

# 1. Introduction

**Pier Luigi Parcu, Giorgio Monti, Marco Botta**

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## 1.1 THE PRIVATE ENFORCEMENT OF EU COMPETITION LAW DURING THE PAST DECADE: FROM THE 2005 GREEN PAPER TO THE IMPLEMENTATION OF THE DAMAGES DIRECTIVE

A long time has passed since Advocate General (AG) Geelhoed stated in his Opinion in *Manfredi* that ‘private enforcement of (competition law) in Europe is still in its infancy’.<sup>1</sup> One decade after the landmark ruling of the Court of Justice of the European Union (CJEU), the number of antitrust claims in national civil courts has steadily increased, though major differences exist among the EU Member States. In particular, the UK, Germany and the Netherlands have become the preferred fora by claimants in cross-border actions, while the majority of the other Member States have not recorded many antitrust damages cases.<sup>2</sup> In terms of remedies, however, claimants often request either injunctive relief or contract invalidation, rather than damages.<sup>3</sup> Finally, industrial customers, rather than final consumers, start most of the legal actions, even in the

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<sup>1</sup> Opinion AG Geelhoed in Case C-295/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:67, para. 29.

<sup>2</sup> For a comparative view of the trends in private enforcement of EU competition law, see Barry Rodger, *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU* (Wolters Kluwer, 2014).

<sup>3</sup> This is the conclusion achieved by Peyer in the context of an empirical study where he analysed 368 cases of private enforcement of EU competition law in Germany during the period 2005–2007. Sebastian Peyer, ‘Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence’ 8(2) (2012) *Journal of Competition Law and Economics*: 338.

countries where private enforcement of EU competition law is more developed.<sup>4</sup>

During the past decade, the EU Commission has actively promoted damages actions for breaches of EU competition rules. During this period of time, the pendulum of the policy discourse followed by the EU executive branch has swung between the goal of increasing the number of damages claims in national courts on the one hand, and the idea of establishing a level playing field among the EU Member States in terms of applicable procedural rules, in order to discourage forum shopping on the other. In the initial 2005 Green Paper,<sup>5</sup> the EU Commission emphasized that damages actions should ‘deter’ competition law violations.<sup>6</sup> In order to achieve such an objective, the document borrowed concepts from US antitrust law, such as punitive damages,<sup>7</sup> rules on disclosure of evidence,<sup>8</sup> collective redress to safeguard final

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<sup>4</sup> For instance, Whish notes that even in the UK the majority of cases of private enforcement have been stand-alone actions for breaches of Art. 102 TFEU started by direct industrial customers, rather than cartel follow-on actions brought by indirect customers. Richard Whish, ‘Article 102 TFEU in the UK: Victims of Abuse, Go Directly to Court’ in Pier Luigi Parcu, Giorgio Monti, Marco Botta (eds), *Abuse of Dominance in EU Competition Law. Emerging Trends* (Edward Elgar Publishing, 2017) 67.

<sup>5</sup> European Commission, *Green Paper – Damages actions for breach of the EC antitrust rules*. Published on 19.12.2005, COM(2005) 672. Available at: <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0672>> (accessed on 24.1.2018).

<sup>6</sup> ‘Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence)’. *Ibid.*, para. 1.1.

<sup>7</sup> ‘... doubling of damages at the discretion of the court, automatic or conditional, could be considered for horizontal cartel infringements’. *Ibid.*, para. 2.3.

<sup>8</sup> ‘Actions for damages in antitrust cases regularly require the investigation of a broad set of facts. The particular difficulty with this kind of litigation is that often the relevant evidence is not easily available and is held by the party committing the anti-competitive behaviour. Access by claimants to such evidence is the key to making damages claims effective. It must therefore be considered whether obligations to turn over documents or otherwise provide access to evidence should be introduced. This is particularly important for stand-alone actions.’ *Ibid.*, para. 2.1.

consumers<sup>9</sup> and rejection of passing on.<sup>10</sup> In the 2008 White Paper,<sup>11</sup> on the contrary, the EU Commission stressed the need to harmonize the diverging national procedural rules:<sup>12</sup> rather than punitive damages, the document emphasized the compensatory nature of damages actions in Europe;<sup>13</sup> rather than an opt-out system of collective redress, the White Paper favoured a combination of an opt-in system and representative actions;<sup>14</sup> finally, in line with the CJEU ruling in *Manfredi*, the standing

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<sup>9</sup> ‘Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money.’ *Ibid*, para. 2.5.

<sup>10</sup> ‘The “passing-on defence” substantially increases the complexity of damages claims as the exact distribution of damages along the supply chain could be exceedingly difficult to prove. Evidentiary problems also burden actions of indirect purchasers, as they might be unable to prove the extent of their damages and the causative link with the infringing behaviour.’ *Ibid*, para. 2.4.

<sup>11</sup> European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*. Published on 2.4.2008, COM(2008) 165. Available at: <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0165>> (accessed on 24.1.2018).

<sup>12</sup> ‘...’, the Commission concluded that this failure is largely due to various legal and procedural hurdles in the Member States’ rules governing actions for antitrust damages before national courts ... The current ineffectiveness of antitrust damages actions is best addressed by a combination of measures at both Community and national levels, in order to achieve effective minimum protection of the victims’ right to damages under Articles 81 and 82 in every Member State and a more level playing field and greater legal certainty across the EU.’ *Ibid*, para. 1.1.

<sup>13</sup> ‘The Court emphasised that victims must, as a minimum, receive full compensation of the real value of the loss suffered. The entitlement to full compensation therefore extends not only to the actual loss due to an anti-competitive price increase, but also to the loss of profit as a result of any reduction in sales and encompasses a right to interest. For reasons of legal certainty and to raise awareness amongst potential infringers and victims, the Commission suggests codifying in a Community legislative instrument the current *acquis communautaire* on the scope of damages that victims of antitrust infringements can recover.’ *Ibid*, para. 2.5.

<sup>14</sup> ‘The Commission therefore suggests a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust:

- representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either (i) officially designated in advance or (ii) certified on an ad hoc basis

of indirect customers<sup>15</sup> and the passing-on defence were recognized.<sup>16</sup> During the past decade, the EU Commission has thus progressively shaped a ‘European’ approach to private enforcement. Such model reflects the CJEU case law and the compensatory nature of civil damages claims in Europe. Secondly, unlike the US model, private enforcement does not replace public enforcement of EU competition law, but it rather complements it.<sup>17</sup>

The Damages Directive has codified in a binding legal instrument most of the ideas proposed by the EU Commission in the White Paper.<sup>18</sup> The aim of the Directive is to harmonize ‘certain rules’ applicable to damages claims for breaches of EU competition law,<sup>19</sup> in order to establish a level playing field among EU Member States. In particular, the Directive codifies the CJEU ruling in *Manfredi* by recognizing the principle of ‘full damages compensation’ (Art. 3)<sup>20</sup> and the principle of passing on (Arts

by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and

– opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action.’ *Ibid*, 2.1.

<sup>15</sup> ‘In the context of legal standing to bring an action, the Commission welcomes the confirmation by the Court of Justice that “any individual” who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts.’ *Ibid*, para. 2.1.

<sup>16</sup> ‘The Commission recalls the Court’s emphasis on the compensatory principle and its premise that damages should be available to any injured person who can show a sufficient causal link with the infringement. Against this background, infringers should be allowed to invoke the possibility that the overcharge might have been passed on. Indeed, to deny this defence could result in unjust enrichment of purchasers who passed on the overcharge and in undue multiple compensation for the illegal overcharge by the defendant.’ *Ibid*, para. 2.6.

<sup>17</sup> ‘Another important guiding principle of the Commission’s policy is to preserve strong public enforcement of Articles 81 and 82 by the Commission and the competition authorities of the Member States. Accordingly, the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement.’ *Ibid*, para. 1.2.

<sup>18</sup> 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. OJ L349/1, 5.12.2014.

<sup>19</sup> *Ibid*, Art. 1.1.

<sup>20</sup> In *Manfredi*, the CJEU relied on the principle of equivalence to rule that Member States where punitive damages were allowed should allow such remedy

12–14).<sup>21</sup> Secondly, the proportionality test that national judges should carry out in deciding when ordering the disclosure of evidence (Art. 5) gets inspiration from the ‘weighing exercise’ of public and private enforcement considerations that, in accordance with the *Pfleiderer* case law, the national courts should carry out in deciding whether to order the disclosure of a leniency file.<sup>22</sup> By contrast, the Damages Directive departs from *Pfleiderer* by introducing a temporary limitation on the disclosure of the internal documents held by the National Competition Authority (NCA) and a total ban on the disclosure of the settlement submissions and the leniency statement.<sup>23</sup> Finally, the Damages Directive introduced a number of new harmonized rules that were not present in the previous CJEU case law, such as the binding effect of the NCA decisions on civil courts in follow-on damages cases,<sup>24</sup> the joint and several liability of cartel members,<sup>25</sup> and rules on the limitation period to start a damages action.<sup>26</sup>

The Directive was proposed by the European Commission in June 2013 in a legislative ‘package’ including two additional soft law instruments, namely a Recommendation encouraging the EU Member States to

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also for a breach of EU competition law. In addition, on the basis of the principle of effectiveness, the CJEU ruled that ‘any individual ... Must be able to seek compensation not only for the actual loss (*damnum emergens*) but also for loss of profits (*lucrum cessans*) plus interest.’ The *damnum emergens*, *lucrum cessans* and interest rate represent the ‘full compensation’, which should be available to claimants in all Member States. Case C-295/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:461, paras 93–95.

<sup>21</sup> In *Manfredi*, the CJEU ruled that ‘any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Art. 101 TFEU’. Since the White Paper, the EU Commission has interpreted this statement as an indirect recognition by the CJEU of the principle of passing on: an indirect customer can have legal standing if it proves to have suffered a competition law harm. Similarly, if the claimant transfers the price overcharge downstream, it loses the legal standing in the damage proceedings (i.e. passing on defence). *Ibid*, para. 61.

<sup>22</sup> Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, ECLI:EU:C:2011:389, para. 31.

<sup>23</sup> In addition, the Damages Directive prohibits the trading of evidence disclosed via a court order and it requires the Member States to introduce ‘sanctions’ against the lack of disclosure of evidence by one of the parties. Damages Directive, *supra* note 18, Arts 6–8.

<sup>24</sup> Damages Directive, *supra* note 18, Art. 9.

<sup>25</sup> Damages Directive, *supra* note 18, Art. 11.

<sup>26</sup> Damages Directive, *supra* note 18, Art. 10.

introduce an opt-in system of collective redress<sup>27</sup> and a Practical Guide addressed to national courts, explaining the techniques relied on by economists to quantify the antitrust damages.<sup>28</sup>

The Directive, adopted by the Council and by the European Parliament in November 2014, had to be transposed by the EU Member States by December 2016.<sup>29</sup> At the time of writing, most of the EU Member States have implemented the Directive.<sup>30</sup> In spite of Brexit, even the UK has implemented the Directive in March 2017.<sup>31</sup> However, as noted by Peyer in his chapter, the effective application of the new rules in UK is postponed to the future: with the exception of the rules on the disclosure of evidence, in fact, the other rules in the Directive will be enforced in the UK only in relation to competition law breaches taking place after March 2017.<sup>32</sup>

Member States have implemented the Directive by either amending the Civil Code and the Code of Civil Procedure (see the case of France in the chapter by Solidoro), or by incorporating the new legislation in the

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<sup>27</sup> 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. OJ L201/60.

<sup>28</sup> European Commission Staff Working Document, Practical guide quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Published in Strasbourg, 11.6.2013, SWD (2013) 205.

<sup>29</sup> Damages Directive, *supra* note 18, Art. 21.

<sup>30</sup> At the time of writing, only Portugal has not transposed the Directive yet. An updated table concerning the process of transposition of the Directive at the national level is available on the EU Commission website: <[http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html)> (accessed on 24.1.2018).

<sup>31</sup> The Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments) Regulations 2017, SI 2017/385, enacted on 9.3.2017. The text of the legislation is available at: <<http://www.legislation.gov.uk/ukdsi/2017/9780111152805>> (accessed on 24.1.2018).

<sup>32</sup> Art. 22 Damages Directive provides that substantive rules included in the Directive will not be applied retroactively, while procedural rules can be applied from the entry into force of the national law transposing the Directive. However, Art. 22 does not specify what rules in the Directive are considered 'substantive' and what are 'procedural'. The UK Implementing Regulation points out that only the provisions on disclosure of evidence (Arts 5–7 Damages Directive) are procedural rules, while the other provisions of the Directive will be enforced only in relation to damage claims related to infringements taking place after 9 March 2017, the date of the entry into force of the Implementing Regulation.

Competition Act (e.g. Germany).<sup>33</sup> Alternatively, other Member States have introduced new legislation to implement the Directive, which represents a *lex specialis* only applicable to damages actions for breaches of EU competition law. As discussed by Pisarkiewicz in her chapter, this has been the approach followed by the majority of Central and Eastern European (CEE) countries in transposing the Directive.

Another interesting aspect concerning the implementation of the Directive is that all EU Member States have extended the scope of the Directive beyond EU competition law, covering damages actions for breaches of national competition law as well. As pointed out by Solidoro in her chapter, France has even extended the scope of the Directive to damages claims concerning abuse of economic dependency, though such rules do not find an equivalent provision at the EU level. On the other hand, the provisions implementing the Directive remain an ad hoc set of procedural rules, which differ from the rules applicable in other policy areas. For instance, Maillo notes in his contribution that the initial Spanish draft law transposing the Damages Directive extended the new rules on disclosure of evidence to other types of proceedings (e.g. civil claims concerning a breach of intellectual property law). However, in the final legislation transposing the Directive the scope of such rules has been narrowed down to competition law damages claims. Such implementation, though lawful, creates new challenges for national judges in proceedings involving different policy areas.

## 1.2 THE PRESENT VOLUME

The book analyses the impact of the Damages Directive on the development of private enforcement of competition law in Europe. The volume thus assesses whether and to what extent the Directive achieves the two goals that the EU Commission has been pursuing during the past decade

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<sup>33</sup> Germany completed the process of implementation of the Damages Directive in June 2017. The Directive has been transposed in Germany in the context of the 9th amendment to the Act against Restriction of Competition (*Gesetzes gegen Wettbewerbsbeschränkungen*, GWB). In particular, Section 33 GWB transposes the provisions of the Damages Directive. The consolidated version of the GWB after the 9th amendments was published on 8.6.2017 in vol. 1, issue 33 of the German Official Journal (*Bundesgesetzblatt*). The text of the legislation is available at: <[https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl117s1416.pdf#\\_\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl117s1416.pdf%27%5D\\_\\_1500978329258](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl117s1416.pdf#__bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl117s1416.pdf%27%5D__1500978329258)> (accessed on 24.1.2018).

in this area: whether the Directive creates real incentives to increase the number of damages claims in national civil courts and whether it establishes a level playing field among Member States.

The eight contributions included in the volume analyse this topic both from a cross-country perspective and via a number of country case studies. In particular, while the chapter by Schreiber, Krüger and Burke discusses practical challenges faced by claimants in cross-border antitrust damages actions and the aspects not harmonized by the Directive, the chapter written by Monti discusses the role of national courts in filling the gaps left open by the Directive. Furthermore, the chapter by Parcu and Rossi discusses the role of economic analysis in antitrust damages cases after the Practical Guide on damages quantification and the Damages Directive. On the other hand, the country case studies discuss the impact of the Directive both in jurisdictions where private enforcement is well developed (i.e. UK and the Netherlands) as well as in countries where it is rather under-developed (i.e. Belgium, France, Spain and countries in CEE). Each chapter focuses on a limited number of procedural aspects harmonized by the Directive and analyses the impact of this legislation, taking into consideration the national jurisprudence and the existing legal framework at the national level.

The book contributes to the existing literature on private enforcement of EU competition law. A number of volumes have analysed trends in private enforcement of antitrust law either in the US<sup>34</sup> or in individual EU Member States.<sup>35</sup> On the other hand, few books have followed a comparative approach like the present volume.<sup>36</sup> In addition, while a number of books were written after the adoption by the EU Commission

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<sup>34</sup> See, for instance, Albert Foer, Jonathan W. Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar Publishing, 2010).

<sup>35</sup> In relation to the UK, see Mark Brealey, Nicholas Green, Kyla George (eds), *Competition Litigation. UK Practice and Procedure* (Oxford University Press, 2010). In relation to Sweden, see Maria Bergström, Marios Iacovides, Magnus Strand (eds), *Harmonising EU Competition Litigation. The New Directive and Beyond* (Hart Publishing, 2016). In relation to Ireland, see David McFadden, *The Private Enforcement of Competition Law in Ireland* (Hart Publishing, 2014). For a comparison between the UK and the Netherlands, see Mirjam Freudenthal, George Cumming, *Civil Procedure in EU Competition Cases before the English and Dutch Courts* (Kluwer Law Int., 2010).

<sup>36</sup> See, for instance, Mihail Danov, Florian Becker, Paul Beaumont (eds), *Cross-Border EU Competition Law Actions* (Hart Publishing, 2013); Barry Rodger (ed.), *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Law Int., 2014).

of the 2005 Green Paper and the 2008 White Paper,<sup>37</sup> the present volume is published after the end of the implementation period of the Damages Directive. The book thus represents one of the first attempts to assess the impact of the Damages Directive at the national level.<sup>38</sup>

### 1.3 PRIVATE ENFORCEMENT OF EU COMPETITION LAW IN THE AFTERMATH OF THE DAMAGES DIRECTIVE

The Damages Directive is likely to have a different impact in each jurisdiction analysed in the volume. However, a number of common trends emerge throughout the chapters.

#### 1.3.1 Harmonization v. Codification of National Rules

The country case studies included in the volume stress that a number of rules included in the Directive were already present in the legal framework of the EU Member States. For instance, the principle of passing on<sup>39</sup> had already been recognized by the jurisprudence of the national supreme courts of all jurisdictions analysed in this volume even before the adoption of the Damages Directive.<sup>40</sup> Similarly, the joint and several liability of cartel members was a concept already present both in common law jurisdictions (e.g. see the case of the UK analysed by Peyer in this volume) and in civil law jurisdictions (e.g. see the case of Spain discussed by Maillo in his chapter),<sup>41</sup> while the rules on the limitation of

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<sup>37</sup> See, for example, Assimakis Komninos, *Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, 2008); Jürgen Basedow (ed.), *Private Enforcement of EC Competition Law* (Kluwer Law Int., 2007); Veljko Milutinović, *The 'Right to Damages' under EU Competition Law: From Courage v. Crehan to the White Paper and Beyond* (Kluwer Law Int., 2010).

<sup>38</sup> Assessment of the impact of the Damage Directive is also provided in David Ashton, David Henry, *Competition Damages Actions in the EU. Law and Practice* (Edward Elgar Publishing, 2013).

<sup>39</sup> Arts 12–14 Damages Directive, *supra* note 18.

<sup>40</sup> Botta has recently achieved a similar conclusion in a comparative study analysing the recognition of the principle of passing on in national courts in Germany, the UK, France and Italy. Marco Botta, 'The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive' 5 (2017) *European Review of Private Law*: 881–908.

<sup>41</sup> Art. 11 Damages Directive, *supra* note 18.

liability for the leniency applicant and for small and medium enterprises (SMEs) are new in both countries. Other rules included in the Directive were already present in the legal framework of some Member States, but not in others: for instance, the binding value of the NCA decision already existed in the UK, Spain and in the majority of the countries of CEE, while it is a novelty in France and in Italy.<sup>42</sup> The Directive, therefore, has achieved the objective of establishing a minimum level playing field among EU Member States, although in many instances the Directive simply codifies rules already present at the national level or legal principles already recognized by national courts.

### **1.3.2 Stand-alone v. Follow-on Actions – Contribution of the Damages Directive**

The rules on disclosure of evidence in court proceedings represent the main added value of the Directive in terms of stimulation of stand-alone damages actions.<sup>43</sup> Such rules aim at solving the perceived information asymmetry between the claimant and the defendant in court proceedings; asymmetry that discourages the claimant from starting any legal action. As pointed out by Maillo in his chapter, traditionally the main obstacles to the disclosure of evidence in civil law jurisdictions are: the lack of pre-trial disclosure obligation; the need for the claimant to identify specific documents to be disclosed via court order; and the lack of sanctions for the defendant who refuses to disclose the requested documents. By extending the UK-style rules on disclosure of evidence to continental Europe, the Directive encourages stand-alone damages actions by reducing the information asymmetry between the claimant and the defendant. In addition, as pointed out by Peyer, the Directive will also have an impact in the UK: the rules that temporarily limit the disclosure of NCA internal documents during the investigations and the total ban on the disclosure of the settlement submissions and the leniency statement are new within the UK legal system as well; they affect the case-by-case approach previously followed by British courts in ordering the disclosure of certain documents. The Directive thus creates a level playing field among Member States and it reduces one of the traditional incentives that claimants had to bring cases to UK courts.

In terms of stimulation of follow-on actions, on the other hand, Art. 9 represents the main added value of the Damages Directive. As mentioned

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<sup>42</sup> Art. 9 Damages Directive, *supra* note 18.

<sup>43</sup> Arts 5–7 Damages Directive, *supra* note 18.

above, although the binding effect of the NCA decision on national civil courts already existed in a number of EU Member States, the codification of this principle in the Directive will encourage follow-on actions in the countries where this principle was not present before. Therefore, by establishing a level playing field among Member States on this issue, Art. 9 should decrease the differences among EU Member States in terms of incentives to start a follow-on damages action.

Under Art. 9 the decision of the domestic NCA upheld on appeal shows that a competition law infringement is ‘deemed to be irrefutably established’, while the decision of a foreign NCA is ‘*prima facie* evidence that an infringement of competition law has occurred’.<sup>44</sup> The open question is whether civil courts will effectively differentiate the probative value of domestic and foreign NCA decisions; the Court of Justice might be called upon in the future to clarify this aspect of the Damages Directive.

### 1.3.3 Passing on and Collective Redress – The Distortive Effects on Private Enforcement

The Damages Directive has codified the principle of passing on, previously recognized by CJEU case law, and it has introduced a rebuttable presumption that indirect customers have legal standing if ‘purchased goods or services ... were the subject of the infringement or ... derived from or containing them’.<sup>45</sup> Via this legal presumption, the Directive aims at encouraging follow-on actions by final consumers harmed by cartels. However, the Directive does not include any rule on collective redress to stimulate actions by final consumers. As mentioned in Section 1.1, in June 2013 the EU Commission published a Recommendation on this subject together with the draft Damages Directive.<sup>46</sup> Nevertheless, few EU Member States have implemented this non-binding document in due time.<sup>47</sup> As pointed out by Schreiber, Krüger and Burke in their

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<sup>44</sup> Art. 9 Damages Directive, *supra* note 18.

<sup>45</sup> Art. 14 Damages Directive, *supra* note 18.

<sup>46</sup> EU Commission Recommendation on Collective Redress, *supra* note 27.

<sup>47</sup> Under para. 38 of the EU Commission’s Recommendation, Member States should have introduced forms of collective redress by 26 July 2015. In addition, under para. 40 they are required to communicate on an annual basis to the EU Commission the initiatives undertaken to comply with the Recommendation. Few Member States have followed the Recommendation. For instance, in the 2015 Consumers Protection Act the UK introduced an opt-out system of collective redress, which clearly diverges from the opt-in system indicated by the EU

contribution, a number of practical challenges affect forms of collective redress in antitrust damages actions, such as the high costs of the legal action, the lack of incentives for final consumers to join the action due to the limited damage suffered, the complexities behind the damages estimation and the different positions of the class members that affect the class certification during the court proceedings. Similarly, Peyer argues in his chapter that even in the UK, where damages actions are traditionally well developed and the claimants can rely on either opt-in, opt-out or representative actions, there are few examples of collective redress in antitrust cases. According to Parcu and Rossi, in the lack of effective EU rules on collective redress, the recognition of the principle of passing on in the Damages Directive could discourage, rather than encourage, private enforcement of EU competition law: rather than encouraging indirect customers to bring a damages compensation action, in fact, passing on will primarily be relied on as a 'defence' by the competition law infringer.

### 1.3.4 The 'Gaps' in the Damages Directive

Monti identifies in his contribution a number of liability issues that have not been harmonized by the Damages Directive. In particular, the need for the plaintiff to prove the presence of injury and fault by the competition law infringer, the joint-liability of the subsidiary and parent company, and the calculation of the interest rate remain 'gaps' in the current EU legal framework. The first question is whether it would be worthwhile harmonizing these gaps at the EU level in order to stimulate private enforcement. Secondly, the question is how such harmonization could be achieved, either via an amendment to the Damages Directive, or via the CJEU case law, or, as proposed by Monti in his chapter, via the jurisprudence of national courts. The latter could promote such harmonization by directly applying the principles of equivalence and effectiveness, rather than referring preliminary ruling questions to Luxembourg. The gaps in the Damages Directive remain an open issue, which will have to be discussed in the coming years.

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Commission in the Recommendation. EU Commission Recommendation on Collective Redress, *supra* note 27. Lianne Craig, Tom Bolster and Gurpreet Chhokar, 'Living up to Expectations? The Consumer Rights Act 2015, a Year on' (2017) *Global Competition Litigation Review*: 31.

### 1.3.5 The Socio-Economic Factors Influencing the Development of Private Enforcement of EU Competition Law

Besides the non-harmonized liability issues mentioned above, a number of additional factors influence the development of private enforcement at the national level and contribute to the current divergences among Member States. For instance, Pisarkiewicz points out in her chapter that the relatively recent adoption of competition law in CEE and the lack of familiarity of national courts and the business community with competition law explains the lack of antitrust damages cases in these countries. Besides the lack of competition culture, additional socio-economic factors can influence the development of private enforcement of competition law. For instance, Vande Walle points out that Dutch courts have been more willing than Belgian tribunals to accept jurisdiction in cross-border competition law cases. According to the author, the lower number of pending civil claims in the Netherlands in comparison to Belgium has made the Dutch courts 'more willing' to accept jurisdiction in cross-border antitrust damages cases. As a consequence, Dutch lawyers have specialized in this field and they have established an active 'legal industry' specialized in follow-on damages claims. Therefore, although Belgium and the Netherlands have very similar procedural rules, these socio-economic factors have led the Netherlands to become one of the major fora in Europe for cross-border damages claims, while a similar development has not been recorded in Belgium. Belgium and the Netherlands show the limits of the Damages Directive in terms of establishment of a level playing field among EU Member States: even in case of full harmonization of national procedural rules, a number of socio-economic factors will always affect the patterns of private enforcement in national courts of different Member States.

These emerging trends represent a first assessment of the impact of the Damages Directive on national legal systems. It remains to be seen how national courts will interpret the new rules, the contribution of CJEU case law in interpreting the Directive and whether the EU Commission will undertake any new legislative initiative in the future. In this regard, the European Commission is expected to publish guidelines on quantification of passing on in the near future.<sup>48</sup> Therefore, rather than being an end in

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<sup>48</sup> Under Art. 16 of the Damages Directive the EU Commission shall issue guidelines on how national courts should estimate the transfer of the price overcharge through the production chain. In order to prepare such guidelines, in November 2016 RBB Economics prepared a study on this topic on behalf of the

itself, the Directive represents a milestone in the road towards the development of a 'European' model of private enforcement of competition law; a road that will still be in front of us in the coming years.

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EU Commission. The text of the study is available at: <[http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html)> (accessed on 24.1.2018).