Institute of International and Comparative Law, the current Austrian framework - the traditional means of multi-party proceedings and the Austrian class actions - are in line with a large measure of the Recommendations.[684] For instance, the Austrian law does not provide punitive damages,[685] jury awards or pre-trial discovery procedure.[686] Most importantly, it is consistently based on the opt-in model.[687] Several ADR mechanisms are in place, within certain limits, to deal with the collective redress.[688] In addition, as to the cost, Austria has a 'loser pays' rule and contingency fees are not allowed.[689] However, the Austrian current framework does not provide a restriction regarding the standing to bring a representative action.[690] Standing is any association whose claims have been assigned. The EU Recommendation on the common principles for collective redress of 2013 did not have any direct impact on the Austrian legislation.[691]. According to para 4 of the Recommendation, the associations' representatives that have standing to bring representative actions should include at least the following requirements: i) the entity should have an NGO character; ii) be a direct relationship between the main objectives of the entity and the rights granted under Union law; and iii) sufficient capacity in terms of financial resources, human resources, and legal expertise. These conditions are not reflected in the Austrian legal system. Furthermore, there is currently no judicial control of litigation funding by the court.[692]

Since 2007, there is an ongoing debate on collective redress. A draft amendment to the Austrian Civil Procedure Code (*ZPO*) was proposed to introduce group trial or the exemplary legal proceedings. The draft amendment failed to become law.[693] Since the *ZPO* does not contain any specific provision, it remains under the discretion of the national courts to deal with the submitted claims. The last proposal for collective redress instrument dates back to 31 January 2018. Two

[684] The British Institute of International and Comparative Law (n 679) 384.
[685] 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 (n 397) para 31.
[686] ibid Rec 15.
[687] ibid paras 21-24.
[688] ibid para 26.
[689] ibid paras 13 and 30.
[690] ibid para 4.
[691] Klever and Schwamberger (n 680) 128.
[692] ibid paras 14-16.
[693] Hauck (n 618) 38.

parliamentary fractions presented two different proposals. In the end, both proposals were unsuccessful.[694] During the parliamentary debate, two concerns were emphasised. Firstly, it was argued that a collective redress instrument would be incapable to avoid abuses of the US class actions system. And secondly, introducing the collective redress mechanism would go hand in hand with the right to claim punitive damages.[695] The Austrian position regarding collective redress is to avoid a national measure and wait for a European approach.[696]

5.2.4.10. Consensual Dispute Resolution in Antitrust Enforcement

The *KaWeRÄG 2017* introduces in § 37g the consensual dispute resolution as an alternative way to the claim for damages as a result of an infringement of the competition law. As the claim for damages falls under the civil court jurisdiction, the rules for arbitration proceedings in *ZPO* provide the possibility to adjudicate the dispute by requiring an arbitration agreement from the parties involved.[697] According to § 581 (1) *ZPO*, an arbitration agreement is an agreement between the parties to submit in arbitration all or certain disputes which have arisen between them, and should be either in a written document signed by the parties or in letters, facsimiles, e-mail or other forms of transmission of messages exchanged between the parties that constitute a proof of the agreement.[698] An arbitration agreement may be concluded for a pecuniary claim or a non-pecuniary claim.[699] Hence, the rules on arbitration proceedings must be respected in order to claim damages for infringements of the competition law.

§ 37g *KaWeRÄG 2017* addresses the effect of the consensual dispute resolution in private enforcement of competition. Two situations are provided. If a consensual settlement has been reached between the injured party and the infringer, the claim of the settling injured party against

[694] ibid 130.
[695] Klever and Schwamberger (n 680) 130; Stenographisches Protokoll, 28.02.2018, 9 Sitzung des Nationairates der Republik Österreich XXVI, 119 -122 <https://www.parlament.gv.at/PAKT/VHG/XXVI/NRSITZ/NRSITZ_00009/fname_688505.pdf> accessed 7 June 2019.
[696] Klever and Schwamberger (n 680) 130; Stenographisches Protokoll (n 695).
[697] Code of Civil Procedure (ZPO), RGBl. No. 113/1895, Sixth Part, Fourth Chapter, as inserted by the Arbitration Law Reform Act 2006, BGBl; I No. 7/2006, with subsequent amendments § 582 (1).
[698] ZPO § 583 (1).
[699] Code of Civil Procedure (ZPO), RGBl. No. 113/1895, Sixth Part, Fourth Chapter, as inserted by the Arbitration Law Reform Act 2006, BGBl; I No. 7/2006, with subsequent amendments § 582 (1).

co-infringers must be reduced by the share the settling infringer is liable for.[700] According to § 37g (2) *KaWeRÄG 2017*, an infringer who has settled with the injured party on a compensation for harm caused by the infringement, will not be liable to pay compensation to non-settling co-infringers for claims raised by this injured party. The settling infringer will be liable to pay a reduced compensation only to the extent that damages cannot be paid by the co-infringer. Any payment resulting from the settlement will be considered proportionately to the relative responsibility.[701]

In case a consensual settlement between the parties is likely to be reached, the § 37g (4) *KaWeRÄG 2017* allows the court to decide on the compensation for harm caused to suspend the proceedings for a maximum period of two years. In the case of unsuccessful settlement negotiations, a claim has to be filed within a reasonable time to avoid the expiry of the limitation period.[702]

5.3. Italy

In Italy, competition law is relatively new. Unlike other founding members of the EEC, which enacted specific competition laws after World War Two, Italy was the only country to not have specific legislation. Despite numerous efforts to introduce specific legislation, a lack of confidence in the efficacy of the legislation and political power of big firms has been sufficient to block the efforts.[703]

For decades in Italy, anticompetitive conduct was examined under Articles 2598 - 2601 of the *Codice Civile*.[704] Under these provisions, the competition was understood as a business matter solely for the protection of the enterprises against anticompetitive acts by direct competitors.[705]

[700] KaWeRÄG 2017 § 37g (1).
[701] KaWeRÄG 2017 § 37g (3).
[702] KaWeRÄG 2017 § 37h (2).
[703] Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (n 53) 408-410.
[704] Regio Decreto 16 marzo 1942, n. 262, Approvazione del testo del Codice civile [1942] GU 79 aggiornato al Decreto Legislativo 10 maggio 2019, n 49, Attuazione della direttiva 2017/828 del Parlamento europeo e del Consiglio, del 17 maggio 2017, che modifica la direttiva 2007/36/CE per quanto riguarda l'incoraggiamento dell'impegno a lungo termine degli azionisti [2019] GU 134 (Codice Civile).
[705] Silvia Branca, 'The Private Enforcement of Competition Law: Developments and persisting Problems' (PhD Thesis, Università degli Studi di Molise 2015)63 -64.

After a long discussion, in 1990, Italy adopted *Legge 287/1990* on the safeguard of the competition and market,[706] modelled strictly in line with the provision of the EU competition law.[707] Article 1 (4) of *Legge* 287/1990 expressly stated that substantive provisions are to be interpreted on the basis of the principles of the EU competition law. Such regulation increased consistency between the Italian and EU competition law and, at the same time, mitigated the uncertainty prompted as a result of this radical change.[708]

Private enforcement was possible even before the transposition of the Directive 2014/104/EU in the Italian legal system. *Legge 287/1990* established an antitrust enforcement system with two 'concurrent and independent lanes': i) administrative enforcement entrusted to AGCM (public enforcement) and ii) judicial enforcement (private enforcement).[709] The original version of Article 33 (2) of *Legge 287/1990* attributed a special jurisdiction to the Court of Appeal of the Region for actions of nullity and damages for an infringement of the competition law.[710] The choice of the Italian legislator to provide special jurisdiction to the Court of Appeal of Regions aimed, firstly, to avoid judicial fragmentation and, secondly, to secure a uniform application and specialisation through only a small number of court with regional jurisdiction.[711] Such a solution made it clear that the competition law is a serious matter that needs to be decided quickly by higher courts.[712] According to the data produced by the Directorate General for Statistics of the Department of Judicial Organisation of the Ministry of Justice, 78 proceedings were registered in 2014, compared to 115 proceedings in 2015 and a total of 71 proceedings in the first half of 2016.[713] While the number of proceedings seems to increase, in total, between 1990 and 2016, the Italian courts have issued 128 rulings on antitrust damages actions, including abuse of market. In

[706] Legge 10 Ottobre 1990, n. 287, Norme per la tutela della concorrenza e del mercato [1990] GU 240.
[707] Michele Carpagnano, 'Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi' [2006] The Competition Law Review 47.
[708] Imelda Maher, 'Alignment of Competition Laws in the European Community' [1996] *Yearbook of European Law 223, 233.*
[709] Giuseppe Tesauro, 'Private Enforcement of EC Antitrust Rules in Italy: The Procedural issues' in Claus-Dieter Ehlerman and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 269-270.
[710] Article 33 (2) of the Legge 287/1990 reads as follow: 'Le azioni di nullita' e di risarcimento del danno, nonche' i ricorsi intesi ad ottenere provvedimenti di urgenza in relazione alla violazione delle disposizioni di cui ai titoli dal I al IV sono promossi davanti alla corte d'appello competente per territorio'.
[711] Tesauro (n 709) 269.
[712] Paolo Giudici, 'Private Antitrust Enforcement in Italy' [2004] The Competition Law Review 61, 67
[713] Susanna Lopopolo, 'Il Recepimento Italiano della Direttiva 2014/104/EU sul Private Enforcement Antitrust' [2017] Rivista di Diritto Pubblico Italiano, Comparato, Europea 1, 8

terms of action type, 44 cases were follow-on actions and 84 were stand-alone actions.[714] While action of damages for the infringement of competition law was possible, the transposition of the Directive 2014/104/EU increases the legal certainty of individuals to seek compensation.[715]

5.3.1. Manner of Implementing the Directive 2014/104/EU

On 24 December 2012, the Italian Parliament approved *Legge 234/2012* to favour a more precise implementation of the EU obligations.[716] *Legge 234/2012* regulates the process of Italy's participation during the drafting process of the EU acts and guarantees the fulfilment of the obligations deriving from Italy's EU membership.[717] According to a new regime, the transposition of the EU legislation into the Italian legal system is regulated by two distinctive normative acts, namely *Legge Europea* and *Legge di Delegazione Europea.*

Pursuant to Articles 31 and 32 of *Legge 234/2012*,[718] the Government was entrusted with the power to adopt a *Decreto Legislativo* for the implementation of the Directive 2014/104/EU.[719] Particularly, Article 2 of *Legge 114/2015* mandated the government for the implementation of the Directive 2014/104/EU, specifying, firstly, that new provisions be applied to damages actions resulting both from violation of Articles 2 and 3 of *Legge 287/90* and of Articles 101 and 102 TFEU.[720] Secondly, the new provisions were to be applied to claims brought by means of class

[714] Lucio D'Amario, Matteo Farneti, Alice Galbusera and Giorgio Valoti, 'Italy' in Hans-Jörg Niemeyer and Hengeler Mueller (eds), *Market Intelligence: Cartels* (Law Business Research 2018) 58; Claudio Tesauro and Dario Ruggiero, 'Private Damage Actions Related to European Competition Law in Italy' [2010] Journal of European Competition Law and Practice 514.

[715] Silvia Marino, 'EU Competition Law after the Directive 2014/104/EU and its Implementation in Italy' in Silvia Marino, Łucja Biel, Martinal Bajčić and Vilelmini Sosoni (eds) *Language and Law: The Role of Language and Translation in EU Competition Law* (Springer 2018) 133.

[716] Legge 24 dicembre 2012, n. 234, Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea [2013] GU 3.

[717] Legge 234/2012, Art 1.

[718] Article 31 of Legge *234/2012* sets out procedure to be followed for enactment of *Legge Europea* and *Legge di delegazione europea;* whereas Art 32 stipulates general principles guiding *Legge Europea* and *Legge di delegazione europea*

[719] Legge 9 luglio 2015, n. 114, Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea [2014] GU 176. Both *Legge* 234/2012 and *Legge* 114/2015 constitute the legal foundation which allows Italy to fulfill the obligations stemming from EU membership. Valentina Leggio, 'Approvata la legge di delegazione europea 2014' (Eurojust.it, 23 July 2015) <http://rivista.eurojus.it/approvata-la-legge-di-delegazione-europea-2014/> accessed 21 February 2019.

[720] Legge 114/2015, Art 2 (1) (a-b); In contrast to Directive 2014/104EU scope of application for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition

actions regulated by Article 140-*bis* of *Codice del Consumo*.[721] Finally, the government was mandated to revise the competencies of specialised sections established by *Decreto Legislativo 168/2003*, concentrating the competence to adjudicate the antitrust damages actions at a limited number of courts.[722]

Decreto Legislativo 3/2017 was the product of a working group set up at the Department for European Policies at the *Presidenza del Consiglio dei Ministri*. Representatives from the Ministry of Justice, Ministry for Economic Development, AGCM attended the meeting. Public consultation with interested parties or stakeholders was not held. The Department for European Policies consulted the way the other EU Member States' transposition model of the Directive 2014/104/EU was implemented.[723] The preliminary draft of *Decreto Legislativo 3/2017* was adopted on 27 October 2016, one day before the deadline expired, and finally approved on 14 January 2017.[724] It was published in the Official Journal on 19 January 2017 and entered into force on 3 February 2017.[725]

Among the issues discussed during the drafting process was the position of the *Decreto Legislativo* 3/2017 into the Italian legal system. One option was to incorporate *Decreto Legislativo* 3/2017 into *Legge 287/1990*. Such a solution would guarantee more coherence, having both public and private enforcement rules in one legal instrument.[726] On the other hand, the Government favoured for an autonomous legislative text considering the differences in *ratio*, purposes and recipients between the public and private enforcement.[727] In the end, it was decided to follow the

law, *Legge* 114/2015 extended the scope of application even to violation of domestic provision without an EU dimension.

[721] Legge 114/2015, Art (1) (c).

[722] Legge 114/2015, Art 2 (1) (d).

[723] Lopopolo (n 713) 4.

[724] Laura Zoboli, 'Approvato il decreto legislativo di attuazione della direttiva 2014/104/UE: verso un private enforcement effettivo?' (Eurojust.it, 24 January 2017) <http://rivista.eurojus.it/approvato-il-decreto-legislativo-di-attuazione-della-direttiva-2014104ue-verso-un-private-enforcement-effettivo/> accessed 21 February 2019.

[725] Decreto Legislativo 19 gennaio 2017, n. 3, Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea [2017] GU 15.

[726] Analisi di Impatto della Regolamentazione allegata allo schema di decreto legislativo di attuazione della Direttiva 2014/104/UE < http://www.senato.it/service/PDF/PDFServer/BGT/993022.pdf> accessed 1 March 2019, 7.

[727] In the regulatory impact analysis attached to the Decreto Legislativo 3/2017, the Government argued that 'la diversa *ratio* della tutela pubblicistica e privatistica del diritto antitrust, le finalità specifiche delle stesse, i diversi destinatari dei due corpi di norme, le stesse definizioni contenute nella Direttiva [rendessero] assolutamente necessaria la

second option: creating an autonomous legislative text and to intervene on the existing legislation only to the minimum limits necessary to coordinate the public and private enforcement rules.

The transposition of the Directive 2014/104/EU into the Italian legal system has been quite on time and generally seems to be correct. According to Marino, two are the important factors contributing to this precision. Firstly, the Directive 2014/104/EU was drafted considering the best practices of civil jurisdictions that have already experienced both stand-alone and follow-on actions. The Italian settled case-law *Manfredi* has to some extent contributed to the codification of the Directive 2014/104/EU. Secondly, the Directive 2014/104/EU harmonises only certain aspects of the private enforcement, leaving other issues on the discretion of the Member States.[728]

The Italian legislator opted for a literal approach to transpose the provisions of the Directive combined with the gold-plating approach for the rules on territorial jurisdiction and retroactive effects of procedural rules, as from 26 December 2014.[729] According to Osti, the transposition of the Directive 2014/104/EU into the Italian legal system 'is most notable for the rather unusual rapidity which characterised its adoption. It is mainly diligent and technically savvy [...] transposition of the text of the directive, with a limited amount of independent thinking'.[730]

5.3.2. Scope of new Rules: Material, Territorial and Temporal

Decreto Legislativo 3/2017 maintains a minimum level of harmonisation focusing only on the claim for damages. 'Anyone' who has suffered damage as a result of an infringement of the competition law is entitled to full compensation. In addition, *Decreto Legislativo 3/2017* makes reference to the class action regulated by Article 140-*bis* of the *Codice del Consumo*.[731] The infringer of the competition law may be an undertaking or an enterprise association.[732] The Italian

costituzione di un testo legislativo autonomo dotato della propria specificità'. Analisi di Impatto della Regolamentazione allegata allo schema di decreto legislativo di attuazione della Direttiva 2014/104/UE <http://www.senato.it/service/PDF/PDFServer/BGT/993022.pdf> accessed 1 March 2019, 8.
[728] Marino (n 715) 156.
[729] ibid 156.
[730] Cristoforo Osti, 'Italy' (Conference on Implementation of the EU Damages Directive into Member States Law 5 May 2017) 7.
[731] Decreto Legislativo 3/2017, Art 1.
[732] Decreto Legislativo 3/2017, Art 2(1)(a).

legislator decided to broaden the scope of the national transposition. For the purpose of *Decreto Legislativo* 3/2017, competition law means: i) Articles 101 and 102 TFEU; ii) Articles 2, 3 and 4 of the *Legge* 287/1990, applied autonomously (without EU dimensions); and iii) the provisions of other Member States which pursue the same objective of Articles 101 and 102 of TFEU and Articles 2, 3 and 4 of the *Legge* 287/1990. The imposition of criminal sanctions on natural persons is excluded from the meaning of 'infringement of competition law', unless such penal sanctions constitute the instruments through which the competition rules applicable to the ompanies are implemented.[733]

Decreto Legislativo 3/2017 entered into force on 3 February 2017 with around 38 days' delay as stipulated in Article 21 of the Directive 2014/104/EU. Pursuant to Article 22 of the Directive 2014/104/EU, the Member States enjoyed some discretion in determining whether the relevant provision had a substantive or procedural nature.[734] In this light, Article 19 of *Decreto Legislativo 3/2017* 3/2017 defined the procedural provisions to be applied retroactively for the action of damages brought after 26 December 2016. Retroactivity is limited only to the production of evidence laid down in Articles 3, 4, 5 and the suspension of the limitation period in the context of the consensual dispute resolution set out in Article 15 (2) of the Directive 2014/104/EU.[735]

5.3.3. Jurisdiction: Competent Courts

Since 2002, pursuant to Article 16 of *Legge 273/2002*,[736] the government adopted *Decreto Legislativo* 168/2003 which established specialised sections in the Italian Court of First Instance and Courts of Appeal competent for dealing with cases on intellectual property law.[737] In 2012, the Italian Parliament ratified *Legge 27/2012*, which replaced the existing specialised sections on

[733] Decreto Legislativo 3/2017, Art 2 (1) (b).
[734] D'Amario and Galbusera (n 598) 178.
[735] Decreto Legislativo 3/2017, Art 19.
[736] Legge 12 dicembre 2002, n. 273, Misure per favorire l'iniziativa privata e lo sviluppo della concorrenza [2002] GU 293 - Supplemento Ordinario n. 230.
[737] Decreto Legislativo 27 giugno 2003, n. 168, Istituzione di Sezioni specializzate in materia di proprieta' industriale ed intellettuale presso tribunali e corti d'appello, a norma dell'articolo 16 della legge 12 dicembre 2002, n. 273 [2003] GU 159, Art 3 and 4.

the industrial and intellectual property rights with 'new' specialised sections.[738] *Legge 27/2012* extended the competences of the specialised sections to treat the issues of general issues of corporate litigation and antitrust damages actions.[739] The new reform corrected the Italian system 'characterised by a separation of the jurisdiction over competition matters dealing with the violations of the EU competition rules on one hand, and violations of the Italian national competition rules on the other'.[740] In addition, *Legge 27/2012* introduced a two-level jurisdiction for all private antitrust litigations, by giving a chance of an appeal of a decision taken in the first instance courts.

Despite the regulation of the jurisdiction for antitrust damages, *Decreto Legislativo 3/2017* sets forth one provision specifying the competent court for private enforcement in Italy. Article 18 of *Decreto Legislativo 3/2017* concentrates on the jurisdiction for handling only the antitrust damages actions on the three *Tribunali delle Imprese* of Milan, Rome and Naples. Such choice stemmed from Article 2 (d) of *Legge Delega* 114/2015,[741] aiming to establish a more specialised, rapid and efficient institutional framework.[742] Caiazzo argues that the concentration in three specialised courts will have two positive impacts. Firstly, it will achieve a uniform and coherent application of rules in the action for damages, which are often complex due to their nature and the number of the injured persons, and difficult in the analysis of the facts and economics. Secondly, the concentration will avoid the inherent risk of multiple actions before many different courts.[743]

[738] Legge 24 marzo 2012, n. 27, Conversione in legge, con modificazioni, del decreto-legge 24 gennaio 2012, n. 1, recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitivita [2012] GU 71 - Suppl. Ordinario n. 53.
[739] Legge 27/2012, Art 3.
[740] Francesca Squillante, 'The Institution of the Italian "Commercial Courts" and its Impact on Antitrust Damages Actions' [2013] Revista Italiana di Antitrust 86, 86.
[741] Legge 9 luglio 2015, n. 114, Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2014 [2015] GU 176.
[742] Enrico Adriano Raffaelli, 'Italy' in Ilene Knable Gotts (ed), *The Private Competition Enforcement Review* (11th edition, Law Business Research Ltd 2018) 167; Ginevra Bruzzone and Enrico Adriano Raffaelli, 'Marina Tavassi (Milan Court of Appeal): The development of private enforcement in Italy - the experience of a specialised judge' (Interview, November 2019, Concurrences Review N 4-2019, Art. N 92001) 2.
[743] Rino Caiazzo, 'The Legislative Decree of Implementation of Directive 2014/104/EU on Antitrust Damages Actions' [2016] Revista Italiana di Antitrust 104, 121.

5.3.4. Relevant Substantive and Procedural Issues of *Decreto Legislativo 3/2017*

Decreto Legislativo 3/2017 follows the structure of the Directive 2014/104/EU and is divided in seven chapters as follow: the object, the scope of application and the definitions (Chapter I); disclosure of evidence (Chapter II); effects of the decisions of the national authority, limitation periods and joint and several liability (Chapter III); the passing-on overcharges (Chapter IV); quantification of harm (Chapter V); consensual composition of disputes (Chapter VI) and final provisions (Chapter VII). The following section examines the substantive and procedural rules concerning the antitrust damages claims affected by the implementation of the Directive 2014/104/EU into the Italian legal system.

5.3.4.1. Right to full Compensation

Article 1 (1) of *Decreto Legislativo 3/2017* entitles full compensation to any natural or legal person, as well as any entity without legal personality that has suffered a loss or damage as a result of a violation of the European and/or Italian competition law. In line with paragraph (2) and (3) of Article 3 of the Directive 2014/104/EU, full compensation shall cover the actual loss, the loss of profit and the payment of interest, whereas overcompensation is not admitted.[744]

5.3.4.2. Limitation Periods

Article 8 of *Decreto Legislativo 3/2017* regulates the limitation period.[745] Italy adopted a one-tier limitation period and the limitation period for damages actions is five years. The limitation period begins to run when the infringement ceases and the claimant knows, or can reasonably be expected to know: i) the behaviour constitutes an infringement of competition law; ii) the fact that the infringement of competition law caused the damage; and iii) the identity of the infringer.[746] In case the AGCM initiates an investigation, the limitation period shall be suspended. The suspension

[744] Decreto Legislativo 3/2017, Art 1 (2).
[745] In his Article, Caiazzo argues that this Article brings a radical change of the Italian legislation. Articles 2935 and 2947 of *Codice Civile* stipulate that limitation period of five years starts from day of the knowledge of violation and the claimant is aware of the damage. Caiazzo (n 743) 114-115.
[746] Decreto Legislativo 3/2017, Art 8 (1).

shall end at the earliest one year after the infringement decision has become final or after the related procedure is otherwise terminated.[747]

5.3.4.3. Joint and Several Liability

Article 2055 of *Codice Civile* regulates the joint and several liabilities in tort. Basically, this Article provides: i) joint and responsible liability for damages in the case that the infringer is more than one (1st paragraph); ii) compensation of the amount in proportion to the degree of fault of each co infringer (2nd paragraph); and iii) in case of doubt, the degree of fault attributable to each is presumed to be equal (3rd paragraph). Article 2055 of *Codice Civile* has found the application in the context of antitrust law. In the case of *International Broker,* the Court of Appeal of Rome recognised that cartel participants in the bitumen market were jointly liable for the damages caused to the claimant.[748]

Article 9 of *Decreto Legislativo 3/2017* by way of derogation from Article 2055 (1) of *Codice Civile* introduces 2 exemptions in favour of SMEs and immunity recipients. Firstly, SMEs, as defined by the Commission Recommendation 2003/361/EC, which infringe competition law shall be only jointly liable to their direct and indirect purchasers when: i) the share of the relevant market has been less than five percent by the time of violation of competition law; and ii) the application of the general rules on joint and several liability would jeopardise its economic stability and cause loss of its economic value. In addition, the SME shall also jointly be liable to other persons if the latter cannot obtain redress from the other co-infringer. This moment is clarified neither by the Directive 2014/104/EU nor by *Decreto Legislativo 3/2017* and will likely lead to controversies.[749] In this situation, the limitation period starts to run from the time the other co-infringers are unable to compensate.[750] However, the exemption laid down in the first paragraph of Article 9 of *Decreto Legislativo 3/2017* will not apply in three circumstances. Firstly, the SME has played a leading role in the infringement of the competition. Secondly, the SME forced other

[747] Decreto Legislativo 3/2017, Art 8 (2).
[748] Court of Appeal of Rome, *Interbroker SpA v Raffineira di Roma SpA et al,* Judgment of 31 March 2008.
[749] Caiazzo (n 743) 116.
[750] Decreto Legislativo 3/2017, Art 9 (4).

companies to participate in the infringement of the competition law. Finally, it is established that the SME has previously committed an infringement of the competition law.[751]

The second exemption to the general rule of joint and several liability applies when the infringer is an immunity recipient. The immunity recipient is defined as an undertaking or a natural person who has been granted immunity from fines by a competition authority under a leniency programme.[752] An immunity recipient is jointly liable against: i) its direct or indirect purchasers or suppliers and ii) other injured parties, only if can not obtain full compensation for damages from co-infringers.[753] The amount of its contribution is determined pursuant to Article 2055 (2) of *Codice Civile* and cannot exceed the harm it caused to its direct or indirect purchasers or providers. Marino argues that the Italian implementation of the Directive 2014/104/EU is incomplete since it refers back to general rules of the *Codice Civile,* and more importantly, Article 9 of *Decreto Legislativo 3/2017* does not refer the third paragraph of Article 2055 of *Codice Civile*, providing equal liability, in the case when it is not possible to determine the exact percentage.[754] The limitation period for leniency recipients which are jointly liable against other injured party begins to run from the time the other co-infringers are unable to compensate for the damage.[755]

5.3.4.4. Quantification of Harm

Article 14 (2) of *Decreto Legislativo 3/2017* introduces a rebuttable presumption of damages limited only to cartels. A cartel infringement is presumed to cause harm, whereas the defendant could still rebut this presumption. Such rebuttal presumption represents a 'radical innovation' compared to the current legislation on which damages are calculated on the basis of the principle of causality.[756]

Instead of introducing specific rules empowering the national courts to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or

[751] Decreto Legislativo 3/2017, Art 9 (2).
[752] Decreto Legislativo 3/2017, Art 2 (1) (q).
[753] Decreto Legislativo 3/2017, Art 9 (3).
[754] Marino (n 715) 145.
[755] Decreto Legislativo 3/2017, Art 9 (4).
[756] Caiazzo (n 743) 118.

excessively difficult to quantify the harm suffered, Article 14 (1) of *Decreto Legislativo 3/2017* makes reference to the quantification of harm regulated by Article 1223, 1226 and 1227 of *Codice Civile*. Such reference provides a total parallelism among damages actions for the competition law, tort and contractual liability.[757] Article 1226 of *Codice Civile*, as interpreted by the Italian courts, requires, firstly, the claimant to prove the damage and then the court to estimate the harm.[758] Therefore, Articles 1226 of *Codice Civile* appears in line with Article 17 (1) of the Directive 2014/104/EU which empowers the national courts to estimate the damages once established that a claimant suffered harm, although practically impossible or excessively difficult to quantify. This solution seems to be well suited, except the reference to Article 1227 of *Codice Civile* which provides the reduction of the quantum of damages, if the victim behaved negligently, causing harm or an aggravation of harm. Such provision has no equivalent in the Directive 2014/104/EU and raises questions about whether Article 1227 of *Codice Civile* is compatible with the notion of the damages introduced.[759] In the future, it is upon the ECJ to interpret such cases. In several tort cases under the EU law, the ECJ has disregarded subjective/psychological elements in analysing the infringer's conduct.[760] To the author acknowledgement, there is no case-law on this issue regarding the victim.

Article 14 (3) of *Decreto Legislativo 3/2017* empowers a national judge to ask specific questions on the quantification of damages to the AGCM. If such assistance is considered being not appropriate considering the need to safeguard the effectiveness of the public enforcement of the competition law, the AGCM does not provide the assistance requested.[761] On the contrary, the AGCM provides the assistance requested following the form and modalities indicated by the judge.

[757] Marino (n 715) 140.
[758] Caiazzo (n 743) 118.
[759] Marino (n 715) 140.
[760] *Brasserie du Pêcheur SA* v *Bundesrepublik Deutschland* and *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 180) paras 43-57; Judgment of 30 September 2003, *Gerhard Köbler* v *Republik Österreich*, C-224/01, ECLI:EU:C:2003:513, paras 52-53; Judgment of 13 June 2006, *Traghetti del Mediterraneo SpA* v *Repubblica italiana,* C-173/03, ECLI:EU:C:2006:391, para 44; Judgment of 24 November 2011, *Commission v Italy*, C-379/10, ECLI:EU:C:2011:775.
[761] Decreto Legislativo 3/2017, Article 14 (3).

To date, the Italian courts have followed different approaches in calculating the damages.[762] In cases *Bluvacanze,*[763] *Inaz Paghe,*[764] *Valgrama*[765]*, International Broker*[766]*,* Italian courts have assessed the damages using a 'but for' approach. In *Avir v ENI* case, the Court of Appeal of Milan opted for the 'yardstick approach', comparing the increase of ENI's gas prices with the trend of the gas quotations at the London Commodity Exchange during the period of violation.[767] Recently, the Italian courts have awarded damages following 'a court appointed expert method'. In *Teleunit*[768] *BT Italia*[769]*,* and *Brennercom,*[770] the appointed experts by courts were crucial in calculating the antitrust damages.

5.3.4.5. Passing-on of overcharges

Before the enactment of the *Decreto Legislativo 3/2017*, there was no definitive certainty over the acceptance of the passing-on defence. Italian courts have ruled on complex issues dealing with the passing-on defence.[771] On 6 July 2000, the Court of Turin recognised the abuse of the dominant position by the Juventus but did not award damages. The Court of Turin based its decision on the argument that the claimant co-participated in the anticompetitive practice.[772] The concept of passing-on overcharges was not recognised.

Article 10 of *Decreto Legislativo 3/2017* stipulates that anyone who has suffered damage, irrespective of whether it is a direct or indirect purchaser of the competition infringer, is entitled to bring an action for damages.[773] The compensation for the damage shall not exceed the overcharge harm suffered at that level.[774] As a rule of thumb, the claimants shall prove the passing-

[762] Raffaelli (n 742) 172; Mario Siragusa, Marco D'Ostuni and Cesare Rizza, 'Italy' in Samantha Mobley (ed), *Private Antitrust Litigation in 24 Jurisdiction Worldwide* (Law Business Research Ltd 2014) 80 – 81; 84-85.
[763] Judgment of 11 July 2003, Court of Appeal of Milan, *Bluvacanze vs. I Viaggi del Ventaglio-Turisanda-Hotelplan Italia*.
[764] Judgment of 11 December 2004, Court of Appeal of Milan, *Inaz Paghe.*
[765] Judgment of 7 February 2002, Court of Appeal of Turin, *Valgrama.*
[766] Judgment of 31 March 2008, Court of Appeal of Rome, *International SpA v Raffineria di Roma SpA et al*.
[767] Judgment of 16 September 2006, Court of Appeal of Milan, *Avir v ENI*.
[768] Judgment of 1 October 2013, Court of Milan, *Teleunit SpA v Vodafone Omnitel NV SpA*.
[769] Judgment of 28 July 2015, Court of Milan, *BT Italia SpA* v *Vodafone Omnitel NV*.
[770] Judgment of 3 March 2014, Court of Milan, *Brennercom SpA v Telecom Italia SpA*.
[771] Raffaelli (n 742) 173.
[772] Judgment of 6 July 2000, Court of Appeal of Turin, *Indaba v Juventus*.
[773] Decreto Legislativo 3/2017, Art 10 (1).
[774] Decreto Legislativo 3/2017, Art 10 (2).

on of overcharge in order to substantiate their claims. In the case that the defendant contends the claimant, the defendant has the burden of proving it. The defendant may request evidence from the claimant or third parties.[775] Pursuant to Article 12 (2) of *Decreto Legislativo 3/2017*, there is a rebuttable presumption if the claimant shows: i) the commitment of the infringement of competition law; ii) this infringement resulted in an overcharge; and iii) the purchased goods or services were objects of the violation of competition law. The burden of proof rests on the defendant.

Article 13 of *Decreto Legislativo 3/2017* rephrases Article 15 of the Directive 2014/104/EU concerning the actions for damages by the claimant from different levels in the supply chain, with a small change that adds a reference to Articles 39 and 40 of *Codice di Procedura Civile* on the *lis pendensa* and other related actions, whenever two or more claims are filed simultaneously in the Italian court. To avoid that action for damages by the claimant from different levels in supply chain lead to multiple liability or to an absence of liability of the infringer and in determining whether the burden of proof required under Article 11 and 12 is satisfied, the Italian judge has the discretion to consider the action for damages related to the same infringement both in Italy and other Member States brought by the claimant from other level of the supply chain and of the decisions taken in these cases. An Italian judge may also take into account the information in the public domain resulting from the public enforcement of the competition law.[776]

5.3.4.6. Standing

According to Article 1 (1) of *Decreto Legislativo 3/2017*, any individual who has suffered loss or damage as a result of a violation of the European and/or Italian competition law shall have standing to bring an action for damages before the competent court. In addition, class actions provided by Article *140-bis* of *Codice del Consumo* are available based on opt-in mechanism. For the purpose of private enforcement, 'any individual' shall mean any natural or legal person, as well as any entity without legal personality which has suffered damage.[777] In addition, Article 10 (1) of

[775] Decreto Legislativo 3/2017, Art 11.
[776] Decreto Legislativo 3/2017, Art 13
[777] Decreto Legislativo 3/2017, Art 2 (1) c.

Decreto Legislativo 3/2017 clarifies further the notion 'everyone who has suffered a damages' by enabling both the direct and the indirect purchaser of the infringer to bring a claim for the damages suffered.

5.3.4.7. Disclosure of Evidence

Before the enactment of the Directive 2014/104/EU, the disclosure of evidence was regulated by Articles 210 – 213 *Codice di Procedura Civile*. According to Article 210 (1) of *Codice di Procedura Civile*, upon the request of a party, the judge may order the counterparty or third parties to disclose the documents or other evidence considered necessary to the decision of the case. In the decision of the disclosure, the judge gives the appropriate time, place and manner of the exhibition.[778] The transposition of the Directive 2014/104/EU brought a change in the regime set forth under Articles 210 – 213 *Codice di Procedura Civile*, where the claimant had to prove the existence of the documents before the judge could order the disclosure. The changes introduced by the transposition of the Directive 2014/104/EU apply only to antitrust damages actions and are 'alien' to the Italian civil procedure rules.[779]

Article 3 of *Decreto Legislativo 3/2017* regulates the general regime of the disclosure of the evidence. The judge may order the disclosure of evidence to other parties in the dispute or even to a third party. The disclosure of evidence for the action for damages caused by a breach of competition law shall be governed by rules laid down in this chapter, respectively Articles from 3 to 6 of *Decreto Legislativo 3/2017*.[780] The disclosure shall refer to specified items of evidence or relevant categories of evidence identified as precisely and as narrowly as possible. The category of evidence is identified by making reference to common features of its constituent elements such as nature, the period during which they were formed, object or the content of the evidence requested to be disclosed, falling in the same category.[781]

[778] Codice di Procedura Civile, Art 210 (2).
[779] D'Amario and Galbusera (n 598) 181.
[780] Decreto Legislativo 3/2017, Art 3 (1).
[781] Decreto Legislativo 3/2017, Art 3(2). The Institute of 'category of evidence' is an innovation for the Italian legal. The new institute has wider scope of the disclosure compared to Article 210 of *Codice di procedura civile*, which may concern not only specific documents or other means of proofs, but also entire 'categories of evidence'. To avoid any legal uncertainty in the future, Italian legislator introduced a 2nd sentence of Article 3 (2) of the Legislative Decree 3/2017 how to identify categories of evidence. Caiazzo (n 743) 108; Marino (n 715) 146.

The order of the disclosure has to be proportionate to the decision adopted. Judges ordering the disclosure shall consider: i) to what extent the action for damages is supported by available facts; ii) the scope and costs of disclosure, especially for the third parties concerned; and iii) whether the requested evidence contains confidential information, especially if it concerns third parties.[782] If these items of evidence contain confidential information, the court shall impose effective measures to protect confidentiality. According to paragraph 4 of Article 3 of *Decreto Legislativo 3/2017*, effective measure to protect confidentiality can include the possibility of: i) redacting sensitive parts in documents; ii) conducting non-public hearings or in the camera; iii) restricting the number of the persons authorised to see the evidence; and iv) instructing experts to produce summaries of the information aggregate or otherwise non-confidential form. Those from whom the production is sought shall have the right to be heard before the court ordering the disclosure of evidence.[783] Confidentiality of communications between lawyers that are members of the Bar and their client is recognised by Article 3 (6) of *Decreto Legislativo 3/2017*.

Article 4 regulates the rules of the disclosure of evidence contained in the file of the competition authority (AGCM). In the past, the AGCM has been reluctant to grant the disclosure of evidence contained in the file of the competition authority. In the case *Alitalia* v *AGCM*, the Italian Administrative Court denied Alitalia request against the refusal by the AGCM to give access to the jet fuel cartel's file to acquire information to bring an action for damages.[784] The refusal was considered legitimate because the documents concerned were considered confidential business information.[785]

Pursuant to the general regime set forth in Article 3 of *Decreto Legislativo 3/2017* and in accordance with Article 4 (2), judges shall authorise the disclosure of evidence contained in the AGCM file, when neither the party nor a third party is reasonably able to provide it.[786] In assessing the proportionality, the judges shall consider whether i) the request has been formulated in a specific manner concerning the nature, subject or content of documents either submitted to an

[782] Decreto Legislativo 3/2017, Art 3 (3).
[783] Decreto Legislativo 3/2017, Art 3 (5).
[784] TAR Lazio, No 1344/2012, *Alitalia* v *AGCM.*
[785] Luca Toffoletti and Emilio de Giorgi, 'Italy' in Bernardine Adkins, Samuel Beighton Wragge (eds), *Private Antitrust Litigation: Jurisdictional Comparisons* (1st edition, Sweet and Maxwell 2013) 151.
[786] Decreto Legislativo 3/2017. Art 4 (1).

AGCM or contained in the file of AGCM; ii) the party requesting disclosure is acting due to an infringement of the competition law; and iii) it is necessary to safeguard the effectiveness of the public competition law application.[787]

Decreto Legislativo 3/2017 introduces three different categories of evidence, as introduced by the Directive 2014/104/EU. First category of evidence relates to the 'grey list' and includes: i) information prepared in the context of AGCM investigation; ii) information that AGCM has drawn up and sent to the parties in the course of its proceedings; and iii) settlement submissions that have been withdrawn.[788] The judges can order the disclosure of the 'grey list' of evidence only after the conclusion of the procedure by the AGCM or Commission, irrespective of who holds such evidence and the ways in which such evidence was obtained (whether through access to the Italian Competition Authority's file or otherwise).[789] If the case is pending before the AGCM or Commission on the facts relevant to the decision, in order to deal with the 'grey list' evidence, the judge may decide to suspend the judgment until the aforementioned procedure is closed by a decision of the authority or otherwise.[790] This solution might be useful for both the enforcement to stay on proceeding without interference and as well for private enforcement.[791]

Second category refers to the 'black list' evidence and includes leniency statements and settlement submissions.[792] The 'black list' category of evidence cannot be disclosed at any time and such category is always inadmissible in the action for damages.[793] However, a claimant may, upon a reasoned request, ask the Italian judge to access the 'black list' evidence solely to ensure

[787] Decreto Legislativo 3/2017. Art 4 (3).
[788] Decreto Legislativo 3/2017. Art 4 (4). The Italian legislator opted intentionally to expand the scope of grey list evidence not only information prepared specifically for AGCM but also other evidence that could be produced in court pending the administrative investigation. cf. Directive 2014/104/EU, Art 6 (5) (a) 'information that was prepared by a natural or legal person specifically for the proceedings of a competition authority'; for more on this argument see D'Amario and Galbusera (n 598) 184 – 185.
[789] Legislative Decree 3/2017, Art 5 (1); D'Amario and Galbusera (n 598) 185 - 186.
[790] Decreto Legislativo 3/2017, Article 4 (8); this regulation was not foreseen in the Directive 2014/104/EU, but the Italian legislator decided to include. In the Explanatory Report of the Legislative Decree is argued that 'tale causa di sospensione, pur non essendo espressamente prevista dalla direttiva ne coglie lo spirito e la finalità di conciliare il private enforcement con il public enforcement' <https://www.giustizia.it/giustizia/it/mg_1_2_1.page;jsessionid=4XGKlGhGo0UkNI6TtEloa8Ej?facetNode_1=0_10&facetNode_2=4_44&facetNode_3=1_6_4&facetNode_4=1_8(2016)&contentId=SAN1285202&previsiousPage=mg_1_2> accessed 21 February 2019.
[791] Marino (n 715) 149.
[792] Decreto Legislativo, Art 4 (5).
[793] Decreto Legislativo 3/2017, Art 5 (1).

that their content corresponds to the definition provided in Article 2 (1), letters (n) and (p) of *Decreto Legislativo 3/2017*.[794] The authors of the evidence may ask the judge for the possibility to be heard, and, in no case, does the judge permit other parties or third parties access to that evidence. Once the judge ascertains that the content does not correspond to the definition provided in Article 2 (1), letters (n) and (p) *Decreto Legislativo 3/2017*, the disclosure is ordered pursuant to paragraphs 4 and 6.

The final type of evidence does not fall either in the 'grey list' or in 'black list', and can be accessed at any time. It can also be used in an action for damages before the end of the public enforcement procedure.[795] This type of evidence which is obtained through access to the file of a competition authority can be used in an action for damages only by the party who obtained them or from their successor in the law.[796]

Article 8 of the Directive 2014/104/EU requires the Member States to ensure that the national courts should be able to impose sufficiently deterrent penalties in order to prevent the destruction of relevant evidence. In the same vein, Article 6 of *Decreto Legislativo 3/2017* empowers a national judge to impose penalties on parties, third parties and their legal representatives,[797] ranging from EUR 15,000 to EUR 150,000 in the event of: i) failure or refusal to comply with the disclosure order of any national court;[798] ii) destruction of relevant evidence;[799] iii) failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;[800] iv) breach of the limits on the use of evidence in the trial.[801] The pecuniary administrative sanction is donated to the *Cassa delle ammende*.[802]

[794] Art 2 (1) letters (n) and (p) of *Decreto Legislativo 3/2017* refers respectively to the definition of 'declaration related to leniency programs' and 'settlement submission'.
[795] Decreto Legislativo 3/2017, Art 4 (6).
[796] Decreto Legislativo 3/2017, Art 5 (2).
[797] Decreto Legislativo 3/2017, Art 6 (5).
[798] Decreto Legislativo 3/2017, Art 6 (1).
[799] Decreto Legislativo 3/2017, Art 6 (2).
[800] Decreto Legislativo 3/2017, Art 6 (3).
[801] Decreto Legislativo 3/2017, Art 6 (4).
[802] Decreto Legislativo 14 marzo 2013, n 33, Riordino della disciplina riguardante il diritto di accesso civico e gli obblighi di pubblicita', trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni [2013] GU 80 come modificato dal Decreto Legislativo 97/2016.

Regarding the behaviour of a party to the proceedings for an action for damages, conducts such as: i) failure or refusal to comply with the disclosure order of any national court; and ii) destruction of relevant evidence, shall give to the court the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims.[803] In case the party uses the evidence in violation with the limits, as referred to in Article 5 of *Decreto Legislativo 3/2017*, the judge can dismiss wholly or partly the claim.[804]

5.3.4.8. Effect of National Competition Authority Decisions

Article 7 (1) of *Decreto Legislativo 3/2017* recognises the binding effects of the final and conclusive decisions of the AGCM or the judgments issued pursued to their judicial review before the administrative court. The judicial review of AGCM decisions by the administrative court involves the direct verification of the facts and technical profiles on which the decision is based.[805] This should not be understood as granting the administrative judge full power to review the decision. The binding effects are limited only to the factual analyses of the infringement of

[803] Decreto Legislativo 3/2017, Art 6 (6).
[804] Decreto Legislativo 3/2017, Art 6 (7).
[805] In his Article, Caiazzo analyses whether second sentence of Article 7 (1) of Legislative Decree is beyond the delegation power conferred upon the Government by the *Legge Delega* 114/2015. Caiazzo acknowledges that such regulation will cause debate among scholars and argues that this regulation does not violate Article 76 of the Italian Constitution and Article 2 of the *Legge Delega* 114/2015 'is sufficiently broad to ensure to the Government wide discretional power'. Caiazzo (n 743) 112 - 113. In addition, this sentence codifies the most recent case-law on the limits of administrative review of AGCM. In the judgment of 20 January 2014, No 1013, *Acea – Suez,* Corte di Cassazione held that:

> Il sindacato di legittimità del giudice amministrativo sui provvedimenti dell'Autorità Garante della Concorrenza e del Mercato comporta la verifica diretta dei fatti posti a fondamento del provvedimento impugnato e si estende anche ai profili tecnici, il cui esame sia necessario per giudicare della legittimità di tale provvedimento; ma quando in siffatti profili tecnici siano coinvolti valutazioni ed apprezzamenti che presentano un oggettivo margine di opinabilità - come nel caso della definizione di mercato rilevante nell'accertamento di intese restrittive della concorrenza - detto sindacato, oltre che in un controllo di ragionevolezza, logicità e coerenza della motivazione del provvedimento impugnato, è limitato alla verifica che quel medesimo provvedimento non abbia esorbitato dai margini di opinabilità sopra richiamati, non potendo il giudice sostituire il proprio apprezzamento a quello dell'Autorità Garante ove questa si sia mantenuta entro i suddetti margini.

Whereas the Consiglio di Stato in the decision 2479/2015 ruled that:

> Il sindacato del giudice amministrativo sulla discrezionalità tecnica dell'Autorità garante della concorrenza e del mercato, è pieno e particolarmente penetrante (in superamento della distinzione tra forte e debole (...) e si svolge tanto con riguardo ai vizi dell'eccesso di potere (logicità, congruità, ragionevolezza, proporzionalità ed adeguatezza del provvedimento sanzionatorio e del relativo impianto motivazionale), ma anche attraverso la verifica dell'attendibilità delle operazioni tecniche compiute, quanto a correttezza dei criteri utilizzati ed applicati.

competition law and do not cover the casual link or the existence of the damage.[806] This solution seemed useful for both an effective use of resources and promotion of private enforcement across EU Member States.[807]

Regarding the legal value of other NCA's decision, Italy opted for a minimum implementation. According to the second paragraph of Article 7 of *Decreto Legislativo 3/2017*, the decision of other NCAs may be presented as a *prima facie* evidence of the infringement. Hence, the decision of other NCAs will be assessed with the other evidence submitted by the parties.[808]

5.3.4.9. Collective Redress

Article 140-*bis* of *Codice del Consumo* regulates class actions which are relatively recent in Italy.[809] The path toward the current version of Article 140-*bis* of *Codice del Consumo* was difficult. Several legislative proposals were submitted to the Italian Parliament but failed to be approved due to wide differences among the proposals.[810] In 2007, a new legal provision was passed by *Legge 244/ 2007* which introduced Article 140-*bis* of *Codice del Consumo*.[811] It was supposed to come into effect in 2008. However, due to the political and economic opposition, the entry into force was postponed. Big firms, banks and insurance companies were particularly concerned about the consequences of such regulation of class actions on their business. In the end, the original version of Article 140-*bis* never entered into force.[812]

[806] Decreto Legislativo 3/2017, Art 7 (1) third sentence.
[807] Bruzzone and Raffaelli (n 742) 3.
[808] Laura Zoboli, 'Private enforcement: verso il recepimento della direttiva sul risarcimento del danno da illecito antitrust' (Eurojust.it, 10 November 2016) <http://rivista.eurojus.it/private-enforcement-verso-il-recepimento-della-direttiva-sul-risarcimento-del-danno-da-illecito-antitrust/> accessed 21 February 2019.
[809] Decreto Legislativo 6 settembre 2005, n. 206, Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n. 229 [2005] GU 235 - Suppl. Ordinario n. 162.
[810] Remo Caponi, 'Collective Redress in Europe: Current Developments of 'Class Action' suits in Italy' [2011] Zeitschrift für Zivilprozess International 61, 65-66.
[811] Legge 24 dicembre 2007, n. 244, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008) [2007] GU 300 - Suppl. Ordinario n. 285, Article 2 para 445-449.
[812] Michele Angelo Lupoi, 'Recent Development in Italian Civil Procedural Law' <https://www.judicium.it/wp-content/uploads/saggi/207/Lupoi%20III.pdf> accessed 20 February 2019, 19.

The new government drafted and introduced a new version of the Article 140-*bis* of *Codice del Consumo*, with legal effects starting from 1 January 2010.[813] This version substantially differed from the original version.[814] In 2012, Article 140-*bis* was amended to make procedural tools more effective. The requirement that the infringed rights of the class member needed to be 'identical' was deleted and replaced with the word 'homogenous'.[815]

Article 140-*bis* of *Codice del Consumo* follows the opt-in model.[816] Consumers or users are obligated to join the class action through an adhesion contract or by other means of a certified mail, email, or fax in addition to evidence that supports their claim.[817] The adhesion contract must contain all personal data of consumers and relevant documents to prove his/her position in the company. In order to take legal effects, the adhesion contract must be registered, within the prescribed time, at the registry.[818] Representation by the legal counsel to join the class action is not required. Class members joining the actions cannot claim before the court on an individual basis unless the proceedings terminate without a decision on merit or the plaintiff reaches a settlement with the defendant and they do not wish to accept it.[819]

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[813] Legge 23 luglio 2009, n. 99, Disposizioni per lo sviluppo e l'internazionalizzazione delle imprese, nonche' in materia di energia [2009] GU 176 - Suppl. Ordinario n. 136, Article 49 para 14

[814] For an overview of the development of Italian class action see: Remo Caponi, 'The Collective Redress Action in the Italian Legal System' [2009] ERA Forum 63; Roald Nashi, 'Italy's Class Action Experiment' [2010] Cornell International Law Journal 147; Caponi (n 810); Giorgio Afferni, 'Class Actions in Italy: A Farewell to America' [2015] The Diggest: National Italian American Bar Association Law Journal 33; Giorgio Afferni, ''Opt-in' Class Actions in Italy: Why are they Failing?' [2016] Journal of European Tort Law 82; Maria Luisa Chiarella, 'Overview of Class Actions: Italian Consumer Law and Cross-Border Litigation' [2018] Athens Journal of Law 165.

[815] Legge 24 marzo 2012, n. 27, Conversione in legge, con modificazioni, del decreto-legge 24 gennaio 2012, n. 1, recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitivita [2012] GU 71 - Suppl. Ordinario n. 53, Article 6.

[816] Luca Toffoletti and Alessandro de Stefano, 'Italy: Italian Implementation of the Directive 2014/104/EU On Antitrust Damages Actions' (26 January 2018)
http://www.mondaq.com/Article.asp?Article_id=663186&type=mondaqai> accessed 14 February 2019.

[817] Codice del consumo, Art 140-bis (3) first sentence read as follow: 'I consumatori e utenti che intendono avvalersi della tutela di cui al presente articolo aderiscono all'azione di classe, senza ministero di difensore anche tramite posta elettronica certificata e fax'.

[818] Codice del consumo, Art 140-*bis* (3)

[819] Codice del consumo, Art 140-*bis* (3) second sentence read as follow:

> L'adesione comporta rinuncia a ogni azione restitutoria o risarcitoria individuale fondata sul medesimo titolo, salvo quanto previsto dal comma 15". Whereas paragraph 15 reads: "Le rinunce e le transazioni intervenute tra le parti non pregiudicano i diritti degli aderenti che non vi hanno espressamente consentito. Gli stessi diritti sono fatti salvi anche nei casi di estinzione del giudizio o di chiusura anticipata del processo" …

According to Article 140-*bis* of *Codice del Consumo*, the class action is available only to consumers or users whose interest is homogeneous. Therefore, under Article 140-*bis* of *Codice del Consumo*, the class action is not a general mechanism granting judicial protection to all weaker parties but a special mechanism providing judicial protection only to consumers or users who have homogeneous interests. Secondly, the mechanism of the class action, pursuant to Article 140-*bis* of *Codice del Consumo*, deals only with certain consumer rights stemming from: i) breach of the contract written in accordance with Articles 1341 and 1342 of *Codice Civile*; ii) torts; and iii) unfair commercial practices or breach of competition law.[820]

The class action can be exercised only by consumers or users with homogeneous rights toward professionals. Consumers or users are defined as 'any natural person who is acting for purposes which are outside his trade, business or profession'.[821] On the other hand, professional means any natural or legal person acting for the purposes of trade, business or profession.[822] According to the first paragraph of Article 140-*bis* of *Codice del Consumo*, the legal standing to claim monetary compensation is conferred upon each member of the class who may file a lawsuit either individually, acting as a lead plaintiff on behalf of other members or through a consumer association. In the latter case, the consumer association lacks standing to bring a class action on its own but can only act as a direct representative of one or more class members.[823] To date, all class actions have been filed through consumer associations. A notable exception from the default rule is the case *De Zordo vs Quadrifoglio,* where an individual consumer filed personally a class action against a private company charged with cleaning of the streets of Florence city.[824]

Furthermore, Article 140-*bis* of *Codice del Consumo* sets out the competent court located in the Region where the company is located, albeit with several exceptions.[825] As noted above,

[820] Codice del consumo, Art 140-*bis* (2).
[821] Codice del consumo, Art 3(1)(a).
[822] Codice del consumo, Art 3(1)(b).
[823] Alberto Malatesta and Gaetano Vitellino, 'Italy' in European Parliament, *Collective Redress in the Member States of the European Union* (Policy Department for Citizens' Rights and Constitutional Affairs 2018) 182-183.
[824] Mrs. de Zordo was a member of city council. Therefore, she was more interested in politicisation of the situation rather than recovering damages. Nevertheles, the Court of Florene and then Court of Appeal of Florence did not admit this class action. Afferni, ''Opt-in' Class Actions in Italy: Why are they Failing?' (n 814) 83; Afferni, 'Class Actions in Italy: A Farewell to America' [2015] The Diggest: National Italian American Bar Association Law Journal (n 814) 33.
[825] Codice del consume, Article 140-*bis* (4):

Article 18 of *Decreto Legislativo 3/2017* confers jurisdiction for private enforcement of the competition law only to three judiciary sections specialised in the business matter. In the case of class actions relating to antitrust matters, Article 18 of *Decreto Legislativo 3/2017* prevails over the regime set out in paragraph 4 of Article 140-*bis* of the Consumer Code.

Upon the first hearing, the competent court assesses the admissibility of the class action. According to paragraph 6, the claim shall be considered inadmissible if: i) it is clearly unfounded; ii) there is a conflict of interest; iii) the rights of the member class are not homogeneous and iv) the lead plaintiff seems incapable handling the class's interest. The order of admissibility can be appealed before the Court of Appeal within 30 days from either its disclosure or notification.[826] The final decision may be appealed and is binding only to the adhered consumers or users.[827]

Dozens of class actions have been declared admissible concerning the overdraft fees applied by the banks, the unfair commercial/trade practice and the violation of data protection regulations.[828] To date, the only class action filed with reference to the action for damages was unsuccessful. The case was brought by two consumer associations relying on a decision of AGCM to open a proceeding against four maritime companies before the Court of Genoa in November 2011.[829] The Court of Genoa stayed the action until the end of proceedings before AGCM. In June 2013, AGCM imposed fines on three of the four parties to the proceedings due to the infringement of the EU competition law. While two consumer associations relied on the decision of AGCM to open the proceeding against four maritime companies before the Court of Genoa, the AGCM decision was annulled by a judgment of the Regional Administrative Court of Latium and

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La domanda è proposta al tribunale ordinario avente sede nel capoluogo della regione in cui ha sede l'impresa, ma per la Valle d'Aosta è competente il tribunale di Torino, per il Trentino-Alto Adige e il Friuli-Venezia Giulia è competente il tribunale di Venezia, per le Marche, l'Umbria, l'Abruzzo e il Molise è competente il tribunale di Roma e per la Basilicata e la Calabria è competente il tribunale di Napoli".

[826] Codice del consume, Art 140-*bis* (7).

[827] Codice del consume, Art 140-*bis* (12-14)

[828] From 1 January 2010 to 12 January 2016, *Oservatorio Antitrust* of the University of Trento has identified 58 class action cases. Of these 58 class actions, only 3 succeded in sentenze di accertamento, risarcimento, restituzioni. Oservatorio Antitrust, 'Azioni di Classe Incardinate nei Tribunali Italiani' <http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/> accessed 25 November 2019; Gennaro d'Andria, 'Class/collective Actions in Italy: Overview' <https://uk.practicallaw.thomsonreuters.com/2-617-5865?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 15 August 2019.

[829] ACGM, *Tariffe Traghetti da/per la Sardegna*, decision of 11 May 2011, No 22416/2011.

confirmed by the Italian Supreme Administrative court in 2015. Consequently, pursuant to the annulment of the AGCM decision, claimants abandoned the action for damage and the proceeding was closed in March 2016.[830]

To certain aspects, Italian class action is in line with a large measure of the EU Recommendations on collective redress. For instance, the Italian law does not provide jury awards, pre-trial discovery procedure or punitive damages.[831] As to the cost, Italian law has a 'loser pays' rule and contingency fees are not allowed.[832] Most importantly, Italian class actions is consistently based on the opt-in model.[833] The Italian class action may proceed only after the *Tribunale* has verified that certain conditions of admissibility - set out in Article 140-*bis* para 6 of *Codice del Consumo* - are met. However, in many other ways, current Italian class action does not comply with the EU Recommendations on the common principles for collective redress of 2013.[834] While Commission recommends that class action be available for both consumers and business, the Italian class action is restricted only to consumers.[835] Thus, only the consumers may file class actions. Further, Italian class action may be filed only for certain infringement, not to all infringement of EU law as suggested in recital 6 and 7 of EU Recommendation on collective

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[830] Raffaelli (n 742) 171.

[831] The British Institute of International and Comparative Law (n 679) 703. While Italian Law does not award punitive damages, in the judgment of 5 July 2017, n 16601, *Corte di Cassazione* decided for the very first time in favour of the enforceability of US punitive damages in Italy. Prior to this decision, there had been few decision concerning admissibility of a US punitive damages, but were refused by *Corte di Cassazione*. The *Corte di Cassazione*, following a series of well-established argument, set forth the following princle of law:

> Nel vigente ordinamento, alla responsabilità civile non è assegnato solo il compito di restaurare la sfera patrimoniale del soggetto che ha subito la lesione, poiché sono interne al sistema la funzione di deterrenza e quella sanziona toria del responsabile civile.
>
> Non è quindi ontologicamente incompatibile con l'ordinamento italiano l'istituto di origine statunitense dei risarcimenti punitivi. *Il riconoscimento di una sentenza straniera che contenga una pronuncia di tal genere deve però corrispondere alla condizione che essa sia stata resa nell'ordinamento straniero su basi normative che garantiscano la tipicità delle ipotesi di condanna, la prevedibilità della stessa ed i limiti quantitativi, dovendosi avere riguardo, in sede di delibazione, unicamente agli effetti dell'atto straniero e alla loro compatibilità con l'ordine pubblico* (emphasized added by author).

On the discussion of punitive damages in Italy see Alessandro P Scarso, 'Punitive Damages in Italy' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer-Verlag Vienna 2009) 103; Angelo Venchiarutti, 'The Recognition of Punitive Damages in Italy: A commentary on *Cass Sez Un 5 July 2017, 16601, AXO Sport, SpA v NOSA Inc*' [2018] Jounal of European Tort Law 104; Letizia Coppo, 'The Grand Chamber's Stand on the Punitive Damages Dilema' [2017] The Italian Law Journal 593.

[832] Afferni, ''Opt-in' Class Actions in Italy: Why are they Failing?' (n 814) 83.

[833] The British Institute of International and Comparative Law (n 679) 692; Afferni, ''Opt-in' Class Actions in Italy: Why are they Failing?' (n 814) 83.

[834] Malatesta and Vitellino (n 823) 192; Afferni, ''Opt-in' Class Actions in Italy: Why are they Failing?' (n 814) 83.

[835] Afferni, ''Opt-in' Class Actions in Italy: Why are they Failing?' (n 814) 83.

redress.[836] In the case that victims claim for mass harm situation, unlike with Commission recommendation which suggest to opt-in until the judgment is given or the case is otherwise settled,[837] the Italian class actions consumers harmed by the same infringement may opt-in only until a short term after the class action has been admitted.[838] Finally, in collective follow-on actions, para 33 of EU Recommendation on collective redress stipulates that collective redress action should start only after the decision of public authority is final. Whereas, the Italian class actions may also be filed before the decision of the public authority is final, although the *Tribunale* may decide of its own motion to stay proceedings until that time.[839] In 2017, the Court of Cassation made reference to the EU Recommendations on the common principles for collective redress and hold that the lack of standing to bring injunction relief based on the discrimination grounds is contrary to the principles of equivalence and effectiveness enshrined in the EU law.[840]

In order to expand the scope, in June 2015, a legislative proposal to reform class actions rules was approved only by one Chamber of the Parliament and examined by the Senate.[841] On April 2019, *Legge 31/2019* '*Disposizioni in materia di azione di classe*' was adopted and will enter into force on 19 April 2020.[842] *Legge 31/2019* becomes Tittle VIII-*bis* of book IV of *Codice di Procedura Civile* and comprise fifteen Articles from 840-*bis* to 840 *sexiesdecies*. Article 140-*bis* of *Codice del Consumo* will be abrogated. Main innovations of *Legge 31/3019* are as follows. Firstly, a key innovation is widening the scope of application to file a class action for the violation of 'homogenous individual rights' of any class of persons not only to consumers, any natural or legal person but also to non-profit organisations and associations whose purpose is the protection of violated rights. The later are listed in a public registry of the Ministry of Justice. Secondly, class actions may be permitted under other areas such as product liability, environmental law, competition law, pensions' dispute, financial services and other areas of law/policy if the same

[836] 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 (n 397).
[837] ibid 23.
[838] Afferni, ''Opt-in' Class Actions in Italy: Why are they Failing?' (n 814) 83.
[839] ibid 83-84.
[840] The Court of Cassation, Judgment of 8 May 2017, Decision No 11165/2017, *INPS v Jaama Oufkir, ASGI, APN*, paras 5.3-5.6.
[841] Fascicolo Iter DDL S. 1950, Disposizioni in materia di azione di classe <http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/45728.pdf?fbclid=IwAR3HdmB2_CnwiZ5d0SNLbDmQKLD_73MCBLFaQnDobtJKfocBtlwOYFuNPmk> accessed 2 March 2019.
[842] Legge 12 aprile 2019, n. 31, Disposizioni in materia di azione di classe [2019] GU 92.

facts are also being investigated by agencies or administrative courts. Thirdly, *Legge 31/2019* does not modify the general limitation period, which currently is 5 years, but introduces a 60-day deadline for filing additional class actions based on the same grounds. Fourthly, *Legge 31/2019* adopts the opt-in mechanism. Accordingly, other members of the class action will be entitled to join in two different phases of the proceedings: i) after the publication of the initial application; and ii) after the publication of the judgment on the merits. Finally, class actions will be heard at *Tribunale delle Imprese* and the proceedings will consist of three stages: i) on admissibility of the class action; ii) on the merits of the dispute and iii) if the actions are successful, the court will issue an order on the compensation of class members and legal costs.[843]

5.3.4.10. Consensual Dispute Resolution in Antitrust enforcement

In the same vein with the Directive 2014/104/EU, Articles 15 and 16 of *Decreto Legislativo 3/2017* provide measures aimed at facilitating the use of consensual dispute resolution and increasing their effectiveness by encouraging the infringer and the injured party to agree on the compensation for the harm caused by the infringement of the competition law.[844]

Article 15 (1) of *Decreto Legislativo 3/2017* refers to general rules on the suspension for the mediation,[845] arbitration,[846] out-settlement,[847] and resolutions for associations.[848] The judge, upon the request of the parties, may suspend for up to two years the pending trial for compensation for the damage caused by the violation of the competition law when the parties have submitted their claim for consensual dispute resolution.[849] Also, the AGCM may consider any compensation paid by the infringer to be a mitigating factor, as a result of a consensual settlement and prior to

[843] For an overview of the current regime and the impact of Legge 31/2019 see d'Andria (n 828).
[844] Caiazzo (n 743) 119.
[845] Decreto Legislativo 4 Marzo 2010, n 28 Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali [2010] GU 53.
[846] Decreto Legge 12 settembre 2014, n. 132, Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile [2014] GU 212, Article 8 as amended by Legge 10 novembre 2014, n. 162, Conversione in legge, con modificazioni, del decreto-legge 12 settembre 2014, n. 132, recante misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile, [2014] GU n. 261.
[847] Codice Civile, Art 2943 (4).
[848] Codice del consume, Art 141-*quinquies.*
[849] Decreto Legislativo 3/2017, Art 15 (2).

its decision.[850]

Article 16 of *Decreto Legislativo 3/2017* establishes the effect of a settlement on other possible damages actions. This Article rephrases Article 19 of Directive 2014/104/EU. The first paragraph stipulates that the injured party who participated in an agreement cannot claim compensation from other co-authors who participated in the infringement. The claim of the injured party is reduced from the settling co-infringer's share of the harm, and any remaining claim shall be exercised only against non-settling co-infringers.[851] If the non-settling co-infringers are not able to pay compensation, the injured party may call the settling infringer to pay the remaining damages unless the parties participated in the agreement have decided to exclude it.[852] According to Article 16 (4) of *Decreto Legislativo 3/2017*, the national court takes into consideration any damage paid pursuant to a prior consensual settlement involving the relevant co-infringer once it determines the amount of the contribution that a co-infringer may recover from any other co-infringers.

5.4. Slovenia

Competition legislation in Slovenia can be traced back to 1935, when the first Decree on Cartels accompanied by other by-laws was enacted in the Kingdom of Yugoslavia. The Decree was modelled in line with the Czechoslovak Cartel which did not prohibit cartels as long as they were not abusing.[853] After the dissolution of the Former Republic of Yugoslavia, the European integration of Slovenia had an impact, *inter alia*, in developing and modelling the national legislation in compliance with the EU *acquis*.[854] In order to prepare to fulfil the criteria for

[850] Decreto Legislativo 3/2017, Art 15 (4).
[851] Decreto Legislativo 3/2017, Article 16 (2).
[852] Decreto Legislativo 3/2017, Art 16 (3).
[853] Fatur, Podobnik and Vlahek (n 66) 27.
[854] Kati Cseres, 'Questions of Legitimacy in the Europeanisation of Competition Law Procedures of the EU Member States' (2013) Amsterdam Centre for European Law and Governance <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213192 > accessed 18 December 2018.

membership[855] and the obligations laid down later in the European Agreement,[856] in 1993, Slovenia enacted the Law on Protection of Competition being 'partly in conformity with the *acquis'*.[857] The Law on Protection of Competition 1993, being the first competition law in independent Slovenia, covered restrictive business practices as well as unfair competition, prohibited practices, dumping and subsidisation and regulatory restriction of competition.[858]

In 1999, as Slovenia opened the negotiation of Chapter 6 'Competition and State Aids', a new Law on Prevention of Restriction of Competition was introduced, repealing the previous one. The 1999 Act on Prevention of Restriction of Competition was in conformity with the EU *acquis*. However, the process of 'Europeanisation' of the Slovenian competition law continued even after the accession of Slovenia. Both Laws of 1993 and 1999 provided no specific reference for private enforcement, but merely referred under general rules of damages applicable to tort law stating that 'a person who causes damages to another is liable for compensating it if he cannot prove that the damage occurred without his fault'.[859]

To comply with Regulation 1/2003, in April 2008, a new Law on Prevention of Restriction of Competition (*Zakon o preprečevanju omejevanja konkurence*, hereafter cited as *ZPOmK-1*) was adopted, replacing the 1999 law.[860] As stipulated in Article 2 (1) of *ZPOmK-1*, this act closely follow the EU competition rules set forth in Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty and Regulation 139/2004 on control of concentration between undertakings.[861] Furthermore, *ZPOmK-1* was modelled in line with the

[855] European Council, 'Conclusion of the Presidency' (n 34) part 7A (iii); Kati Cseres and Rozeta Karova, 'The Europeanisation of Private Law in CEECs: The Case of Competition Law' in Fabrizio Cafaggi, Olha O Cherednychenko, Katalin Cseres, Lukasz Gorywoda, Rozeta Karova, Hans W Micklitz (eds), *The Europeanisation of Private Law in Central and Eastern European Countries (CEECs): Preliminary Findings and Research Agenda* (EUI Working Paper Law 2013/07, 2013) 26-27.
[856] European Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part [1999] OJ L 51/3.
[857] Nina Bučan, 'The Enforcement of EU Competition Rules by Civil Law' (PhD thesis, University of Radboud 2013) 219.
[858] Fatur, Podobnik and Vlahek (n 66) 29.
[859] Obligacijski zakonik (Code of Obligation) – OZ [2001] OJ 83/01, Art 131 (1)
[860] Zakon o preprečevanju omejevanja konkurence (Prevention of the Restriction of Competition Act) – ZPOmK-1 [2008] OJ 36/08
[861] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

recommendations in the Commission's White Paper on damages and the Commission Staff Working Paper on Damages Action for Breach of the EC antitrust rules.[862] Article 62 (1) of *ZPOmK–1* provided that anyone who violated provisions of the national competition law (Articles 6 or 9 of *ZPOmK–1*) or EU Competition Law (Articles 101 and 102 of TFEU), either deliberately or negligently, shall be liable for any damages arising from such violation. If any damage has been caused, the court shall be bound by the decision of the Slovenian Competition Protection Agency (SCPA) or the final decision adopted in the judicial protection procedure against the SCPA's decision.[863] Since April 2008**,** *ZPOmK–1* has been amended 9 times and the last amendment occurred in 2017, which implemented the Directive 2014/104/EU.[864]

5.4.1. Manner of Implementing the Directive 2014/104/EU

The Directive 2014/104/EU was implemented in Slovenia by an amendment of the existing *ZPOmK–1* taking the form of a new 'Act Amending and Supplementing *ZPOmK–1*' (hereinafter cited as *ZPOmK-1G*).[865] The draft proposal for the implementation of the Directive 2014/104/EU was released for public consultation during 15 June - 15 July 2016, and received comments by the European Commission and various interested stakeholders in Slovenia such as: the industry, academia, judges, the Slovenian Bar Association, the SCPA, the Ministry of Justice and other institutions.[866] After the initial comments, on 5 September 2016, the Ministry of Economic Development and Technology held another public consultation to address the issues of private enforcement and the implementation of the Directive 2014/104/EU.[867] On the basis of the comments received, the Ministry of Economic Development and Technology refined the original

[862] White Paper on damages; Commission, 'Commission staff working paper accompanying the White paper on damages actions for Breach of the EC antitrust rules' (n 327)
[863] ZPOmK-1, Art 62 (2)
[864] Zakon o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence (Act Amending the Prevention of the Restriction of Competition Act) – ZPOmK-1G [2017] OJ 23/17
[865] ZPOmK-1G, Art 2 (2).
[866] Ana Vlahek and Klemen Podobnik, 'Slovenia' in Anna Piszcz (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Center for Antitrust and Regulatory Studies 2017) 264; Andreas Polk and Andreja Primec, 'Slovenian and German Competition Regimes: A Comparative Analysis' Naše Gospodarstvo/Our Economy [2017] 3, 12-13.
[867] Vlahek and Podobnik (n 866) 264.

draft on 13 February 2017.[868] The proposal was approved by the Government on 2 March 2017,[869] and, on 25 April 2017, the National Assembly of the Republic of Slovenia adopted the amending act. The *ZPOmK-1G* comprises a new Part VI titled 'Individual rules on compensation for the harm caused by an infringement of the Competition rules' encompassing 16 new Articles and a couple of more amended articles. It introduces the substantive and procedural rules to facilitate damages actions brought by injured parties against undertakings infringing the EU or Slovenian competition law.

5.4.2. Scope of new Rules: Material, Territorial and Temporal

Likewise the Directive 2014/104/EU, the Slovenian legislator maintained a minimum level of harmonisation focusing only on the claim for damages. In the first draft act released for consultation with the interested parties, the Slovenian legislator intended to implement the Directive 2014/104/EU more broadly, covering unjustified enrichment claims. In a response to the draft act, the Commission insisted to be limited only to the claim for damage, which was materialised in the final draft.[870]

On the other hand, unlike the Directive 2014/104/EU that suggests application only to breaches of the EU competition law or national competition law that predominantly pursue the same objective of Article 101 and 102 TFEU, and are applied to the same cases and in parallel to the EU competition law[871], the *ZPOmK-1G* covers as well situation where anticompetitive conduct has no EU dimension.[872] According to Article 3 paragraph (2) point (1) of *ZPOmK-1G*, the infringement of the competition law for the purpose of the implementation of the Directive 2014/104/EU shall mean as: i) the infringement of Articles 6 or 9 of *ZPOmK-1G*; or ii) the infringement of Articles 101 or 102 TFEU; or iii) the infringement of the provisions of a Member

[868] Ministry of Economic Development and Technology, 'Predlog Zakona o spremembah in dopolnitvah Zakona o preprečevanju omejevanja konkurence – predlog za obravnavo' (EVA 2016 – 2130 – 0075) <http://84.39.218.201/MANDAT14/VLADNAGRADIVA.NSF/18a6b9887c33a0bdc12570e50034eb54/9fcea42da87d0eebc12580c80025fa7a/$FILE/VG_ZPOmK-1G_k.pdf> accessed 18 December 2018.
[869] Commission, 'Action for Damages: Directive on Antitrust Damages Actions' (n 582).
[870] Petr (n 562) 25; Vlahek and Podobnik (n 866) 271.
[871] Directive 2014/104/EU, Article 2 (1) and (3).
[872] Petr (n 562) 22-23.

State of the European Union that determines the prohibition of restrictive agreements; or iv) the prohibition of the abuse of a dominant position within the meaning of Articles 101 or 102 TFEU.

The Directive 2014/104/EU applies to 'anyone who has suffered harm caused by an infringement of competition law (...) and can effectively exercise the right to claim full compensation'.[873] In the same vein, the *ZPOmK-1G* regulates the personal scope. Accordingly, an infringer shall mean an undertaking that has committed an infringement of competition law.[874] An undertaking means any entity engaged in economic activities, regardless of its legal form of organisation and ownership origin. Also, an undertaking shall be considered an association of undertakings not directly engaged in an economic activity but which affects or may affect the behaviour of the undertakings engaged in the economic activity.[875]

According to Article 21 (1) of the Directive 2014/104/EU, Slovenia had to transpose the Directive into the national law on 27 December 2016. The *ZPOmK-1G* came into force on 20 May 2017 and complied with the obligation of retroactive effects for the proceedings after 26 December 2014 as set out in Article 22 (1) of the Directive 2014/104/EU. Article 13 of *ZPOmK-1G* ensured the application of the provisions of disclosure of evidence and the consequences of the disclosure of evidence for proceedings started after 26 December 2014.[876]

5.4.3. Jurisdiction: Competent Courts

The Slovenian Courts Act (*ZS-L*) is the main legal framework that regulates the jurisdiction and compositions of the judiciary in Slovenia.[877] According to Article 98 and Articles 114 -117 of *ZS-L*, the judiciary is made up of courts of first instance: 44 local courts (*okrajna sodišča*) and 11 district courts (*okrožna sodišča*) and 2 bodies that act as appellate courts: 4 higher courts (*višja sodišča*) and the Supreme Court (*Vrhovno sodišče).*

[873] Directive 2014/104/EU, Article 1 (1).
[874] ZPOmK-1G, Art 3 (2) (2).
[875] ZPOmK-1G, Art 3 (1) (1).
[876] ZPOmK-1G, Arts 62a; 62c; 62č; 62d; 62e; 62f.
[877] Zakon o spremembah in dopolnitvah Zakona o sodiščih (The Slovenian Courts Act) – ZS-L [2015] OJ 17/15

In Slovenia, there are no specialised civil or commercial courts but only specialised divisions within the local court, district court and high court. Pursuant to Articles 99 and 101 of *ZS-L*, the local court (*okrajna*) and district court (*okrož*na) are vested with the jurisdiction to decide civil proceedings. Since both the local court (*okrajna*) and the district court (*okrožna)* have the jurisdiction to decide on civil proceedings, the general delineation of competences depends on the value of the dispute. According to Article 30 of *ZPP-E*, the local court (*okrajna*) has the jurisdiction in litigation on claims of property not exceeding EUR 20.000. If the value of the claim exceeds EUR 20.000, the district court (*okrožna)* shall have the jurisdiction to hear and decide.[878] However, in disputes concerning the protection of competition, the district court (*okrožna)* has jurisdiction, irrespective of the value of the claim.[879] Brkan and Bratina argue that 'these jurisdictional rules are applicable in cases where competition law is applied *à titre principal*.'[880] The higher court (*višja sodišča*) has the jurisdiction to decide on appeals against the decisions of local and district courts.[881] The Supreme Court (*Vrhovno sodišče)* has the jurisdiction to decide on appeals against the decisions of higher courts.[882]

5.4.4. Relevant Substantive and Procedural Issues of ZPOmK-1G

As discussed above, Slovenia opted to implement the Directive 2014/104/EU by amending the existing Competition Act. Provisions applicable only for compensation for harm caused by an infringement of competition were incorporated in Part VI as follows: the object, the scope of application and the definitions (Arts 1-4 and 62); disclosure of evidence (Arts 62a, 62č, 62d, 62e and 62f); effects of the decisions of the national authority (Art 62g); limitation periods (Art 62j); joint and several liability (Arts 62h and 62i); the passing-on overcharges (Arts 62l, 62m); joinder of claims (Art 62c); quantification of harm (Art 62k); consensual composition of disputes (Arts 62n and 62o); and cooperation between the courts, the European Commission and the Agency (Art 63). The following section examines the substantive and procedural rules concerning the antitrust

[878] Zakon o spremembah in dopolnitvah Zakona o pravdnem postopku (Code of Civil Procedure) – ZPP-E [2017] OJ 10/17, Art 32.
[879] ZPP-E, Art 32(6)
[880] Maja Brkan and Tanja Bratina, 'Private Enforcement of Competition Law in Slovenia: a New Field to be Developed by Slovenian Courts' [2013] Yearbook of Antitrust and Regulatory Studies 75, 82.
[881] ZPP-E, Art 35.
[882] ZPP-E, Art 37.

damages claims affected by the implementation of the Directive 2014/104/EU into the Slovenian legal system.

5.4.4.1. Right to full compensation

In line with the ECJ settled case-law, Article 62 (1) *ZPOmK-1G* reaffirmed the right of any person who has suffered harm by an infringement of the competition law to claim compensation under the general rules of the Slovenian Code of Obligation, unless otherwise provided in the ZPOmK-1G. Accordingly, the infringer shall be liable to pay not only the actual loss but also the late payment interest starting from the time the harm occurred until the time the compensation is paid. Article 3 (3) of Directive 2014/104/EU stipulates that full compensation shall not lead to overcompensation whether by means of punitive, multiple or other types of damages not mentioned in the *ZPOmK-1G*. According to the Explanatory Part, the Ministry of Economic Development and Technology purposely opted for non-transposition of Article 3 (3) of the Directive 2014/104/EU, arguing that the definition of damages – actual loss, loss of profits and interest - have a compensatory function and do not amount to double damages.[883]

5.4.4.2. Limitation Periods

Article 62j *ZPOmK-1G* regulates the limitation period for the damages actions. Before the transposition of the Directive 2014/104/EU, the statute of the limitation for non-contractual obligation was regulated by the Code of Obligation (*OZ*)[884] and Article 62 (3) of *ZPOmK-1*. According to Article 352 (1) of *OZ*, the right for compensation was statute-barred three years after the injured party is made aware of the damage and the identity of the person that caused the damage. The second paragraph of Article 352 of *OZ* stipulated that this right becomes statute-barred five years after the occurrence of the damage.[885] On the other hand, Article 62 (3) of

[883] Slovenian scholars maintain the position that the absence of reference could lead to an interpretation that embraces alson non – compensatory considerations which is against principal aim of the Directive 2014/104/EU. Petra Weingerl, 'The Implementation of the Antitrust Damages Directive in Slovenia: Tensions with the (Lurking) Preventive Character of Liability in Damages?' [2016] LeXonomica 139.
[884] Obligacijski zakonik (Code of Obligation) – OZ [2001] OJ 83/01, Art 352; Bučan (n 857) 285 – 286; Brkan and Bratina (n 880) 87-88.
[885] OZ, Art 352 (2).

ZPOmK-1 stated the suspension of the limitation period for compensation claims from the date of initiation of the procedures before the SCPA or the Commission until the date the proceeding is finally concluded.

A proper implementation of Article 10 of the Directive 2014/104/EU required the amendment of the current regime governing statute of limitations. Instead of a one-tier system introduced by Article 10 of the Directive 2014/104/EU, the Slovenian legislator maintained a two-tier system of limitation period, a combination of five and ten years. The short subjective limitation period in Slovenia shall be of five years since the infringement of the competition law ceased and began if the claimant knows or could reasonably be expected to know: i) the act of the infringer and the fact that the act represents an infringement of competition law; ii) the harm caused by the infringement of competition law; and iii) the infringer.[886] Controversially, the ten-year limitation period – known as the longer objective period – begins to run when the damage is sustained but it cannot run before the infringement has ended.[887] Article 62j (3) of *ZPOmK-1G* introduces the suspension of limitation period during the public enforcement proceedings. The limitation period for a claim for damages shall not run from the day that the SCPA conducts an investigation or a procedure for the infringement of the competition law until the day marking the end of the first year the final decision on the infringement or any other conclusion of the procedures was reached. The time passed before the suspension shall be counted in the limitation period.

Also, the *ZPOmK-1G* introduces a limitation period for a claim for damages due to an infringement of competition law caused by several persons.[888] In this situation, the limitation period shall not run between the immunity recipient and the claimant who is not the immunity's customer – his/her direct or indirect purchaser or supplier - from the moment the injured party filed a claim for damages against other infringers. Limitation period of a claim for damages caused by several persons together shall resume the day after the injured party could not have obtained full compensation from other jointly and severally liable debtors. The time expired before the suspension of the limitation period will be calculated in the limitation period.

[886] ZPOmK-1G, Art 62j (1).
[887] ZPOmK-1G, Art 62j (2).
[888] ZPOmK-1G, Art 62i (2).

5.4.4.3. Joint and Several Liability

Joint and several liability set out in the Directive 2014/104/EU corresponded partially with the general rule of joint and several liability under the Slovenian legislation.[889] However, in order to comply with the requirement laid down in Article 11 of the Directive 2014/104/EU, the Slovenian legislator introduced two specific provisions dealing with: i) joint and several liability for SMEs;[890] and ii) immunity recipients from a fine.[891]

Article 62h *ZPOmK-1G* introduces special rules on joint and several liability SMEs. This Article lacks reference to the application to micro enterprises. Various academicians argue that Article 62h *ZPOmK-1G* is also applicable to micro enterprises for the compensation caused by the infringement of the competition law.[892] The infringer who employs less than 250 persons with an annual turnover not exceeding EUR 50 million, or an annual balance sheet total not exceeding EUR 43 million, is liable only to its direct or indirect purchasers if they prove that: i) the market share in the relevant market was below 5% at all times during the infringement of competition law; and ii) the application of the general rules of joint and several liability would inflict economic damages on it and cause its assets to lose all their value.[893] The alleged infringer has the burden of proof. Such infringer is jointly and severally liable to other injured parties if the latter were unable to obtain full compensation from the other undertakings involved in the joint behaviour.[894] The infringer is also liable, irrespective of the cumulative conditions laid down in the first paragraph, where: i) they organised the unlawful conduct or coerced other undertakings to participate in the infringement; or ii) it has been found to infringe the competition law by an administrative or judicial decision which is not related with the alleged infringement of competition law in the claim for damages.[895]

The other exemption from the general of joint and several liability relates to the immunity

[889] Andrej Fatur, 'The Slovenian Parliament adopts an amended Competition Act implementing the EU Damages Directive into national law' [2017] e-Competitions, n 85047.
[890] ZPOmK-1G, Art 62h.
[891] ZPOmK-1G, Art 62i.
[892] Vlahek and Podobnik (n 866) 279.
[893] ZPOmK-1G, Art 62h (1).
[894] ZPOmK-1G, Art 62h (2).
[895] ZPOmK-1G, Art 62h (3).

recipients. An immunity recipient is jointly and severally liable only to: i) his or her direct or indirect purchaser or suppliers; and ii) other injured parties only where full compensation cannot be obtained from the other undertakings involved in the same infringement of the competition law.[896] The amount of payment of the jointly and severally liable immunity recipients shall not exceed the extent of the harm caused to their direct or indirect purchasers or suppliers.[897] Conversely, the amount to be paid to other jointly and severally liable debtors shall be proportional to the liable debtors' share of responsibility for the damage.[898] Furthermore, Article 62i (2) *ZPOmK-1G* provides a suspension of the limitation period of a claim for damages due to an infringement of the competition law caused by several persons.

5.4.4.4. Quantification of Harm

General regime of awarding compensation is foreseen in Article 216 (1) of *ZPP-E* which basically provides courts' discretion to determine the liability of the infringer - the right to compensation, the right to any amount of money or generic goods - in the case that the amount of money or quantity of goods cannot be determined or if following the determination thereof were to ensure unreasonable difficulties.[899] Nevertheless, the Slovenian legislator decided to introduce a special rule on awarding compensation for infringement of the competition law.

According to Article 62k *ZPOmK-1G*, when the court decides on the award of compensation, in addition to the discretion laid down in Article 216 (1) of *ZPP-E*, it may consider even the part of the infringer acquired by infringing the competition law. Such additional requirement was introduced by the Ministry of Economic Development and Technology on the latest stage of the implementation process, depriving interested parties to comment on it.[900] As no explanation is given in the commentary to the proposal submitted to the National Assembly, Vlahek and Podobnik criticise this provision due to the ambiguity as to what its content means.[901]

[896] ZPOmK-1G, Article 62i (1).
[897] ZPOmK-1G, Article 62i (3).
[898] ZPOmK-1G, Article 62i (4).
[899] Tjaša Ivanc, *Evidence in Civil Law – Slovenia* (Lex Localis 2015) 27.
[900] Mikelėnas and Zaščiurinskaitė (n 538) 117.
[901] Vlahek and Podobnik (n 866) 280–282.

Article 62k (2) *ZPOmK-1G* presumes that the cartels cause harm. In accordance with Article 17 (3) of the Directive 2014/104/EU, the Slovenian legislator introduces an additional tool to quantify damages. Accordingly, the Slovenian court may request the SCPA or NCAs of other Member States to provide assistance to determine the amount of damage.[902] In the case the Slovenian court asks the SCPA to provide assistance to determine the amount of damage, Article 62k (3) *ZPOmK-1G* establishes a 30-day deadline for the submission of the opinion on the determination of the amount of damages. On the other hand, pursuant to Article 62k (5) *ZPOmK-1G*, a court of another Member State may ask an opinion to determine the extent of harm to the SCPA. In addition, the Slovenian Court may also rely on the Commission's Communication on quantification of harm in the action for damages,[903] accompanied by a more comprehensive and detailed *Practical Guide*[904] in order to assess the damage caused by breaches of Articles 101 and 102 TFEU.

5.4.4.5. Passing-on of overcharges

Article 62l *ZPOmK-1G* regulates passing-on defence and overcharge in the supply chain. According to Article 62l (1) *ZPOmK-1G*, the harm in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. Likewise Article 12 (2) of the Directive 2014/104/EU, the Slovenian legislator laid down procedural rules to ensure that the compensation for actual loss at any level of the supply chain shall not exceed the overcharge harm suffered on to that level. If the injured party passed on the overcharge and it resulted in the decline of sales or purchases, the injured party should be entitled with compensation.[905] On the other hand, the infringer may invoke a passing-on defence, proving that the overcharge fully or partially passed to the next level of the supply chain. The burden of proof rests with the defendant.[906]

[902] ZPOmK-1G, Art 62k (3) and (4).
[903] Communication from the Commission on Quantifying Harm in Actions for Damages based on Breaches of Article 101 and 102 of the Treaty on the Functioning of the European Union (n 544).
[904] Commission, 'Practical Guide: Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (n 399).
[905] ZPOmK-1G, Art 62l (2).
[906] ZPOmK-1G, Art 62l (3).

Article 62m *ZPOmK-1G* spells out rules on actions for damages by indirect purchasers. If the indirect purchaser brings an action for damages, the claimant bears the burden of proving the existence and the scope of the overcharge passes on to him. The claimant may, upon a reasoned proposal, suggest or require from the court the disclosure of evidence from the defendant or a third person.[907] Second paragraph of Articles 62m *ZPOmK-1G* introduces a legal presumption that the overcharges have indeed passed on to the claimant, if they succeed to prove that: i) the defendant has infringed the competition law; ii) passing on of overcharges was as a result of that breach; and iii) the claimant purchased goods or services subject of that infringement. Such legal presumption is rebuttable if the defendant proves that the overcharge was not fully or partially passed on to the plaintiff.[908]

In addition, the fourth paragraph of Article 62m *ZPOmK-1G* sets out additional criteria to be taken into account by the court when evaluating whether the defendant has succeeded in proving that the plaintiff fully or partially passed on the overcharge, and whether the plaintiff succeeded in proving that the overcharge was passed on. Accordingly, Slovenian courts should consider: i) actions for damages for the same infringement of competition law lodged by claimants from other levels of the supply chain; ii) final judgments issued on the basis of actions for damages mentioned above; and iii) other relevant publicly accessible information relating with the cases deriving from public enforcement authority.[909] If the passed overcharge has been proved but the amount cannot be determined, Slovenian courts may use their discretion to evaluate which part of the price difference was passed on.[910]

5.4.4.6. Standing

With regard to standing, according to Article 62 (1) *ZPOmK-1G*, any person who has suffered harm caused by an infringement of the competition law shall have the right to claim compensation for harm under the general rules of OZ, unless otherwise provided in the ZPOmK-1G.

[907] ZPOmK-1G, Art 62m (1).
[908] ZPOmK-1G, Art 62m (3).
[909] ZPOmK-1G, Art 62m (4).
[910] ZPOmK-1G, Art 62m (5).

5.4.4.7. Disclosure of evidence

The *ZPOmK-1* enacted in 2008, despite being modelled in line with the EU competition law, did not contain rules on the disclosure of evidence for the actions for damages. The disclosure of evidence for private enforcement was regulated by the Slovenian Civil Procedure Act 1999 (*ZPP*). According to Galič, 'a transposition of the Directive's litigation disclosure mechanism will require a fundamental change in the very key procedural principles'.[911] Therefore, the Slovenian legislator did not choose to amend the disclosure regime stipulated in the Slovenian Civil Procedure Act (*ZPP-E*), but instead, incorporated the rules of disclosure of evidence in the *ZPOmK-1G* applicable only for the claim for damages.[912] In this regard, the disclosure of the evidence regime regulates in detail the rights and obligations of the parties and third parties.[913]

Article 62a *ZPOmK-1G* regulates the disclosure of evidence and the protection of confidential information. Both the injured party and the infringer have the right to claim the disclosure of evidence. The injured party may claim the disclosure of evidence or information in possession from the infringer or third party necessary for the claim for damages lodged before the court. On the other hand, even the infringer may claim the disclosure of evidence or information in possession from the injured party or third party necessary for the defence against the claim for damages.[914] Since the Slovenian legal system was not familiar with the standard of 'plausibility of claim' set out in the Directive 2014/104/EU, the legislator introduced a new standard.[915] The second paragraph of Article 62a *ZPOmK-1G* envisages a conditional right to demand the disclosure of evidence for the defendant, if: i) the facts and evidence available sufficiently support the plausibility of the claim for damages; ii) the evidence or information is relevant due to an additional statement of facts or proof of the existence or non-existence of a claim for damages or the amount thereof; and iii) the requested evidence or information to be disclosed is described

[911] Galič (n 485) 124.
[912] Fatur (n 889).
[913] Marko Ketler, 'New Rules on the Private Enforcement of Competition Laws in Slovenia'<https://www.karanovicpartners.com/knviews/Pages/2017/12/New-Rules-on-the-Private-Enforcement-of-Competition-Laws-in-Slovenia.aspx> accessed 25 December 2018.
[914] ZPOmK-1G, Art 62a (1).
[915] Inese Druviete, Jūlija Jerneva and Aravamudhan Ulaganathan Ravindran, 'Disclosure of Evidence in Central and Eastern European Countries in Light of the Implementation of the Damages Directive' [2017] Yearbook of Antitrust and Regulatory Studies 197, 206.

specifically and in detail on the basis of facts and evidence known to the person requesting the disclosure of evidence or information under reasonable conditions.[916] Consequently, any party requesting the disclosure of evidence or information must 'produce facts and evidence which enable a *prima facie* conclusion that the damages claim is not substantiated'.[917]

Furthermore, Article 62a *ZPOmK-1G* emphasises the importance of proportionality between the legitimate interests of all parties and the control over potential abuses of the disclosure regime for fishing expeditions.[918] A list of consideration must be taken into account, in particular, whether: i) the justification of the existence or non-existence of the obligation to provide compensation for damage is sufficiently supported by the available facts and evidence; ii) exist non-specific searches for information which is unlikely to be of relevance for the decision on the existence; iii) the scope and cost of the disclosure, especially for any third persons; and finally iv) the evidence or information requested contains confidential information, in particular with respect to third parties and all the possible measures for securing confidential information.[919] On the other hand, if the disclosure of evidence or information is included in the file of the authority responsible for the protection of competition, besides the above-mentioned circumstances, additional considerations must be taken into account to ensure proportionality.[920]

Paragraphs 6 to 9 of Article 62a *ZPOmK-1G* regulate the protection of confidential information. They prescribe the evidence or information which may only be disclosed if certain conditions are met, and those which may not be disclosed at all, most notably, the leniency statement and other evidence or information. In the case of the existence of confidential information, a list of measures to protect the confidential information should be followed by national judges, such as: i) providing a non-confidential version of the evidence within a specific time in which the confidential parts of the text either are deleted or shortened; ii) the availability of the evidence containing confidential information only on the premises of the person requesting it; and iii) limiting the examination or copying confidential information shall be allowed only to

[916] ZPOmK-1G, Art 62a (2).
[917] Druviete, Jerneva and Ravindran (n 915) 206.
[918] ibid 206.
[919] ZPOmK-1G, Art 62a (3).
[920] ZPOmK-1G, Art 62a (4).

the expert, auditor, attorney of the applicant, external expert assistant of the applicant or expert witnesses. The latter shall have an obligation not to disclose such information to the parties in the procedure or to third persons, but only to use in the procedure.[921] The request to disclose confidential information may be refused only in the case of the privileged communication stipulated in Article 32 *ZPOmK-1G*. Certain types of evidence or information related to: i) the information prepared for the procedure before the SCPA; ii) the information prepared by SCPA which is sent to parties; and iii) the settlement submissions that have been withdrawn, shall not be disclosed as long as the procedure before the SCPA has been concluded.[922] On the other hand, the evidence or information included in the file of the authority responsible for the protection of the competition related to: i) the evidence foreseen in Article 18 paras 1 and 2-5 *ZPOmK-1G*; ii) leniency statements, or iii) settlement submissions, shall not be disclosed.[923]

As a general rule, the applicable law on the claim for damages is *ZPP-E*, unless provided otherwise.[924] Pursuant to Article 6 (10) of the Directive 2014/104/EU, the Slovenian legislator introduces a specific provision disclosure of the evidence or information in a civil procedure. The first paragraph of Article 62č *ZPOmK-1G* intends to clarify that all court orders for the disclosure of evidence from the opposing party must be in accordance with the conditions referred to in Articles 62a and 62č *ZPOmK-1G*. Both the injured party and the infringer have the right to file a request for the disclosure of evidence. If, on reasonable grounds, either the injured party or the infringer cannot obtain the evidence or information from the opposing party or a third person, the court may request the SCPA to disclose the evidence or information.[925] In case the requested evidence or information is included in the file of the SCPA, the third paragraph of Article 62č ZPOmK–1G obliges the court to inform the SCPA on the possession of such evidence, and then to give its opinion on the proportionality of the claim or motion. In addition, if the claim or motion for the disclosure of evidence or information relates to confidential information, the court decides to whom the evidence or information may be disclosed.[926] The court shall decide on the merit of the claim, only if either the injured party or the infringer objects the disclosure of evidence due to

[921] ZPOmK-1G, Art 62a (6).
[922] ZPOmK-1G, Arts 62a (8) and 62d (2).
[923] ZPOmK-1G, Arts 62a (9) and 62d (1) - (3).
[924] ZPOmK-1G, Art 62b.
[925] ZPOmK-1G, Art 62č (2).
[926] ZPOmK-1G, Art 62č (4).

the privileged communication.[927] Upon the reasoned motion of the party or third person, the court must verify whether the content of the leniency statement or settlement submission corresponds to the definition set out in point 6, paragraph 2 of Article 3 and point 21, paragraph 1 of Article 3 of *ZPOmK-1G*. After verification, the Court must inform the person who submitted such motion and he/they have the right to give a statement on such issue.[928] The costs of the procedure for disclosing the evidence or information are first covered by the party requesting the disclosure. The reimbursement of the costs of the disclosure of evidence or the information may be claimed subsequently as part of the costs of litigation in civil proceedings for the compensation according to the success in the litigation.[929]

Articles 62e and 62f of *ZPOmK-1G* regulate the consequences of failure to comply with the decision for the disclosure of evidence or information either from a party or a third person and the sanctions that may be imposed by the court. The court shall decide based on its discretion in the case that a party fails or refuses to comply with the decision for the disclosure of evidence or information, and if it destroys or hides relevant evidence or information.[930] In the case that a third person fails or refuses to comply with a final procedural decision on the disclosure of evidence or information, the court shall act *ex officio* to enforce the procedural decision.[931] Furthermore, courts may impose fines to persons for non-execution of the measures to protect the disclosure of information which can vary but not exceeding EUR 5.000 for natural persons and from EUR 5.000-100.000 on the legal person, individual sole trader, attorney and assistant attorney.[932] If the fine is imposed on an attorney or attorney training, the court will also notify the Bar Association.[933] For parties or third parties which hide or destroy relevant information from the moment of filing the request and the date of the decision, the fine cannot exceed the amount EUR 5.000.[934] The fine will be imposed by a procedural decision where the court shall determine the time limit, which is not less than 15 days and not longer than 3 months, for the debtor to pay the fine.[935] Appeal is

[927] ZPOmK-1G, Art 62č (5).
[928] ZPOmK-1G, Art 62č (6).
[929] ZPOmK-1G, Art 62č (8).
[930] ZPOmK-1G, Art 62e (1).
[931] ZPOmK-1G, Art 62e (2).
[932] ZPOmK-1G, Art 62f (1).
[933] ZPOmK-1G, Art 62f (6).
[934] ZPOmK-1G, Art 62f (2).
[935] ZPOmK-1G, Art 62f (4).

allowed against the procedural decision of imposing a fine.[936]

5.4.4.8. Effect of National Competition Authority Decisions

The binding effect of the NCAs decision was regulated in the ZPOmK-1, adopted in 2008. According to Article 62 (2) *ZPOmK-1*, the Slovenian courts were bound to follow the decisions of the SCPA or the Commission on subsequent damages actions if the damage has been caused by the infringement of Articles 6 or 9 of *ZPOmK-1* or Articles 101 and 102 TFEU. However, such regulation was not sufficient to be in compliance with the correct transposition of the Article 9 of the Directive 2014/104/EU.[937]

Article 62g of ZPOmK-1G regulates the effect of a decision taken by the SCPA. The national courts are bound by the final decision of the SCPA on the infringement or by the final decision on the infringement issued by a judicial protection procedure against the SCPA.[938] In contrast to Article 62 (2) of *ZPOmK-1* adopted in 2008, the Slovenian legislator decided not to regulate the court's obligation to be bound by a decision of the Commission in order to establish the existence of a breach. This issue, regulated by Article 16 of Regulation 1/2003, which has general application, is binding in its entirety and directly applicable in all Member States. Article 62g (2) of *ZPOmK-1G* determines the effects of the decisions of NCAs or the final decision of a court of another Member State. The Slovenian legislator decided not to fully equate with the SCPA.[939] If there was an infringement either by a final decisions of NCAs of another Member State or by a final decision of a court of another Member State, which is competent on the basis of a regular judicial remedy for the purpose of assessing the decision of NCAs of another Member State, it is presumed that the infringers determined in the decision of infringement act unlawfully unless the opposite party proves otherwise.[940]

[936] ZPOmK-1G, Art 62f (5).
[937] Brkan and Bratina (n 880) 93-94.
[938] ZPOmK-1G, Art 62g (1).
[939] Lee (n 502) 192.
[940] ZPOmK-1G, Art 62g (2).

The Slovenian legislator went even further by amending or introducing rules on the domestic and international cooperation between the court and the SCPA or NCAs of other Member States. Some of them were introduced since 2008 with the enforcement of *ZPOmK-1*. First of all, the court shall inform and sent a copy of the decision to the SCPA for any proceedings for the infringement of competition law, in relation to the application of Article 6 or 9 of *ZPOmK-1G* or Articles 101 and 102 TFEU.[941] The Court may ask the SCPA to provide a written opinion and, with the consent of the Court, it may provide a verbal opinion during the hearing.[942]

Secondly, the Slovenian court may request an opinion from the SCPA to determine the extent of the harm. The SCPA can either consider its help as: i) appropriate and shall inform the Court on its opinion within 30 days from the date of the request; or ii) as inappropriate and no opinion will be sent back.[943] Article 62k (4) of *ZPOmK-1G* laid down the possibility of the Slovenian court to ask the NCA of another Member State to give its opinion on the extent of the harm determined. In addition, the SCPA may, by request of the court of a Member State, provide assistance to the national courts of other Member States.[944]

Finally, Article 63 (4) - (7) of *ZPOmK-1G* regulates the cooperation of the Commission with the national court and the SCPA. In the case the Commission provides a written opinion to the court under Article 15 (1) and (3) of Regulation 1/2003, the court has the obligation to forward a copy of the opinion to the parties and the SCPA.[945] On the other hand, if the SCPA provides a written opinion on questions related to Articles 101 or 102 TFEU, the SCPA must send a copy to the Commission as well.[946]

5.4.4.9. Collective Redress

Article 62c of *ZPOmK-1G* lays down only the possibility of joining the cases when several civil procedures are lodged before the court of first instance – local court (*okrajna sodišča*) and

[941] ZPOmK-1G, Art 63 (1) - (2).
[942] ZPOmK-1G, Art 63 (3).
[943] ZPOmK-1G, Art 62k (3).
[944] ZPOmK-1G, Art 62k (5).
[945] ZPOmK-1G, Art 63 (4)-(6).
[946] ZPOmK-1G, Art 63 (5).

district court (*okrožna sodišča*) – for claims deriving from the same infringement of competition law and where the same person is the opposing party in relation to different plaintiffs or defendants. In this case, upon the proposal of the competent court or the parties to reduce costs, the Supreme Court may join the claims for a common hearing and may issue a joint judgment on all joint claims. The issue of collective redress was not addressed by the *ZPOmK-1G*.

On 26 September 2017, the Slovenian National Assembly adopted the Collective Actions Act (*Zakon o Kolektivnih Tožbah - ZKoIT*)[947], which, for the first time, introduced class action mechanism into the Slovenian legal system.[948] The *ZKoIT*, being modelled in line with the European Commission Recommendation on common Principles injunctive and compensatory collective mechanism,[949] came into force on the 21 October 2017 and is applicable from 21 April 2018. The *ZKoIT* aims to facilitate access to justice in order to stop and prevent unlawful conduct (injunctive relief) and to enable the injured with the right for compensation in cases of massive harm due to the violation of civil rights, economic and labour relations rights.[950] It regulates procedures for collective redress in specific civil, commercial and labour law matters, respectively, when the infringer breaches: i) consumers' rights provided by the law governing consumer protection; ii) provisions prohibiting restrictive practices provided in Articles 6 and 9 of *ZPOmK-1G* and Articles 101 and 102 TFEU; iii) rules of trading on regulated markets and prohibited conduct of market abuse; iv) workers' claim which would, as a separate action, be handled with an individual labour dispute as defined by the Law regulating the proceedings at labour courts; and v) cases for damages caused by an environmental accident.[951]

[947] Zakon o Kolektivnih Tožbah (Collective Actions Act) – ZkoIT [2017] OJ 55/17.
[948] Marko Ketler, 'Views: Slovenia Adopts Class Action Law' <https://www.karanovicpartners.com/knviews/Pages/2017/10/Slovenia-Adopts-Class-Action-Law.aspx> accessed 15 January 2019; Branka Sedmak, 'Implementation of Collective Redress Mechanisms in Slovenia' <https://www.lexology.com/library/detail.aspx?g=64ef43b2-4497-4ce0-ad85-895be5367a01> accessed 15 January 2019.
[949] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in Member States concerning violation of rights granted under Union Law (n 397)
[950] ZKoIT, Art 1(2).
[951] ZKoIT, see Art 1(2) and 2.

5.4.4.10. Consensual Dispute Resolution in Antitrust Enforcement

The general regime for consensual dispute resolution is regulated by Article 305b of *ZPP-E* and Article 15 Act on the Alternative Resolution,[952] which provides the possibility of the court to offer to the parties an opportunity to resolve their dispute in the ADR by terminating the civil proceedings of less than 3 months. However, in order to comply with the requirements of Articles 18 and 19 of the Directive 2014/104/EU, an exemption from the general rule should be introduced to regulate actions for damages. Therefore, Articles 62n and 62o of *ZPOmK-1G* deal with the suspension of consensual dispute resolution and effect of concluded settlements on other actions of damages.

Article 62n of *ZPOmK-1G* provides the suspension of proceedings due to consensual dispute resolution up to 2 years. If the parties consent to consensual dispute resolution regarding the claim for damages, the court may, at any time, suspend the civil procedure for the time of the duration of the consensual dispute resolution. The court may suspend the proceedings for up to two years. Such provision encourages parties to reach an out-of-court agreement even though the court's proceedings have already started.

On the other hand, Article 62o of *ZPOmK-1G* regulates the modification of the settling infringer's liability in multi-party cases. The first paragraph of Article 62o of *ZPOmK-1G* stipulates that an injured party who has concluded a settlement with one or more joint and several debtors has the right to claim only the amount of damages reduced by the share of each joint and several debtors with whom the injured party has concluded a settlement. The injured party does not have the right to claim for damages from joint and several debtors with whom they have not concluded a settlement. Furthermore, the second paragraph provides the possibility of recovering any remaining amount of damage from joint and several debtors with whom they have not concluded a settlement. The latter cannot claim contribution for the remaining claim from joint or several debtors with whom they have concluded a settlement.[953] However, pursuant to Article 62o (3) of *ZPOmK-1G*, the injured party may recover the remaining amount of the damages from a

[952] Zakon o alternativnem reševanju sodnih sporov (Act on the Alternative Resolution) – ZARSS [2009] OJ 97/09.
[953] ZPOmK-1G, Art 62o (2)

joint and several debtors with whom they concluded a settlement if the joint and several debtors with whom they have not concluded a settlement cannot pay the remaining amount of damages, unless the parties have decided otherwise. In the case the injured parties have not concluded a settlement, the request for compensation for harm from all joint and several debtors should be considered taking into account the special rules on joint and several liability. According to Article 62o (5) of *ZPOmK-1G*, the national court determines the amount of a reimbursement claim by taking into account any of the damages paid by this joint and several debtors pursuant to a prior concluded settlement with other injured parties in accordance with their share of responsibility of harm caused by the infringement.

CHAPTER

6. Europeanisation of Albanian Competition Law: Roles and Perspectives of Private Enforcement

6.1. Introduction

For Albania, the return to Europe and the transition to democracy and market economy have not been easy due to communism's legacy. Albania followed a communist model strictly based on the 'Marxist ideology and Stalinist economic practice', with some differences 'towards a more orthodox model' adapted considering the country's size, political choice and economic development.[954] The State kept an absolute monopoly over the production and distribution. The market economy was considered as an evil which undermines the communism principles. After the collapse of communism, Albania had to undergo a fundamental change in the political, economic and legal aspects. Within a short time, Albania had to establish a functional market economy with an appropriate regulatory framework and institutional building capacities. As Albania oriented its economic policy toward a market economy, the competition as a core feature of the market economy gained significance. In 1995, Albania enacted the first competition law, which paved the way for the institutionalisation of competition policy.[955] Most provisions of Law 8044/1995 remained only on paper and were never applied. In 2003, Albania adopted a new competition law drafted in line with the EU competition *acquis*. The enactment of the new competition law coincided with the EU perspective introduced to Albania upon the negotiation and later the signing of the Stabilisation and Association Agreement (hereafter cited as SAA). Harmonisation of existing and future legislation in compliance with the EU *acquis* became a precondition for membership. From then on, Albania gradually aligned its legislation with the EU law, including the competition law.

This chapter analyses the impact of the EU law on the Albanian competition law with a specific reference on private enforcement mechanism. The second section analyses the role of the

[954] Marta Muço, 'Economic Transition in Albania: Political Constraints and Mentality Barriers' (NATO Individual Fellowship Program 1995-1997, 1997) 6.
[955] Law 8044/1995, 'For Competition' [1995] OJ 27.

EU as a legal exporter of the EU *acquis* in third countries and discusses the status of SAA in the Albanian legal system, whether the SAA provisions produce direct effects. The latter is important since it provides a legal basis for the citizens to vindicate their rights. The third section provides an overview of the Europeanisation of Albanian competition law from a top-down approach. In light of the EU law, this section addresses how the Albanian competition law has changed to comply with the EU competition *acquis*. The fourth section focuses on the current regime of private enforcement of the competition law. The analysis follows the same structure of the substantive and procedural issues identified in the Directive 2014/104/EU and elucidated in Chapter 5 for each selected EU-Member State. Section 5 deals with some missed opportunities and obstacles encountered for the development of private enforcement followed by the Guideline on damages issued by the Albanian Competition Authority, which transposed the Directive 2014/104/EU (section 6). Besides the novelties introduced by the Guideline on damages, the final section discusses whether the Guideline on Damages is an appropriate instrument for the transposition of the Directive 2014/104/EU into the Albanian legal system.

6.2. Legal Europeanisation: EU Conditionality and Approximation of Legislation

6.2.1. Exporting EU acquis and Harmonizing Domestic Legislation

Since the 1990s, Europeanisation has become a buzzword denoting the impact of the EU to induce domestic changes (be it domestic polity, politics and policies) on the Member States or candidate countries.[956] The most comprehensive definition has been given by Radaeli, defining Europeanisation as:

> Processes of (a) construction, (b) diffusion, and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public

[956] Robert Ladrech, 'Europeanisation of Domestic Politics and Institutions: The Case of France' [1994] Journal of Common Market Studies 69; Maria Green Cowles, James A Caporaso and Thomas Risse (eds), *Transforming Europe: Europeanisation and Domestic Change* (Cornell University Press 2001); Tanja A Börzel, 'Towards Convergence in Europe? Institutional Adaptation to Europeanisation in Germany and Spain' [1999] Journal of Common Market Studies 573.

> policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies.[957]

Despite being 'fashionable' and arousing academic interest, the usage of the term Europeanisation remains contested due to its application in a number of different areas.[958] Europeanisation literature can be grouped into two categories. The first category focuses on the impact of Europeanisation on the domestic level of the Member States. Several books and journal articles have been written to analyse the effects of Europeanisation in certain areas of the Member States such as the environmental policy[959], monetary policy[960], immigration policy,[961] agricultural policy,[962] education policy[963] transport policy,[964] and administrative policy.[965] The recent book, edited by Brouard *et al.,* measures empirically the impact of Europeanisation on domestic legislatures of the Member States or third countries without an explicit membership perspective, - to mention the case of Switzerland.[966]

On the other hand, the prospect of membership given in 1999 and the re-confirmation in the Thessaloniki Summit (2003) that Western Balkans countries 'will become an integral part of the EU, once they meet the established criteria',[967] laid down the opportunity for the Europeanisation of the Western Balkan countries. Various mechanisms used by the EU to affect

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[957] Claudio M Radaelli, 'The Europeanisation of Public Policy' in Kevin Featherstone and Claudio M Radaelli (eds) *The Politics of Europeanisation* (OUP 2003) 30.
[958] Johan P Olsen, 'The Many Faces of Europeanisation' [2002] Journal of Common Market Studies 921.
[959] Andrew J Jordan and Duncan Liefferink (eds), *Environmental Policy in Europe: The Europeanisation of National Environmental Policy* (Routledge 2006).
[960] Kenneth Dyson, 'Europeanisation of German Economic Policies: Testing the Limits of Model Germany' [2002] Public Policy and Administration 87.
[961] Andrew Geddes, 'Still Beyond Fortress Europe? Patterns and Pathways in EU Migration Policy' (*Queen's Papers on Europeanisation*, No 4/2003).
[962] Christilla Roederer-Rynning, 'Farm Conflict in France and the Europeanisation of Agricultural Policy' <http://aei.pitt.edu/2167/1/002686.PDF > accessed 18 March 2019.
[963] Nafsika Alexiadou, 'The Europeanisation of Education Policy: researching changing governance and 'new' modes of coordination' [2007] Research in Comparative and International Education 102.
[964] Hussein Kassim and Handley Stevens, *Air Transport and the European Union: Europeanisation and its Limits* (Palgrave Macmillan 2010).
[965] Christoph Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence* (CUP 2004).
[966] Sylvian Brouard, Oliver Costa and Thomas König (eds), *The Europeanisation of Domestic Legislatures: The Empirical Implications of the Delors' Myth in Nine Countries* (Springer 2012).
[967] Council of the European Union, *Thessaloniki European Council 19 and 20 June 2003 Presidency Conclusions* (Brussels, 1 October 2003).

domestic changes have been identified.[968] Among the most important identified mechanism is conditionality, described by Anastasakias and Bechev as 'the EU's most powerful instrument for dealing with the candidate and potential candidate countries in post-communist Europe'.[969] The dominant logic of the EU accession conditionality is the 'reinforcement by reward'[970] by 'linking of perceived benefits […] to the fulfilment of a certain programme, in this case, the advancement of democratic principles and institutions in a "target" state'.[971] Under this strategy, the reward – most importantly the financial assistance and the EU membership - is granted if the candidate country complies with the conditions of the reward.

At the core of Europeanisation is the transposition of the EU *acquis*.[972] Rooted in the first enlargement, acceptance of EU *acquis* has become a condition for EU membership.[973] The subsequent EU enlargement was carried on the absence of clearly defined criteria until the European Council at the Copenhagen Summit in 1993 endorsed accession criteria.[974] In this summit, the European Council decided that 'accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political

[968] Michael W Bauer, Christoph Knill and Diana Pitschel, 'Differential Europeanisation in Eastern Europe: The Impact of Diverse EU Regulatory Governance Patterns' [2007] Journal of European Integration 405; Thomas Diez, Stephan Stetter and Mathias Albert, 'The European Union and Border Conflicts: The Transformative Power of Integration' [2006] International Organisation 563; Christoph Knill and Dirk Lehmkuhl, 'How Europe Matters Different Mechanism of Europeanisation' (European Integration online Papers, 15 June 1999) <http://eiop.or.at/eiop/pdf/1999-007.pdf> accessed on 11 March 2019.

[969] Othon Anastasakis and Dimitar Bechev, 'EU Conditionality in South East Europe: Bringing Commitment to the Process' (St. Antony's College University of Oxford 2003) 3.

[970] Frank Schimmelfennig and Ulrich Sedelmeier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' [2004] Journal of European Public Policy 661, 662.

[971] Paul J Kubicek, 'International Norms, the European Union, and Democratisation: Tentative Theory and Evidence' in Paul J Kubicek (ed), *The European Union and Democratisation* (Routledge 2003) 7.

[972] Frank Schimmelfennig, 'Europeanisation Beyond Europe' (Living Reviews in European Governance 2012) <http://www.europeangovernance-livingreviews.org/Articles/lreg-2012-1/download/lreg-2012-1Color.pdf> accessed on 11 March 2019; Stephan Renner and Florian Trauner, 'Creeping EU Membership in South-east Europe: the Dynamics of EU Rule Transfer to the Western Balkans' [2009] Journal of European Integration 449, 455.

[973] In The Hague Summit held on 1-2 December 1969, the Heads of Government and States endorsed that 'In so far as the applicant States accept the Treaties and their political aims, the decisions taken since the entry into force of the Treaties and the options adopted in the sphere of development,' the negotiation between EC and applicant countries could commence. The Hague Summit, 'Final Communique of the Conference of Heads of State or Government' (1-2 December 1969) <http://aei.pitt.edu/1451/1/hague_1969.pdf> accessed on 21 March 2019.

[974] Frank Hoffmeister, 'Enlargement' in Andrea Ott and Kirstyn Inglis (eds) *Handbook on European Enlargement: a Commentary on the Enlargement Process* (T.M.C. Asser Press 2002) 87 – 111; Christophe Hillion, 'EU Enlargement' in Paul Craig and Gráinne de Búrca (eds) *Evolution of EU Law* (2nd edition, OUP 2011) 188 – 216; Frank Emmert and Siniša Petrović, 'The Past, Present, and Future of EU Enlargement' [2014] Fordham International Law Journal 1349; Tanja Marktler, 'The Power of the Copenhagen Criteria' [2006] Croatian Yearbook of European Law and Policy 343.

conditions required'.[975] To accede to the EU, a country has to demonstrate that it has achieved 'stability of the institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union'.[976] The Copenhagen criteria were further developed by the Madrid European Council in 1995, where the adjustment of the administrative structure became an added condition for the approximation and effective implementation of the EU *acquis*.[977] The rationale of the Copenhagen Criteria was to minimise the risk of the new entrants becoming politically and economically unstable and to bring European values to CEECs before accession.[978] For this reason, in 1995, the Commission published a White Paper to guide the CEECs countries in preparing to operate under the requirements of the internal market and accept the EU *acquis*.[979] The Copenhagen Criteria together with the White Paper 1995 provided a real momentum in the enlargement process by transforming the enlargement question 'from a theoretical possibility to an agreed goal'.[980]

After a period of conflicts and instability in the Western Balkan countries, in the late 1990s, the EU intensified bilateral relations by introducing the Stabilisation and Association Process (SAP), an integration mechanism designed to bring these countries closer to the EU.[981] The

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[975] European Council, 'Conclusion of the Presidency' (n 34) part 7A (iii).

[976] ibid part 7A (iii).

[977] European Presidency conclusion confirmed:

> the need to make sound preparation for enlargement on the basis of the criteria established in Copenhagen and in the context of the pre-accession strategy defined in Essen for the CCEE; that strategy will have to be intensified in order to create the conditions for the gradual, harmonious integration of those States, particularly through the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment.

European Council, 'Presidency Conclusion' (Madrid, 15 and 16 December 1995) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00400-C.EN5.htm> accessed 27 March 2019

[978] Heather Grabbe, *The EU's Transformative Power: Europeanisation through Conditionality in Central and Eastern Europe* (Palgrave Studies in European Union Politics, Palgrave Macmillan 2006) 10.

[979] Commission 'Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union' (White Paper) COM (1995) 163 final, para 6.3.

[980] Quoted in John O'Brenan, *The Eastern Enlargement of the European Union* (Routledge 2006) 22.

[981] Commission 'The Stabilisation and Association Process for Countries of South-Eastern Europe – Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania' (Communication from the Commission to the Council and European Parliament) COM (1999) 235 final; David Phinnemore, 'The Stabilisation and Association Process: A Framework for European Union Enlargement?' in Arolda Elbasani (ed), *European Integration and Transformation in the Western Balkans: Europeanisation or Business as Usual* (Routledge 2013) 22-35.

primary objective of the strategy was the stabilisation of the region and then the integration into the EU. The SAP covers four components: i) regional dialogue; ii) asymmetrical trade preferences; iii) pre-accession aid, and iv) the stabilisation and association agreement.[982] The cornerstone of the SAP is the contractual relationship between each country and the EU, respectively the SAA.[983] The latter falls under the mixed or associate agreement, where the EU may conclude agreements with one or more third countries establishing 'an association involving reciprocal rights and obligations, common actions and special procedures'.[984] According to the EU, the SAA provides a framework for political dialogue; supports the strengthening of Albanian democracy, rule of law, and the development of its economic and international cooperation through the approximation of its legislation to that of the Union; promotes harmonious economic relations; gradually establishes a Free Trade area and fosters regional cooperation in the areas subject to the agreement.[985]

The SAA contains an approximation clause designed as an instrument for a gradual transposition of the EU *acquis*.[986] The approximation clause encourages third countries (like Albania) to voluntarily harmonise their domestic legislation gradually with the EU law. According to Article 70 (1) SAA:

> The Parties recognise the importance of the approximation of Albania's existing legislation to that of the Community and of its effective implementation. Albania shall endeavour to ensure that its existing laws and future legislation shall be gradually made compatible with the Community acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced.

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[982] Gentjan Skara, 'The Stabilisation and Association Process as an Integration Mechanism for the Western Balkans: The Case of Albania' (LLM Thesis, University of Graz 2014) 11-20.
[983] David Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans' [2003] European Foreign Affairs Review 77.
[984] TFEU, Article 217. International Agreement concluded by the EU can be divided into 2 categories. The first category consists of agreement on which the EU has exclusive treaty-making competence. The second category consists of mixed agreement or associated agreement concluded by on the one side EU and Member states *ex parte* and on the other side, the non-member countries. For more on treaty making competences and effects of associate/mixed agreement see: Andrea Ott, 'Different forms of EC Agreements' in Andrea Ott and Kirstyn Inglis (eds) *Handbook on European Enlargement: A Commentary on the Enlargement Process* (T M C. Asser Press 2002) 205-209; Piet Eeckhout, *EU External Relations of EU Law* (2nd edition, OUP 2011) 212-266; Pieter Jan Kiujper, *et al*., *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP 2013) 105-170.
[985] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declaration [2009] OJ L 107/166, Art 1 (2).
[986] Roman Petrov, 'Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries' [2008] European Foreign Affairs Review 33, 42.

References to the terms *approximation* and *shall endeavour* represent a typical best endeavours clause providing voluntary harmonisation.[987] The voluntary harmonisation of the legislation, as defined by Evans, is a situation 'where a third state adapts its national law to Community law rules which have no binding force in relation to that state and in the framing of which the state may have had no real participation.'[988] In the face of the EU accession process, the best endeavours clause for Albania is a mandatory obligation to approximate its domestic law with the EU *acquis* supported by a strong conditionality. According to the conditionality provision, as stated in the SAA, 'account shall be taken of the progress achieved by the Parties in the approximation of their laws'[989] or 'the Community shall examine periodically whether Albania has indeed introduced such legislation' in its public utility sector.[990] The adoption of the EU *acquis* encourages Albania to adjust its domestic legal system in compliance with the EU standards, in order to fully embrace the 'Union's common value' laid down in Article 2 TFEU and ensure a friendly legal environment and the liberalisation of the market.

Moreover, while in *prima facie* approximation may relate only to the technical process of adoption of the legislation, it has a broader scope covering the legislative process and ensuring proper implementation of the new legislation.[991] This latter aspect has been even more daunting than the approximation of the legislation *per se*.[992]

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[987] Eugeniusz Piontek, 'Central and Eastern European Countries in Preparation for Membership in the European Union – a Polish Perspective' [1996] Yearbook of Polish European Studies 73, 76; Andrew Evans, 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe' [1997] European Law Review 201. Other authors have defined it as 'voluntary adaptation'. see Peter-Christian Müller-Graff, 'East Central Europe and the European Union: from Europe Agreements to a Member Status: a general report' in Peter-Christian Müller-Graff (ed), *East Central Europe and the European Union: from Europe Agreements to a Member Status* (Nomos Verlagsgesellschaft 1997) 33.

[988] Andrew Evans, 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe' [1997] European Law Review 201.

[989] SAA, Art 57 (3).

[990] SAA, Art 74 (2).

[991] Adam Lazowski, 'Approximation of Laws' in Andrea Ott and Kirstyn Inglis (eds) *Handbook on European Enlargement: A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002) 632; Alfred E Kellerman, *et al.*, *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries - Hopes and Fears* (T.M.C. Asser Press 2006).

[992] Bojana Hajdini and Gentjan Skara, 'Lost in Implementation: EU Law Application in Albanian Legal System' [2017] Journal of Legal Studies 43.

The approximation process develops gradually in two stages.[993] During the first stage, starting from the SAA signing date (2009), the approximation focuses on the fundamental elements of the internal market and other important areas. Article 70 (3) SAA provides a list of priority areas for the first phase such as competition, intellectual property, industrial and commercial property rights, public procurement, standards and certification, financial services, land and maritime transport company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities.[994] The remaining part of the EU *acquis* is approximated in the second stage. The approximation is carried out on the basis of a mutually-agreed programme between the Commission and Albania, where all the modalities for the monitoring of the implementation for the approximation of the legislation and law enforcement actions have been defined.[995]

The EU sectorial *acquis* on competition law is explicitly elucidated in Article 71 SAA. The main role of the SAA competition provisions is to reduce and, if possible, eliminate the practices carried out by undertakings that may affect the trade between the EU and Albania. From the EU perspective, the inclusion of this provision in the SAA follows the same logic as that of the competition policy in the EU market policy ensuring an open market that could be achieved through the approximation of the domestic legislation of candidate countries.[996] Being drafted in line with the EU competition law, Article 71 SAA 'envisages extensive coordination of competition standard'[997] and reflects conditionality as laid down in the Copenhagen criteria that could be translated into the following elements: i) transposition of the legislative framework with respect to competition and state aid; ii) an adequate administrative capacity and iii) effective

[993] SAA, Art 6.
[994] It should be noted that the scope of approximation activities is much wider than areas enumerated in Article 70 of SAA due to the dynamic character of EU *acquis*. On the dynamic character of EU *acquis* and its wider understanding see Roger J Goebel, 'The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden' [1994] Fordham International Law Journal 1093, 1140-1154; Loïc Azoulai, 'The *Acquis* of the European Union and International Organisations' [2005] European Law Journal 196; Antje Wiener, 'The Embedded *Acquis* Communautaire: Transmission Belt and Prism of New Governance' [1998] European Law Journal 294; Roman Petrov, 'The Dynamic Nature of the *Acquis Communautaire* in EU External Relations' [2006] European Review of Public Law 741; Roman Petrov, 'The External Dimension of the *Acquis Communautaire'* (EUI MWP 2007/02).
[995] SAA, Article 70 (3) (4).
[996] Claus-Dieter Ehlermann, 'The International Dimension of Competition Policy' [1993] Fordham International Law Journal 833, 841; Maher (n 708) 239; Papadopoulos (n 66) 95-100.
[997] Jean-Christophe Maur, 'Exporting Europe's Trade Policy' [2005] The World Economy 1565, 1574.

enforcement of the *acquis* in all areas of competition policy.[998] In a nutshell, Articles 70 and 71 SAA introduces Albania with the obligation to approximate the competition law and establishes an independent authority with appropriate powers to ensure a comprehensive application of competition rules.

The SAA competition provision (Art 71) borrows from the competition rules delineated in the TFEU and explicitly clarifies that any practices defying Article 71 SAA shall be assessed on the criteria laid down in the EU competition law, particularly Articles 101, 102, 106 and 107 TFEU and the interpretative instruments adopted by the EU institutions. The adherence to the 'interpretative instruments' is an open clause and includes even the ones not enforced when the SAA was signed.[999] These 'criteria' and 'interpretative instruments' include the legislation, the case-law of the Court of Justice and the General Court, the Commission's decision in competition cases and various soft law measures, namely, the Commission Guidelines and Notices. Consequently, the Albanian courts are obliged to directly apply all primary and secondary EU competition rules, including the interpretation adopted by the Commission and the CJEU.

According to Article 71 (1) SAA, the following shall be incompatible with their functioning when interstate is affected: i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;[1000] ii) similarly incompatible is the abuse of a dominant position by one or more undertakings in the territories of the EU or of Albania either substantially or as a whole;[1001] and iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.[1002]

[998] Hölscher and Stephan (n 142) 322-323.
[999] Cremona argues that the clause 'interpretative instruments adopted by the Community Institutions' includes both hard and soft law and also judgement of the EUCJ. In addition, she adds that the clause has dynamic character meaning that candidate countries should take into considerate future secondary legislation that EU institutions shall adopt. Marise Cremona, 'State Aid Control: Substance and Procedure in the Europe Agreements and the Stabilisation and Association Agreements' [2003] European Law Journal 265, 269-271.
[1000] SAA, Art 71 (1) (i).
[1001] SAA, Art 71 (1) (ii).
[1002] SAA, Art 71 (1) (iii).

Additionally, Article 71 is a far-reaching provision since it includes the establishment of two law enforcement institutions. The first institution shall be responsible for antitrust and abuse of the dominant position,[1003] whereas the second institution shall be responsible for state aid. The latter shall have the power to authorise State aid schemes and individual aid grants as wells as to order the recovery of State aid that has been unlawfully granted.[1004] Before the establishment of the State Aid Authority, Albania has to prepare a comprehensive inventory of aid schemes and align such aid with the EU requirements within exactly 4 years from the entry into force of the SAA.[1005] Both parties shall ensure transparency in the area of State aid including the delivery of regular annual reports on State aid.[1006]

6.2.2. SAA Status, the effects in the Albanian Legal System and Application by National Courts

The Albanian Constitution adopted in 1998 and last amended in 2016, as a modern constitution, contains Articles on the ratification of the international agreements, their effects on the domestic legislation and the delegation of power to International Organisations in part seven.[1007] Under Article 116 (1), which lays down the sources of law in the Albanian legal system, the ratified international agreements are listed as the second in terms of importance, immediately after the Constitution. Various academicians conceded that such order constitutes a formal hierarchy of the sources of law in the Albanian legislation for two main reasons. Firstly, Article 4 of the Constitution establishes an undisputed position of the Constitution as the highest law in the territory of the Republic of Albania. Secondly, according to Article 122 (2), 'an international agreement that has been ratified by law has an authority superior to the laws of the country that are not compatible with the agreement.'[1008] The two most important Articles with regard to the international agreement are presented below.

[1003] SAA, Art 71 (3).
[1004] SAA, Art 71 (4).
[1005] SAA, Art 71 (6). For an overview of state aid in Albania see Fjoralba Caka, 'Nocioni i Ndihmës Shtetërore që Çrregullon Tregun e Lirë dhe Konkurrencën sipas Legjislacionit dhe Praktikës Ndërkombëtare' (PhD Thesis, University of Tirana 2019)
[1006] SAA, Art 71 (5).
[1007] Constitution of the Republic of Albania adopted in 1998 as last amended on 2016 [2016] OJ 138.
[1008] For more on position of International agreement in Albanian legal system see Luan Omari and Aurela Anastasi, *E Drejta Kushtetuese* (ABC 2010) 47; Gentian Zymberi and Semir Sali, 'The Place an Application of International Law in Albanian Legal System' in Siniša Rodin and Tamara Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer-Verlag Berlin Heidelberg 2015) 81 – 108; Fjoralba Caka, 'The Application of the

Article 122
1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.
3. The norms issued by an international organisation have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organisation is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein.

Article 123
1. The Republic of Albania delegates to international organisations state powers for specific issues on the basis of international agreements.
2. The law that ratifies an international agreement as provided in paragraph 1 of this Article is approved by a majority of all members of the Assembly.
3. The Assembly may decide that the ratification of such an agreement be done through a referendum.

The Albanian Constitution lacks a specific clause on the applicability of EU law. In 2014, an initiative to reform the judiciary system was initiated.[1009] During *travaux preparatoires* of the Justice Reform, the High Level Expert Group proposed a draft amendment of the Constitution suggesting, *inter alia*, to include a subparagraph in Article 122 (2) stipulating that 'The EU law shall prevail over the domestic law of the Republic of Albania' and deleting the third paragraph which regulates the status of norms produced by the International Organisation.[1010] The rationale behind such a proposal was not to make subsequent changes to the Constitution after Albania's accession to the EU.[1011] However, in the end, it was decided not to reflect the supremacy of the EU law on the Albanian Constitution on the assumption that Albania is not yet an EU-Member State.

International and European Union Law by National Courts in Albania' in Goran Koevski, Veronika Efremova and Christian Athenstaedt (eds), European Union Law Application by the National Courts of the EU Membership Aspirant Countries from South – East Europe (Centre for SEELS 2014) 28-36.

[1009] Law 96/2014, 'On the Establishment of a Special Parliamentary Commission on Justice System Reform' [2014] OJ 189.

[1010] 'Consolidated Version of the Constitution of the Republic of Albania Integrating the Draft Constitutional Amendments'
<http://www.euralius.eu/old/images/Justice-Reform/Amendamentet-Kushtetuese-24.09.2015_AL.pdf > Article 11, accessed on 1 May 2019.

[1011] Explanatory Note on the Constitutional Amendments, < http://www.euralius.eu/old/images/Justice-Reform/Material-shoqerues-i-projektamendamenteve-kushtetuese.pdf> point 1, accessed 7 August 2019; Opinion of the Experts of Opposition in Connection to the Constitutional Amendments, (Opinion No 2) <http://www.euralius.eu/old/images/Justice-Reform/Opinion-i-eksperteve-te-opozites-lidhur-me-amendamentet-kushtetuese.pdf> point III-2(1), accessed 7 August 2019.

The applicability of the EU law, either directly or indirectly, needs to be established by the provisions governing the status of the international agreement, especially regarding the SAA. For an international agreement to be part of the Albanian legal system, it must, firstly, be ratified by the law[1012] and, secondly, published in the Official Journal. Only if these two conditions are met, can the ratified international agreement be directly applicable and have supreme authority over the domestic law. In *Van Gend en Loos*, the ECJ held that the EEC 'constitutes a new legal order of international law'[1013] and, since then, the EU law has evolved into a unique supranational legal order.[1014] Similar to the international agreements ratified by the Republic of Albania in May 2009, the SAA is directly applicable after entering into force[1015] and has supremacy over the domestic law.[1016]

Another issue concerns the ability of individuals – either EU or Albanian citizens – to be able to invoke the provisions of the SAA before national courts. The SAA was introduced as an instrument to bring Albania closer to the EU. Therefore, Albania has the obligation to approximate its existing and future legislation and ensure its proper implementation. It is generally agreed by various authors that the European Agreement (hereafter cited as EA) has served as a bedrock for the SAA[1017] and the major difference between the EA and the SAA relates to the regional cooperation dimension and the stages of the approximation process.[1018] Both the EA and SAA have identical provisions of fundamental freedoms except the time limit of implementation. Similar to the EA, the SAA contains the harmonisation clause that imposes the obligation to

[1012] The Parliament is the main body responsible vested with the power for ratification of the International Agreement. Article 121 (1) provides an exhaustive list of agreements that can be exclusively ratified or denounced by law from the Parliament. With regard to publication, no special procedure is laid down in the Constitution. Article 117 (3) provides that 'international agreements that are ratified by law are promulgated and published according to the procedures that are provided for laws.'
[1013] *Van Gend en Loos v Administratie der Belastingen* (n 50).
[1014] J H H Weiler, 'The transformation of Europe' [1991] Yale Law Journal 2403.
[1015] Constitution of the Republic of Albania adopted in 1998 as last amended in 2016 [2016] OJ 138, Art 122 (1).
[1016] ibid art 122 (3).
[1017] Steven Blockmans and Adam Lazowski, 'The European Union and its neighbours: questioning identity and relationships' in Steven Blockmans and Adam Lazowski (eds), *The European Union and its neighbours: a legal appraisal of the EU's policies of stabilisation, partnership and integration* (TMC Asser Press 2006) 3.
[1018] Phinnemore (n 983) 77; Joseph Marko and Judith Wilhelm, 'Stabilisation and Association Agreements' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Enlargement: a Commentary on the Enlargement Process* (T M C Asser Press 2002) 170-174; Skara (n 982) 52-54.

interpret the national law in the light of the EU law.[1019] So far, the ECJ has not dealt with a preliminary ruling on such interpretation. However, in the case of associated agreements concluded with the CEECs countries, the ECJ issued several judgments with regard to the direct effects of the EA provisions. Therefore, the ECJ decisions on the direct effects of the European Agreement provision have an important role to clarify this issue.

In *Demirel*, where the ECJ decided on the scope and nature of the mixed agreement, the Court ruled that:

> a provision in an agreement concluded by the community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[1020]

Proceeding from well-known established formula of direct effects in *Demirel*, in several cases such as *Gloscuk*,[1021] *Kondova*,[1022] *Jany*,[1023] *Barkoci and Malik*,[1024] the ECJ has ruled that provisions of the EA on the right of establishment have direct effects, and the nationals of the respective countries can rely on those provisions in the EU Member States courts even in the period of pre-accession. These decisions indicate that the EA provisions are capable of entailing direct effects once firstly, they fulfil the criteria established in *Demirel* and *Sürül* and secondly, the European Agreement is ratified in accordance with the requirement of the CEECs Constitutions. In the same vein, the SAA provisions are capable of having direct effects.

[1019] Mislav Mataija, 'The Unfulfilled Potential of Stabilisation and Association Agreements before SEE Courts' in Siniša Rodin and Tamara Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer-Verlag Berlin Heidelberg 2015) 12.

[1020] Judgment of 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd.*, C-12/86, ECLI:EU:C:1987:400, para 14. This approach was reaffirmed in a subsequent Judgment of 4 May 1999, *Sema Sürül v Bundesanstalt für Arbeit,* C-262/96, ECLI:EU:C:1999:228, para 60.

[1021] Judgment of 27 September 2001, *The Queen and Secretary of State for the Home Department ex parte v Wieslaw Gloszczuk et Elzbieta Gloszczuk,* C-63/99, ECLI:EU:C:2001:488.

[1022] Judgment of 27 September 2001, *The Queen and Secretary of State for the Home Department ex parte v Eleanora Ivanova Kondova*, C-235/99, ECLI:EU:C:2001:489.

[1023] Judgment of 20 November 2001, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, C-268/99, ECLI:EU:C:2001:616.

[1024] Judgment of 27 September 2001, *The Queen and Secretary of State for the Home Department ex parte v Julius Barkoci and Marcel Malik*, C-257/99, ECLI:EU:C:2001:491.

During the pre-accession period, the major challenge faced by the CEECs and the national courts was whether legislative harmonisation 'should be accompanied by judicial harmonisation'.[1025] Judicial harmonisation means that 'the national courts should apply the interpretation of the European Court of Justice and take account of the EU legislation when applying the provisions of domestic laws or the provisions of Europe Agreements'.[1026] The CEECs pre-accession experience has shown a 'Euro-friendly approach' of the national courts in the interpretion and application of the domestic legal system.[1027]

Likewise, since April 2009 when the SAA entered into force, the Constitutional Court and Albanian Courts[1028] have adopted a 'Euro-friendly approach' to interpret the national law in the light of the EU secondary law or SAA provisions. Pursuant to the direct applicability of the SAA as an international agreement, in the Decision 24/2009, the Constitutional Court invoked directly the SAA standstill clause provision (Art 33) and other restrictive quantitative restrictions on import or measures having equivalent effects (Art 42) against a decision of the Council of Ministers in terms of quality standards of diesel oils.[1029] The Council of Ministers imposed a ban on the import of certain products and at the same time considered domestic-produced diesel oils as more favourable compared to imported products.[1030] In assessing whether the restriction of economic freedom imposed by the Council of Ministers' Decision complies with the SAA provisions, the Constitutional Court referred to Article 33 (2) SAA which explicitly stipulated that: 'no new quantitative restrictions on imports or exports or measure having equivalent effect shall be

[1025] Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP 2005) 52.
[1026] ibid 52.
[1027] ibid 52-56; Zdeněk Kühn, 'European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries' [2005] Croatian Yearbook of European Law and Policy 55; Michal Bobek, 'A New Legal Order, or a non-existent one? Some (Early) Experiences in the Application of EU Law in Central Europe' [2006] Croatian Yearbook of European Law and Policy 265; Yvonne Goldammer and Elzé Matulionyté, 'Towards an Improved Application of European Union Law in Lithuania: The Examples of Competition Law and Intellectual Property Law' [2007] Croatian Yearbook of European Law and Policy 307.
[1028] Identifying cases in the Court of First Instance and the Court of Appeal has been difficult due to the fact that decisions are not published online. In some decisions identified, EU law is applied as a persuasive source of law to support the court's decision. For instance, in one decision concerning an ending employment contract of a person working as administrative assistant near Embassy of the Republic of Kosovo, the Court of First Instance of Tirana made reference to the case-law of CJEU C-154/11 *Mahamdia* para 49 without arguing on which legal ground has been cited. Judgement of 28 December 2016, Court of First Instance of Tirana, No 8994. In another decision, the Court of First Instance of Pogradec held that custom practice is in line with the documents and type of product laid down in Commission Regulation 1810/2004. Judgement of 20 March 2013, Court of First Instance of Pogradec, No 311-204.
[1029] Judgment of 24 July 2009, Albanian Constitutional Court, V-24/09, [2009] OJ 119.
[1030] Decision of Council of Minister 52/2009, 'On the quality of diesel produced from the refining of crude oil extracted in the territory of the Republic of Albania and marketed for road vehicles and generators' [2009] OJ 5.

introduced, nor shall those existing be made more restrictive, in trade between the Community and Albania.' Furthermore, the Constitutional Courts rejected the claimants' argument according to which bans were justified on Article 42 'Restrictions authorised'. On the other side, the claimants failed to prove that such a measure does not constitute a means of arbitrary discrimination or a disguised restriction on trade. While the Constitutional Court adopted a 'Euro-friendly approach', it did not address the basic question about the reasons the SAA provisions need to be applied. Furthermore, the Constitutional Court neither looked at the substance of Articles 34 and 36 TFEU for a consistent interpretation nor elaborated further the notion of quantitative restrictions or measures having an equivalent effect with the quantitative restriction. It was the first time the Constitutional Court applied directly the SAA provisions and rejected to apply the national law.

The Constitutional Court has also considered the secondary sources of the EU law to make a consistent interpretation of the national law. In Decision 3/2010,[1031] concerning the constitutionality of the law 'On statutory audit, the organisation of the profession of the statutory auditors and chartered accountants', the Constitutional Court took into consideration the Directive 2006/43/EC 'On statutory audits of annual accounts and consolidated accounts' to justify the rejection of the claim that the national law was unconstitutional. The claimant – the Professional Association of Economists (*Organizata Profesionale e Ekonomistëve*) – claimed that Law 10091/2009[1032] 'On legal auditing and the organisation of the profession of the statutory auditors and chartered accountants' was in violation with the EU law, since it established a monopolistic situation by creating an Institute of Authorised Auditors (*Instituti i Ekspertëve Kontabël të Autorizuar*) which interfered in the exercise of the auditors' profession and discriminated foreign auditors. That being said, Law 10091/2009 must be declared unconstitutional. The Constitutional Court referred to the Directive 2006/43/EC which regulates the profession of auditing. The Constitutional Court found no signs of violation of professional independence by the state supervision of auditors because, *inter alia*, such supervision complies with Article 32 of the Directive 2006/43/EC. Additionally, in Decision 56/2016, the Constitutional Court assessed

[1031] Judgment of 5 February 2010, Albanian Constitutional Court, V-3/10, [2010] OJ 17.
[1032] Law 10091/2009, 'For Legal Auditing, Organisation of the Profession of Registered Accounting Expert and Certified Accountant' [2009] OJ 36.

whether the restriction of ownership foreseen in Article 62 (3) of Law 97/2013[1033] complies with the Directive 2010/13.[1034] In its reasoning, the Constitutional Court found that the national measures, specifically Article 62 (3), fail to comply with the Albanian obligation to harmonise its domestic law since the Directive 2010/13 does not require any restriction of ownership from the companies operating in the media.[1035] In both these decision, the Constitutional Court did not provide any clarification i) why relied on the EU law secondary sources to support its judgment, and ii) the impact of the EU law secondary sources on Albanian legal system.

The tendency to adopt a 'Euro-friendly approach' has also been followed by the High Court. Interestingly enough, in the first case, the High Court referred Regulation 1182/71[1036] to interpret some provisions of the Civil Code. Regulation 1182/71 was cited just as an international agreement without clarifying the reasons why it was considered relevant.[1037] In another case, the High Court had to rule on the issue whether it is under the Albanian courts' jurisdiction to review an application for the interim injunction when the parties have an agreement for another jurisdiction. The High Court cited Regulation 44/2001[1038] arguing that 'despite the fact that our country is not yet a member of the European Union with all the rights pertaining thereto, directives (regulation) adopted by them are guiding for our legal practice'.[1039] Only a few days later, did the High Court acknowledge the importance of the process of approximation of the existing Albanian legislation with the *acquis*. The High Court stated that:

> Our country should strive to ensure that its existing and future legislation converge move gradually towards alignment with the *acquis communauitaire*. Albania shall ensure that the existing and future legislation be applied and imposed properly (Article 70 of the Law No

[1033] Article 62 (3) reads as follow: 'No physical or juridical person, local/national or foreign, may have more than 40 percent of the total capital of a joint-stock company, which possesses a national license of audio broadcasting or a national license of audiovisual broadcasting.' Law 97/2013, 'On audio and audio-visual media services in the Republic of Albania [2013] OJ 37/1497.
[1034] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions laid down by Law, Regulation or Administrative Action in the Member States Concerning the Provision of Audiovisual Media Services [2010] OJ L95/1.
[1035] Judgment of 27 July 2016, Albanian Constitutional Court, V-56/16, [2016] OJ 152, paras 52-53.
[1036] Regulation No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time [1971] OJ L 124/1.
[1037] Judgment of 27 March 2012, High Court, No 2, [2012] OJ 106. In a later unified administrative decision, High Court reconfirmed, again, interpretation of the domestic provision in the light of Regulation 1182/71 (n 1036). Judgement of 29 February 2016, High Court, No 1, [2016] OJ 93, para 40.
[1038] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.
[1039] Judgment of 11 January 2011, High Court, No 22, [2011] OJ Special Edition, 125.

9590, date 27.07.2006 'On the Ratification of the Stabilisation and Association Agreement with Albania and European Communities and its member states.[1040]

There has been a relatively increasing attitude to embrace the 'Euro-friendly approach'. The High Court has relied on the CJEU cases to interpret the national legislation. In one case, the High Court referef to *Pupino* case[1041] which argues the obligation of the Member States to interpret their procedural criminal law in the light of the EU law.[1042] Nevertheless, the High Court failed to explain the reasons for relying on the CJEU cases and its impact in candidate countries.

While the application of the EU law in the pre-accession phase depends on the judges' 'European convictions', the competition law has been considered as a privileged area where the EU law including the Commission's soft laws should be applied even in terms of pre-accession.[1043] In addition to the obligation stemming from the approximation clause (Art 70 SAA), Article 71 (2) SAA requires an interpretation of the national competition law in the light of the criteria arising from the application of the EU competition rules applicable – in particular from Articles 101, 102, 106 and 107 TFEU and the interpretative instruments adopted by the Community institutions – soft laws of the Commission and the ECJ decisions. Hence, Article 71 SAA has direct effects, and the Albanian courts are obligated to rely upon the EU competition law and interpretative instruments adopted by the Community institutions to interpret the national competition law. This interpretation has been confirmed by the Constitutional Court in the Decision V-14/14 where:

[1040] Judgment of 17 January 2011, High Court, No 1, [2011] OJ 88-e.
[1041] Judgment of 16 June 2005, *Pupino*, C-105/03, ECLI:EU:C:2005:386.
[1042] Judgment of 27 April 2015, High Court, No 1, [2015] OJ 142, para 48.
[1043] Experience from CEECs countries and other Western Balkan countries (Bosnia and Herzegovina; North Macedonia; Serbia and Croatia) reveal case practice assessing restrictive agreement in the light of EU law or Commissions soft laws. Kühn (n 1027) 55; Zlatan Meškić and Darko Samardžić, 'The Application of EU Law in Bosnia and Herzegovina' in Goran Koevski, Veronika Efremova and Christian Athenstaedt (eds), *European Union Law Application by the National Courts of the EU Membership Aspirant Countries from South – East Europe* (Centre for SEELS 2014) 61, 69 – 70; Iris Goldner Lang and Mislav Mataija, 'Application of EU law by Croatian Courts and Relevant Constitutions Provisions' in Goran Koevski, Veronika Efremova and Christian Athenstaedt (eds), *European Union Law Application by the National Courts of the EU Membership Aspirant Countries from South – East Europe* (Centre for SEELS 2014) 91, 95 – 96; Sašo Georgievski, Ilina Cenevska and Denis Prešova, 'Application of the Law of the European Union in the Republic of Macedonia' in Goran Koevski, Veronika Efremova and Christian Athenstaedt (eds), *European Union Law Application by the National Courts of the EU Membership Aspirant Countries from South – East Europe* (Centre for SEELS 2014) 99, 122; Radovan D Vukadinović, Dobrosav Milovanović, Dejan Janićijević and Vuk Cucić, 'Application of EU Law by Serbian Courts Pre-Accession Issues' in Goran Koevski, Veronika Efremova and Christian Athenstaedt (eds), *European Union Law Application by the National Courts of the EU Membership Aspirant Countries from South – East Europe* (Centre for SEELS 2014) 141, 150.

> 31. The Court notes that under the Stabilisation and Association Agreement, practices contrary to Article 71 (competition and other economic provisions) are assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular Articles 81 82, 86 and 87 of the Treaty establishing the European Community, and interpretative instruments used by Community institutions. In these circumstances, as in previous judgments, the Court finds it appropriate to refer to the jurisprudence of the European Court of Justice (ECJ), regarding the application of competition rules in compliance with this Agreement.[1044]

Even in this case, the Constitutional Court failed to clarify the recourse on the SAA provision despite the fact that Article 71 (2) explicitly refers to the interpretation of the national competition law in light of the EU competition law. Moreover, the Constitutional Court language – 'in these circumstances, as in previous judgment, the Court finds it appropriate' – casts doubts on whether the reference to the CJEU's decision stems from Article 71 (2) SAA or because of the harmonisation clause.

6.3. Alignment of Albanian Competition Law with EU competition law

The regulatory alignment of the Albanian competition law with the EU standards has been developed gradually. Depending on changes as a result of the Europeanisation process, be either on legal normative or establishing an independent institution framework, various authors divide the development of competition law into 3 periods.[1045] The first period, 1990 – 2003, reflects the transition from the planned economy toward a market economy and institutionalisation of competition policy in Albania with the Law 8044/1995, which paved the way toward the establishment of the conditions for free competition. The second period, 2003-2009, coincides with the adoption of the new Law 9121/2003 and the Albanian efforts to start and conclude the negotiation of the SAA, which entered into force in April 2009. The enactment of Law 9121/2003 was characterised by a voluntary willingness, since the SAA had not entered into force yet. The

[1044] Judgment of 21 March 2014, Albanian Constitutional Court, V-14/14, [2014] OJ 50.

[1045] ACA in the first 'National Competition Policy' published in 2006 has divided in three periods. The first period, from the 1990s until 1995, marks the adoption of an open market policy. The second period reflects the period in which Law 8044/1995 as amended was in force. The last period includes from 2003 onwards when the new Law 9121/2003 was enacted. ACA, 'National Competition Policy' (2006) <http://www.caa.gov.al/uploads/publications/POLITIKA_aca.pdf> accessed 3 April 2019. Bojana Hajdini, 'The impact of Europeanisation of Normative and Institution Building in Albania: The Case of Competition Law' [2018] SEE Law Journal 30, 33; Gentjan Skara and Bojana Hajdini, 'The Adjustment of Albanian Competition Law with the EU Competition Law' (the Challenges and Perspectives of Private Law, International Scientific Conference, Tirana, 20 – 21 October 2017) 281-294.

third period, 2009-ongoing, echoes the obligation stemming from Articles 70 and 71 of SAA to approximate the competition law within the five years from the moment of entry into force. The remaining section provides a historical development of the Albanian competition law as a result of the EU legal pressure to approximate its domestic legislation and establish an independent institution to enforce competition rules.

6.3.1. From Centralised to an Open Market Economy: The Need for a Competition Law

After the Second World War, Albania established, at different periods, relations with Communist countries such as Yugoslavia, the Soviet Union and China.[1046] Due to the political party orientation, claiming Albania as the only real Communist country in the world, the relations with these countries were brought to an end on the grounds of their deviation from the pure communist ideology.[1047] In 1976, the new Constitution proclaimed 'Marxism and Leninism' as the official ideology and prohibited private ownership.[1048] The new regime was characterised by high economic concentration in the hands of the State empowered to plan, supervise and develop the whole economy and social life based on a unique general plan.[1049] Article 23 of the 1976 Constitution recognised as private property only some personal belongings and people's earnings from their salaries. The State owned exclusively all means of production[1050] and had a monopoly over trade.[1051] Relying on the principle enshrined in Article 14 'relying on our own forces', Albania had the toughest communist regime in the world.[1052] By the end of the communist regime, Albania was one of the poorest countries in the world.

Once the communist regime fell, the new pluralist Parliament adopted Law 7491/1991 'On Main Constitutional Provisions' which established the fundamental principles and basic

[1046] Elizabeth Pond, *Endgame in the Balkans: Regime Change, European Style* (Brookings Institution Press 2006) 194-196.
[1047] Miranda Vickers, *The Albanians: A Modern History* (I B TAURIS 2001) 170-203
[1048] Law 5506/1976, 'Constitution of Socialist Republic of Albania' Arts 3 and 16 (hereafter cited as Constitution of 1976).
[1049] Constitution of 1976, Art 25.
[1050] Constitution of 1976, Art 16.
[1051] Constitution of 1976, Art 27.
[1052] After cutting of relations with communist countries, Albania become an isolated county and proclaimed in Article 14 of 1976 Constitution that 'In building socialism, the People's Socialist Republic of Albania relies heavily on its own forces'.

institutions toward a market economy.[1053] Private ownership was introduced along with private initiative,[1054] followed by a decree guaranteeing the protection of the private property and privatisation of the state undertaking.[1055] With some technical assistance from the International Monetary Fund (IMF) and the World Bank (WB), structural reforms toward liberalisation were carried out by the Albanian governments of the mid-1990s consisting of liberalisation of prices, balancing the budget deficit, establishing a new banking system and currency convertibility; privatisation and trade liberalisation.[1056]As a result, Albania made impressive economic progress, achieving one of the fastest rates of GDP annual growth in Europe: 9.4 percent in 1994, 8.9 percent in 1995, and 9.1 percent in 1996.[1057] As the Albanian economy shifted toward a market economy, anti-competitive practices and conducts started to appear as a threat for a free and competitive market.[1058]

In order to prevent future deregulation of the market and to create a legal infrastructure to support the market economy, in 1995, Albania enacted the first competition law which laid down the foundations for the creation of a legal framework and paved the way toward the institutionalisation of competition policy.[1059] Law 8044/1995 was modelled in line with the German Law 'On the Protection of Competition', guided by 'a "step-by-step approach", which aimed to introduce basic rules with a low level of sanctions at the initial phase of transition'.[1060] Its main purpose was to define the rules of market players, their rights and obligations in the conditions of fair competition.[1061] According to Article 2, the scope of the application included

[1053] Law 7491/1991, 'For Main Constitutional Provisions' [1991] OJ Special Edition.
[1054] Law 7491/1991, Arts 10 and 11.
[1055] Decree 7476/1991, 'For Permitting and Protection of Property and Private Activity' [1991] OJ 3.
[1056] Gramoz Pashko, 'Obstacles to Economic Reform in Albania' [1993] Europe-Asia Studies 907; Marta Muço and Luljeta Minxhozi, 'The political and economic transformation of Albania' [1992] The International Spectator: Italian Journal of International Affairs 95; Marta Muço, 'Economic transformation in Albania' [1996] the International Spectator: Italian Journal of International Affairs 65; Ian Jeffries, *Eastern Europe at the Turn of the Twenty-first Century: A Guide to the Economies in Transition* (Routledge 2002) 101 – 116; Tjaša Redek, Fatmir Memaj, Janez Prašnikar and Domen Trobec, 'Albania: Two Decades of Economic Development at a Glance' in Janez Prašnikar, Tjaša Redek and Fatmir Memaj (eds), *Albania: the Role of Intangible Capital in Future Growth* (Ljubljana, Faculty of Economics 2012) 4.
[1057] UNCTAD, *Voluntary Peer Review of Competition Law and Policy: Albania* (UN 2015) 9.
[1058] Jonid Kazani, 'Aspekte Ligjore të së Drejtës së Konkurrencës dhe Konkurrenca në Sistemin Elegtroenergjitik Shqiptar' (PhD Thesis, University of Tirana 2015) 87
[1059] Law 8044/1995, 'For Competition' [1995] OJ 27 (hereafter cited as Law 8044/1995).
[1060] Pranvera Këllezi, 'Albania: Introducing competition law' [2009] Horizons | Concurrences 1.
[1061] Law 8044/1995, Art 1.

both undertakings that operate within the territory of the Republic of Albania and outside if their conduct affected the domestic market.

Law 8044/1995 contained 69 Articles and included issues regarding antitrust rules, unfair competition, rules on consumer protection and numerous sectorial exemptions. The main characteristics of Law 8044/1995 were as follows. First, the dominant position in the market was forbidden and, therefore, companies were obliged to split in, so, that newly-established companies should acquire economic independence and maintain their competitiveness.[1062] Second, Law 8044/1995 forbid illegal acts against the consumer (Arts 27 – 36) and competitor (Arts 37 – 42). Third, Law 8044/1995 provided numerous sectorial exemptions in the sectors of: i) agriculture, forest and food;[1063] ii) public services companies such as electric energy, gas and water;[1064] iii) telecommunications, railways and companies of aviation and shipping in the case that prices or other terms of contracts require a public approval or if their activity exceeds national borders;[1065] iv) banks and insurance companies;[1066] and v) copyright companies.[1067] Fourth, the Law 8044/1995 established the Economic Competition Department, a dependent institution operating under the authority of the Minister of Economic Cooperation and Trade, responsible for the protection of competition.[1068] The Economic Competition Department had investigative power upon a formal request by merchants, consumers and their associations according to their interest.[1069] Fifth, the Law 8044/1995 recognised the right of compensation for damages caused as a result of an infringement of competition rules.[1070] District courts were competent for claims for damages.[1071] Finally, Article 67 of Law 8044/1995 stipulated fines for companies or individuals that infringe the provisions on competition. Fines were low-ranging, from 10.000 ALL to 50.000 ALL.[1072]

[1062] Law 8044/1995, Art 5. The split-up process and registration of newly independent companies are regulated by Arts 6-15.
[1063] Law 8044/1995, Art 51.
[1064] Law 8044/1995, Art 52.
[1065] Law 8044/1995, Art 53.
[1066] Law 8044/1995, Art 54.
[1067] Law 8044/1995, Art 55.
[1068] Law 8044/1995, Art 57.
[1069] Law 8044/1995, Art 60 (1).
[1070] Law 8044/1995, Art 62 (1).
[1071] Law 8044/1995, Art 64.
[1072] Law 8044/1995, Art 67 (1) and (2).

Law 8044/1995 was amended only once by the Law 8403/1998.[1073] The amendment consisted only in asserting the third paragraph in Article 39 related to the price of the newspapers and magazines not to be sold lower than their production cost. Meanwhile, in this period, the Albanian Parliament adopted the first post-communist constitution.[1074] Article 11 (1) of the Constitution enshrines an economic system in Albania, which specifies that the economic system of Albania is based on private and public property, as well as on a market economy and on the freedom of economic activity.

During 1996-2001, Albania was characterised by an unstable competition structure due to the legacy of extreme central planning for decades. Typically, transition economies struggle with inadequate legal, economic and institutional framework policies, skills base and administrative capacity.[1075] While, Law 8044/1995, as amended, created the basis for a competition policy in Albania, in practice, it was considered 'as insufficiently applied' and its 'implementation, extremely weak'.[1076] Most of the provisions remained only in paper and were not applied in practice.[1077] In 2002, the first EC Commission Progress report on Albania concluded that:

> the development of competition policy in Albania remains at an early stage despite the existence of basic legislation since 1995. Implementation is weak, due in particular to the clearly insufficient resources devoted to this area. [Although the law provides for the establishment of an independent Competition Office, this structure does not yet exist and competition issues are handled by the Department of Economic Competition within the Albanian Ministry of Economy]. This department remains poorly staffed and, as a result, enforcement of the law is extremely limited.[1078]

These findings were confirmed by the Competition Directorate in OECD Global Forum on

[1073] Law 8403/1998, 'Amendment to Law no. 8044/1995 *On Competition*' [1998] OJ 23 (hereafter cited as Law 8044/1995 as amended).
[1074] Law 8417/1998, 'Constitution of Republic of Albania' [1998] OJ 28.
[1075] R Shyam Khemani, 'Competition Law and Policy in the Transitional Market Economies' in Sübidey Togan and V N Balasubramanyam (eds), *Turkey and Central and Eastern European Countries in Transition Towards Membership of the EU* (Palgrave Macmillan 2001) 244.
[1076] Irena Dajkovic, 'Competing to Reform: An Analyses of the New Competition Law in Albania' [2004] European Competition Law Review 734, 736; Këllezi (n 1060) 1.
[1077] Teuta Baleta, *et al.,* 'Dominimi i Tregut Bankar Shqiptar' (Banka e Shqipërisë 2000) 31 - 32; UNCTAD (n 1057) 13.
[1078] Commission 'Albania: Stabilisation and Association Report 2002' (Commission Staff Working Paper) COM(2002) 163 final, 24.

Competition held on 12 and 13 February 2004.[1079] Major deficiencies in enforcing the Law 8044/1995, as amended, were primarily related with the lack of an appropriate legal framework to provide adequate power in the investigation and imposing sanctions. Pursuant to Article 60 (1), an investigation could be opened by the Economic Competition Department only on the basis of a formal request. The Economic Competition Department did not have the power to initiate an investigation *ex officio*. Moreover, the Economic Competition Department was not empowered to enter into the premises to seize the documents to be accepted as evidence for the case without a court order.[1080] What is more, Articles on prohibition of horizontal and vertical agreements or on fixing prices were not applicable in numerous important economic activities due to the exemptions foreseen in Articles 51-55. Another weakness was related to the lack of an independent institution. According to Article 57, the Economic Competition Department was operating under the authority of the Minister of Economic Cooperation and Trade which was also responsible for the privatisation process.[1081] Third, the Albanian competition structure lacked sufficient and qualified staff. Fourth, there was an obvious lack of financial resources in conducting surveys for market data collection due to the high level of informality. At that time, the informal economic sector was estimated about 30%.[1082]

6.3.2. Voluntary Harmonisation of Competition Law with the EU Competition Acquis

Problems posed by Law 8044/1995, as amended, created favourable conditions to increase the awareness for the importance of competition rules. The new law had to consider the revision of numerous sectorial exemptions and establish an independent competition authority.[1083] Such a situation coincided with the perspective of EU membership given for Western Balkan countries in

[1079] Albanian Competition Department, 'Challenges/Obstacles faced by Competition Authorities in Achieving Greater Economic Development through the Promotion of Competition: Contribution from Albania' (OECD Global Forum on Competition 12-13 February 2004)
<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/24742637.pdf> accessed on 26 March 2019.
[1080] Law No. 8044/1995, Art 59 (4).
[1081] According to Këllezi, Law 8044/1995 remained unenforced due 'low incentive to break up monopolies before the privatisation process' because state firms possessing a strong position in the market were able to get more revenues from the privatisation, which in turn, lowered the incentives to reduce their market share by divestment. Këllezi (n 1060) 1.
[1082] Eduard Alia, 'Antitrust in Transitional Economies: The Case of Albania' (LLM Thesis, New York University 2008) 11; UNCTAD (n 1057) 13.
[1083] Servete Gruda and Pajtim Melani, 'Some Challenges of Competition Authorities of Small Countries Toward European Integration: The Case of Albania' [2010] The Western Balkans Policy Review 185, 192.

Thessaloniki Summit 2003. The process of negotiations of the SAA provided a real momentum for Albania to establish an effective competition regime. The SAA provisions required, *inter alia*, the harmonisation of existing and future legislation with the EU legislation. Most of the provisions of Law 8044/1995, as amended, were not in compliance with SAA provisions and, most importantly, it suffered an independent enforcement body to ensure proper implementation.[1084] The enactment of the new Law 9121/2003 'On the Protection of competition' marked the second stage where Albania had to pursue voluntarily a regulatory alignment with the EU standards.[1085] Drafted by the Competition Department with the assistance of *Deutsche Gesellschaft fur technische Zusammenarbeit* (GIZ), Law 9121/2003 was based on the Treaty provisions (Articles 101 and 102 TFEU), the main EU regulation in terms of competition law,[1086] and several Commission's notices and guidelines.[1087]

Law 9121/2003 is structured in 7 parts and comprises 86 Articles. The first part entitled 'General Provisions' deals with the scope of Law, its applicability and definitions of most important terms. Law 9121/2003 creates the legal framework for effective competition policy in Albania.[1088] It introduces several novelties with regard to: i) the scope of a restricted agreement; ii) the abuse of the dominant position; iii) concentration and iv) the establishment of a new independent competition authority with appropriate enforcement powers.[1089] In contrast to the previous Law 8044/1995, as amended, Law 9121/2003 applies to any entity, be it public or private, engaged in commercial activity or undertaking operating outside Albania as long as their behaviour affects the domestic market. Furthermore, unlike Law 8044/1995, which included rules on unfair competition, Law 9121/2003 did not contain such rules, leaving them outside of its scope. Article

[1084] Jeton Loxha, 'Competition Law of Western Balkan countries and EU Competition Law as a benchmark' (Master Thesis, Faculty of Law University of Ljubljana 2016) 15; Skara and Hajdini (n 1045) 286-287.
[1085] Law 9121/2003, 'For Competition Protection' [2003] OJ 71.
[1086] Regulation 1/2003; Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] L 123/18; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.
[1087] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/65; Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5; Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17; Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2; Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/13.
[1088] Law 9121/2003, Art 1.
[1089] Law 9121/2003, Art 2.

3 (4) of Law 9121/2003 defines 'agreement' as: i) an agreement of any kind between undertakings, either with or without force; ii) decisions or recommendations of associations of undertakings; or iii) concerted practices among undertakings operating either at the same levels (horizontal agreements) or different levels (vertical agreements) in the market. A dominant position is defined as the position of one or more undertakings capable in view of supply or demand, to behave in a substantially independent manner with regard to the other participants in the market, such as competitors, clients or consumers.[1090]

The second part deals with restrictive agreements, the abuse with market dominance and control of concentrations. Article 4 of Law 9121/2003 mirrors Article 101 TFEU prohibiting agreements which have as their objective the prevention, restriction or distortion of competition rules. Agreements whose object or effect is to prevent, restrict or distort competition shall be prohibited, especially those agreements which:

> a) directly or indirectly fix purchase or selling prices, or any other trading conditions;
> b) limit or control production, markets, technical development, or investment;
> c) share markets or sources of supply;
> ç) apply dissimilar conditions to equivalent transactions to other trading parties, thereby placing them at a competitive disadvantage;
> d) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts; shall be prohibited.[1091]

Additionally, agreements which are prohibited agreements under 1st paragraph and not exempted under Articles 5, 6 and 7 of this Law, are considered null unless the Albanian Competition Authority (ACA) issues exemptions.[1092] Articles 5, 6, 7 provide the grounds for exemption from the application of Article 4. To obtain an exception, entities must notify their agreement to the ACA (Art 49) and the exemption may be granted only if the restriction listed in Article 4 (1) of Law 9121/2003 can be justified on the grounds of economic efficiency.[1093] On the other hand, Article 7 announces the possibility of exemptions for licence agreements. The situation

[1090] Law 9121/2003, Art 3 (5).
[1091] Law 9121/2003, Art 4 (1).
[1092] Law 9121/2003, Art 4 (2).
[1093] Law 9121/2003, Arts 5, 6 and 50.

and reasons for justification to exemptions seem to be quite similar to those laid down in Article 101 (3) TFEU.

Articles 8 and 9 of Law 9121/2003 incorporate Article 102 TFEU. Article 8 introduces the following criteria for the appraisal of the dominant position: i) the relevant market share of the investigated undertaking/s and other competitors; ii) the barriers to entry the relevant market; iii) the potential competition; iv) the economic and financial power of the undertakings; v) the economic dependence of the suppliers and purchasers; vi) the countervailing power of buyers/customers; vii) the development of the undertaking's distribution network; viii) access to the sources of supply of products; and the undertaking's connections with other undertakings; and ix) other characteristics of the relevant market such as: the homogeneity of the products, the transparency of the market, the cost and size symmetries, the stability of the demand, or the free production capacities. Article 9 (2) provides a non-exhaustive list of examples that may be considered as an abuse of the dominant position.[1094] Unlike Law 8055/1995, as amended, which made the separation of all undertakings in a dominant position mandatory, the Law 9121/2003 prohibits only the abuse of the dominant position and not the dominant position itself. Furthermore, the third paragraph of Article 9 stipulated that unilateral conduct of one or more undertakings shall not be considered as abusing with the dominant position if these undertakings prove that they have acted for objective reasons be it technical or legitimate commercial reasons.

Another novelty of Law 9121/2003 relates to a number of clear provisions dealing with the concentration of the undertaking. According to Article 10 (1), concentration covers: i) the merger of two or more undertakings or parts of undertakings hitherto independent of each other; ii) any transaction when one or more undertakings, acquire, directly or indirectly, a controlling interest in all or parts of one or more undertakings; and iv) joint ventures exercising all the functions of an autonomous economic entity.[1095] Mergers should notify the ACA if the combined turnover of all

[1094] Albanian legislator introduced the concept of 'essential facilities' in the main provision, respectively in Article 9 (2) (e) Law 9121/2003 stipulating that may be considered as abuse, particularly, 'refusal to allow another undertaking access to its own networks or other infrastructure facilities of undertakings with a dominant position, against adequate remuneration, provided that without such concurrent use the other undertaking is unable to operate as a competitor of the undertaking with a dominant position'.

[1095] Definition introduced in Article 10 was in line with the EU Council Regulation 4064/89 and subsequent amendment by EC Merger Regulation. cf Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of

participating undertakings in the international market is more than 70 milliard ALL, or if the combined turnover of all participating undertakings is more than 800 million ALL. In the case that the undertaking operates in the Albanian market, the domestic turnover of at least one participating undertaking should be more than 500 million ALL.[1096]

The third part entitled 'Competition Authority and Administrative Procedures' laid down the organisation and functioning of the competition authority; the general administrative procedures; procedures on agreements and abuse of the dominant position; and procedures on concentration. An independent competition authority was established with appropriate powers of investigating and imposing sanctions.[1097] The ACA comprises two bodies: the Commission, which is a decision-making body or authority whose members are elected by the Parliament[1098] and the Secretariat, an administrative and investigative body.[1099] The Commission had powers to open an investigation either by a formal request or *ex officio;*[1100] to enter into the premises to investigate;[1101] and seize the documents to be accepted as evidence in the proceedings.[1102]

Part four (Arts 65-68) regulates private enforcement. Parties who have suffered loss as a result of anti-competitive behaviour are entitled to seek: i) removal or prevention of a competition restriction; or ii) compensation for damages caused in accordance with the rules of the Civil Code.[1103] The competent court to address claims for damages for the infringement of competition provisions is the District Court of Tirana, which is a court of first instance.[1104] According to Article 65 (2), private enforcement can run independently of the administrative procedure undertaken by the ACA.

Concentration between undertakings [1989] OJ L 395/1, Art 3; Council Regulation (EC) 139/2004 of 20 January 2004 on the Control of Concentration between undertakings (the EC Merger Regulation) OJ l 24/1, Art 2.

[1096] Law 9121/2003, Art 12.

[1097] Law 9121/2003, Art 18.

[1098] Law 9121/2003, Art 19-26.

[1099] Law 9121/2003, Art 27-29.

[1100] Law 9121/2003, Art 60.

[1101] Law 9121/2003, Arts 36 and 37.

[1102] Law 9121/2003, Art 38. For an assessment of ACA powers in competition policy and law implementation see Ahmet Mancellari, 'Competition Policy in Albania' in Slavica Penev and Andreja Marusic (eds), *Competition Policy in Western Balkan Countries* (Westminster Foundation for Democracy 2013) 54-69.

[1103] Law 9121/2003, Art 65 (1) (b).

[1104] Law 9121/2003, Art 68.

Part five (Arts 69-72) foresee provisions on cooperation with other institutions. This part laid down the obligations of central and local administration bodies to require an opinion whether any draft normative act affects the restriction of market (Art 69); role of the ACA with regard to regulation and regulatory reform (Art 70); exchange of information with the Commission or competition authorities of other countries based on bilateral or multilateral treaties (Art 71) and suspension or termination of proceedings in the case that other competition authorities, either have received a complaint or are acting on their own initiative under this law against the same infringement (Art 72).

Part six and seven consist of 'Administrative violations and sanctions' (Arts 73-80) and transitionary provisions (Arts 81-86), respectively. In contrast to Law 8044/1995, as amended, Law 9121/2003 introduced, firstly, a range of fines such as: fines for not serious infringements (Art 73); fines for serious infringements (Art 74); periodic fines (Art 76); leniency (Art 77); and individual fines (Art 78). In determining the amount of the fine, the Commission shall consider both the gravity and duration of the infringement.[1105] The decision of the ACA may be appealed before the District Court of Tirana. Secondly, criminal responsibility as foreseen in Article 68 of Law 8044/1995 for infringement of competition law was repealed.

In 2006, Law 9121/2003 'On Competition Protection' was amended twice. Such amendment did not come as a result of the EU conditionality exertet or the entry into force of the interim agreement.[1106]. The first amendment consisted of two issues: i) the criteria to be elected as a member of the Commission and ii) the reasons for the release of members of the Commission. Accordingly, suitable candidates for the Commission, besides having at least 15 years of work experience, must have at least 5 years of academic experience or hold a doctoral degree in Law or Economics with a research interest in Civil Law or Administrative Law.[1107] Conversely, the members of the Commission, who are absent for more than one month for unjustified reason, are

[1105] Law 9121/2003, Art 75.
[1106] The trade provisions of the SAA were initially implemented by interim agreement and then replaced by the SAA. Interim Agreement on Trade and trade-related matters between the European Community, of the one part, and the Republic of Albania, of the other part [2006] OJ L 239/2.
[1107] Law 9499/2006, 'For some changes on the law no 9121 date 28. 07. 2003 'For Competition Protection' [2006] OJ 37, Article 20 (c). Before the amendment, Art 20 (c) required that the candidate for Commission be recognised in the field of economic and legal sciences or for management skills and professionalism in different economic sectors.

released by decision of a majority in the Parliament.[1108] This amendment, especially the criteria to be elected as a member of competition, made it difficult to fill the vacancies and, at the same time, restricted young professionals and academicians to become a member of the Commission. For a long time, the Commission operated with 4 instead of 5 members as required by law.[1109] The second amendment related to the salaries and the remuneration of the structure of independent constitutional institutions and other independent institutions.[1110]

6.3.3. Europeanisation of Albanian Competition law

With the entry into force of the SAA in 2009, the Council of Ministers determined as a priority the adjustment of the domestic legal system and establishment of an independent authority entrusted with appropriate powers to ensure the full application of competition rules.[1111] In order to achieve further approximation with the EU competition law and increase the effectiveness of competition policy reflecting the recent developments at EU level, Law 9121/2003 'On Competition Protection' was amended again in 2010.[1112] In addition to the EU Regulation and Commission's notice and guidelines, the amendment reflected the suggestions of the business community and public institution.[1113]

The 2010 amendment improved the scope of the competition law, clarifying its provisions, competences and procedures. Law 9121/2003 was applicable only for undertakings which directly or indirectly have or may have an influence in the market or for undertakings operating outside the Albanian territory but whose effects influenced competition in the territory of Albania. In line with Article 106 TFEU, the 2010 amendment extended its scope of application in: i) public undertakings and undertakings granted by the State with special or exclusive rights to perform certain economic

[1108] Law 9499/2006, 'For some changes on the law no 9121 date 28. 07. 2003 'For Competition Protection' [2006] OJ 37, Art 22 (3) (c). Previously, it was for more than 3 months for an unjustified reason.
[1109] Ermal Nazifi and Petrina Broka, 'Review of ten years of Albanian Competition Law developments' [2015] Yearbook of Antitrust and Regulatory Studies 129, 134.
[1110] Law 9584/2006, 'For Wages, Remuneration and Structure of Independent Constitutional Institutions and other Independent Institutions, established by Law' [2006] OJ 84.
[1111] Eriona Katro and Kestrin Katro, 'Analysis on the recent Amendments of the Albanian Law on Competition protection in Albania' [2012] International Journal of Management Cases 83, 84; Hajdini (n 1045) 36.
[1112] Law 10 317/2010, 'For some additions and changes in the law no 9121 date 28. 07. 2003 'For Competition Protection' [2010] OJ 135.
[1113] Gruda and Melani (n 1083) 194; Mancellari (n 1102) 51-53.

activities; and ii) undertakings entrusted with the operation of services of general economic interests or having the character of a revenue-producing monopoly as far as competition law enforcement does not obstruct the fulfilment of tasks.[1114] Furthermore, the amendment improved the definition of both agreements and the dominant position by enhancing more clarity on these concepts in line with the EU law. Agreement shall be considered all 'agreements and/or concerted practices of two or more undertakings, and the decisions or the recommendations of associations of undertakings, regardless of their form, written or not, of binding force or not'; whereas dominant position 'is a position of economic strength enjoyed by one or more undertakings which enables them to prevent effective competition on the market by giving them the power to behave, with regard to demand or supply, independently of other market participants such as competitors, customers or consumers.'[1115]

With regard to the restraint of competition, the amendments occurred are as follows. First, in terms of restrictive agreement, similarly to the Commission's powers, the ACA was empowered with the ability: i) to grant individual exemption;[1116] ii) to block exemption to certain categories of agreement between undertaking;[1117] and iii) to apply *de minimis* the rule towards the agreement of minor impact on competition. For the latter, the agreement must not significantly restrict market competition and the combined market share of undertakings involved in the agreement must not exceed: i) 10% of the relevant market for agreement or practices between actual and potential competitors; and ii) 15% of the relevant market in the case that participant undertaking are not current or potential competitors.[1118] Second, regarding the abuse of the dominant position, the 2010 amendment repealed the third paragraph of Article 9, which allowed the abusing undertaking to prove that its practice was committed for objective reasons of legal or economic nature and it has not committed an infringement.[1119] This revision was important, on one hand, to further the approximation of legislation and on the other hand, to restrict the possibility of undertakings to legitimise their behaviour abusing with the dominant position due to technical or business reasons. Third, in the area of merger control, the 2010 amendment introduced: i) a new test for merger

[1114] Law 10 317/2010, Art 1.
[1115] Law 10 317/2010, Art 2.
[1116] Law 10 317/2010, Art 4.
[1117] Law 10 317/2010, Art 5.
[1118] Law 10 317/2010, Art 6.
[1119] Law 10 317/2010, Art 7.

appraisal in line with the EU law development in the area of merger control;[1120] ii) a significant reduction of the thresholds for notifying concentration; iii) an increase of the deadline of notification - from one week to 30 days.[1121]

Furthermore, the 2010 amendment strengthened and increased market supervision tools by aligning them with the principles and standards of EU competition law. The investigative procedures were approximated almost completely with the relevant EU regulations and the Commission's soft laws (Arts 17-19). Penalties were revised in compliance with the European legislation (Arts 28-31). The 2010 amendment clarified the authority in charge for the execution of fines (Art 34) and that appeals against the Authority's decision shall not suspend the execution of the decision (Art 33). Therefore, the 2010 amendment introduced more effective measures for restoring competition and imposing penalties against entities that distort competition. As a regulatory institution in a competitive market, the ACA role has been increased by intervening in many sectors of the economy where anti-competitive practices have been identified and detected (Table 2). However, still more should be done for the benefits of consumers.

Table 2: Statistical Data on Competition Commission Decision for the period 2004 -2018

Year	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**11**	**12**	**13**	**14**	**15**	**16**	**17**	**18**
Concentrations	2	0	4	9	11	8	6	10	9	13	8	11	12	16	30
Abuse of Dominant position	0	0	0	1	1	1	3	2	2	0	3	3	5	9	14
Restrictive Agreement	0	0	0	3		2	2	2	2	1	7	6	7	2	8
Exempted Agreement	0	0	0	0	1	1	0	0	1	1	1	1	4	0	1
Regulations and Guidelines	6	2	0	4	4	2	7	6	5	3	2	3	5	1	0
Recommendations to public institutions	1	3	1	2	5	10	5	5	5	1	4	11	12	9	9
Fines	0	1	1	5		2	2	1	7	2	2	0	0	0	6
Interim Measure	0	0	0	0	0	0	0	0	0	1	0	1	0	2	2
Conditions and Obligations	0	0	0	0	0	0	0	0	0	0	1	2	1	0	0
other decisions	4	12	9	6	7	12	11	18	24	22	14	15	6	8	17
TOTAL	**13**	**23**	**15**	**30**	**29**	**38**	**36**	**44**	**55**	**44**	**42**	**53**	**52**	**47**	**87**

Source: ACA, 'Annual Report' (ACA 2016; 2017; 2018).

[1120] Law 10 317/2010, Art 8.
[1121] Law 10 317/2010, Art 9.

While the 2010 amendment reflected the EU secondary competition legislation and the Commission's soft laws, the ACA has been very active to further harmonise the competition law. Article 24 (dh) empowers the ACA to issue regulations and guidelines in order to implement the provisions of Law 9121/2003, as amended. In this context, several ACA guidelines or notices have been adopted to advance further the alignment of the Albanian competition law with the EU secondary legislation or the Commission's soft law. The Tables below show the EU *acquis* transposed into the domestic competition law.

Table 3: Compliance of Law 9121/2003 as amended in with the EU Regulation on competition Law (2009 – 2019)

No	EU *Acquis*	Albanian legislation	Level of harmonisation
1	Regulation (EC) No. 139/2004	Regulation "On the concentration procedures"	Fully
2	Regulation (EC) No139/2004	Regulation "On implementation of the procedures of concentrations between undertakings"	Fully
3	Regulation (EC) No 1/2003	Regulation "On investigative procedures of the Albanian Competition Authority"	Fully
4	Regulation (EC) No 772/2004	Regulation "On categories of technology transfer agreements"	Fully
5	Regulation (EU) No 1217/2010	Regulation "On exemptions of the categories of research and development agreements"	Fully
6	Regulation (EU) No 1218/2010	Regulation "On exemptions of the categories of specialisation agreements"	Fully
7	Regulation (EU) No 330/2010	Regulation "On the categories of vertical agreements and concerted practices"	Fully
8	Regulation (EU) No 461/2010	Regulation "On categories of agreements in the motor vehicle sector"	Fully
9	Regulation (EU) No 267/2010	Regulation "On categories of agreements in the insurance sector"	Fully
10	Regulation (EC) No 487/2009	Regulation "On categories of agreements and concerted practices in the air transport sector"	Fully
11	Regulation (EC) No 622/2008	Regulation "On settlement procedures"	Fully
12	Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases	Regulation 'On Commitment Procedures'	Fully
13	Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union	On damages caused and actions undertaken for infringements of the provisions of Law no. 9121, dated 28.07.2003 "On Competition Protection", as amended	Partially

Source: Skara and Hajdini (n 1045) 289 and Authors' own calculation based on National Plan for European Integration 2016-2020 and 2019-2021.

Table 4: Compliance of Law 9121/2003 as amended in with the EU soft law issued by Commission for competition Law (2009 – 2019)

No	EU *Acquis*	Albanian legislation	Level of harmonisation
1	Commission Notice on Immunity from fines and reduction of fines in cartel cases	Regulation 'On fines and leniency'	Fully
2	Guideline on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003		
3	Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings;	Guideline 'On the assessment of horizontal mergers between undertakings'	Fully
4	Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings;	Guideline 'On the assessment of non-horizontal mergers and conglomerate mergers between undertakings'	Fully
5	Commission notice - Guidelines on Vertical Restraints	Guideline 'On the assessment of vertical restraints agreements'	Fully
6	Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)	Regulation 'On agreements of minor importance, de minimis'	Fully
7	Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings" (2008/C 95/01);	Guideline 'On control of concentrations'	Fully
8	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements	Guideline 'On the assessment of horizontal agreements'	Fully
9	Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings	Guideline 'On the enforcement of Articles 8 and 9 of Law 9121, dated 28.07.2003, "On Competition Protection'	Fully
10	Commission notice - Guidelines on Vertical Restraints	Guideline 'On the assessment of vertical restrains'	Fully
11	Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No /8022004	Guideline regarding remedies	Fully
12	ECN Leniency programe	Leniency programe	Fully
13	Commission Notice on simplified procedure for treatment of certain concentrations under Regulation 139/2004	Guideline 'On the simplified procedure in cases of concentrations'	Fully
14	Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03)	On restrictions directly related and necessary to concentrations	Fully
15	Notice on the application of the competition rules to access agreements in the telecommunications sector (98/C 265/02)	For the implementation of competition rules in the assessment of telecommunication access agreements	Fully

Source: Skara and Hajdini (n 1045) 290 and Authors' own calculation based on National Plan for European Integration 2016-2020 and 2019-2021.

6.4. Private Enforcement of Competition Law in Albania

Actions for damages for breach of competition rules in Albania are not governed by a special legislation but regulated by: i) the provisions laid down in Law 9121/2003, as amended, ii) the general rules of civil liability as established by Albanian Civil Code (ACC) [1122] and Albanian Code of Civil Procedure (ACCP).[1123] Since its adoption in 1994, as last amended in 2016, the ACC has paid special attention to tort liability. Title IV of Part IV, respectively Articles 608-647, provides general rules applicable for tort liability. According to Article 608 (1) ACC, a person who, illegally and due to his fault, causes damages to another in person or *in rem* shall be obliged to compensate the caused damage. The right of compensation for the injured person is subject to the existence of four cumulative conditions: i) the unlawful act; ii) the damage suffered; iii) the offenders' fault; and iv) the causal link between the unlawful act and damage.[1124]

Additionally to the general rules applicable for tort law, both Law 8044/1995, as amended, and later amended by Law 9121/2003 contained a specific provision regarding the possibility of private enforcement for damages caused by the infringement of competition rules. A common similarity of both laws is that only the material scope and the competent court are regulated, while others substantial and procedurals issues are not mentioned but should refer to general rules applicable to tort law, either to the ACC or the ACCP.

6.4.1. Material Scope

The material scope of private enforcement as stipulated in Law 9121/2003, as amended, concerns only the infringement of national competition law, respectively Article 4 'Prohibitive

[1122] Law 7850/1994, 'On the Civil Code of the Republic of Albania' [1994] OJ 11 as last amended by Law 113/2016 'For some additions to Law No 7850 date 29.7.1994, 'Civil Code of the Republic of Albania' [2016] OJ 219.
[1123] Law 8116/1996, 'Code of Civil Procedure of Albanian Republic' [1996] OJ 9 as last amended by Law 38/2017, 'On Some Additions and Amendments to Law No. 8116, Dated 9.3.1996, "Code of Civil Procedure of the Republic of Albania" [2017] OJ 98.
[1124] Marjana Tutulani-Semini, *E Drejta e Detyrimeve dhe e Kontratave: Pjesa e Përgjithshme* (Skanderbeg Books 2006) 251 – 256; Amantia Levanaj and Besmira Arshiaj, 'Causing non-contractual damages according to Albanian Law' [2015] Academicus International Scientific Journal 166.

Agreement' and Article 9 'Abuse of the Dominant position'.[1125] Despite progressive alignment of Law 9121/2003, as amended, with the EU competition *acquis*, the material scope remains limited only to the national law. Such limited scope is understandable since Albania is not yet a member of the EU.

6.4.2. Jurisdiction: Competent Courts

Unlike Law 8044/1995, as amended, which stipulates that a party has the jurisdiction to bring actions for damages before the District Courts whose offices are in the same place with the relevant branch of economic competition,[1126] Articles 65 (1) and 68 of Law 9121/2003, as amended, empower third parties to bring an action for damages before the District Court of Tirana. Consequently, only the District Court of Tirana is competent to deal with the actions for damages. Furthermore, Article 65 (3) clarifies that the District Court of Tirana shall not have the jurisdiction to request an exemption from the prohibition of an agreement and the procedures of concentration control. Only the ACA has exclusive competences to grant exemptions.[1127] Even in the case an action is lodged in the Court regarding the right resulting from an agreement between an undertaking falling within the scope of Article 4 Law 9121/2003, as amended, and the other party invokes conformity of the agreement with the exemptions, the national judge shall suspend the proceedings until the ACA takes a decision to grant the exemption in question.[1128]

[1125] cf Law 8044/1995 as amended, Art 62 (1) reads as follow: 'Competitors, suppliers and consumers or other parties, whose economic interest has been damaged as a result of actions prohibited by this *Law* or which are declared illegal may file a claim for compensation.' Law 9121/2003 as amended, Art 65 (1) (b) reads as follow:

> 1. A person impeded in its activity, by a prohibited agreement as referred in Article 4 of this Law, or by an abusive practice as referred in Article 9 of this Law, may challenge this action in court and request: a) […];
>
> b) reparation or compensation from damages caused by these practices, in accordance with relevant provisions of the Civil Code.'.

[1126] Law 8044/1995 as amended, Art 64 reads as follow: 'The claims under Articles 62 […] are competent district courts having their offices in the same place with the relevant branch of economic competition.'

[1127] Law 9121/2003 as amended, Arts 65 (3) and 48. Pursuant to Law 49/2012 as amended disputes relating to the challenge of a decision issued by ACA are heard by the Tirana Administrative Court and subsequently, by the Tirana Appeal Administrative Court. Law 49/2012, 'On the Organisation and Functioning of Administrative Courts and Adjudication of Administrative Disputes' [2012] OJ 53 as amended.

[1128] UNCTAD (n 1057) 55.

Actions for damages may be undertaken despite the existence of a proceeding before the Authority or prior a decision made thereof for the same subject.[1129] Therefore, based on Article 65 (2), two types of strategies can be considered in terms of suffered damages due to the antitrust infringement. Firstly, an injured party may submit an antitrust damages claim based on the decision issued by the ACA recognising that an infringement has taken place (follow-on action). On the other hand, the injured party may submit an antitrust damages claim relying not on a prior decision of the ACA, but leaving to the court to decide both on the breach of Law 9121/2003, as amended, and on the claim for damages (stand-alone action).

6.4.3. Relevant Issues of the Private Enforcement in Albanian Legal System

This section provides an overview of private enforcement of competition law in Albania. Issues identified by the Directive 2014/104/EU serve as a blueprint.

6.4.3.1. Conditions for Tort Liability and the Right to Compensation

According to the general regime of tort liability, an injured party has to prove four cumulative elements to be successful for actions of damages. The four cumulative elements are as follows: i) the illegal act; ii) the damage caused; iii) the existence of fault and iv) the causal link between damages. Only if all the cumulative elements are fulfilled will the defended be liable.

The first element is the illegality act of the defendant. Such illegality will be established by the national competition law assessed on the basis of the criteria arising from the application of the EU competition rules applicable in the Community, particularly Articles 101, 102, 106 and 107 TFEU and interpretative instruments adopted by the Community institutions.[1130] Article 4 (1)

[1129] Law 9121/2003 as amended, Art 65 (2).

[1130] Law 9121/2003 as amended does not contain any provisions with regard to requirements laid down in Art 71 (2) of SAA. With regard to Western Balkan countries as candidate countries, only Competition Act in Bosnia and Herzegovina, in Article 43 (7) provides that 'for the purpose of the assessment of a specific case, the Council of Competition may use the case-law of ECJ and Commission'. cf national report on the judicial application of European law at Goran Koevski, Veronika Efremova and Christian Athenstaedt (eds), *European Union Law Application by the National Courts of the EU Membership Aspirant Countries from South – East Europe* (Centre for SEELS 2014); Siniša Rodin and Tamara Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer-Verlag Berlin Heidelberg 2015).

of Law 9121/2003 as amended, - aligned fully with Article 101 TFEU - defines the prohibited agreements 'as agreements which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited'. Such agreements between any undertakings, concerted practice of undertakings and the decisions or the recommendations of associations of undertakings shall be void and null.[1131] The prohibition applies particularly to those agreements which:

> a) directly or indirectly fix purchase or selling prices, or any other trading conditions;
> b) limit or control production, markets, technical development, or investment;
> c) share markets or sources of supply;
> ç) apply dissimilar conditions to equivalent transactions to other trading parties, thereby placing them at a competitive disadvantage;
> d) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts; shall be prohibited.[1132]

According to Article 65 of Law 9121/2003, as amended, abuse of the dominant position is the second provision of competition, whose violation justifies a claim for damages. According to Article 9 of Law 9121/2003, as amended, – aligned with Article 102 TFEU – 'any abuse by one or more undertakings of a dominant position in the market shall be prohibited.' In determining the abuse of the dominant position, certain factors laid down in Article 8 should be considered.[1133] The abuse with the dominant position may consist of:

> a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> b) limiting production, markets or technical development;
> c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> ç) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[1134]

[1131] Law 9121/2003 as amended, Arts 3 (4) and 4 (2).
[1132] Law 9121/2003 as amended, Art 4 (1).
[1133] Art 8 introduces criteria for the appraisal of dominant position such as: i) the relevant market share of the investigated undertaking/s and other competitors; ii) the barriers to entry to the relevant market; iii) the potential competition; iv) the economic and financial power of the undertakings; v) the economic dependence of the suppliers and purchasers; vi) the countervailing power of buyers/customers; vii) the development of the undertaking's distribution network; viii) access to the sources of supply of products; and the undertaking's connections with other undertakings; and ix) other characteristics of the relevant market like the homogeneity of the products, the transparency of the market, the cost and size symmetries, the stability of the demand, or the free production capacities.
[1134] Law 9121/2003 as amended, Art 9 (2).

The damage caused is the second element of entitling tort liability. Article 65 (1) (b) of Law 9121/2003, as amended, makes reference to the provisions of the ACC with regard to the compensation of the damage caused. Under the ACC, the claimant has the right to compensation for: i) effective damage (*damnun emergens*); ii) lost profits (*lucrum cessans*) and iii) non - material damage. According to Article 640 ACC, compensation for the property damage suffered consists not only of the effective damage but also of the loss of profits and interests. Also are compensated as well: i) the expenses incurred reasonable to avoid or to reduce the damage, ii) the expenses necessary to define the liability and amount of damage and iii) reasonable expenses incurred to obtain compensation through extra-judiciary ways.[1135] In addition, the plaintiff is also entitled to claim non-monetary damage under certain specific circumstances enumerated in Article 625 ACC such as: i) sustaining a health, physical or psychical integrity damage; ii) encroachment upon the personality, reputation, name or private life; and iii) impairing the remembrance of a deceased person. Article 647 (a) ACC defines the criteria for judges to determine the non-monetary damage for tort liability. In the case of an action for damages for an infringement of competition rules, the potential non-monetary damage may be damages resulting from the harm to reputation or name.

The third element for tort liability is the existence of fault. According to Article 608 (1) ACC 'A person who, illegally and due to his fault, causes damage to another in person or in rem shall be obliged to compensate the caused damage.'[1136] Consequently, fault requirement is necessary for liability. Law 9121/2003, as amended, remains silent on whether intent or negligence is required for establishing liability for damages.

The fourth element of tort liability is a causal link between the illegal act and the damage. Any intentional and illegal fact causing damages to another person obliges the offenders to compensate the damages. It should be noted that the damage should be the direct and immediate consequence of the action or omission of the person.[1137]

[1135] Albanian Civil Code, Art 640 (2).
[1136] Albanian Civil Code, Art 608 (1).
[1137] Albanian Civil Code, Art 609.

The issue of the causal link in tort law has been clarified and unified by the practice of the High Court. According to Decision 12/2007, the High Court emphasised that the acceptance of tort liability is conditional upon the existence of a materially causal link between the unlawful conduct with fault and damage caused. In addition, the High Court added that 'in order to determine the concrete damage stemming from this unlawful act and the determination of corresponding compensation, it should be proved a legally causal link between them'. According to the High Court's view:

> Through the material causal link, it is verified who is the responsible person (the active subject) and cause- consequence link between three objective and subjective elements of the illegal fact (causing the damage): the unlawful behaviour (objective) and with fault (subjective) and the effect coming from them, therefore the damage of a person or his property (objective). In this case applies the legal principles, *condicio sine qua non*, according to which, the arrival of the harmful consequence would not be proved if the cause would not have happened, unlawful behaviour with fault of the person responsible for causing the damage.
>
> Whereas, with the legal causal link is proved cause- consequence link between unlawful behaviour in its entirety and concrete violations incurred in rights and legitimate interests, as the passive subject on which this unlawful fact acted directly, as well the other people resulting damaged as a result of the consequences that normally and usually come from the same unlawful fact, according to the principles of regularity and efficiency of the causal link (*id quod plerumque accidit*).

Looking at Article 65 Law 9121/2003, as amended, seems that the right to claim compensation for infringement of competition law deviates from the default rule of compensation for tort liability as stipulated in the ACC. Accordingly, a person impeded in its activity by a restrictive agreement or practice can bring a court action and claim: i) elimination or prevention of the potential or actual competition restriction and ii) compensation or the payment of damages in accordance with the relevant provisions of ACC.[1138] While the right of compensation was acknowledged, Article 65 does not explicitly mention: i) fault requirement - whether undertakings have acted intentionally or not; and ii) the causal link. Therefore, the injured party must prove an illegal act and damage suffered to claim compensation. Such a position is in compliance with Article 1 (1) of the Directive 2014/104/EU.[1139]

[1138] Law 9121/2003 as amended, Art 65 (1).
[1139] Directive 2014/104/EU, Art 1 (1) reads that 'anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.'

6.4.3.2. Limitation Period

Law 9121/2003, as amended, does not contain a provision to set out a limitation period for the action for damages for an infringement of competition law. Since Law 9121/2003, as amended, does not provide a limitation period for antitrust cases, the limitation period for tort liability applies.

Albania has adopted the one-tier system. According to Article 115 (dh) of ACC, the limitation period for bringing a claim for damages before the court is three years. The limitation period starts from the date when the injured party has been or should have been aware of the damage suffered and of the person who has caused it.[1140]

6.4.3.3. Joint and Several Liability

Law 9121/2003 as amended does not contain rules on joint and several liability in the case of mass infringement of competition law. When the damage has been caused jointly by a number of infringers, general rules of tort liability applies. According to Article 626 of ACC, the infringers causing the damage jointly shall be jointly liable.[1141]

The degree of liability for each co-infringer is determined by the court during the proceeding. Article 627 ACC provides the infringer having indemnified the damage with the right to seek from co-infringers having caused the damage their respective share proportionally to the degree of responsibility of each co-infringer and the entirety of the consequences. In the case each party's proportionate share cannot be defined, it is presumed that the degree of fault is equal.

6.4.3.4. Quantification of Harm

Damages suffered as a result of the infringement of competition law is assessed and evaluated pursuant to provisions of the ACC. In tort law, damages are deemed illegal when results

[1140] Albanian Civil Code, Art 120.
[1141] Albanian Civil Code, Art 626.

directly from the violation or harm of the interests and rights of the other, protected either by legal order or good custom.[1142]

The Albanian Civil Code recognises pecuniary and non-pecuniary damages. According to the general rule laid down in Article 640 of ACC, compensation for the property damage suffered consists of not only of the effective damage but also of the loss of profits and interests. As well are compensated: i) the expenses incurred reasonable to avoid or to reduce the damage; ii) the expenses necessary to define the liability and amount of damage; and iii) reasonable expenses incurred to obtain compensation through extra-judiciary ways.[1143] In addition, the claimant is entitled to non-pecuniary damages, but only for certain injuries stipulated in Article 625 ACC.[1144] In the case of damages deriving from anticompetitive conduct, the non-pecuniary damages could be awarded under Article 625 ACC due to the damage suffered for harm caused to reputation or name of the undertaking.

While the legal framework and court practice have clarified the effective damage and loss profits,[1145] the calculation of interest remains unclear.[1146] In 1994, when the ACC was approved, the Albanian legislator emphasised, in Article 450 ACC, that compensation for any damage caused

[1142] It has been debated in Albanian literature whether 'good customs' refers to moral customary. Muskaj maintains that interest violated do not refer to moral customary, whereas, Omari and Mataj argue that good customs refers even to the moral customary. Accordingly, actions that are unfair due to good customary of the country where the damage has occurred will be subjectively considered. However, it is the duty of the High Court to clarify and at the same time unify as what does it mean. On this topic see Aleksandër Muskaj, 'Përgjegjesia Civile nga Shkaktimi i Dëmit jopasuror' (PhD Thesis, University of Tirana, Faculty of Law 2013) 29 – 30; Luan Omari, *Parimet dhe Institucionet të së drejtës publike* (6th edition, Elena Gjika 2004) 311; Rezarta Mataj, 'Përgjegjesia Jashtëkontraktore e Organeve Publike në Shqipëri' (PhD Thesis, University of Tirana, Faculty of Law 2017) 55-57.

[1143] Albanian Civil Code, Art 640 (2).

[1144] According to Article 625 of ACC, non-pecuniary damage is entitled if: i) the person has suffered injury to his health or is harmed to his honor and personality; and ii) the memory of a dead person is desecrated and the spouse he lived with until the day of his death or his relatives up to the second scale.

[1145] In the Decision 999/2002, High Court held that in the case that debtor refuses to comply with the fulfilment of the obligation, for any reason, it also assumes the risk of paying in the future the loss profit that would result from the failure to meet the obligation in the future. High Court endorsed the Court of Appeal approach to determine loss profit by an appointed expert. Judgement of 24 October 2002, High Court, No 999. Furthermore, in the decision 17/2007, High Court clarified that in principle the difference between the effective damage and loss of profits consist on the actuality or not of the property interest being affected. In the case of effective damage, the object of the damage is the reduction of property, thus, the loss of an actual property interest belonging to the injured party at the time of causing the damage. Whereas the loos of profit refer to the situation with the impossibility of benefiting future property interests, which does not belong to the injured at the moment of causing the damage. Judgement of 13 and 14 September 2007, High Court, No 12, OJ 193.

[1146] Ermal Nazifi and Petrina Broka, 'Grounds for Private Enforcement of Albania Competition Law' [2016] Yearbook of Antitrust and Regulatory Studies 61, 66.

as a result of the delay in the payment of a sum of money consists of matured interests from the date of commencement of the debtor's delay in the official currency of the country where the payment is made. In the following sentence, it was stipulated that the rate of interest shall be determined by law. Hitherto, no law has been enacted. Interests have been calculated by economic experts assigned by judges. In addition, neither the regulation nor the guidelines have been issued by the ACA with regard to quantifying the harm for the damages caused as a result of the infringement of competition law.

6.4.3.5. Passing–on overcharges

Passing-on overcharges does not correspond to any provisions either in Law 9121/2003, as amended, or the ACC. Such a concept is new in the Albanian legal system.

6.4.3.6. Standing to Claim Compensation

According to Article 65 (1) of Law 9121/2003, as amended, anyone who is impeded in its activity by a prohibited agreement as defined in Article 4 'Restrictive Agreement' or by an abusive practice of a dominant position as referred in Article 9 'Abuse with the dominant position' shall have the right to claim compensation. This provision determines that the persons shall be entitled to bring an action for damages only for an infringement of national competition law. Standing to claim compensation shall be every person's right, be natural or legal person, regardless of its legal or factual position. With regard to the possibility of the indirect purchasers, Law 9121/2003, as amended, remains silent. It is unclear whether the indirect purchaser has legal standing to claim compensation for an infringement of competition rules.

6.4.3.7. Disclosure of Evidence

The collection and presentation of evidence are crucial for competition cases. As emphasised in the Ashurst study and then the Green Paper on damages,[1147] obtaining relevant documents or at least being aware of their existence is an obstacle for the private enforcement of

[1147] cf Waelbroeck (n 16); Green Paper on damages, 5.

competition law, especially for stand-alone cases – when there is no prior decision by the NCA. Law 9121/2003, as amended, contains only one provision stipulating the right of the ACA to be informed by third parties or undertakings, upon a request, even for confidential information.[1148] On the other hand, Law 9121/2003, as amended, does not contain any provision that would facilitate obtaining evidence either from the defendant or the ACA in case an infringement has occurred. Therefore, in the absence of a specific disclosure regime of evidence for the antitrust infringement, the general rule on the disclosure of evidence for the civil law will be applicable.

According to Article 11 ACCP, 'evidence is the data being taken from the sources and under the rules provided for in this Code and in other laws, which corroborate or reject the claims or defences of the participants to the proceeding.' Evidence should be taken in accordance with rules provided in the ACCP and should have direct or indirect relations with facts pretended during the proceeding.[1149] The ACCP recognises the following types of evidence which are applicable even in antitrust cases: i) the court admissions (Arts 214, 281-285 ACCP); ii) expertise (Arts 224 (a) – 230 ACCP); iii) the witness statement (Arts 168, 218, 231-245 ACCP); iv) the written documents (Arts 246-280 ACCP); v) the examination of persons, things and place (Arts 286-291 ACCP). The ACCP has no rule with regard to relative weight to be conferred upon different types of evidence. The Court's decision is based on the evidence presented by parties or by the attorney. The evidential value of the evidence presented is assessed by the judge's own discretion.[1150]

From time to time, litigations are very complex that require knowledge in a variety of areas such as, economics, business and accounting. In such cases, judges may face difficulties to understand properly the nature of the dispute. For these reasons, in 2012, the ACCP was amended by adding, *inter alia*, provisions regarding the acceptance of experts' evidence in civil proceedings. Therefore, judges have to rely on the expert's evidence in order to acquire technical information with regard to the dispute. According to Article 224 (a) ACCP, judges have the authority to appoint

[1148] Law 9121/2003 as amended, Article 33 (1) reads as follow: 'The Authority, by means of a request from the Secretariat or the Commission, may always request of third parties, undertakings or associations of undertakings to provide it with all the information required for the implementation of this Law, including confidential information or business secrets.'
[1149] Albanian Code of Civil Procedure, Article 11; Flutura Kola Tafaj and Asim Vokshi, *Procedurë Civile: Pjesa 1* (ILAR 2013) 379-380.
[1150] Albanian Code of Civil Procedure, Art 29 (2) reads as follows: 'The court evaluates the evidence which are in the acts and on basis of its inner conviction, formed by the consideration of the circumstances of the case in their entirety.'

one or more experts in the fields of science, technology or art when the knowledge of an expert is required for the assessment or clarification of facts in the dispute. The expert is chosen from an online inventory administered and published by the Ministry of Justice or in specific circumstances, it may be appointed avoiding the online inventory if the experts are required in a specific area for which the law does not provide licence.[1151] The expert submits a written opinion, but can also be heard and be questioned by the court or parties. The experts do not provide a legal interpretation or to value the judgment. Instead, the experts provide opinions related to their field of expertise.[1152] Consequently, the expert's evidence will be very helpful for the judge to prove several aspects in private enforcement such as: i) relevant market and market share, ii) amount of damage, and iii) lost profits. On the other hand, the use of experts increases the cost of litigation.

In a civil procedure, the parties have the obligation to submit the facts they base their claims whereon. Pursuant to Article 12 of ACCP, the court, upon a decision, allows the parties to prove the facts on which they based their claim, by presenting to the court only that evidence which is indispensable and is related to the case. In other words, the claimant shall submit all the necessary evidence in their possession in order to prove their claim, while the defendant submits a statement made in their defence.

While as a general rule the parties cannot submit evidence against their own cases, the ACCP makes an exemption by obligating a party to present evidence in his possession. Article 223 ACCP provides the discretion of the national judge to decide on whether to issue an order to disclose the evidence from the defendant or third parties. Accordingly, in the absence of a specific provision for the disclosure of evidence in the actions for damages for an infringement of competition law, the court can rely on this Article to request the disclosure of evidence from the defendant or third party. However, the application of Article 223 ACCP is limited. First, the court order pursuant to Article 223 ACCP is upon the judge's discretion, if the obtained evidence would be necessary to guarantee a complete and comprehensive investigation in compliance with the law.[1153] Secondly, the claimant is obligated to describe all the circumstances as precisely as

[1151] Albanian Code of Civil Procedure, Art 224 (d) (2).
[1152] Albanian Code of Civil Procedure, Art 224 (b).
[1153] Tafaj and Vokshi (n 1149) 88.

possible, describing credibly the location of evidence, its characteristics and facts proved by this document. During the proceeding, the court may order the defendant or third parties not participating in the case to present a document or other evidence by specifying the necessary guidelines for a time, place and manner of presenting the evidence. In practice, due to an asymmetric distribution of information, the injured party might face difficulties in identifying the exact evidence requested by the circumstances to be proved. All the necessary expenses are covered by the claimant.

The court order to disclose the evidence is compulsory and has to be presented within the time determined in the order. If the party is unable to present the evidence, the court must be notified through a written form explaining the causes and reasons.[1154] Once the court assesses the causes indicated and considers them as inappropriate, it has the right to punish the responsible persons. The refusal for complying with the court order is punished by the court with a fine ranging from 50.000 to 100.000 ALL.[1155]

While Article 223 ACCP foresees the disclosure of evidence during the proceedings, interested parties can also request the disclosure of evidence contained in the file of the ACA.[1156] The access to public information is guaranteed by Article 23 of the Albanian Constitution and further detailed by Law 119/2014, which regulates the right of access to information being produced or held by public sector bodies. Every person - be they legal entities, a natural person or stateless - has the right to access public information from the public institutions, without being forced to justify the motives of the request. Law 119/2014 contains rules designated to ensure public access to information.[1157] Public sector bodies include: i) any administrative body established by law for administrative procedures, law-making bodies, judicial and prosecution bodies, local governance units bodies of every level, state authorities and public entities, established by the Constitution or law (*inter alia* the ACA); ii) commercial companies only if a) the state holds the majority of shares; b) are exercised public functions; c) any natural or legal

[1154] Albanian Code of Civil Procedure, Art 276.
[1155] Albanian Code of Civil Procedure, Art 167.
[1156] Tafaj and Vokshi maintain the view that interested parties, firstly, have to make efforts to obtain the evidence pursuant to Law 119/2014 'On the Right to Information'. If the reply is negative or no reply has been sent, the interested parties can rely on Art 223 of ACCP. Tafaj and Vokshi (n 1149) 88-89.
[1157] Law 119/2014 'On the Right to Information' [2014] OJ 160, Art 1.

person, awarded the right to assume public functions by law or other by-laws.[1158] Public information has been defined by Article 2 (2) as 'any data recorded in any type of form or format, in the course of assuming the public function, regardless of whether it has been worked out by the public sector body itself or not.'[1159] The definition for 'public information' includes three types of categories. The first category includes data produced by the authority such as a decision, regulation, guidelines, orders, contract or other documents that serve for the maintenance of communication between different organs of the public authority. The second category comprises data received by other public authorities such as information, orders, annual reports, decisions or other documents serving the communication between the institutions. The last category includes data produced by the providing parties, and the access to these documents is subject to limitations.[1160]

The request for information is made in writing and registered in the Register of Requests and Responses. A serial number is assigned for further follow-up.[1161] The application is submitted in person, ordinary mail or e-mail, providing accurately the identity and signature of the applicant and should contain some necessary elements as defined by Article 11 (4) such as: i) name and surname of the applicant; ii) postal or electronic address where the information shall be sent to; iii) description of the information applied for; iv) format that the information is preferred to be obtained; v) any data that the applicant deems could facilitate the identification of the information applied for.

According to Article 17 of Law 119/2014, the right of information may be restricted in four cases. First, the access to public information may be restricted if it is necessary, proportional and where the given information would harm the following interests: i) the right to privacy; ii) the commercial secrets; iii) the copyright; iv) patents.[1162] Nevertheless, in the case the holder of these rights has provided consent to make available the information or, at the time of providing information, they have been considered as the public sector body, the above-mentioned restriction

[1158] Law 119/2014, Art 2 (1).
[1159] Law 119/2014, Arts 1 and 3.
[1160] Law 119/2014, Art 17; Dorian Matlija, *Komentar i ligjit nr. 119/2013 "për të drejtën e informimit" së bashku me praktikën e Komisionerit për të drejtën e Informimit* (Res Publica 2015) 13-14.
[1161] Law 119/2014, Art 11.
[1162] Law 119/2014, Art 17 (1).

shall not be applied.[1163] Second, the access to public information is restricted if it is necessary, proportional and where the given information causes evident and grave damages to the following interests: i) national security matters; ii) prevention, investigation and prosecution of criminal offences; iii) during an administrative review in the context of disciplinary proceedings; iv) inspection and auditing procedures for the public sector bodies; v) monetary and fiscal policies of the state; vi) equality of parties in judicial proceedings; vii) preliminary consultation or discussion within or among the public sector bodies for developing public policies; and viii) maintaining the international and inter-governmental relations.[1164] The requested information shall not be rejected only if a higher public interest exists to provide it. Third, the right to access of information shall be restricted if it is necessary, proportional and dissemination of information would infringe the professional secret guaranteed by law.[1165] Fourth, the right of access to information shall be restricted, despite the assistance of public authority; the application request remains unclear and it is not possible to identify the sought information.[1166]

6.4.3.8. Effect of National Competition Authority Decisions

Law 9121/2003, as amended, remains silent on the legal effects of the ACA decisions on subsequent damages. It does not contain any rule regarding the consistency between the ACA decisions and the Albanian courts, neither an explicit provision to recognise the binding effects of final infringement decisions of the ACA on the Albanian courts. The ACA decisions constitute material evidence in terms of the committed infringement. However, the importance of such a decision should be not underestimated as it is likely to have a persuasive influence on the judge decision. The judge can disregard the ACA decision only if it is: i) forgery; ii) out the scope of law; and iii) not in the required form.[1167]

The ACA's decision can be appealed before the District Court of Tirana within 30 days from the moment of notification.[1168] The appeal does not suspend the Authority's decisions which

[1163] Law 119/2014, Art 17 (1).
[1164] Law 119/2014, Art 17 (2).
[1165] Law 119/2014, Art 17 (3).
[1166] Law 119/2014, Art 17 (4).
[1167] UNCTAD (n 1057) 56.
[1168] Law 9121/2003 as amended, Art 40 (1).

authorise concentrations and interim measures pursuant to Article 44 of Law 9121/2003, as amended.

The District Court of Tirana, upon the plaintiff's request to ensure the removal or prevention of the obstacle to competition, may rule that a certain contract is null in whole or in part, with a retroactive effect.[1169] The issued decision taken by the District Court of Tirana is sent to the ACA within one month and is binding upon the ACA.[1170]

6.4.3.9. Collective Redress

The Albanian procedural law fails to provide a general injunctive and compensatory collective redress mechanism, as set out by the Commission Recommendation 2013/396/EU. Some possibilities of collective redress are foreseen by the ACCP and the *lex specialis*. First, Article 95 ACCP makes possible for a person to raise an action for another when the law explicitly allows it. Law 9121/2003, as amended, fails to recognise such a possibility. In addition, according to Article 65 of Law 9121/2003, as amended, standing to claim damages is possible only for the injured party due to an infringement of competition law. Law 9902/2008 'On Consumer Protection', as amended, provides a kind of representative action, meeting only partially the objectives of the Commission Recommendation 2013/396/EU.[1171] According to Article 54 of Law 9902/2008, as amended, the consumers associations are entitled to handle and follow up the consumer complaints.[1172] The right of consumers for the protection of competition is not recognised by law. Nazifi and Broka argue that considering the importance of competition to consumers, it can impliedly be concluded that 'free and effective competition is a pre-requisite for the enjoyment of consumer rights specifically mentioned in the Consumer Protection Law'.[1173]

[1169] Law 9121/2003 as amended, Art 66 (1).
[1170] Law 9121/2003 as amended, Art 66 (2).
[1171] For an overview of '*quasi'* collective redress mechanism in Albanian legislations see Flutura Kola Tafaj and Ersida Teliti, 'Collective Redress in Consumer Protection in Albania' in Veronika Efremova (ed), *Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe: Comparative Study* (GIZ 2018); Dorian Matlija and Irene Dule, *Padia Kolektive Mungesa e së cilës zhbën të Drejtat Mjedisore dhe ato të Konsumatorëve* (Qendra Res Publica 2018).
[1172] Law 9902/2008, 'On Consumer Protection' [2008] OJ 61 as last amended by Law 71/2018 'On some amendment to the Law no 9902, dated 17/04/2008, "On consumers' protection' [2018] OJ 162. (hereafter Law 9902/2008 'On Consumer Protection' as amended.
[1173] Nazifi and Broka (n 1146) 69.

While the legal framework leaves room for manoeuvre for collective redress by the consumer associations, it is not clear enough to support the standing of the consumer associations.[1174]

Second, Article 161 of the ACCP is the only general mechanism providing group action (co-litigator-*bashkëndërgjyqësi*) under which an action can be brought jointly by many plaintiffs or against many defendants if: i) they have joint rights or obligations on the subject of lawsuit and ii) their rights or obligations have the same basis from the point of view of the fact or of law.[1175] Each plaintiff should have a direct, personal and interest in the action. Under the third paragraph, the group action exists even if the proceeding has begun, and the plaintiff finds that their claim extends against another person. In such a situation, they may extend the claim summoning the other person as a defendant.[1176]

Furthermore, group action might have a facultative or compulsory character. Facultative group action can be formed by joining different cases when the decision depends partially or entirely on them. In the facultative group action, each party acts independently against the opposing party and their procedural actions inflict neither damage nor benefit.[1177] The court's decision is extended only to the parties in the proceedings and not to other parties that have the same case with the same object or cause. On the other hand, in the compulsory group actions, the court's decision is extended to all co-litigants, and the procedural actions carried out by some co-litigators have affected even the ones who have not appeared in the court or have taken any action within the prescribed time.[1178] The compulsory type is conditional only where the law provides it or due to the nature of the legal relationship of the parties in the dispute.[1179] The lack of a provision in Law 9121/2003 recognising the possibility of compulsory group action makes it difficult to convince the national judge to extend the applicability to private enforcement.

[1174] According to Article 55 of Law 9902/2008 'On Consumer Protection' as amended, consumer associations are entitled to address to the Court only to request only the cessation of a violation and not the right to claim compensation.
[1175] Albanian Civil Procedure Code, Art 161 (a) and (b).
[1176] Albanian Civil Procedure Code, Art 161 (c).
[1177] Albanian Civil Procedure Code, Art 162 (1).
[1178] Albanian Civil Procedure Code, Art 162 (2).
[1179] Alban Abaz Brati, *Procedura Civile* (1st edn, Dudaj 2008) 128-132; Tafaj and Vokshi (n 1149) 245-255.

Law 9121/2003, as amended, does not provide a special judicial collective redress. Article 29 (1) of Law 9121/2003, as amended, recognises only the possibility for a representative collective administrative complaint. Accordingly, third parties or interested parties related to competition restriction, distortion or obstruction may submit a complaint or notification to the ACA. The content of the complaint or notification and the handling procedure is regulated by Articles 26 (1); 26 (2) and 26 (3) of the Regulation 'On the functioning of the ACA'.[1180]

6.4.3.10. Consensual Dispute Resolution

Unlike Law 9902/2008 'On Consumer Protection', as amended, which recognises the possibility to submit the complaint to, *inter alia*, arbitration court and any other body in particular, established specifically for dispute settlement extra-judicially,[1181] Law 9121/2003, as amended, remains silent on this issue.

6.5. Missed Opportunities and Obstacles for the Development of Private Enforcement of Competition Law

To the author's best knowledge, no claim for action for damages has been filed in Tirana District Court. Consequently, antitrust damages claims in Albania are quite underdeveloped in contrast to the public enforcement. Undertakings and individuals are not aware concerning the possibility to claim compensation for an infringement of competition rules. In addition, the absence of a specific legal framework and lack of clear-cut jurisprudence for antitrust damages refrain

[1180] ACA Decision No 563 of 25 October 2018 on the Approval of the Regulation 'On the Functioning of the Competition Authority' [2018] Official Bulletin XIV, 237 (hereafter cited as Regulation on Organisation and Functioning of ACA).

[1181] Art 56 of Law 9902/2008 'On Consumer Protection' as amended reads as follow:

1. The consumer, whose rights are infringed, has the right to submit a complaint to:
   a. the state administrative bodies responsible for consumer protection;
   b. to consumer associations;
   c. ombudsman;
   ç. to the arbitration court,
   d. to the judicial authorities;
   dh. to any other body particularly, established specifically for dispute settlement extra-judicial.

1. 1 The minister, being responsible for trade, shall issue the instruction on determining the procedures for processing complaints being submitted with the structure provided for in letter "a" of point 1 of this Article.
2. The Council of Ministers shall be tasked with determining the criteria to be met by the structure provided for in letter "dh" of point 1 of this Article.

undertakings or individuals to claim damages. The underdevelopment of private enforcement in Albania is related with several reasons.

First, as identified by the Commission and various academicians, one of the main obstacles for the development of private enforcement of competition law is the information asymmetry between the plaintiff and the defendant.[1182] The Albanian Civil Code Procedure sets out a strict traditional civil law requirement which states that a party which has been asked for disclosure of evidence must describe all the circumstances as precisely as possible, to make credible the location of evidence, its characteristics and the facts to be proved by this document. In the actions for damages, parties do not have the same position/opportunities of parties regarding the access to evidence. This, in turn, constitutes an obstacle for the plaintiff to get the necessary evidence for a successful claim for damages especially for stand-alone cases. Nevertheless, even in the follow-on cases, victims have been reluctant to claim for damages due to the lack of information and the necessary mechanism such as collective redress. The lack of procedural instruments for the private parties to easily obtain evidence for the antitrust infringement combined with absence of competition culture constitutes an obstacle for the development of private enforcement in Albania.

Second, there exists a lack of competition culture either from the undertakings operating in the market or the consumers. The competition culture, best characterised as 'the awareness of economic agents and the public at large about competition rules', is crucially important for effective market competition.[1183] Developing a competition culture is rewarded for enterprises which, under the pressure of competition, will increase their performance and perform with efficiency. This, in turn, will have a positive impact on consumers' living standards and their employment prospectives.[1184]

[1182] White Paper on damages, 5.
[1183] EMA, 'Is Albania ready for a Fair Competition? Strengthening Enforcement and Developing Advocacy Mechanism' (Policy Paper 2012) 5.
[1184] ibid 5.

The ACA has identified several prohibited agreements – known as naïve cartel – intended to increase the price of bread in three main cities Fier,[1185] Korça[1186] and Vlora.[1187] Due to the lack of legal culture, the majority of the entrepreneurs, who decided to increase the price of the bread, made the statement to media announcing the price increase and justifying it. In another case, concerning the production of ready-mixed concrete, the producer not only appeared in the media announcing the agreement but also advertised it.[1188] In all these cases, no action for damages was initiated.

With regard to the abuse of the dominant position, the ACA has been actively intervening in different sectors. In the telecommunication sector, the ACA fined two operators of national mobile telephony market – AMC sh.a. and Vodafone sh.a. – as abusing with dominant positions in the mobile market. During the investigation procedure, the ACA found that both operators held joint dominant position and applied unfair prices which were the highest in Europe and South East Europe.[1189] Recently, in 2018, the ACA fined two companies for abusing with the dominant position. The first decision concerned 'EKMA Albania' shpk operating in renting premises for the storage and trading of Agro-Food products in the city of Tirana.[1190] Second decision is related with a compulsory technical control of motor vehicles and their trailers for abusing with their dominant

[1185] ACA Decision No 57 of 01 October 2007 on the Abolishment of the Agreement in the Bread Production Market in Fier District, [2008] Official Bulletin 2, 12; ACA Decision No 67 of 24 December 2007 for individual fines against Mr. Kajo Hallka, [2008] Official Bulletin 2, 70.

[1186] ACA Decision No 146 of 17 June 2010 on the closing of the preliminary investigation in the market of the production and sale of bread in Korca City, [2011] Official Bulletin 7, 71. During the preliminary hearings organised by Competition Commission in Korca, undertakings accepted lack of legal knowledge of competition law and afterwards started to restore competition by reducing the price of bread independently. (para 5).

[1187] The information on the increase in bread price was released in printed and online media. For more see ACA Decision No 184 of 07 May 2011 on the opening of the preliminary investigation in the market of the production and sale of bread in Vlora City, [2012] Official Bulletin 7, 57; ACA Decision No 191 of 31 May 2011 on the opening of the in-depth investigation in the market of the production and sale of bread in Vlora City, [2012] Official Bulletin 7, 80; ACA Decision No 202 of 26 September 2011 on fining companies participating in the restricted agreement in the market of bread production and marketing in the city of Vlora, as well as giving some recommendations to the General Directorate of Taxes [2012] Official Bulletin 7, 163.

[1188] ACA Decision No 56 of Date 24 September 2007 on the abolishment of the agreements in the concrete production market in Tirana Region, [2007] Official Bulletin 1, 131; Nazifi and Broka (n 1146) 61.

[1189] ACA Decision No 59 date 09 November 2007 on the Abuse of Dominant Position in the Mobile Telecommunication Market by Albanian Mobile Communication sh.a. and Vodafone Albania sh.a. [2008] Official Bulletin 2, 26.

[1190] AACA Decision No 572 date 22 November 2018 on fines and liabilities to the company EKMA Albania SHPK, in the market of renting premises for the storage and trading of Agro-Food products in the city of Tirana [2019] Official Bulletin 14, 143.

position.[1191] From the informal discussion with the individuals/undertakings who rented premises from 'EKMA Albania' shpk it was noticed the lack of legal knowledge for the possibility to ask remedies for the damages occurred. Additionally, the lack of collective redress mechanism makes it difficult for the individuals to claim damages alone, as was the case of SGS Automotive Albania" shpk which abused with dominant position. These cases, where injured persons were aware due to media appearance of ACA fines' decision, constitute a lost opportunity for the Albanian individuals, consumer organisations or businesses affected to seek damages for the infringement of competition law. In this aspect, the ACA should deem as necessary to raise awareness to the individuals and businesses for the possibility of private enforcement of competition law as well as the consequences of their failure to react.

Another obstacle which may indirectly affect private enforcement is the lack of confidence and credibility in the Albanian court system. Corruption is widespread in Albania.[1192] In 2013, a report prepared for the European Commission found that both the state and private sector influence on judiciary through buying or influencing the legislation and/or the outcomes in court cases.[1193] The same was confirmed by the Group of High Level Experts who found that the Albanian judiciary is characterised by a high level of corruption and low levels of efficiency.[1194] For this reason, in 2014, a reform on import began to create an impartial and efficient judicial system. Three new judiciary commissions – the Independent Qualification Commission; the Appeal Chamber and the Public Commissioners – composed of 27 members were established to vet existing judges and prosecutors in order to remove corrupt and inefficient officials from the judiciary system. The vetting process started, first, with the judges from the Constitutional Court

[1191] ACA Decision No 562 date 25 October 2018 for fines and liabilities for "SGS Automotive Albania" SHPK in the market of compulsory technical control of motor vehicles and their trailers in the Republic of Albania and giving some recommendations [2019] Official Bulletin 14, 119.
[1192] The Corruption Perceptions Index 2018 which ranked Albania in the 99th position out of 199 with 36 points. The ratings are based on a score from zero (highly corrupt) to 100 (very clean). Freedom House rated Albanian for corruption 5.25 out of 7 where 7 represents the lowest scale. For a general overview of the level of corruption see CPI 2018 <https://www.transparency.org/cpi2018> accessed 30 July 2019; Freedom House, 'Nation in Transition 2018: Albania' < https://freedomhouse.org/sites/default/files/NiT2018_Albania_0.pdf> accessed 30 July 2019.
[1193] Berenschot and Imagos, 'Final main report: thematic evaluation of rule of law, judicial reform and fight against corruption and organised crime in the Western Balkans – Lot 3' (IPA Service Contract Ref. No 2010/256 638, February 2013) 26.
[1194] Group of High Level Experts, 'Analysis of the Justice System in Albania' (Ad Hoc Parliamentary Committee on Justice System Reform, Albanian Parliament 2015) <http://www.euralius.eu/images/pdf/Analysis-of-theJustice-System-in-Albania.pdf> accessed 30 July 2019, 10.

and the High Court. As a result of this reform, both the Constitutional Court and the High Court remained without a quorum for more than 15 months as a result of the dismissal on the grounds of not justifying their economic fortunes. As of 25 November 2019, out of 196 judges and prosecutors vetted, 88 are dismissed, 30 have resign and 77 have been confirmed in the duty.[1195] The final aim of the reform is to bring the citizens close to the judiciary and regain their trust.[1196] Most importantly, the judiciary reform should be associated with the continuous training of the judges in the field of (EU) competition law, which combines both legal and economic aspects.

6.6. Transposition of Directive 2014/104/EU in Albanian Legal System: Role and Perspectives of Private Enforcement

Recently, on 26 June 2019, the ACA published a guideline to implement the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 'On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union'.[1197] The guideline was drafted by the ACA and was published on 7 June 2019 in the ACA official website for consultation. Comparing the text of the draft guideline published online in the ACA official website and the final version adopted 26 June 2019, no changes were reflected. This means that either the ACA did not take into account the comments or no comments were sent due to short time, around 19 days.

The Guideline on Damages reproduces the wording and the structure of the Directive 2014/104/EU. It introduces a number of new substantive and procedural rules aimed at facilitating the actions for damages brought by injured parties against undertakings that have infringed the Albanian competition law. From an assessment made by the author, the ACA adopted a literal transposition of the Directive 2014/104/EU. The Guideline on Damages contains 30 recitals and only the first and the second recitals were modified to reflect the Albanian legislation, the others

[1195] Reporter.al, 'Ecuria e vetingut' <https://reporter.al/vetingu/> accessed 25 November 2019.
[1196] Genoveva Ruiz Calavera, 'Justice reform and vetting: for the citizens, with the citizens' <https://eeas.europa.eu/delegations/albania/63073/reforma-e-drejt%C3%ABsis%C3%AB-dhe-vetingu-p%C3%ABr-qytetar%C3%ABt-me-qytetar%C3%ABt_sq> accessed 30 July 2019.
[1197] Guideline 'on the damages caused and actions for infringement of the provisions of Law no. 9121, dated 28.07.2003 "On Protection of Competition", as amended' [2019] Guideline No 3 <http://www.caa.gov.al/uploads/laws/Udhzues_nr.3_dat_26.06.2019.pdf> accessed on 8 July 2019 (hereafter cited as Guideline on damages).

were literally borrowed from the Directive 2014/104/EU. With regard to the normative part, Articles 16 and 19 of the Directive 2014/104/EU were not transposed into the Guideline on Damages. Moreover, the provisions under Chapter VII 'Final Provisions' of the Directive 2014/104/EU dealing with the review process (Article 20); transposition (Article 21); temporal scope (Article 22) and entry into force (Article 23) were excluded from the transposition process.

The material scope of the guideline on damages was limited only to the claim for damages caused by the infringement of the provisions of the Albanian competition law. Likewise the Directive 2014/104/EU, the ACA adopted a minimum harmonisation concerning only the actions of damages resulting from the infringement of national competition law, respectively, Articles 4 and 9 of Law 9121/2003, as amended. In contrast to the Directive 2014, which is applicable parallel to the EU and the national law, the Guideline on Damages is applicable only to the national competition law.

First, the Guideline on Damages introduces the principle of full compensation for an infringement of Articles 4 and 9 of Law 9121/2003. as amended. Full compensation covers the right for compensation for actual loss and for loss of profit, plus the payment of interest. Similarly to Article 3 (3) of the Directive 2014/104/EU, full compensation that leads to overcompensation, whether by means of punitive, multiple or other types of damages, is prohibited.[1198] Article 4 introduces the principle of effectiveness and equivalence. However, it is unclear the relevance of these two principles since the scope of the Guideline on Damages is limited only to the national legislation and not to the EU competition law.

The regime of the disclosure of evidence is regulated by Articles 5-9 of the Guidelines on Damages. It introduces the principle of proportionality of presenting the evidence and regulates confidentiality.[1199] Since the ACCP had only one provision, the disclosure regime introduced represents a novelty in the Albanian legal system. The disclosure of evidence included in the file of a competition authority is detailed in Article 6 of the Guidelines on Damages, whereas the limits

[1198] Guideline on damages, Art 3 (3).
[1199] Guideline on damages, Art 5.

on the use of evidence obtained solely through the access to the file of a competition authority and the penalties are transposed in Articles 7 and 8.

Chapter III of the Guideline on Damages regulates the effect of national decisions (Art 9); limitation period (Art 10) and joint and several liability (Art 11). Article 9 of the Guideline on Damages stipulates that the final decision of the CAA is deemed to be irrefutably established for the purposes of an action for damages brought before the national courts. However, the Guideline on Damages fails to regulate the legal value of the other NCA's final decision, at least as *prima facie* evidence to be presented before the Albanian court as required by Article 9 (2) of the Directive 2014/104/EU. Second, recognising the importance of the limitation period and foreseeing when it start and ends, Article 10 does not explicitly emphasise that limitation periods for bringing actions for damages are at least five years. It acknowledges in the footnote that some Member States have followed a one-tier system – 5 years. The main reason why the ACC did not introduce such limitation period is related with period laid down in the Civil Code.

Chapter IV of the Guidelines on Damages regulates the passing-on of overcharges and the right to full compensation (Article 12); the passing-on defence (Article 13); indirect purchasers (Article 14); the actions for damages by the claimants of different levels in the supply (Article 15). These provisions are the same as those in the Directive 2014/104/EU.

Chapter V of the Guidelines on Damages regulates the quantification of harm (Article 16). The principle that cartel causes harm was introduced in the second paragraph (Article 16/2). The third paragraph laid down the possibility of the CAA to assist the national courts in determining the quantum of damages wherever it considers such assistance to be appropriate.

Chapter VI regulates suspensive and other effects of consensual dispute resolution (Article 17). The effect of consensual settlements on subsequent actions for damages as foreseen in Article 19 of the Directive 2014/104/EU was not transposed.

Despite the positive step of the CAA to transpose the Directive 2014/104/EU, the approach followed by the ACA to issue a guideline is not appropriate since it does not harmonise substantial

and procedural rules introduced by the Directive. According to Articles 24 (dh) of Law 9121/2003 as amended and 3 (5) of the Regulation on Organisation and Functioning of the ACA, the ACA issues regulations and guidelines to further harmonise the legislation in competition law. The Guideline has an explanatory character aiming to elaborate further the provisions of Law 9121/2003, as amended.[1200] As can be observed from Table 3 and 4, the ACA has heavily relied on the Guidelines to transpose the secondary legislation of the EU institutions and soft laws by the Commission. The transposition of the secondary legislation of the EU institutions in the form of a Guideline is mistaken and does not bring any changes in the domestic legal system. The binding instrument laid down in Article 288 TFEU has legal consequences on the legal system of the Member States either unifying the law (Regulation) or harmonising (Directive). As Albania aspires to harmonise its domestic legislation with the EU, existing and future legislation should be changed to comply with the EU *acquis*. Consequently, the transposition of the EU binding instruments shall be done either to enact new laws or amending the existing ones, whereas, the Commission's soft laws can be transposed through ACA's by-laws.

Furthermore, according to Article 116 of the Albanian Constitution, as amended, which hierarchically lists all the sources of the Albanian legal system, laws prevail over the by-laws issued by the Ministries or other independent bodies.[1201] It is evident that private enforcement regime of competition law regulated by Law 9121/2003, as amended, and the general rules on tort liability as established by theACC and the ACCP prevail over the Guideline of Damages. In a hypothetical case, before the District Court of Tirana, the national judge will rely on Law 9121/2003, as amended, the ACC and the ACCP regarding substantive and procedural issues of private enforcement, unless judges will disapply national law in the spirit of Article 71 (2) of the SAA. Furthermore, the supremacy of general provisions over Guideline on damages is directly

[1200] Regulation on Organisation and Functioning of ACA, Art 13 (b).
[1201] Art 116 of the Albanian Constitution read as follow:
1. Normative acts that are effective in the entire territory of the Republic of Albania are:
a) the Constitution;
b) ratified international agreements;
c) the laws;
ç) normative acts of the Council of Ministers.
2. Acts that are issued by the bodies of local government are effective only within the territorial jurisdiction exercised by these bodies.
3. Normative acts of ministers and steering bodies of other central institutions of the state are effective in the entire territory of the Republic of Albania within the sphere of their jurisdiction.

acknowledged by the latter, which did not introduce a five-year limitation period as required by Article 10 (3) of the Directive 2014/104/EU. Instead, Guideline on damages referred to the general regime of limitation period laid down in Article 115 (dh) of the ACC which is three years.

In conclusion, harmonisation of laws in compliance with the EU law requires not only remodelling the legal system but also the obligation to ensure the proper application of the EU law. The Guideline on Damages introduces a number of measures intended to facilitate private enforcement of competition rules but lacks legal binding effects. Considering transposition experience of 3 EU-Member States, Albania has two possible paths to incorporate the Directive 2014/104/EU. The first path is to amend at least Law 9121/2003, as amended, general rules of civil liabibilty as established by Albanain Civil Code and Albanian Code of Civil Procedure and other *lex specialis* that regulates certain aspects covered by Directive 2014/104/EU. The second path is to enact a new specific act designed to deal with the actions for damages stemming from the infringement of antitrust rules and, at the same time, repealing all the existing provision contrary to the new act. While the first option seems to increase the consistency between all the legal acts, the second option seems simpler from the legislative point of view. Nevertheless, only the future can tell.

CHAPTER

7. Conclusions

The development of the EU private enforcement of antitrust rules has been a difficult journey. Since the establishment of the ECSC and later the EEC, the enforcement of competition rules has been considered a matter of administrative (public) enforcement. While the ECSC Treaty vested High Authority with the powers to enforce ECSC competition provisions (Arts 65 and 66), the EEC Treaty remained silent concerning the enforcement mechanism of competition rules, leaving the task of constructing a completion enforcement mechanism to the Member States and the EU institutions. Based on Article 87 EEC Treaty, Regulation 17, which established the enforcement system of competition rules, conferred the central role upon the Commission and the DG for Competition, formerly known as the DG IV. The NCA had a limited role in applying the EU competition rules; whereas the national courts were unable to apply. The Commission had exclusive competence in monitoring the EU competition law and played a significant role in developing EU competition policy. The lack of explicit provision for private enforcement made it extremely difficult for individuals to seek redress for damages for the infringement of competition rules.

With the enlargement of the EU and the process of modernisation, the enforcement system shifted from a centralised to a decentralised system. Regulation 1/2003 empowered national courts and NCAs to fully apply the EU treaty provisions, and set out rules for the relationship between the EU and the national competition rules. Regulation 1/2003 did not contain any provision for private enforcement, but Recital 7 of its preamble noted the responsibility of the national courts to award damages to the victims of infringements.

The development of private enforcement of competition rules in the EU level has been characterised by: i) an important role played by the CJEU in providing a remedy in damages established by *Courage* and *Manfredi*; and ii) the persistent role of the Commission aiming to establish a common European antitrust private enforcement system. In the famous *Courage* ruling, the ECJ clearly established the right of individuals to claim damages before a national court for

loss caused by violations of the EU competition provisions (Arts 101 and 102 TFEU). In *Manfredi*, the right to damages for infringement of the EU antitrust rules was reaffirmed and most importantly, the ECJ sealed the *Courage* ruling repeating to the 'effectiveness' rationale[1202] and the principle of national procedural autonomy in the absence of the Community rules governing the matter.[1203] In contrast to *Courage*, the ECJ went further into more detail clarifying to the fullest the encompassed rights for damages.[1204]

In addition, the Commission has played an important role in facilitating and encouraging the right to damages. Since the early 1960s, the then draft Regulation 17 recognised the complex relations between the national law and the EU law as the main problem for private enforcement. However, as years passed by, no further measures were taken. In 2004, Ashurst Study revealed an 'astonishing diversity' in the approach taken by the Member States regarding the actions for damages.[1205] While the rule of the substance which establishes whether an infringement is common to all Member States (Articles 101 and 102 TFEU), conditions of liability vary considerably from one Member State to another. The Ashurst Study identified a number of obstacles such as: the non-availability of collective redress mechanism; the need to establish a causal link between the infringement and the damages as well as the need to prove fault; the uncertainty with legal standing; the difficulties gathering the required evidence; the difficulties in the quantification of damages; uncertainty whether to rely or not on the decisions of the NCA and the costs and risks of litigation.

Noticing the obstacles of the development of the EU private enforcement, in 2005, the Commission responded by launching a Green Paper on damages, which opened the debate with different stakeholders. Despite the criticism, a widespread agreement existed on the complementary role of private enforcement in the overall enforcement system of the EU competition law. In 2008, the Commission issued a White Paper on damages proposing several measures to develop private enforcement which codified the ECJ settled case-law. Despite criticism, both initiatives of the Commission-Green Paper on damages and the White Paper on

[1202] *Manfredi* (n 7) paras 60-61.
[1203] *Manfredi* (n 7) para 62.
[1204] *Manfredi* (n 7) para 100.
[1205] Waelbroeck (n 16).

damages-provided a valuable complementary focus in the debate about EU private enforcement. They drew attention to the state of play of private enforcement at national level and stimulated the debate in the business community, academic circles and national parliaments for the need for the development of private enforcement.

In 2014, the Council and the European Parliament adopted the Directive 2014/104/EU, which marked the beginning of the new area of the EU competition law because of the negative harmonisation, specifically in the EU private enforcement.[1206] According to Article 1 of the Directive 2014/104/EU, the Directive pursues two objectives, one one hand, to optimise the interaction between the public and private enforcement of the competition law and, on the other hand, to ensure that victims of infringements of the EU competition rules can obtain full compensation for the harm they had suffered. The Directive 2014/104/EU reaffirms the right for compensation to anyone harmed by a competition infringement and clarifies the nature of damages accounted for infringement of EU competition law. Relying on the experience of Member States which had been active and successfully encouraging the actions for damages,[1207] Directive 2014/104/EU introduces rules on the discovery of evidence, the statute of limitation, the joint and several liability,the effects of national decision, the passing-on defence, standing, the quantification of harm and the consensual dispute resolution.

The Member States faced enormous challenges during the transposition process of the Directive 2014/104/EU for two main reasons. Firstly, the Directive 2014/104/EU entails a minimum harmonisation setting out only certain rules governing the actions for damages under the national law for the infringements of the competition law provisions of the Member States and of the European Union. The Directive 2014/104/EU covers only the monetary compensation for the harm, not the restitution or satisfaction; even unjust enrichment claims seem to not be covered by the Directive.[1208] Secondly, the Directive 2014/104/EU offers a combination of different

[1206] Lorenzo F Pace, 'The Court of Justice 'Antitrust Enforcement Negative Harmonisation Framework' and the CDC and Pfleiderer Judgments: 'Another Brick in the Wall' in Bernardo Cortese (ed) *EU Competition Law: between Public and Private Enforcement* (Wolters Kluwer 2013) 241-255.
[1207] Howard (n 477) 456; Maton, Poopalasingam, Kuijper and Angerbauer, 'The Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation' (n 477) 489; Maton, Poopalasingam, Kuijper and Angerbauer 'Update on the Effectiveness of National For a in Europe for the Practice of Antitrust Litigation' (n 477) 586
[1208] cf Directive 2014/104/EU, Art 2 (4); Magnus Strand, 'Indirect Purchasers, Passing-on and the New Directive on Competition Law Damages' [2014] European Competition Journal 361, 378 – 380

harmonisation techniques within the core section of the Directive, which partake the attribution of the minimum harmonisation model, uniform principles and the national procedural rule.[1209] Whilst uniform principles were literally transposed into the Directive, the Member States enjoyed wide discretion concerning the provisions assisting the attribution of the minimum harmonisation model and the national procedural rule, subject to the principles of effectiveness and equivalence. Finding themselves in front of a challenging process where it was indispensable to determine the extent the national legislation should be changed or repealed, all three selected EU-Member States transposed the Directive's provisions literally with some gold-plating rules with regard to the competent court to deal with actions for damages or other provisions related to the minimum harmonisation.

In view of the implementation of the Directive 2014/104/EU, selected EU-Member States have chosen either to amend the existing competition law, just like Austria and Slovenia, or to transpose the Directive by enacting a specific legislation, as is the case of Italy. All three selected EU-Member States accomplished a minimal implementation of the Directive 2014/104/EU focusing only on the action to damages. Only the Slovenian legislator, during the *travuax preparatory* of ZPOmK-1G, intended to broadly implement such Directive covering even cases of unjustified enrichment claim. In response to the draft act, the Commission insisted that the Member States be limited only to the damages claims, reccommendation which was materialised in the final draft.[1210]

The Directive 2014/104/EU remained silent on whether the provisions had a substantive or procedural character. Consequently, the Member States have enjoyed wide discretion concerning the temporal application of the national implementing legislation and the distinction between procedural and substantive rules. Article 22 (1) of the Directive 2014/104/EU stipulated that the Member States shall ensure compliance of the adopted national measures with *substantive* provisions of this Directive. In contrast, the national measures adopted to comply with said procedural rules may have limited retroactivity effect, but they shall not apply to actions for

[1209] Albertina Albors – Llorens, 'Antitrust Damages in EU Law: The Interface of Multifarious Harmonisation and National Procedural Autonomy' [2018] University of Queensland Law Journal 139, 145-149.
[1210] Petr (n 562) 25; Vlahek and Podobnik (n 866) 271.

damages of which a national court was seized prior to 26 December 2014. All three selected EU-Member States implemented the provisions of the Directive on the disclosure of evidence as procedural rules for the purposes of determining the time the EU disclosure regime should apply. In Austria, measures relating the disclosure of evidence – § 37j to § 37m – shall apply retroactively as of 27 December 2016 subject of two limitations. Firstly, the limitation period stipulated in § 37h KaWeRÄG 2017 shall apply to claims that are not yet statute-barred by 26 December 2016 unless the injured party benefits by the application of the law in force by the afore-mentioned date. Secondly, § 37m KaWeRÄG 2017, concerning administrative penalties, may be imposed for conduct that took place after 30 April 2017. In Italy, Article 19 of *Decreto Legislativo 3/2017* 3/2017 defined the procedural provisions that may be applied retroactively for actions of damages brought after 26 December 2016. Retroactivity is limited only to the production of evidence laid down in Articles 3, 4, 5 and the suspension of the limitation period in the context of consensual dispute resolution set out in Article 15 (2) of the Directive 2014/104/EU. In Slovenia, Article 13 of ZPOmK-1G ensured the application of the provisions of the disclosure of evidence and the consequences of the disclosure of evidence for proceedings started after 26 December 2014.

In compliance with Articles 5-7 of Directive 2014/104/EU which introduce an EU-wide disclosure mechanism, the national measures empowered the national courts to order the defendants, claimants, third parties to disclose relevant evidence in their possession or control or even order the disclosure of information included in the file of an NCA. Such disclosure is subject to a number of safeguarding and restrictive measures aiming to protect the defendant from wide and vague disclosure requests. With regard to protective measures, the Member States have taken different approaches providing minimum harmonisation. The disclosure of the 'black list' evidence was prohibited.

Whilst the Directive 2014/104/EU stipulates 'uniform rules' to be implemented by the Member States concerning the effects of NCAs on one side, it introduces minimum harmonisation opportunities on the other. In this context, selected EU-Member States have chosen different approaches concerning the provisions which provide minimum harmonisation opportunities. For instance, only Slovenia and Austria did provide a legally binding effect to a decision of other NCAs or national courts. Italy opted for a minimum implementation; in other words, the decision

of other NCAs may be presented as a *prima facie* evidence of the infringement. Notwithstanding the 3 selected EU-Member States, the national transposition measure, similarly to the Directive 2014/104/EU, is unclear concerning: firstly, the extent the national judges shall consider the detailed facts of the case itself when assessing the significance properly attached to the infringement decision of an NCA of another Member State; and, secondly, whether there should be made any distinction in terms of the significance given to the infringement decisions of less experienced or more well-established NCAs. In the absence of a rule, the national judges should decide on the above-mentioned issues pursuant to the principle of effectiveness and equivalence.

All three selected EU-Member States introduced uniform rules in compliance with Article 10 about the start of the limitation period. However, different approaches were embraced concerning the limitation period. Austria and Italy adopted the one-tier limitation period − five years, − whereas the Slovenian legislator maintained a two-tier system of limitation period, − a combination of five and ten years.

Additionally, the concept of joint and several liability and the rules on passing-on defence in antitrust damages were introduced by all selected EU-Member States. National measures reflected the exceptions provided in Article 11 paras 2 and 5 of the Directive 2014/104/EU which grant a degree of protection from standard joint and several liability to all SMEs and immunity recipients.

Article 17 of the Directive 2014/104/EU introduces a uniform principle that cartel causes harm, and some basic principles intended to avoid a situation where national laws of procedure make it practically difficult to initiate any form of antitrust claims. In line with Article 17 (1), the selected EU-Member States ensured that neither the burden nor the standard of proof for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Furthermore, the national judges are empowered to estimate, in accordance with national procedures, the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the evidence available. In the same vein with Article 17 (3) of the Directive 2014/104/EU,

NCAs of selected EU-Member States were empowered to assist national courts for the determination of the quantum of damages if they consider such assistance to be appropriate.

All three selected EU-Member States introduced key measures aimed at increasing the incentives for parties to reach a consensual resolution of antitrust damages actions. Firstly, the suspension to bring an action for damages of maximum 2 years was introduced into the consensual settlement process. Secondly, in all selected EU-Member States, NCAs have been granted the discretion to consider whether a settlement reached prior to a fining decision should be a mitigating factor in setting the level of such fine. Finally, the national measures introduced the effect of consensual settlements on subsequent actions for damages.

Other issues not covered by the Directive 2014/104/EU remained at the discretion of the Member States. The Directive 2014/104/EU did not stipulate a competent court to deal with an action for damages. In this context, the Member State enjoyed a wide discretion, subject to the principles of effectiveness and equivalence. Additionally, the Directive 2014/104/EU did not address the issue of collective redress. This seems to be one of the biggest failures of the Directive. Instead, the Commission issued a non-binding Recommendation which had a two-fold purpose: i) to facilitate the access to justice in relation to violations of rights under the Union Law and ii) to recommend that all Member States should follow the same basic principles across all policy fields throughout the Union, while respecting different national legal traditions. The Recommendation urged the Member States to introduce the principle of 'opt-in' into their national collective redress mechanism. However, five years later, an assessment report on the implementation of the Commission Recommendation on collective redress found that 4 Member States had insistently applied both the 'opt-in' and 'opt-out' principles, while only the Netherlands and Portugal applied only the 'opt-out' principle.[1211] The assessment concluded that:

> the analysis of the legislative developments in the Member States as well as the evidence provided demonstrate that there has been a rather limited follow-up to the Recommendation. The availability of collective redress mechanisms as well as the

[1211] 4 Member States that apply both opt-in and opt-out principles are: Belgium, Bulgaria, Denmark and United Kingdom. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Implementation of the Commission Recommendation of 11 June 2013 on Common Principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law [2018] COM(2018) 40 final, 13.

> implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU.[1212]

The same conclusion has been subsequently confirmed in three selected EU-Member States where the Recommendation had little if not no impact. The Directive's failure to address collective redress by a legally legislative act represents a significant obstacle to achieve one of Directive's purposes, namely, compensation. It remains to be seen if the Commission's assessment report of the Directive, expected to be submitted to the European Parliament and the Council by 27 December 2020, is going to propose further harmonisation or not.

Besides the EU Member States, the obligation to transpose the Directive 2014/104/EU into the domestic legal system lies with all countries aspiring to become EU Member States. These countries shall fulfil the obligation to adjust their existing and future legislation in compliance with the EU *acquis* and ensure the proper implementation. Albania, as a post-communist country, did not inherit any competition culture or appropriate legal framework of competition. In 1995, Albania adopted the first competition law (Law 8044/1995) which lays down the foundations for the creation of a legal framework and paved the institutionalisation of the competition policy. While Law 8044/1995 provided a legal basis for the competition law, in practice, most of the provisions remained unenforced. Major deficiencies of Law 8044/1995, as amended, related with the lack of: i) an appropriate legal framework to provide adequate power in investing and imposing sanctions; ii) an independent institution since, pursuant to Article 57, the Economic Competition Department was operating under the authority of the Minister of Economic Cooperation and Trade; iii) sufficient and qualified staff; and iv) financial resources in conducting surveys for market data collection due to a high level of informality. The immediate need to consider the revision of numerous sectorial exemptions and establishing an independent competition authority coincided with the perspective of EU membership. In this context, in 2003, with the assistance of *Deutsche Gesellschaft fur technische Zusammenarbeit* (GIZ), the Competition Department drafted a new law modelled in line with Articles 101 and 102 TFEU, Regulation 1/2003, the EC Merger Regulation and several Commissions' notice and guidelines.

[1212] ibid 19

With the entry into force of the SAA (2009), Albania entered into the obligatory phase of Europeanisation of the competition law due to the approximation clause (Art 70 of SAA) and Article 71 (2) of SAA providing explicitly the assessment of the national competition law in light of the EU competition law and Commission's interpretative instruments. Therefore, in 2010, an amendment was adopted which brought, firstly, further clarification on the scope of the law, the provisions and main concepts such as 'agreement', 'abuse of the dominant position' and 'merger'. Alike the Commission, the ACA was empowered with the ability to grant individual or block exemptions to certain categories and applied *de minimis* rules towards the agreement with minor impact on competition. Finally, the 2010 amendment strengthened and increased market supervising tools. Investigative procedures were harmonised almost completely and the penalties were revised in compliance with the EU legislation.

Additionally to the public enforcement, Law 9121/2003, as amended, provides the right for any natural or legal person to seek compensation for the harm caused due to the infringement of the competition law. The competent court to deal with an action for damages is the District Court of Tirana. Law 9121/2003, as amended, regulates only the right to compensation and a competent court. Other substantive and procedural issues of private enforcement are regulated by the general provisions of tort liability. Despite the existence of the legal framework that could be an impetus, to the author's best knowledge, the private enforcement of competition rules in Albania is non-existent. This thesis identified the following obstacles in relation to private enforcement of competition law in Albania: i) the high burden of proof, since the Albanian Civil Code of Procedure provides a strict traditional civil requirement to precisely identify and describe the documents to be disclosed; ii) the absence of collective redress which enables the injured party to address jointly lawsuits; iii) the unfamiliarity of economic operators, Albanian judges, attorneys and consumer associations with the private enforcement of the competition law; and iv) the lack of credibility in the judiciary system due to the high level of corruption and interference of business in the final decision.

While the Law 9121/2003, as amended, was adjusted in line with the EU competition *acquis*, the provisions of the private enforcement did not change to consider either the ECJ settled decision or the recommendations of the Commission's White Paper on damages and the

Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules, what Slovenia actually did before enacting the ZPOmK–1 in 2008. In this context, entrusted with the responsibility to further harmonise the domestic legislation with the EU competition *acquis*, in June 2019, the ACA adopted a Guideline on damages that transposes the Directive 2014/104/EU. The Guideline on damages literally reproduces the Directive. However, the approach taken to harmonise the Albanian competition legislation in line with the EU *acquis* is incorrect.

From the perspective of the EU law, the Directives are binding only if they lead to achievable results, leaving to the Member States full freedom to decide upon the most appropriate form and method of implementation. Instead of amending Law 9121/2003 and the general provisions of tort law, the ACA opted for a Guideline on damages whose provisions of Law 9121/2003, as amended, have an explanatory character. Therefore, since the Guideline on damages has a non-binding character, the transposition of the Directive 2014/104/EU has not been completed. The ACA had to propose an amendment to the existing competition law or enact a specific law to transpose the Directive 2014/104/EU into the Albanian legal system.

Even from the Albanian perspective, the Guideline on damages did not bring any legal changes. According to Article 116 of the Albanian Constitution, as amended, which lists the sources of law in the Albanian legal system, laws prevail over the by-laws issued by the Ministries or other independent institutions. Therefore, the private enforcement of competition law will persistently be governed by Articles 65- 69 of Law 9123/2003, as amended, and other general rules applicable for tort liability.

It is generally agreed that the SAA provisions on fundamental freedoms have direct effects and its legal impact depends on the interpretation the national judges give on the interpretation of the SAA.[1213] In case the competition provisions are modelled in line with TFEU provisions, the

[1213] Alfred E Kellerman, 'The Right of Non – Member State Nationals under the EU Association Agreements' [2008] European Journal of Law Reform 339, 353 – 354; Alfred E Kellerman, 'Impakti i Anëtarësimit në BE në Rendin e Brendshëm Ligjor' [2007] E Drejta Parlamentare dhe Politikat Ligjore 4, 18; Xhezair Zaganjori, Aurela Anastasi and Eralda (Methasani) Çani, *Shteti i së Drejtës në Kushtetutën e Republikës së Shqipërisë* (Adelprint 2011) 66 – 71; Iva Zajmi, 'The Legal Obligations of Albania in the Stabilisation and Association Agreement between Albania and EU' [2013] Journal of US-China Public Administration 662; Iva Zajmi, Autonomia e Zbatimit të Ligjit komunitar' [2011] Revista Shqiptare për Studime Ligjore 98

national judges shall interpret the domestic law in accordance with the EU law. Such inspiration to rely upon the EU law stems from 3 sources. The first source relates to the approximation clause to remodel the existing and future legislation in line with the EU law and ensure proper implementation. Secondly, Article 71 (2) of SAA requires both the interpretation of a restrictive agreement in line with the EU competition provisions – Articles 101, 102, 106 and 107 TFEU – and interpretative instruments of the CJEU and the Commission. Thirdly, Article 126 (1) of SAA requires the parties to 'take any general or specific measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives set out in this Agreement are attained.' To conclude, in the hypothetical case the injured parties seek damages for an infringement of the competition law, the Albanian attorneys, individuals and judges can also make reference to the Directive 2014/104/EU, since the SAA provisions oblige the Albanian courts to directly apply all primary and secondary EU competition rules, including the interpretation adopted by the Commission and the CJEU.

The thesis concludes that the EU private enforcement of competition law is far from being finished. Harmonisation is the best way to enhance the private enforcement of competition rules. Provisions of tort law are an integral part of the EU Member States' private law, which differes considerable not between common law and civil law traditions, but there is differences even beteween civil law systems.[1214] More decisive steps are required to be taken for issues that fall under the national legal system of the Member States without risking incoherence and fragmentation. Besides the EU Member States, Albania as a candidate country shall properly transpose the Directive 2004/104/EU through a legally binding act enacted by the Albanian Parliament. In so doing, an increase in understanding the culture of competition and especially private enforcement *per se* should be addressed. In this context, it is appropriate that different activities be organised; the more economic operators, consumers, national judges, lawyers and consumer associations participate in workshops, seminars or short courses, the more intense the positive outcome in the area of private enforcement of the competition law.

[1214] Kent Oliphant, 'Cultures of Tort Law in Europe' [2012] Journal of European Tort Law 147; Helmut Koziol, 'Harmonizing Tort Law in the European Union: Advantages and Difficulties' [2013] ELTE Law Journal 73, 80-83.

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