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"The interaction between public and private enforcement of EU competition law"

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TABLE OF ABBREVIATIONS

CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECN	European Competition Network
EU	European Union
GC	General Court
NCA	National Competition Authority
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

PREFACE

The present dissertation aims to provide a critical overview of the dual system of enforcement of EU competition law, namely public and private enforcement, and explore the interaction between them. Although eighteen years have passed since the express recognition by the CJEU of a right to claim damages for loss caused by conduct liable to restrict or distort competition, the clarification of the interrelations between the rules governing the exercise of such right and those governing enforcement by competition authorities continues to be a highly relevant matter. As effective competition is a prerequisite for the proper functioning of the internal market, lying in the foundations of the EU as a whole, optimal coordination between the two systems is not only desirable, but necessary; hence the need to examine their mutual interaction in the context of current trends and developments in the EU legal order.

The introduction to the dissertation seeks to provide an insight into the historical development of the two systems of enforcement of EU competition law, as well as their main objectives and characteristics. In particular, it will present the purpose and scope of said systems, their significance in the EU legal order, as well as the role of both lawmaking and case-law in their formation. Albeit in principle designed to function in parallel and complementarily, the two enforcement models may under certain circumstances become subject to a hierarchy, which entails that the one may take precedence over the other. On this premise, the main body of the dissertation is divided in two parts: the *first part* highlights aspects of convergence between the two systems, understood as rules and mechanisms which seek to guarantee that the two systems function in parallel and complementarily in a coherent manner, while the *second part* focuses on aspects of hierarchy, understood as rules and mechanisms which give precedence to one form of enforcement mainly to preserve its effectiveness. Such aspects are assessed from both a substantive and a procedural perspective.

More specifically, the first part will seek to elaborate on the reasons why a high degree of convergence and coherence between the two systems is required, focusing on the need for uniformity in the application of competition rules across the EU, avoidance of contradictory results and legal certainty. In this chapter two substantive forms of convergence will be addressed. *Firstly*, the binding effect of decisions of competition authorities on private court proceedings will be examined. More particularly, this section will (i) analyse the rules which provide that a finding of an infringement by the Commission or an NCA is binding in the context of national court proceedings, (ii) address the options available to avoid contradictory results in the case of parallel pending proceedings and (iii) assess the compliance of imposing such

binding effect with article 47 CFR. *Secondly*, the requirements regarding the uniform interpretation of substantive rules in the context of both enforcement systems will be examined. Furthermore, this chapter will address two procedural forms of convergence: *firstly*, the rules on disclosure of evidence in the course of private proceedings, as a lever for uniformity between the two systems; *secondly*, the rules on limitation periods with respect to bringing an action for damages, in the event that a competition authority takes action in respect of an infringement to which such action for damages relates.

The second part will highlight aspects of hierarchy between public and private enforcement, elaborating on rules and mechanisms which may entail that one enforcement system takes precedence over the other, ultimately in order to guarantee the effectiveness of public enforcement. The first part will assess whether a hierarchy is caused by rules affecting substance. *Firstly*, the analysis will focus on decisions of competition authorities with limited effect on court proceedings, such as decisions of a competition authority in a Member State other than the one in which a private action is raised as well as commitment decisions. *Secondly*, the accumulation of fines and damages will be examined as a potential threat to the practical effect of private enforcement. Moreover, the second part will address two procedural points creating a form of hierarchy: *firstly*, limits and exceptions imposed on the disclosure of evidence in the course of private proceedings, particularly with respect to leniency statements and settlement submissions; *secondly*, the passing on defence, which may reduce the effectiveness of private damages actions as compared to the effectiveness of public enforcement, with particular reference to the need for a uniform EU collective redress mechanism in the system of private enforcement.

The main body of the dissertation will be followed by conclusions concerning the current interplay between the two forms of enforcement of EU competition law as well as proposals for further coherence.

In closing this preface, I would like to take the opportunity to acknowledge and thank my supervisor, Assistant Professor Mrs. Revekka-Emmanuela Papadopoulou, Professor Emeritus Mr. Vasileios Christianos, Assistant Professor Mrs. Metaxia Kouskouna and Assistant Professor Mr. Emmanuel Perakis, for triggering my interest to the study of EU law and for their invaluable esteemed guidance. Furthermore, I would like to thank my family for their wise counsel and support throughout my undergraduate and postgraduate studies.

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INTRODUCTION

a. The role of competition law in the EU legal order

Competition law has been a cornerstone of the substantive law of the EU from the very inception of its creation and a fundamental lever for the advancement of European integration. The development of EU competition law, which, along with fundamental freedoms, has shaped the internal market and served to guarantee its proper functioning, has undergone several phases.

Albeit at a sectoral level, the first seeds were planted with the adoption of the Treaty on the European Coal and Steel Community in 1951[1], which inter alia assigned to the –then– Community the task to assure the establishment, maintenance and observance of normal conditions of competition and prohibited all agreements, decisions and concerted practices which would tend to prevent, restrict or distort normal competition in the common market for coal and steel.[2] This example was followed by the Treaty of Rome of 1957, which established the European Economic Community and incorporated both antitrust and State aid rules, lacking however any merger control provisions.[3] Merger control powers were assigned by virtue of secondary EU law, namely Regulation (EEC) No 4064/89, in 1989.[4] Furthermore, sectoral competition rules were introduced in 2009 through secondary EU law for key utilities, namely electronic communications and energy.[5]

Apart from the initiatives of the EU legislature in this field, the CJEU laid the foundations for the shaping and evolution of EU competition law and, in particular, the antitrust rules now found in articles 101 and 102 TFEU[6], to which this dissertation will focus, prohibiting anticompetitive agreements and concerted practices and abuse of dominance accordingly. The CJEU was called to interpret for the first time article 85 of the EEC Treaty (now article 101 TFEU) in case

[1] Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951, articles 5 and 65.

[2] Mestmäker E.-J., "Towards a Concept of Workable Competition Law Revisiting the Formative Period" in Patel K.K. and Schweitzer H. (*eds*), The Historical Foundations of EU Competition Law, Oxford University Press, 2013.

[3] Treaty establishing the European Economic Community, Rome, 25 March 1957, articles 85-86 and 92-94; see also Sauter W., Coherence in EU Competition Law, Oxford University Press, 2016, p. 27; Schwartz E., Politics as Usual: The History of European Community Merger Control, (1993) Yale Journal of International Law 18(2), p. 613.

[4] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30/12/1989.

[5] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.4.2002; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009.

[6] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012 (consolidated version).

Consten and Grundig v Commission, in 1966[7]. Taking this opportunity, the CJEU clarified that the rationale behind the introduction of antitrust rules was to prevent private undertakings from restoring the barriers to trade between Member States, which the Treaty sought to abolish inter alia through the provisions on fundamental freedoms.[8] In 1977, in case *INNO*[9], with a view to guaranteeing the *effet util* of competition provisions, the Court ruled that although article 86 of the EEC Treaty (now article 102 TFEU) is directed at undertakings, the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness. Almost a decade later, in *Van Eycke*[10], the CJEU elaborated on the criteria for the application of competition rules to Member State action, the scope of which was in turn apparently limited in *Meng*, *Ohra* and *Reiff*[11]. Furthermore, in *Eco Swiss*[12], the CJEU acknowledged that article 81 of the EC Treaty (now article 101 TFEU) constitutes a fundamental provision, which is essential for the accomplishment of the tasks entrusted to the EU and, in particular, for the functioning of the internal market and, as such, it may be regarded as a matter of EU public policy.

In order to better comprehend their role and function in the EU legal order, competition rules should be read in conjunction with the principles and objectives enshrined in the Treaties.[13] Article 3(3) TEU provides that the Union shall establish an internal market, which, pursuant to Protocol 27 to the TEU, is to include a system ensuring that competition is not distorted. It is noted that, although, article 3(1)(g) of the previous EC Treaty made separate reference among the activities of the –then– Community to a system ensuring that competition in the internal market is not distorted, following the amendments brought about by the Lisbon Treaty, competition remained linked with the objective of the internal market. Moreover, article 3(1)(b) TFEU stipulates that the Union shall have exclusive competence to establish the competition rules necessary for the functioning of the internal market. Finally, articles 119 and 120 TFEU, forming the EU's economic constitution, provide that both the Member States and the EU shall

[7] CJEU, 13.7.1966, *Consten and Grundig v Commission of the EEC*, Joined cases 56 and 58-64, EU:C:1966:41.

[8] *Ibid*, para. 340.

[9] CJEU, 16.11.1977, *INNO v ATAB*, 13/77, EU:C:1977:185, para. 31.

[10] CJEU, 21.9.1988, *Van Eycke*, 267/86, EU:C:1988:427; Concerning the three-limb test employed in Van Eycke, see also Opinion of AG Jacobs, 28.1.1999, in *Albany*, C-67/96, EU:C:1999:28, para. 301; Szyszczak E., The Regulation of the State in Competitive Markets in the EU, Hart Publishing, 2007, para. 62.

[11] CJEU, 17.11.1993, *Meng*, C-2/91, EU:C:1993:885; CJEU, 17.11.1993, *Bundesanstalt für den Güterfernverkehr v Reiff*, C-185/91, EU:C:1993:886; CJEU, 17.11.1993, *Ohra*, C-245/91, EU:C:1993:887; see also Reich N., The "November Revolution" of the European Court of Justice: Keck, Meng and Audi Revisited, (1994) Common Market Law Review 31 (3), pp. 459–492.

[12] CJEU, 1.6.1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paras 37 and 39.

[13] See Whish R., Bailey D., Competition law, Oxford University Press, 2015, p. 53.

act in accordance with the principle of an open market economy with free competition. In light of the above, it is evident that an overarching aim of competition law in the specific context of the EU legal order is to safeguard the functioning of the internal market. This conclusion is corroborated by the CJEU's case-law, which determines that competition rules are designed to protect, independently of other considerations, the structure of the market and competition as such[14] and proclaims that dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition in the market[15].

The above, however, do not signify that EU competition law does not pursue objectives other than market integration, such as economic efficiency.[16] As a detailed examination of all possible aims of EU competition rules would fall beyond the scope of the present analysis, particular reference shall be made to consumer welfare, which has gradually gained wider significance.[17] Consumer interests are explicitly found, for instance, in article 101(3) TFEU and article 2(1)(b) of Regulation (EC) No 139/2004 (EU Merger Control Regulation). Besides, the European Commission has repeatedly highlighted in various soft-law instruments that consumer welfare constitutes one of the main goals of competition rules.[18] As the CJEU has also recognized, the function of such rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the EU.[19]

The enforcement of the competition rules laid down in articles 101 and 102 TFEU[20] is currently achieved through a multilevel, decentralized system, involving both EU institutions – notably the European Commission and the CJEU – as well as National Competition Authorities and national

[14] CJEU, 4.6.2008, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343CJEU, para. 38. CJEU, 6.10.2009, *Aseprofar v GlaxoSmithKline*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, C-519/06 P, EU:C:2009:610, para. 63.

[15] CJEU, 9.11.1983, *Michelin v Commission*, 322/81, EU:C:1983:313, para. 57; CJEU, 14.10.2010, *Deutsche Telecom v Commission*, C-280/08 P, EU:C:2010:603, para. 176.

[16] For a comprehensive analysis, see Lianos I., "Some reflections on the question of the goals of EU competition law" in Lianos I., Geradin D. (*eds*), Handbook on European Competition Law: Substantive Aspects, Edward Elgar Publishing, 2013, p. 4 et seq; Monti G., EC Competition Law, Cambridge University Press, 2007, p. 39 et seq.

[17] See Cseres K. J., The Controversies of the Consumer Welfare Standard, 3(2) The Competition Law Review, 2007.

[18] Commission notice - Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, p. 7; Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 13; 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, OJ C 45, 24.2.2009, p. 1 and 5.

[19] CJEU, 21.9.1989, *Hoechst v Commission*, Joined cases 46/87 and 227/88, EU:C:1989:337, para. 25; CJEU, 22.10.2002, *Roquette Frères*, C-94/00, EU:C:2002:603, para. 42; CJEU, 17.2.2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, para. 22.

[20] The present analysis will focus on the enforcement of the rules laid down in articles 101 and 102 TFEU. Therefore, use of the expression 'competition rules' hereinafter shall refer to those provisions.

courts. The Commission and National Competition Authorities enforce competition rules *inter alia* by conducting investigations, requiring the termination of infringements and imposing fines, while the General Court and –on appeal on points of law– the Court of Justice, on the one hand, and national courts, on the other hand, review their decisions, accordingly (*public enforcement*). National courts are also called to adjudicate on actions for damages due to infringements of competition law, initiated by private parties, while the CJEU may be indirectly involved in such proceedings through the preliminary reference procedure under article 267 TFEU (*private enforcement*). The evolution of these two systems will be analysed in the following chapters.

b. The development of public enforcement of EU competition law

The European Commission was granted precise powers for the application of article 101 and 102 TFEU for the first time by virtue of Regulation 17/62 (*Regulation No 17*), which sought to create a uniform and effective enforcement system in order to ensure that competition is not distorted in the –then– common market.[21] The provisions of this Regulation established a centralized system for the enforcement of competition rules – notably article 101 TFEU –, which was entrusted to the Commission. Indeed, article 9(1) of Regulation No 17 awarded to the Commission sole power to declare article 85(1) EC (now 101(1) TFEU) inapplicable pursuant to article 85(3) EC (now 101(3) TFEU), subject to review of its decisions by the CJEU. Thus, although article 85(1) and 86 EEC could at that time be applied in parallel by national authorities and courts, the application of article 85(3) was a monopoly for the Commission.

In essence, under articles 4 and 5 of Regulation No 17, both new and old agreements, decisions and concerted practices, i.e. those that had entered before and after the entry into force of the Regulation respectively, should be notified to the Commission in order to benefit from an exemption and avoid liability for fines. This resulted in the Commission receiving more than 34,500 notifications only from the six first Member States, which entailed the risk of an 'administrative paralysis'[22]. This eventually resulted in the Commission adopting block exemption regulations[23] and the *de minimis* notice[24] or employing the solution of non-binding comfort letters[25].

Consequently, the centralised authorisation system under Regulation No 17 was considered ineffective, in the sense that, *firstly*, it prevented the Commission from focusing its resources on the most significant restrictions of competition, *secondly*, it did not allow the Commission to deal with cases in a timely manner and throughformal instruments that would guarantee legal

[21] Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21.02.1962.

[22] Ehlermann C.-D., The modernisation of EC antitrust policy: A legal and cultural revolution, (2000) Common Market Law Review 37(3), p. 541; see also Ehlermann C. D., Atanasiu I., European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law, Hart Publishing, 2003, p. 67; Cooke J. D., Centralised Subsidiarity: The Reform of Competition Law Enforcement, (2001) Irish Journal of European Law 10, p. 5.

[23] See, for instance, Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, now replaced by Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010.

[24] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ C 368, 22.12.2001 now replaced by Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, OJ C 291, 30.8.2014.

[25] Ehlermann C. D., Atanasiu I., *supra* n. 22, p. 68.

certainty and, *thirdly*, it obstructed the decentralised application of EU competition law by national authorities and courts.[26] Besides, it was questionable whether such a centralised authorization system was still necessary by the late 1990s given that a common competition culture had already been formed to a considerable extent among Member States.[27]

In light of the above, the Commission considered that the system should move towards modernisation. In its Modernisation White Paper published in 1999, the Commission analysed two possible options for the future development of public enforcement of EU competition law: *either* retaining the existing system, albeit with improvements, *or* switching to a directly applicable exemption system.[28] The second option would entail an ex post supervision of restrictive practices and abolishing the prior notification system and would render the whole of article 85 –now article 101 TFEU– as a directly applicable provision which individuals could invoke before national courts or authorities. Indeed, this option was ultimately adopted by Regulation 1/2003[29], which marked the initiation of a new era for the public enforcement of competition law in the EU.

Under Regulation 1/2003, the Commission and the NCAs of Member States formed together a network, the ECN, being jointly responsible for the enforcement of articles 101 and 102 TFEU. The Regulation lays down provisions which seek to enhance coordination and ensure the uniform application of EU Competition law. It also prescribes the enforcement powers of the Commission, while the respective powers of the NCAs, which the Member States were required to designate under article 35, are to be regulated by national laws within the framework set by the Regulation[30].

Article 7 of Regulation 1/2003 grants the Commission the power to order the termination of infringements, by imposing either structural or behavioural remedies in accordance with the principle of proportionality. It thus creates flexibility as to the form, type and purpose of remedies which the Commission is empowered to impose.[31] Article 8 allows the Commission to order interim measures in cases of urgency, due to the risk of serious and irreparable damage to competition. Article 9 empowers the Commission to adopt commitment decisions and thus

[26] See White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, 28.04.1999, para. 55.
[27] see Cooke J. D., *supra* n. 22, p. 5.
[28] See *supra* n. 26, paras 63-73.
[29] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003.
[30] See article 5 of Regulation 1/2003.
[31] Hjelmeng E., Competition Law Remedies: Striving for Coherence or Finding New Ways?, (2013) Common Market Law Review 50, 2013, p. 1008.

terminate investigation proceedings on the basis of concessions given by the undertakings concerned, which however do not include any finding of infringement. In particular, the Commission is empowered to make the commitments offered by the parties binding by virtue of a decision, but also to reopen the proceedings in case that decision was based on incorrect or misleading information, in case of a material change in facts or in case the commitments are infringed.[32] Chapter V of the Regulation provides the Commission with wide investigation powers, including the power to address requests for information, take statements and inspect premises. Finally, articles 9 and 10 empower the Commission to impose fines and periodic penalty payments either for the substantive infringements of competition rules found or for procedural infringements. Regulation 1/2003 thus prescribes the Commission's enforcement duties and powers, reaffirming its role to design and pursue a general competition policy under articles 101 and 102 TFEU, as already acknowledged by the CJEU in earlier case-law[33].

Although Regulation 1/2003 sought to leave considerable discretion to the Member States as to the shaping of their domestic system of public enforcement, such discretion should be exercised on the basis of the principles already formulated in the case-law of the CJEU. Member States must, for instance, ensure that infringements of EU Competition law are penalised under procedural and substantive conditions which are analogous to those applicable to infringements of national competition law of a similar nature and importance and which ensure that penalties are effective, proportionate and dissuasive.[34]

In light of the above, Regulation 1/2003 established a multi-level, decentralised system of public enforcement of EU competition law, which is to be implemented by a network working in close cooperation and under the duty to ensure uniformity and coherence. This system is complemented by the mechanisms of private enforcement which have mainly been developed through the case-law of the CJEU along with specific initiatives on the part of the EU legislature, as will be analysed in the following section.

[32] On the implications of commitment decisions on the interaction between public and private enforcement of EU competition law, see *infra* chapter 2.1.1(c).

[33] See CJEU, 7.6.1983, *Musique Diffusion française v Commission*, Joined Cases 100/80 to 103/80, EU:C:1983:158, para. 105.

[34] CJEU, 21.9.1989, *Commission v Greece*, 68/88, EU:C:1989:339, para. 24; For an analysis of the principles developed by the case-law of the CJEU in this respect, see Frese M. J., Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability, (2011) World Competition 34(3), p. 401.

c. The development of private enforcement of EU competition law

The development of private enforcement of EU competition law finds its origins in the early landmark judgments delivered by the CJEU. In *Van Gend en Loos*, the CJEU recognised that the provisions of the Treaty may produce direct effect and confer rights on individuals, which national courts must protect.[35] Furthermore, in *BRT v SABAM* the CJEU expressly acknowledged that the provisions of articles 101(1) and 102 have such direct effect.[36] However, the question remained open as to whether EU law provided for a basis empowering national courts to award damages to individuals due to an infringement of EU competition law.

This issue was raised for the first time before the CJEU in *Banks*[37]. Among the preliminary questions referred in that case was whether a national court had the power and/or the obligation under –then– Community law to award damages for a breach of the provisions of the ECSC and EEC Treaties on competition. In his Opinion[38], AG van Gerven suggested that the principle already established by the CJEU in *Francovich*[39] with respect to State liability for a breach of EU law should extend to cases where an individual infringes a provision of –then– Community law thereby causing loss and damage to another individual. On this basis, along with other considerations specific to the field of competition law, AG van Gerven concluded that, in order to ensure that Community law is fully effective and to protect the rights conferred on individuals, national courts should be obliged to award damages in case of a breach of EU competition rules by individuals.[40] However, the CJEU ruled that, since the Commission had sole competence under the ECSC Treaty to find that competition rules had been infringed, national courts did not have the power to award damages in the absence of a Commission decision adopted in the exercise of its competence.[41] This judgment has been characterised as a 'cautious ruling carefully confined to the Coal and Steel Treaty'.[42]

The decisive step towards the establishment of the system of private enforcement was taken in *Courage*[43], where the CJEU ruled that the full effectiveness of Article 85 EC (now 101 TFEU) would be put at risk if it were not open to any individual to claim damages for loss caused by a

[35] CJEU, 5.2.1963, *Van Gend en Loos*, 26/62, EU:C:1963:1.
[36] CJEU, 27.3.1974, *BRT v SABAM*, 127/73, EU:C:1974:25.
[37] CJEU, 13.4.1994, *Banks*, 128/92, EU:C:1994:130.
[38] Opinion of AG van Gerven, 27.10.1993, in *Banks*, 128/92, EU:C:1993:860.
[39] CJEU, 19.11.1991, *Francovich*, C-6/90, EU:C:1991:428.
[40] *Ibid*, para. 45.
[41] CJEU, *Banks*, *supra* n. 37, para. 21.
[42] Weatherill S., Cases and Materials on EU Law, Oxford University Press, 2016, p. 515.
[43] CJEU, 20.9.2001, *Courage and Crehan*, C-453/99, EU:C:2001:465.

contract or conduct liable to restrict or distort competition.[44] The CJEU added that such a right can discourage agreements or practices, frequently covert, which are liable to restrict or distort competition, thus, actions for damages before the national courts could make a significant contribution to the maintenance of effective competition.[45] Therefore, the judgment of the CJEU in *Courage* confirmed that individuals derive a right to claim compensation due to infringements of EU competition rules directly from EU law. The CJEU had the chance to elaborate more on the conditions and principles framing this right in *Manfredi*.[46] In particular, the CJEU confirmed the requirement of a causal link between an anticompetitive practice or agreement and the harm suffered from the individual concerned, adding that in the absence of EU rules on the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of the right to compensation, provided that the principles of equivalence and effectiveness are observed.[47] Moreover, the CJEU ruled that the compensation should not only cover actual loss (*damnum emergens*) but also loss of profit (*lucrum cessans*) plus interest.[48]

While it is clear that the right to claim damages for a breach of EU competition law has a compensatory nature, its deterrent function cannot be disregarded, and is actually read along the lines of *Courage*. As recently acknowledged by AG Wahl in *Skanska Industrial Solutions*, although claims for compensation tend to have a primarily reparatory function in Europe, in the context of EU competition law, actions for damages are intended to fulfil both functions.[49] Thus, it appears that in the context of EU competition law enforcement, the private interest contributes to the safeguarding of public interest which is inherent in competition rules.[50]

In light of the aforementioned developments in the case-law of the CJEU, the Commission adopted in 2008 a White Paper on damages actions for breach of EU antitrust rules, which

[44] *Ibid*, para. 26.
[45] *Ibid*, para. 27.
[46] CJEU, 13.7.2006, *Manfredi*, Joined cases C-295/04 to C-298/04, EU:C:2006:461.
[47] *Ibid*, paras 63-64.
[48] *Ibid*, para. 95.
[49] Opinion of AG Wahl, 6.2.2019, in *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:100, paras 27-28.
[50] See Komninos A., The Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari in Lowe P., Marquis M. (eds), European Competition Law Annual 2011: Integrating Public and Private Enforcement – Implications for Courts and Agencies, Hart Publishing, 2014, p. 144; on the objectives pursued by the both forms of enforcement, see also Marcos F., Sanchez Graells A., Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?, 3 European Review of Private Law (2008), p. 476; Dunne N., Role of Private Enforcement within EU Competition Law, (2013-2014) The Cambridge Yearbook of European Legal Studies 16, p. 146.

envisaged the introduction of harmonized rules for the creation of an effective system of private enforcement that would complement public enforcement.[51]

In 2014, the EU legislature adopted Directive 2014/104/EU.[52] Building upon the *acquis* on the right to compensation, the Directive laid down harmonised rules aiming to ensure the effective exercise of the right to claim full compensation for infringements of competition law, thus fostering undistorted competition in the internal market.[53] As recognised in recital 6 to the preamble of the Directive, it is necessary to coordinate the two forms of competition law enforcement in a coherent manner, with a view to avoiding divergent application of EU rules, which could endanger the proper functioning of the internal market.

It is evident from the above that private enforcement of EU competition law has been developed as an independent system, aiming at functioning along the system of public enforcement complementarily and in a cohesive manner. The main body of this dissertation, will examine whether the two systems indeed operate coherently as independent, equally important complements, or whether divergence and, eventually, a hierarchy can be implied to exist between them.

[51] White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, p. 3.
[52] 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 OJ L 349, 5.12.2014.
[53] Article 1(1) of Directive 2014/104/EU.

1. ASPECTS OF CONVERGENCE BETWEEN PUBLIC AND PRIVATE ENFORCEMENT OF EU COMPETITION LAW

The multilevel, decentralized dual system of enforcement of EU competition law entails an intense interaction between administrative and judicial institutions across different Member States and EU institutions. This in turn implies that competition rules are to be applied within a framework of diverse principles which govern the function of such different institutions.[54] Indeed, not only is administrative and judicial bodies governed by different rules of procedure or evidence appreciation, but, more importantly, they serve different objectives and possess different remedial powers. Considering the different legal traditions of Member States and the principle of procedural autonomy –as framed by the principles of equivalence and effectiveness– one can imagine the complexity of the context in which EU competition law is to be applied. In such a context, inconsistencies may arise *within* each system of enforcement, but also *between* the two of them.

Indeed, in the field of public enforcement, several divergences arise as National Competition Authorities may adopt divergent approaches on the same legal issues. This became all the more evident in recent cases relating to the digital economy sector.[55] The different stance adopted in respect of narrow most favoured nation (MFN) clauses used by digital hotel platforms, which required hotels not to offer more favourable prices or conditions on their own websites, albeit permitting them to do so on other platforms, is indicative.[56] In April 2015, the National Competition Authorities of France, Italy and Sweden accepted commitments from the company Booking to modify its wide MFN clauses into narrow MFN clauses, which were considered non problematic from a competition perspective.[57] On the contrary, in December 2015, the Germany's Bundeskartellamt found that such narrow MFN clauses were incompatible with

[54] See Lianos I., Davis P., Nebbia P., Damages claims for the Infringement of EU Competition Law, Oxford University Press, 2015, p. 215.

[55] Toth A., Overview of the National Enforcement of EU Competition Law, 2(4) European Competition and Regulatory Law Review, 2018, p. 265.

[56] For a detailed analysis, see Ezrachi A., The competitive effects of parity clauses on online commerce, 11(2-3) European Competition Journal, 2015; Colangelo M., Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking, 8(1) Journal of European Competition Law & Practice, 2017.

[57] France: Autorité de la Concurrence, Decision of 21 April 2015 in case 15-D-06; Italy: Autorità Garante della Concorrenza e del Mercato, Decision of 21 April 2015 in Case 1779 B; Sweden: Konkurrensverket, Decision of 15 April 2015 in Case 596/13.

competition rules and prohibited Booking from continuing to apply them with respect to hotels in Germany.[58]

In the field of private enforcement, Directive 2014/104/EU does not cover all aspects relevant to the exercise of the right to claim damages for a breach of EU competition law. Issues which have not been harmonised are governed under national laws, and insofar as these issues refer to procedure, they are subject to the principles of equivalence and effectiveness. Besides, the Directive pursues a minimum level of harmonization, which implies significant leeway for variations between Member States even in respect of those aspects addressed by the Directive.[59] Moreover, a private party having suffered damage due to an infringement could seize the courts of various Member States in respect of the same infringement, which would also entail a risk of irreconcilable judgments.[60]

The present analysis will focus in particular on the risk of divergences between the two enforcement systems. Since no *de jure* hierarchy has been established between public enforcement and private actions for damages[61], the question arises whether these two systems require coordination or a form of "equalization" with a view to achieving optimal enforceability and ensuring that the exercise of one enforcement model does not impinge upon the effective exercise of the other[62].

The above question should be answered in the affirmative. In the specific context of the EU legal order, this is dictated at least for three reasons: (i) to safeguard the unity and consistent application of EU competition rules across the EU and protect the integrity of the internal market; (ii) to guarantee the *effet util* of such rules and (iii) to enhance legal certainty.

The uniform application of EU law is a requirement inherent to the very nature of the EU, constituting the core objective of its judicial architecture and a *sine qua non* for the attainment of

[58] Bundeskartellamt, Decision of 23 December 2015 in Case B 9-121/13.

[59] Dunne, N., Courage and compromise: the Directive on antitrust damages, 4 European Law Review, 2015; Lianos I., Davis P., Nebbia P., Damages *supra n*. 54, 2015, p. 7.

[60] CJEU, 21.5.2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, para. 22; Havu K., Private claims based on EU competition law - Jurisdictional Issues and Effective Enforcement, 22(6) Maastricht Journal of European and Comparative Law, 2015, p. 880.

[61] Opinion of AG Mazák, 16.12.2010, in *Pfleiderer*, C-360/09, EU:C:2010:782, p. 40; Komninos A., *supra n.* 50, 2014, p. 142.

[62] See Kloub J., White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement, 5(2) European Competition Journal, 2009, p. 527-52, 543.

European integration.[63] Indeed, in the absence of uniform interpretation of EU law –which is guaranteed by the overarching interpretative monopoly of the CJEU– the full effect and autonomy of EU law would be jeopardized.[64] Besides, the need to ensure consistency particularly in the application of articles 101 and 102 TFEU, within the dual system of enforcement of EU competition law, is expressly acknowledged in Directive 2014/104/EU.[65] This consistency cannot be achieved, unless the two enforcement means operate in coordination and present a high level of coherence. This coherence is in turn expected to create a level-playing field of competition enforcement across the EU and shield the internal market from being fragmented along divergent or contradictory approaches.

Furthermore, coordination rules would allow each of the two systems to effectively achieve its distinct goals – mainly, the injunctive and deterrent objective in the case of public enforcement and the restorative-compensatory objective in the case of private enforcement. If the function of either system were to jeopardize the function of the other, EU competition rules would be deprived of their practical effectiveness.

Finally, the principle of legal certainty implies that those subject to the law must know what the law is so as to be able to plan their actions accordingly.[66] This cannot be achieved unless EU competition provisions are construed in a consistent manner in both concepts of enforcement, which, albeit independent, shall lead to coherent results.

The following analysis will examine the various substantive (1.1) and procedural (1.2) aspects of convergence between public and private enforcement, namely rules and mechanisms which seek to guarantee that the two systems function in parallel and complementarily in a coherent manner.

[63] See also Opinion 2/13 of the CJEU of 18.12.2014, Accession of the EU to the ECHR, EU:C:2014:2454, p. 174: "In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law".

[64] CJEU, 6.3.2018, *Achmea*, C-284/16, EU:C:2018:158, para. 37.

[65] See recitals 34 and 54 to the preamble of Directive 2014/104/EU.

[66] Tridimas T., The General Principles of EU Law, Oxford University Press, 2007, p. 242.

1.1. SUBSTANTIVE FORMS OF CONVERGENCE

As analysed above, the multilevel, decentralized dual system of enforcement of EU competition law entails a high risk of inconsistent interpretation and application of the relevant rules, on the one hand, by the European Commission and National Competition Authorities and, on the other hand, by national courts adjudicating in private enforcement actions. This chapter seeks to examine rules which are deemed to contribute to the establishment of a coherent approach across the EU as to the substance of EU competition provisions, allowing at the same time private and public enforcement to function effectively in parallel. Thus, although such rules may also affect procedure, they will be addressed as means of achieving uniformity in the application of EU competition law and effectiveness in the operation of its dual enforcement system.

The analysis will focus, *firstly,* on the binding effect of decisions of competition authorities on actions for damages (1.1.1) and, *secondly*, on the uniform interpretation of substantive rules in the context of both enforcement systems, achieved through the applicability of EU competition law concepts and principles of public enforcement also to private proceedings (1.1.2).

1.1.1. The binding effect of decisions of competition authorities over private enforcement actions

a. The effect of European Commission decisions over private enforcement actions

i. CJEU case-law setting the foundations

The CJEU extensively addressed for the first time the risk of contradictory decisions in the application of EU competition law by the Commission and national courts in *Delimitis*[67]. In this case, preliminary questions were referred in the context of judicial proceedings between S. Delimitis, formerly the licensee of premises for the sale and consumption of drinks in Frankfurt am Main, and the brewery Henninger Bräu AG, in relation to an amount claimed by the brewery from the licensee following the termination of a contract entered into between them. In its final question, the referring court requested guidance on how to assess an agreement, which did not satisfy the conditions of a block exemption regulation[68], under competition rules. The CJEU recalled that articles 85(1) and 86 EEC (now articles 101(1) and 102 TFEU) produce direct effect and, consequently, that the Commission shares its competence to apply them with national

[67] CJEU, 28.2.1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91.

[68] Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements, OJ L 173, 30.6.1983.

courts.[69] Hence, the CJEU identified a risk of national courts taking decisions which could conflict with those taken or envisaged by the Commission, which would be incompatible with the general principle of legal certainty.[70]

The CJEU proposed the following options with a view to avoiding contradictory decisions and safeguarding the Commission's fundamental role in the implementation and orientation of competition policy: (a) the national court could *continue* proceedings and rule on the agreement at issue provided, in essence, that the answer on the application of the EU provisions in question was clear and the court retained no doubts or (b) the national court could decide to *stay* the proceedings or adopt *interim measures* if there was a risk of a conflict between its judgment and a contemplated, future Commission decision in the application of articles 85(1) and 86 (now articles 101(1) and 102 TFEU)[71] or (c) stay the proceedings and make a reference for a preliminary ruling to the CJEU.[72]

At that time, many authors and national courts had already adopted a deferential stance towards the Commission based on the primacy of EU law, the duty of sincere cooperation (now enshrined in article 4(3) TEU) and the need to avoid contradictory outcomes.[73] The Commission, in its proposal which eventually led to the adoption of Regulation 1/2003, had only made reference to an obligation of national courts to *use every effort* to avoid contradicting a Commission decision.[74] This notwithstanding, no formal obligation to accord full binding effect to Commission's decisions was to be expressly imposed, although such an obligation was inferred from *Delimitis* in legal theory.[75] The decisive step was taken by the CJEU in

[69] See CJEU, 28.2.1991, Delimitis v Henninger Bräu, C-234/89, EU:C:1991:91, para. 45.

[70] *Ibid*, para. 47.

[71] It is noted that at the time the judgment in *Delimitis* was delivered, the Commission still had sole power to declare article 81(1) EC (now 101(1) TFEU) inapplicable pursuant to article 81(3) EC (now 101(3) TFEU) under Regulation No. 17.

[72] *Ibid*, paras 44, 50-52, 54.

[73] See, among others, Komninos A., Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight, 44 Common Market Law Review, 2007, p. 1391; Siragusa M., "The modernisation of EC competition law: Risks of inconsistency and forum shopping", in Ehlermann C.-D. and Atanasiu I. (*eds*) European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy, Hart Publishing, 2001, p. 450; Kerse C. S., EC Antitrust Procedure, Sweet & Maxwell, 1998, p. 442.

[74] Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, COM(2000)582 final, OJ C 365E , 19.12.2000, pp. 286, 290.

[75] Paulis E., "Coherent Application of EC Competition Rules in a System of Parallel Competencies" in Ehlermann C.-D. and Atanasiu I. (eds) European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy, Hart Publishing, 2001, p. 450; Kerse C. S., *supra n.* 73, p. 420.

Masterfoods, where it proclaimed that national courts are under a duty not to take decisions "running counter" to a decision of the Commission.[76]

Masterfoods concerned the compatibility of an exclusivity clause contained in agreements for the supply of freezer cabinets concluded between HB, the leading manufacturer of ice cream in Ireland, and retailers of impulse ice cream. The facts of the case are telling of the complex interaction which may arise between EU institutions and national courts in the application of EU competition law. Masterfoods, a competitor of HB, brought an action in 1990 before the High Court of Ireland invoking that the exclusivity clause at issue was null and void under both domestic competition law and articles 85 and 86 EC (now articles 101 and 102 TFEU) and claiming damages. HB also brought an action for an injunction against Masterfoods to restrain it from inducing retailers to breach the clause in question, also claiming damages. In 1992 the High Court dismissed Masterfoods' action and granted a permanent injunction in favour of HB. Masterfoods appealed against such judgment before the Irish Supreme Court, while, in parallel, it lodged a complaint against HB before the Commission, which eventually adopted an infringement decision.

Under those circumstances, two conflict scenarios were envisaged: *first*, a partial conflict between the decision of the High Court and the Commission's decision, which was based on evidence adduced at a later stage than the time when the High Court's judgment was delivered and, *second*, a potential conflict between the projected judgment of the Irish Supreme Court and the Commission's decision.[77]

In this context, the Court ruled that despite the division of powers between the Commission and national courts, in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a judgment issued by a national court; on the contrary, national courts are bound by the Commission's decisions and cannot deliver judgments which would be in contradiction with those decisions, based on the duty of sincere cooperation, the binding nature of the Commission's decisions, the exclusive competence of the CJEU to review the validity of EU acts and the principle of legal certainty.[78] Thus, in order to avoid reaching a decision running counter to that of the Commission, national courts should stay proceedings pending final judgment in an action for annulment by the EU Courts or refer a preliminary question to the CJEU.[79]

[76] CJEU, 14.12.2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, para. 52.

[77] See Opinion of AG Cosmas, 16.5.2000, in *Masterfoods*, C-344/98, EU:C:2000:249, para. 21.

[78] CJEU, *Masterfoods and HB*, *supra* n. 76, paras 48-56; see also Lianos I., Davis P., Nebbia P., *supra n.* 54, p. 238.

[79] CJEU, *Masterfoods and HB*, *supra* n. 76, para. 57.

However, a significant issue was left open in *Masterfoods*, namely the determination of the exact scope of the binding effect that is to be accorded to Commission decisions by national courts[80]. Does such binding effect cover only the operative part of a Commission decisions or does it also extend to its reasoning, including findings on fact and legal and economic assessments? In the first case, the possibility of a conflict would arise only if the subject matter and the facts of a case reviewed by the Commission and those brought before a national court were identical; in the second case, for a conflict to appear it would suffice that the facts were similar.[81]

A wide conception of the binding effect would imply the risk of rendering national courts "mere assessors of damages"[82], which would not conform to the independence and complementarity of the two systems of enforcement of EU competition law. Moreover, commentators[83] have argued that a broad reading would effectively preclude the contestability of a broad range of findings, not necessarily supporting the operative part of a Commission decision, thus raising effective judicial protection concerns, given the wide margin of appreciation awarded to the Commission by EU Courts in respect of complex economic assessments in the field of competition law[84]. Overall, such a broad reading could potentially downgrade the importance of national courts in the decentralized dual system of enforcement of EU competition law, which, as later proclaimed by the CJEU in *Courage*, make a significant contribution to the maintenance of effective competition in the EU.[85] A careful reading of the facts in *Masterfoods* also advocates that the concept of conflict is to be narrowly viewed, given that, under the circumstances of the case, the referring Irish court was to give a judgment on a case having the same factual background with the case which led to the adoption of the Commission decision in question.

In light of the above considerations, the *Masterfoods* rule should apply only where the facts of the case being examined by the Commission are completely identical to those before the national

[80] Nazzini R., Concurrent Proceedings in Competition Law: procedure, evidence and remedies, Oxford University Press, 2004, p. 74.

[81] Komninos A., *supra* n. 73, p. 1397.

[82] Komninos A., *supra* n, 50, p. 148.

[83] See Burrichter J., Paul T.-B., Economic Evidence in Competition Litigation in Germany, in Hüschelrath K., Schweitzer H. (*eds*), Public and Private Enforcement of Competition Law in Europe - Legal and Economic Perspectives, Springer-Verlag Berlin Heidelberg, 2014, p. 202.

[84] CJEU, 11.7.1985, *Remia v Commission*, 42/84, EU:C:1985:327, para. 34; GC, 17.9.2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, para. 482; GC, 9.9.2009, *Clearstream v Commission*, T-301/04, EU:T:2009:31793; Geradin D., Layne-Farrar A., Petit N., EU Competition Law and Economics, Oxford University Press, 2012, p. 386 et seq.; Jaeger M., The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?, 2(4) Journal of European Competition Law & Practice, 2011, pp. 295-314; see, *infra*, chapter 1.1.1(c) for an assessment of compliance with article 47 CFR.

[85] CJEU, 20.9.2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, para. 27.

court, whereas a mere connection of the legal question being reviewed should not suffice.[86] On this premise, the binding effect of a Commission decision shall be framed with reference to the operative part of the decision and the particular facts on which it is based; assessments carried out in the reasoning of the decision shall in turn serve as interpretative points. This approach conforms with the stance eventually adopted by the Commission itself, as will be described in the following section.

ii. The incorporation of case-law in EU legislation

The conclusion reached by the CJEU in *Masterfoods* was given legislative expression in article 16(1) of Regulation 1/2003, despite the Commission's initial cautious reference to a duty of national courts' to "use every effort" so as not to deliver judgments contradictory to its decisions[87]. In its final form, article 16(1) imposes an obligation on national courts, when ruling on agreements, decisions or practices under articles 101 or 102 TFEU, not to take decisions running counter to existing or contemplated decisions of the Commission. This obligation, albeit substantially limiting the national courts' powers in applying articles 101 and 102 TFEU[88], is without prejudice to their rights and obligations under article 267 TFEU. This is dictated by the central function of the CJEU in the EU's judicial architecture and its authority to provide the authentic interpretation of EU law.

As exemplified by the Commission in its Explanatory Memorandum to the proposal which led to the adoption of Regulation 1/2003, the potential for a conflict depends on the *operative part* of the Commission decision and the *facts on which it is based*.[89] Besides, a narrow reading of the rule provided for in article 16(1) is pursued also in the Notice on the co-operation between the Commission and national courts, which stipulates that the application of articles 101 and 102 TFEU *in a specific case* binds the national courts when they apply EU competition rules *in the same case* in parallel with or subsequent to the Commission.[90]

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[86] See also Opinion of AG Cosmas in *Masterfoods*, *supra* n. 77, para. 16.

[87] Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *supra* n. 74, pp. 286, 290.

[88] Boskovits K., Modernization and the Role of National Courts: Institutional Choices, Power Relations and Substantive Implications, in Lianos I., Kokkoris I. (*eds*), The Reform of EC Competition Law: New Challenges, Kluwer Law International, 2010, p. 101.

[89] *Ibid.*

[90] 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, OJ C 101, 27.4.2004, para. 8.

In practical terms, the rule incorporated in article 16(1) entails that, if the Commission has adopted a decision finding that one or more undertakings have committed an infringement of EU competition provisions, a national court must consider such infringement as established when it adjudicates on a private enforcement action, either seeking the declaration of nullity under article 101 TFEU or damages, against one or more of *the same undertakings* and on the basis of *the same infringement*. In case damages are sought, as elucidated by the CJEU in *Otis*, the national court remains free to independently assess the existence of loss and of a direct causal link between the loss and the anticompetitive agreement or practice in question.[91]

iii. Implications of the binding effect of Commission decisions on the relation between public and private enforcement

Having addressed the origins and the scope of the obligation of national courts not to deliver judgments contradictory to Commission decisions, another question appears to come naturally. Should this obligation be considered as implying or resulting in creating a hierarchy between public and private enforcement?

Indeed, it has been argued that the *Masterfoods* judgment has had implications on the interplay between public and private enforcement of EU competition law not only at a practical, but also at a symbolic level.[92] Indeed, the CJEU accorded to the Commission's practice a degree of "primacy" over private proceedings brought before national courts, reaffirming its central importance in the competition enforcement system[93] and its special task of defining the priorities and orientation as well as implementing EU competition policy[94]. This, however, does not imply *per se* that the Commission prevails, as a competition authority, over civil courts and, as a result, that private enforcement is subjected to public enforcement. Given the special characteristics of the EU legal order, the kind of "primacy" acknowledged in this case is that of a supranational authority over national institutions.[95] In essence, the conclusion reached in *Masterfoods* and incorporated in article 16(1) of Regulation 1/2003 signifies that national courts become subject,

[91] CJEU, 6.11.2012, *Otis*, C-199/11, EU:C:2012:68465, paras 65-66; see also Frenz W., Handbook of EU Competition Law, Springer-Verlag Berlin Heidelberg, 2016, p. 87; Wils W., The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 32(1) World Competition, 2009, para. 16.;

[92] See Lianos I., Davis P., Nebbia P., *supra* n. 54, p. 238.

[93] Middleton K., Cases and Materials on UK and EC Competition law, Oxford University Press, 2009, pp. 110-111.

[94] Paulis E., *supra* n.75, p. 450; Kerse C. S., *supra n.* 73, p. 420.

[95] Paulis E., Gauer C., La réforme des règles d'application des articles 81 et 82 du Traité, 11 Journal des tribunaux Droit européen, 2003, p. 69; Komninos A., *supra* n. 50, p. 146.

not to the authority of the Commission, but, ultimately, to the authority of interpretation of EU competition law by the CJEU.[96]

In light of the above, the binding effect of Commission decisions over national courts serves to guarantee the consistency of results between the two systems of enforcement, preserving both their parallel effective function and the uniform application of EU competition rules.

b. The effect of NCA decisions over private enforcement proceedings

i. The road towards article 9(1) of Directive 2014/104/EU

The characteristics of the system of enforcement of EU competition law entail that a national court may be seized to rule on damages claims arising from infringements which have already been the subject-matter, not only of a Commission decision, as described above, but also of a decision of an NCA. Indeed, given the secrecy normally surrounding competition infringements under article 101 TFEU, especially cartels, and the evidential difficulties private parties may face to establish such infringements in court, actions for damages in Member States usually follow a finding of an infringement by an NCA (*follow-on actions*).[97]

However, although article 16(1) of Regulation 1/2003 regulates the effect of Commission decisions over private proceedings before national courts, no rules had been laid down as to the effect of NCA decisions prior to the enactment of Directive 2014/104/EU. No rules existed also in respect of the co-operation between national enforcement bodies, which remained to be governed primarily by national law.[98] The issue of according binding effect to NCA decisions was addressed by the Commission in the Green Paper on damages action, however only between certain briefly enumerated options aiming at alleviating the burden of proof.[99] In contrast with the limited emphasis given on the matter in the Green Paper, the White Paper on damages

[96] Komninos A., *supra* n. 73, p. 1393.

[97] See Voss K., Facilitating Follow-on Actions? Public and Private Enforcement of EU Competition Law after Directive 2014/104/EU in Strand M., Bastida V., Iacovides M. C. (*eds*), EU Competition Litigation: Transposition and First Experiences of the New Regime, Hart Publishing, 2019, p. 107; Jaspers J.D., Managing Cartels: how Cartel Participants Create Stability in the Absence of law, 23(3) European Journal on Criminal Policy and Research, 2017, pp. 319-335; see *infra* chapter 1.2.1 on the procedural rules aiming to facilitate disclosure of evidence.

[98] Commission Notice on the co-operation between the Commission and the courts of the EU Member States *supra* n. 90, para. 16.

[99] Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672 final, 19.12.2005, options 8-10: other options included a rebuttable presumption, the reversal of the burden of proof where an NCD decision exists and the shifting or lowering the burden of proof in cases of information asymmetry.

actions[100] and the accompanying Staff Working Paper[101] considered it in detail. The introduction of such a rule was now not addressed only as a means of promoting effectiveness and procedural efficiency through the alleviation of burden of proof; it was envisaged as a further safeguard for the unity and consistent application of EU competition law and legal certainty, complementing the mechanisms provided for in Regulation 1/2003. The prospect was not entirely unknown in the legal orders of Member States, as certain of them had already introduced provisions stipulating –albeit with variations as to their scope– that civil courts in follow-on proceedings for damages could not deviate from the decision of the respective NCA.[102] But, arguably, neither was the prospect completely novel in the EU legal order itself. A careful consideration of the principles governing the decentralized system of enforcement set up by Regulation 1/2003 appears to advocate that, even though not formally bound, national courts already were under an implicit duty not to disregard decisions adopted by the NCAs.[103]

More particularly, accepting that national courts in damages proceedings were not at all constrained with respect to taking account of the relevant NCA decisions would imply the risk of jeopardizing the uniform application of EU competition law, which the NCAs also *individually* serve to guarantee. Indeed, the ECN does not constitute a mere network of bodies with similar responsibilities, but a network expected to co-operate in order to create and maintain "a common competition culture in Europe" *inter alia* by ensuring the effective and consistent application of EU competition rules.[104] Besides, the Commission is ultimately, but not solely, responsible for developing policy and safeguarding consistency as to the application of EU competition law.[105] Article 16(2) of Regulation 1/2003, providing that NCAs ruling on agreements, decisions or practices under articles 101 and 102 TFEU which already form the subject of a Commission decision, cannot take decisions running counter to the Commission's decision, necessarily signifies that NCAs are under a duty to pursue uniform and coherent results in the sphere of application of EU law.

[100] White Paper on damages actions *supra* n. 51, point 2.3.

[101] Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, 2.4.2008, paras 139-162.

[102] See Commission Staff Working Paper, *supra*, n. 101, para. 140 with references to the UK, Germany and Hungary.

[103] For a detailed analysis of the issue, see Pistoia E., The Quest for Uniformity between National Competition Authorities and Courts, 25(6) European Business Law Review, 2014, pp. 893–922.

[104] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 1, 3; See also CJEU, 11.6.2009, *X*, C-429/07, EU:C:2009:359, paras 20-21, clarifying that the cooperation developed in the ECN is part of the general principle of sincere cooperation under article 4(3) TEU.

[105] Ibid, p. 43; See also recitals 7-8 to the preamble of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019.

In view of the above considerations, it transpires that there would be no particular reason for the rule proclaimed in *Masterfoods* and incorporated in article 16(1) of Regulation 1/2003 not to extend *explicitly* to the relations between NCAs and national courts with respect to follow-on private damages proceedings. The Commission's proposal provided that a final decision of an NCA *in the ECN*, or a final judgment of a review court upholding such decision, should be binging on national courts –in *any Member State*– ruling on the same competition infringements, without prejudice to the rights and obligations of national courts under Article 267 of the Treaty.[106] This notwithstanding, the final text of article 9(1) of Directive 2014/104/EU grants full binding effect to NCA decisions only on proceedings before *their* national courts.[107]

ii. The scope and legal effect of article 9(1) of Directive 2014/104/EU

Article 9(1) of Directive 2014/104/EU provides that Member States shall ensure that an infringement of competition law found by a *final* decision of a national competition authority or by a review court is deemed to be *irrefutably established* for the purposes of an *action for damages* brought before *their national courts* under Article 101 or 102 TFEU or under national competition law.[108] However, this provision is without prejudice to the rights and obligations of national courts under Article 267 TFEU, as prescribed in article 9(3).

By introducing this presumption, the EU legislature took a step towards increasing the legal protection afforded to private parties adversely affected by antitrust offences[109], by enhancing legal certainty, avoiding inconsistency in the application of Articles 101 and 102 TFEU, increasing the effectiveness and procedural efficiency of actions for damages and, eventually, fostering the functioning of the internal market[110]. As the scope of the presumption has not yet been specifically addressed by the CJEU in its case-law[111], significant interpretative guidance

[106] See recital 25 and article 9 of the 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, 11.6.2013, COM(2013) 404 final.

[107] See, *infra*, chapter 2.1.1, for an examination of the reasons behind this limitation and its effects on the interaction between public and private enforcement of EU competition law. See also Ashton D., Competition Damages Actions in the EU: Law and Practice, Edward Elgar Publishing, 2018, para. 5.28, where he argues that this limitation rendered the rule a "pure rule of evidence".

[108] Article 9(1) of 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 L 349, 5.12.2014.

[109] See Opinion of AG Kokott, 17.1.2019, in *Cogeco Communications*, C-637/17, EU:C:2019:32, para. 95.

[110] Recital 34 to the preamble of Directive 2014/104/EU.

[111] CJEU, 28.3.2019, *Cogeco Communications*, C-637/17, EU:C:2019:263: This was the first preliminary reference with respect to article 9(1) of Directive 2014/104/EU, however it mainly concerned the temporal application of the Directive, which was found by the CJEU not to apply in the dispute in the main proceedings (see para. 34).

can be found in the preamble to the Directive as well as the *travaux préparatoires* which led to its adoption.

The presumption only covers final infringement decisions, which means that only *positive* findings of infringement produce binding effect. Indeed, NCAs are not competent to adopt negative (or inapplicability) decisions, namely decisions holding that certain agreements or practices do not constitute an infringement of article 101 or 102 TFEU, as these are not enumerated in the exhaustive list laid down in article 5 of Regulation 1/2003. This lack of competence was confirmed by the CJEU in *Tele2 Polska*[112], a preliminary reference through which the referring national court sought guidance as to the interpretation of article 5 and, in essence, the way in which an NCA may bring an administrative procedure to an end, where it finds that a particular undertaking does not infringe article 102 TFEU. The CJEU's ruling exemplifies that the empowerment of NCAs to take negative decisions would call into question the system of cooperation established by Regulation 1/2003 and undermine the power of the Commission, insofar as it could prevent it from subsequently finding that the practice at issue amounts to a breach of EU competition provisions.[113] Thus, the only way for an NCA to terminate an administrative procedure under such circumstances is to issue a decision stating that there are no grounds for action on its part.

Ratione materiae, the irrefutable presumption captures only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the NCA or the competent review court in the exercise of its jurisdiction.[114] Hence, it covers the facts of the case and their legal classification.[115] The national court remains free to rule on the existence of loss and of a causal link between such loss and the infringement in question. Furthermore, the probative effect is confined to the same practices and same undertaking(s) for which the NCA or the review court found an infringement. The identity between the infringer and the defendant in the private proceedings is dictated by the need to guarantee observance of the rights of defence, namely to ensure that an NCA decision can only be invoked against undertakings that participated in the administrative proceedings and were thus allowed to advance their arguments on the

[112] CJEU, 3.5.2011, *Tele2 Polska*, C-375/09, EU:C:2011:270.
[113] *Ibid*, paras 27-28.
[114] Recital 34 to the preamble of Directive 2014/104/EU.
[115] See Asimakopoulou E., Actions for damages due to infringements of free competition law – Law 4529/2018 – Transposition in Greek law of Directive 2014/104/EU, 11 Business and Company Law, Nomiki Vivliothiki, 2018, p. 1283 (*in Greek*).

substance.[116] However, not all parties to the proceedings must be identical, given that claimants in civil proceedings need not necessarily be a party in the administrative proceedings, for instance, as complainants.

Besides, only *final* infringement decisions shall have binding effect, namely decisions that cannot be, or that can no longer be, appealed by ordinary means.[117] This covers in essence infringement decisions which have either been accepted by their addressees, by refraining from lodging an appeal, or have been upheld upon appeal by the competent review court(s).[118] Of course, private parties are not precluded from raising a claim for damages while the relevant NCA decision has not yet become final, either because an appeal is pending or because the time-limits for an appeal have not yet expired. Such an approach would encroach upon the independence of the two enforcement systems, which is not the purpose of Article 9(1) to affect, seeking predominantly to facilitate uniformity, effectiveness and procedural efficiency. In this scenario, the national court would remain free to determine the probative value of the NCA decision.

However, inconsistencies may arise where the national court (i) follows an NCA decision which is subsequently annulled on appeal or (ii) deviates from an NCA decision which is subsequently upheld.[119] Such inconsistencies are probable only where the appeal pending seeks to overturn the establishment of the infringement and is not confined, for instance, in challenging the amount of the fine imposed, given the material scope of the presumption described above. In order to avoid contradictory outcomes, national courts should consider staying the proceedings when an appeal against the finding of an infringement is pending.[120] In any case, they could make a preliminary reference to the CJEU under article 267 TFEU.

[116] Commission Staff Working Paper, *supra*, n. 101, para. 154; The requirement for identity between the infringer and the defendant has raised questions as to whether EU law regulates the attribution of liability *for damages*, for instance, to a parent company or to a successor of the infringer. This issue is addressed in Chapter 1.1.2.

[117] See Article 2(12) of Directive 2014/104/EU.

[118] White Paper on damages actions, *supra* n. 51, para. 2.3.

[119] See, on this subject, Truli E., White Paper on Damages Actions for Breach of the EC Antitrust Rules: The Binding Effect of Decisions Adopted by Competition Authorities, 5 (2009) European Competition Journal, pp. 802-803.

[120] Commission Staff Working Paper, *supra*, n. 101, para. 157; See, however, Truli E., *supra* n. 119, p. 803 and references therein, suggesting in essence that, in order to avoid delays in civil proceedings which could also make difficult the proof of damage, it should be preferable that the civil court continue with the adjudication of the damages claim to the extent that the Member State concerned has a procedural instrument to reverse its judgment.

iii. Implications of the binding effect of NCA decisions on the relation between public and private enforcement

With reference to the implications of awarding binding effect to *Commission decisions* over private proceedings, addressed in the previous chapter, it was indicated that the rule of article 16(1) of Regulation 1/2003, being an expression of the CJEU's previous case-law, neither creates a hierarchy between the two systems of enforcement, subjecting private to public enforcement, nor does it affect their independence and effective parallel function.[121] However, can the same conclusion be reached also in respect of the binding effect of NCA decisions over national courts adjudicating on damages actions?

It is argued that the answer should be in the affirmative. Indeed, if national courts retain serious doubts as to the interpretation and application of articles 101 or 102 TFEU by an NCA in a specific decision, they in any case have the possibility –or, if there is no judicial remedy against their decisions, the obligation[122]– to make a preliminary reference to the CJEU. Thus, it becomes apparent that the binding effect of final NCA decisions over national courts does not preclude them from holding divergent views, provided that they have first sought guidance by the CJEU. Therefore, they retain their powers to interpret and apply EU competition provisions, as is dictated by their function in the decentralised judicial system of the EU, guaranteeing the rights which individuals derive from EU law.[123]

c. Assessment of the binding effect in light of article 47 CFR

Article 47 CFR aims at guaranteeing the effective judicial protection of individuals' rights under EU law.[124] According to the Explanations relating to the CFR[125], which are to be duly regarded by EU and Member States' courts[126], article 47 CFR corresponds, as far as its second paragraph is concerned, to article 6(1) ECHR. Furthermore, article 52(3) CFR requires rights contained in

[121] See *infra* chapter 1.1.1(a)(iii).
[122] Article 267, paragraph 3 TFEU; See also CJEU, 6.10.1982, *CILFIT*, 283/81, EU:C:1982:335 on the interpretation of this obligation.
[123] CJEU, 5.2.1963, *van Gend en Loos*, 26/62, EU:C:1963:1, p. 13; CJEU, 20.9.2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, para. 23.
[124] CJEU, 24.6.2019, *Commission v Poland*, C-619/18, EU:C:2019:531, para. 49.
[125] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007.
[126] Article 52(7) of the Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012.

the CFR which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, taking also into account the case-law of the ECtHR[127].

In *Menarini*, a case concerning an alleged violation of article 6(1) ECHR arising from the imposition by the Italian NCA of a fine of six million Euro due to an infringement of competition rules on the market for diabetes diagnostic tests, the ECtHR (i) considered that proceedings conducted by NCAs result in the imposition of *criminal* sanctions and (ii) ruled that such proceedings are compatible with article 6(1) ECHR only where the relevant decisions are subject to subsequent review by a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law.[128] The CJEU appears also to have acknowledged that antitrust proceedings, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, are of a quasi-criminal nature.[129]

In light of the above, a provision entailing that the finding of an infringement of EU competition law, made in the sphere of the quasi-criminal public enforcement, is irrefutably established or binding on civil judicial proceedings would be consistent with article 47 CFR only if such a finding could have been contested before, and reviewed by, a court having full jurisdiction. Otherwise, the undertakings involved would be exposed to damages claims arising from an infringement which they would not have the opportunity to challenge in a court having the power to review all questions of fact and law.

With respect to the binding effect of Commission decisions under article 16(1) of Regulation 1/2003, it is noted that the CJEU has been criticised in legal theory for recognizing a wide margin of appreciation to the Commission in cases involving complex economic assessments[130] as well as by applicants or appellants before the GC and the CJEU[131]. This notwithstanding, in *Otis*, the CJEU had the chance to confirm that the rule under article 16(1) is compatible with

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[127] CJEU, 26.2.2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 44; CJEU, 18.7.2013, *Schindler*, C-501/11 P, EU:C:2013:522, para. 32; CJEU, 16.7.2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, para. 56; Explanations relating to the Charter, *supra* n. 89, Explanation on article 52.

[128] *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, ECHR, 2011, para. 59; See also Bronckers M, Vallery A., Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini?, 8 European Competition Journal (2012), pp. 294-296.

[129] CJEU, 8.7.1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, para. 150; Wils W. P. J., Is Criminalization of EU Competition Law the Answer? in Cseres K. J., Schinkel M. P., Vogelaar F. O.W. (*eds*), Criminalization of Competition Law Enforcement, Edward Elgar Publishing, p. 63

[130] See *supra* n. 49; see also Marsden P., Checks and balances: EU competition law and the rule of law, (2009) 5 Competition Law International, pp. 27-28. On the definition of the scope and nature of the margin of appreciation, see Prek M., Lefèvre S., Competition Litigation before the General Court: Quality if not quantity?, (2016) 53 Common Market Law Review, pp. 71-74.

[131] CJEU, 8.12.2011, *Chalkor v Commission*, C-386/10 P, EU:C:2011:815, para. 41; CJEU, 8.12.2011, *KME Germany and Others v Commission*, C-272/09 P, EU:C:2011:810, para. 84.

article 47 CFR, as the review of Commission decisions carried out by the EU judicature is in compliance with the requirements of effective judicial protection under article 47 CFR.[132]

In this respect, the CJEU has ruled that the EU judicature, in carrying out the review of legality incumbent upon it, cannot use the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.[133] Besides, in addition to the review of legality provided for in article 263 TFEU, the EU judicature has unlimited jurisdiction with respect to fines imposed under article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. This unlimited jurisdiction empowers it to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed.[134] Therefore, as the review exercised refers both to the law and the facts and entails the power of the EU judicature to assess the evidence, annul the contested decision and alter the amount of the fine, it guarantees effective judicial protection.

With respect to the binding effect of NCA decisions over national courts of their Member States, the issue may appear more complex as compliance with the principle of effective judicial protection depends upon the standard of review exercised in each particular Member State. In this respect, a report drawn up in 2012 by an ECN working group on cooperation issues and due process indicated that in the vast majority of Member States full judicial review of NCA decisions is provided, meaning that the competent judicial authorities may quash such decisions both on facts and law.[135] Besides, insofar as they apply EU law, national courts reviewing NCA decisions remain bound by article 47 CFR to ensure that the review exercised meets the appropriate standard. National civil courts, on the other hand, remain in any case free to use the preliminary reference procedure, retaining thus their powers to interpret and apply EU competition provisions and guaranteeing the effective judicial protection of undertakings faced with claims for damages due to an infringement of EU competition law.

[132] CJEU, *Otis*, *supra* n. 91, paras 55-56; See also Botta M., Commission acting as plaintiff in cases of private enforcement of EU competition law: Otis, (2013) 50 Common Market Law Review, p. 1111.
[133] CJEU, *Chalkor*, *supra* n. 131, para. 62; CJEU, *KME*, supra n, 131, para. 102; CJEU, *Otis*, *supra* n. 91, para. 61.
[134] CJEU, *Chalkor*, *supra* n. 131, para. 63; CJEU, *KME*, supra n, 131, para. 103; CJEU, *Otis*, *supra* n. 91, para. 62; CJEU, *Schindler*, *supra* n. 127; For a comprehensive analysis and assessment of the judicial review conducted by EU Courts, with references to CJEU and ECtHR case-law, see Castillo de la Torre F., Gippini Fournier E., Evidence, Proof and Judicial Review in EU Competition Law, Edward Elgar Publishing, 2017, p. 289 et seq.
[135] ECN Working Group Cooperation Issues and Due Process, Decision-making Powers Report, 31.10.2012, p. 19.

1.1.2. The uniform interpretation of substantive concepts in the context of both enforcement systems

As already analysed, Directive 20014/104/EU did not cover all aspects relating to the exercise of the right to claim compensation due to an infringement of EU competition provisions. Besides, although the CJEU has given "shape" to this right through its case-law, setting basic principles for its exercise[136], it remains nonetheless true that private enforcement still relies considerably on domestic laws and procedures. Such laws and procedures present several divergences, given the different legal traditions among the EU Member States, which refer to the conduct which may give rise to liability, the persons to be regarded as injured parties, causation, or types of harm which may be compensated.[137]

In that context, it appears crucial, in order to ensure consistency in the application of EU competition rules and legal certainty, to distinguish between the questions governed by EU law and those governed by the domestic laws of Member States. The CJEU recently addressed this issue in *Skanska Industrial Solutions*[138], a case with important implications for the relation between EU and domestic law in terms of the exercise of the right to claim damages, but also for the interplay between public and private enforcement.

Before analysing the legal questions posed, the facts of the case shall be briefly set out. In 2009, the Finnish NCA imposed fines on several undertakings due to their participation in a cartel in the asphalt market between 1994 and 2002. In the early 2000s' certain of the companies involved had been dissolved in voluntary liquidation procedures, while their respective parent companies acquired their assets and continued their economic activity. The NCA also imposed fines on such parent companies, for the conduct of their subsidiaries, in application of the principle of economic continuity, which has been developed in the case-law of the CJEU based on a broad construction of the concept of "undertaking"[139]. The City of Vantaa subsequently brought a claim for damages jointly and severally against the companies which had been fined, seeking

[136] See, *inter alia*, CJEU, 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paras 95-97 on the components of compensation, which shall include actual loss, loss of profit and interest; CJEU, *Otis*, *supra* n. 91, para. 32 on the right of access to documents relating to a leniency procedure.

[137] Opinion of AG Wahl, in *Skanska Industrial Solutions and Others, supra n.*49, para. 26.

[138] CJEU, 14.3.2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204.

[139] On the principle of economic continuity, see CJEU, 15.7.1970, *ACF Chemiefarma v Commission*, 41/69 EU:C:1970:71, paras 173-176; CJEU, 29.6.2006, *Showa Denko v Commission,* C-289/04 P, EU:C:2006:431, para. 61; CJEU, 7.6.2007, *Britannia Alloys & Chemicals v Commission*, C-76/06 P, para. 22. The principle of economic continuity is applied, in particular, where the entity that committed the infringement has ceased to exist, either in law or economically. The rationale of extending liability to the entity that has continued the activities of that entity is that undertakings could otherwise escape penalties by changing their identity through restructurings, sales or other legal or organisational changes.

compensation for the additional costs which it had to pay for asphalt works due to the cartel in question. In this context, the question arose as to (i) whether the persons liable to pay compensation for harm caused by an infringement of EU competition law are to be determined on the basis of EU law or domestic law and (ii) whether the principle of economic continuity, developed in the sphere of public enforcement, is to be applied also in the context of private enforcement in order to determine the persons liable for compensation.

The majority of the parties which submitted observations took the view that the determination of the persons liable for damages is a matter of national law that should be circumscribed by the principles of equivalence and effectiveness.[140]

AG Wahl made a distinction between detailed *rules governing the exercise* of the right to claim compensation and the *constitutive conditions* of the right to claim compensation, advocating that the first are those to be laid down by the Member States, under the constraints imposed by the principles of equivalence and effectiveness[141], while the second are governed by EU law.[142] He then concluded that the determination of the persons liable to pay compensation is not a question relating to the application of a claim or to the enforcement of the right to compensation; on the contrary, it is exactly "the other side of the coin" of such right, which presupposes that there is a person liable for that infringement.[143] Furthermore, AG Wahl concluded that the principle of economic continuity is to be applied also in the field of private enforcement, considering that the two forms of enforcement form together a complete system that should be regarded as a whole.[144]

Following the reasoning of AG Wahl, the CJEU confirmed that the determination of the entity which is required to provide compensation is *directly governed by EU law*, albeit without explicitly characterising this element as a constitutive condition of the right to claim damages.[145] It then proceeded by holding that the concept of "undertaking", which constitutes an autonomous concept of EU law, cannot have a different scope with respect to the imposition of fines by the Commission comparing to private actions for damages for infringements of EU competition rules.[146] The CJEU based its conclusion *inter alia* on the premise that actions for damages are an

[140] See Opinion of AG Wahl in *Skanska Industrial Solutions and Others, supra* n.49, para. 52.
[141] See, inter alia, CJEU, *Courage, supra* n. 50, paras 24, 29; CJEU, *Manfredi*, supra n. 101, paras 61-62; CJEU, 6.6.2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paras 23, 27.
[142] Opinion of AG Wahl in *Skanska Industrial Solutions and Others, supra* n. 49, paras 40-41.
[143] *Ibid*, para. 61.
[144] *Ibid*, para. 76.
[145] CJEU, *Skanska Industrial Solutions and Others, supra* n. 103, para. 28.
[146] *Ibid*, para. 47.

integral part of the system of enforcement of EU competition law, highlighting also their deterrent nature.[147]

Indeed, if such a system is to operate coherently, substantive concepts, such as the concept of an "undertaking", may not be subject to divergent interpretations depending on the form of enforcement at issue; on the contrary, they shall be uniformly applied in the context of both enforcement systems, as autonomously interpreted by the CJEU. This further exemplifies that the dual system of enforcement of EU competition law constitutes a cohesive whole, with two limbs complementary to each other.

[147] *Ibid*, para. 45.

1.2. PROCEDURAL FORMS OF CONVERGENCE

This chapter seeks to examine *procedural* rules and mechanisms which aim at enhancing the interoperability and coordination between public and private enforcement of EU competition law by limiting potential points of divergence. In doing so, such rules facilitate the effective function of the dual enforcement system as a whole, leading to uniformity and convergence.

The analysis will focus, *firstly*, on the system of disclosure of evidence held by competition authorities under Directive 2014/104/EU (1.2.1), and, *secondly*, on rules on limitation periods aiming at fostering the effective exercise of private enforcement.

1.2.1. Disclosure of evidence held by competition authorities under Directive 2014/104/EU

a. The need for a system of disclosure of evidence in private enforcement proceedings

It is commonly accepted that infringements of competition law, notably cartels, mostly take place in secrecy.[148] Indeed, parties to anticompetitive agreements or practices usually develop mechanisms which seek to prevent disclosure of their action and ensure stability.[149] An economic approach suggests that such stability is guaranteed, in essence, through internal monitoring and punishment.[150] A social approach indicates that stability depends upon interpersonal trust through communication, reciprocity and a reputation for being trustworthy.[151]

Moreover, the establishment of infringements of competition law require complicated factual, legal and economic assessments associated, for instance, with the definition of the relevant market or the existence of a dominant position. The concepts developed in the context of interpretation of competition rules also present complexities; it suffices to refer to the concept of concerted practice under article 101 TFEU, which requires the establishment of "a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which

[148] *Supra* n. 62.

[149] See Jaspers J.D, *supra* n. 97, for a comprehensive analysis of the principles, methods and mechanisms which create cartel stability.

[150] Spar D. L., The cooperative edge: The Internal politics of international cartels, Cornell University Press, 1994; Ayres I., How cartels punish: a structural theory of self-enforcing collusion, Colombia Law Review, 1987, pp. 295–325; Levenstein M. C., Suslow V. Y., What determines cartel success?, Journal of Economic Literature, XLIV, 2006, pp. 43–95.

[151] Jaspers J.D. *supra* n. 97; Stephan A., Cartel laws undermined: Corruption, social norms, and collectivist business cultures, 37(2) Journal of Law and Society 2010, pp. 345–367.

do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market".[152] Particular difficulties may also arise in establishing the other conditions for awarding damages, such as loss and causal link.[153]

The above exemplify that an information asymmetry exists especially in the field of private enforcement of competition law, given that evidence necessary to establish an infringement and substantiate a claim for compensation will be normally held by the defendant, a third party or even competition authorities.[154] Competition authorities, in particular, may acquire significant information in the course of administrative proceedings, which may have been submitted by the defendant or gathered through exercise of their investigatory powers.[155]

In this context, facilitating access of private parties to evidence becomes imperative, taking also into account the adoption of an effects-based approach in EU competition law[156], which requires a detailed appreciation of all the relevant facts[157]. Access to evidence becomes thus one of the most crucial prerequisites for the effectiveness of private enforcement claims.

b. The regime prior to Directive 2014/104/EU

Before addressing the specific rules introduced by Directive 2014/104/EU with a view to facilitating access to evidence, a brief analysis will be made on the potential legal routes which existed before its enactment. As the conditions for access to documents held by NCAs were governed by national laws, the analysis will be confined to available options for access to the file of the European Commission. Two instruments appear to be relevant in this respect: the Notice

[152] CJEU, 14.7.1972, *ICI v Commission*, 48/69, EU:C:1972:70, para. 64; CJEU, 16.12.1975, *Suiker Unie and Others v Commission*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174, para. 26; see also Metaxas A., Article 101 TFEU in Christianos V. (ed.), Interpretation of TEU & TFEU, Nomiki Vivliothiki, 2012, pp. 566-567 (*in Greek*).

[153] See on that point Heinemann A., Access to Evidence and Presumptions – Communicating Vessels in Procedural Law, in Hüschelrath K., Schweitzer H. (*eds*), Public and Private Enforcement of Competition Law in Europe - Legal and Economic Perspectives, Springer, 2014, p. 170.

[154] See also Papadopoulou R.-E. Public and Private Enforcement of competition law in light of Directive 2014/104 of the European Union: a relation of complementarity or contradiction?, 12 Business and Company Law (2017), Nomiki Vivliothiki, 2017, p. 1433; on the definition of information asymmetry in the context of EU competition law, see European Commission, Commission Staff Working Paper – Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2005) 1732, 19.12.2005, para. 81.

[155] See Lianos I., Davis P., Nebbia P., *supra* n. 54, p. 249, noting that private parties may wish to have access to such information to initiate either a follow-on or even a stand-alone action where the authority has not adopted an infringement decision.

[156] Such an approach has been endorsed in CJEU, 6.9.2017, *Intel v* Commission, C-413/14 P, EU:C:2017:632.

[157] See also Heinemann A., *supra* n. 153, p. 177.

on the rules for access to the Commission's file[158] and Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents[159].

The Notice on access to the Commission file sought to set the framework for the exercise of the right to access the Commission's file, as provided inter alia in article 27(1) and (2) of Regulation 1/2003 and article 15(1) of Commission Regulation No 773/2004 relating to the conduct of proceedings under articles 101 and 102 TFEU[160]. It contains the rules and procedure governing the access to documents by the parties participating in the administrative proceedings, which are in principle the persons, undertakings or associations of undertakings to which the Commission addressed its objections.[161] The Notice, however, also covers situations where the Commission may, or has to, provide access to documents to the complainants in antitrust proceedings, albeit with the caveat that complainants do not have the same rights and guarantees as the parties under investigation.[162]

The importance of obtaining access to the Commission's file was emphasized by the GC in *Postbank*[163]. In this case, the European Commission had authorized two private parties to produce a complete version of the statement of objections and the minutes of a hearing before a national court. This action on the part of the Commission was challenged on the basis of its alleged incompatibility with article 20(1) of Regulation No 17 (now replaced by article 28(1) of Regulation 1/2003)[164]. The latter provided that the information acquired in the context of administrative proceedings could be used only for the purpose of the relevant request or investigation, with a view to protecting professional secrecy.[165] As a result, the argument was raised that information obtained from the Commission's file could not be subsequently used in the context of national court proceedings. However, the GC ruled that the need to protect

[158] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005.

[159] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145, 31.5.2001.

[160] 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, OJ L 123, 27.4.2004.

[161] See Commission Notice on the rules for access to the Commission file, *supra* n. 158 para. 7.

[162] *Ibid*, para. 30; see to that effect GC, 17.7.1993, *Matra-Hachette SA v Commission*, EU:T:1994:89, para. 34, where the GC held that the rights of third parties, as provided in article 19 of Regulation No 17 (now replaced by Regulation 1/2003), were limited to the right to participate in the administrative procedure.

[163] GC, 18.9.1996, *Postbank v Commission*, T-353/94, EU:T:1996:119.

[164] Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21.02.1962.

[165] The currently applicable article 28(1) of Regulation 1/2003 is without prejudice to article 12 and 15 of the same Regulation, which provide for the transmission of information by the Commission to NCAs and national courts.

confidential information and, in particular, business secrets cannot override the right of undertakings to argue their case in national legal proceedings.[166]

In light of the above, the Notice on access to the Commission file could be used as a route to obtain evidence which is crucial in the context of private proceedings. However, apparently, it would not provide a solution for third parties other than the complainant(s) in the respective antitrust proceedings.

Third parties not involved in the proceedings could only benefit from the provisions of Regulation 1049/2011 (Transparency Regulation). Article 4(2) of this Regulation provides that the Commission may refuse access to documents where their disclosure would undermine, inter alia, commercial interests of a natural or legal person, including intellectual property (1st indent), or the purpose of inspections, investigations and audits (3rd indent), unless there is an overriding public interest in disclosure[167].

Important guidance as to the application of these provisions in the field of competition law is inferred from the case-law of the CJEU and, in particular, from *Commission v EnBW*[168]. This case arose following a rejection by the Commission of EnBW's request to access the documents contained in the file relevant to a Commission decision, which found a cartel on the gas insulated switchgear market, involving bid-rigging, price fixing and allocation of projects and markets in Europe. EnBW brought an action for annulment of the Commission decision denying access, which was upheld by the GC, inter alia, on the basis that the Commission was not entitled to presume, without undertaking a specific analysis of each document, that all documents requested were clearly covered by the 3rd indent of Article 4(2) of Regulation No 1049/2001.[169] Subsequently, the Commission lodged an appeal before the CJEU against the GC's decision. The CJEU, based on its previous case-law on the matter, ruled that the Commission is entitled to *presume*, without carrying out an individual examination of each of the documents in a file relevant to article 101 TFEU proceedings, that disclosure of such documents will, in principle, *undermine the protection of the commercial interests* of the undertakings involved in such proceedings and *the protection of the purpose of the investigations* relating to the proceedings

[166] GC, *Postbank*, *supra* n. 163, para. 68.

[167] For a comprehensive analysis, see Karydis G., The right of third parties to access documents of the administrative file in antitrust and State aid cases: Transparency vs effectiveness of investigation, 6 Business and Company Law (2015), Nomiki Vivliothiki, p. 595.

[168] CJEU, 27.2.2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112.

[169] GC, 22.5.2012, *EnBW Energie Baden-Württemberg v Commission*, T-344/08, EU:T:2012:242, paras 54-63.

(emphasis added).[170] However, this general presumption does not rule out the possibility of demonstrating that a specific document requested to be disclosed is not covered by that presumption, or that there is an overriding public interest in disclosure of the document by virtue of Article 4(2) of Regulation No 1049/2001.[171] On this premise, the CJEU concluded that a person seeking compensation due to an infringement of article 101 TFEU must establish that access to the Commission's file is necessary, in order for the Commission to weigh up, on a case-by-case basis, the respective interests.[172]

It transpires from the above that Regulation 1049/2011 indeed provided –and continues to provide– a basis for parties, which were not involved in the relevant antitrust proceedings, to obtain access to documents held by the Commission with the purpose of producing them before national private proceedings, albeit under very restrictive conditions. Besides, the Regulation only applies to documents held by the Commission, not those held by NCAs.

Hence, the regime under both the Notice on the access to the Commission file and Regulation 1049/2001 appeared inadequate to address the information asymmetry in the field private enforcement of EU competition law. A solution to the problem was sought through the provisions on disclosure of evidence introduced by virtue of Directive 2014/104/EU.

c. The solution adopted in the context of Directive 2014/104/EU

Directive 2014/104/EU facilitates the disclosure of evidence held by competition authorities[173] in proceedings relating to actions for damages through the provisions of articles 5 and 6.

Article 5 is the general provision on disclosure of evidence[174], requiring Member States to ensure that upon request of a damages claimant, who has presented a reasoned justification containing

[170] CJEU, *Commission v EnBW*, *supra* n. 168, para. 80; see also previous case-law, CJEU, 29.6.2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, para. 61; CJEU, 28.6.2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, para. 64; see also Vandenborre I., Goetz T., Kafetzopoulos A., Access to the EU Commission's File or Decision for Purposes of Damages Claims, and Confidentiality of Information under European Competition Law, 9(1) Journal of European Competition Law & Practice (2018), pp. 655-665, concluding that recent case-law demonstrates the continued willingness of EU Courts to protect the Commission's file from access by damages claimants by reaffirming the existence of a general presumption that the disclosure of documents would, potentially undermine Commission inspections and investigations.

[171] CJEU, *Commission v EnBW*, *supra* n. 168, para. 100.

[172] CJEU, *Commission v EnBW*, *supra* n. 168, para. 107; see also, to that effect, CJEU, 6.6.2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paras 30, 34.

[173] It is noted that under Article 2, point (8) of Directive 2014/104/EU the term "competition authority shall mean the Commission or a national competition authority or both, as the context may require.

[174] Article 2, point (13) of Directive 2014/104/EU defines evidence as referring to 'all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored'.

reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant *or a third party* to disclose relevant evidence which lies in their control. The European Commission or an NCA may qualify as such a third party.[175] National courts should be able to order the disclosure of 'specified items' of evidence or of relevant 'categories of evidence', limiting such disclosure to the level proportionate considering the legitimate interests of all parties and third parties concerned.[176]

Article 6 provides for specific rules on the disclosure of evidence included in the file of a competition authority.[177] National courts may order such disclosure mainly under two conditions: *firstly*, that they have considered the need to safeguard the effectiveness of the public enforcement of competition law[178] and, *secondly*, that no party or third party is reasonably able to provide that evidence[179]. The provisions of article 6 are without prejudice to the rules and provisions of Regulation No 1049/2001.[180] Besides, article 7(3) clarifies that evidence obtained only through access to the file of a competition authority can be used in an action for damages by successors, including acquirers, thus allowing the use of such evidence by third party entities which have purchased claims from would-be claimants.[181]

Through the above provisions, the Directive has set up a decentralised system of disclosure of evidence emphasizing the central function of courts seized with actions for damages, which have to perform strict judicial review as to its necessity, scope and proportionality.[182] This system essentially ensures, at a minimum level, effective access to evidence required for claimants to substantiate their claims for damages due to infringements of EU competition law. By establishing a procedural interoperability mechanism between the two enforcement systems, it facilitates the correction of information asymmetry and thus safeguards the effective function of private enforcement and the achievement of consistency in the application of EU competition law.

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[175] See also Lianos I., Davis P., Nebbia P., *supra* n. 54, p. 255.

[176] Articles 5(2) and 5(3) of Directive 2014/104/EU; it is noted that article 5(2) and recital 16 stipulate that in case the order for disclosure refers to categories of evidence, these shall be circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

[177] Given the definition of the term "competition authority" in article 2, point 8) of Directive 2014/104/EU, the rules on disclosure of evidence under article 6 shall apply both to NCAs and the European Commission.

[178] Article 6(4)(c) of Directive 2014/104/EU.

[179] Article 6(1) of Directive 2014/104/EU.

[180] Article 6(2) of Directive 2014/104/EU; see, in this respect, Papadopoulou R.-E. supra n. 154, p. 1434, characterizing the option of an order for disclosure as '*ultimum refugium'*.

[181] The practice is referred to as third party litigation funding; see. Lianos I., Davis P., Nebbia P., *supra* n. 54, p. 258.

[182] See 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, 11.6.2013, COM(2013) 404 final, Explanatory Memorandum, p. 14.

1.2.2. Rules on limitation periods aiming at fostering effective private enforcement

In the context of actions for damages due to an infringement of competition law, it is commonly acknowledged that limitation periods are of particular significance in ensuring legal certainty, but also in providing those having suffered loss due to such an infringement with adequate time to gather the necessary evidence.[183] Indeed, limitation periods may contribute to the effective exercise of both standalone and follow-on actions. If a limitation period is too restrictive or may not be suspended, the risk arises that a claim for compensation will be already time-barred when a decision by a competition authority is adopted.[184] These considerations were taken into account by the EU legislature in adopting Directive 2014/104/EU.

More specifically, as far as duration is concerned, Article 10(3) of Directive 2014/104/EU obliges Member States to ensure that the limitation periods for bringing actions for damages are at least five years.[185] Furthermore, with respect to the commencement date of the limitation period, article 10(2) provides that this shall not begin to run before the infringement of competition law *has ceased* and the claimant *knows, or can reasonably be expected to know of* (a) the relevant behaviour and the fact that it constitutes an infringement of competition law; (b) the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer. Through the introduction of this rule, the Directive aims at enhancing actions for damages in the case of continuous or repeated infringements, given that, if the limitation period were to commence on the date when the infringement is committed, the action could have been time-barred even before the termination of such infringement.[186]

Particular significance, from the perspective of the interaction between public and private enforcement, is to be accorded to article 10(4) of the Directive. The provisions of this article seek to guarantee the effectiveness of follow-on actions by preventing the possibility that the limitation period expires while public enforcement by NCAs or competent review courts is still pending. In particular, article 10(4) provides that a limitation period shall be *suspended or interrupted* if a competition authority takes action in respect of an infringement of competition law to which the respective action for damages relates. The suspension of the limitation period

[183] Commission Staff Working Paper *supra* n. 101, para. 226.
[184] *Ibid*, para. 227.
[185] *Ibid,* 236: The Commission had identified considerable divergences as to the duration of limitation periods between Member States, which ranged from 1 to 30 years; See also Lianos I., Davis P., Nebbia P., *supra* n. 54, p. 293, stating that limitation periods might also differ within the same Member State, referring to the applicable regime in the UK.
[186] See also CJEU, *Manfredi*, *supra* n. 46, para. 76.

shall in turn end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

The aforementioned provisions acknowledge the strong interdependence between actions for damages and administrative proceedings for infringements of competition law and grant claimants sufficient time to prepare their actions to assert their rights before national courts. Private enforcement thus functions in detailed coordination with public enforcement so that coherence and effectiveness is achieved.

2. ASPECTS OF HIERARCHY BETWEEN PUBLIC AND PRIVATE ENFORCEMENT OF EU COMPETITION LAW

The preceding analysis has indicated that, despite the fact that the two systems of enforcement of competition law may appear in certain cases to compete with each other, EU law provides for rules and mechanisms which aim at guaranteeing that both accomplish their underlying objectives in a coherent manner. However, the question arises whether public and private enforcement can be *indeed* perceived as equal limbs of a dual system, or a hierarchy may be inferred to exist between them.

Can both mechanisms operate under all circumstances in parallel avoiding the risk that the function of the one endangers the function of the other? That would be particularly the case if the rights accorded to individuals in the context of private enforcement were to interfere with the investigation and enforcement powers of competition authorities. Such a risk was indeed recognised by the Commission in the White Paper as well as the Proposal which led to adoption of Directive 2014/104/EU. More specifically, the Commission suggested that the measures to be implemented should create a system of private enforcement which, however, would not 'replace or jeopardise' public enforcement.[187] Besides, in the Explanatory Memorandum to the Proposal, the Commission recognised a significant risk that effective public enforcement by the Commission and NCAs could be endangered in the absence of EU-wide rules governing the interaction between public and private enforcement, referring notably to rules on the access to the administrative file.[188] Therefore, it transpires that the interrelations between the two forms of enforcement may under certain circumstances require a balancing of the interests involved, which may cause the one, notably public enforcement, to take precedence.

The following chapters will address aspects which imply such a hierarchical order, either as a result of limitations imposed on the effectiveness of private enforcement, through rules which affect the substance, or as a result of a balancing exercise which favours public enforcement and is evidenced in rules which affect procedure.

[187] White Paper on damages actions, *supra* n. 51, p. 3.
[188] Proposal for a Directive, *supra* n. 186, Explanatory Memorandum, para. 3.2.

2.1. HIERARCHY FROM A SUBSTANTIVE PERSPECTIVE

This chapter will address, *firstly*, the limited effect that certain categories of decisions of competition authorities have on private enforcement proceedings (2.1.1), and, *secondly*, the issue of accumulation of liability due to infringements of EU competition law (2.1.2) with a view to examining whether their implications on the practical effectiveness of private enforcement eventually render it inferior to public enforcement.

2.1.1. Decisions of competition authorities with limited effect over private proceedings

a. The scope and legal effect of article 9(2) of Directive 2014/104/EU

As analysed above[189], article 9(1) of Directive 2014/104/EU confers binding effect on final infringement decisions adopted by NCAs, or final judgments of review courts, over *their* national courts when the latter rule on actions for damages. Nonetheless, the Commission's proposal, which led to the adoption of Directive 2014/104/EU, initially envisaged a wider territorial scope for said binding effect, suggesting in essence that a final decision of an NCA in the ECN, or a final judgment of a review court upholding such decision, should be binding on national courts in *any Member State* adjudicating on the same competition infringements.[190]

The proposal received criticism as to its potential to give rise to forum-shopping strategies across the EU.[191] In particular, given the divergences between Member States as to procedural rights, review mechanisms and required standard of proof, concerns were raised that parties invoking loss due to anticompetitive practices or agreements would seek (a) to initiate public enforcement through complaints in Member States where, for instance, judicial review of NCA decisions appeared to be more limited, acknowledging on the NCA a wide margin of appraisal, and (b) proceed with follow-on actions for damages in jurisdictions which offer higher chances of restitution. In general, the proposal was considered premature, at least until greater uniformity in terms of procedural safeguards could be achieved.[192] Moreover, commentators were critical on

[189] See *infra* chapter 1.1.1(b).

[190] See recital 25 and article 9 of the 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, 11.6.2013, COM(2013) 404 final.

[191] See Grassani S., The Binding Nature of NCA Decisions in Antitrust Follow-on Litigation: Is EU Antitrust Calling For Affirmative Action?, 1 Competition Policy International (2013), p. 4; Truli E., *supra* n. 119, p.814, with references to responses received in the course of public consultation as to the White Paper on actions for damages.

[192] Merola M., Armati, L. The Binding Effect of NCA Decisions under the Damages Directive: Rationale and Practical Implications. 3(1) Italian Antitrust Review (2016), p. 97.

the implications that the proposed rule would have on the territorial scope of NCA decisions, which would thus extend beyond the jurisdiction of the respective NCA.[193]

Article 9(2) of the Directive, as adopted, provides that a final decision of an NCA in another Member State may be presented before a national court, and in accordance with national law, as at least *prima facie evidence* that an infringement of competition law has occurred and may be assessed along with any other piece of evidence adduced by the parties. Hence, in contrast with the *irrefutable* presumption provided for in article 9(1), the Directive imposes no restriction on the defendant before a national court ruling on an action for damages to challenge the probative value of NCA decisions adopted in other Member States.

However, limiting the probative value of findings of NCAs of other Member States creates an asymmetry[194] which may have dissuasive effects in respect of bringing actions for damages, thus endangering the effective function of the system of private enforcement. This is particularly the case where a claimant files a claim for damages in another Member State, for example, due to the fact that one of the infringing undertakings is domiciled in that Member State.[195] In such a scenario, the rule under article 9(2) of the Directive would allow a reassessment of issues which have already been considered by specialised authorities and reviewed by specialised courts, increasing among others the cost and duration of private proceedings. Additionally, dissuasive effects may be caused with respect to concentrating damages proceedings before a single national court where an infringement of competition rules has been found by decisions of several NCAs, impinging upon procedural economy and efficiency. In view of the above considerations, the non-extension of binding effect to decisions of foreign NCAs may undermine the practical significance of private enforcement, disregarding its fundamental role as an independent and equal component in the dual system of enforcement of EU competition law.

Besides, the solution adopted may also appear to disregard the function of each NCA in the ECN as an independent guardian of consistency[196] and, as it does not shield against contradictory results, may prejudice the uniform application of competition rules across the EU.

Nonetheless, it shall be noted that Directive 2014/104/EU pursues minimum harmonisation, which means that Member States remain free to accord a stronger probative value to foreign

[193] Truli E., *supra* n. 119, p.809.
[194] See also Wright K., The Ambit of Judicial Competence after the EU Antitrust Damages Directive, 43(1) Legal Issues of Economic Integration (2016), pp. 15-40.
[195] Commission Staff Working Paper *supra* n. 101, para. 160.
[196] See, *infra*, 1.1.1(b)(i).

NCA decisions than that of *prima facie* evidence.[197] In fact, some Member States have already done so by introducing rebuttable presumptions[198] or even awarding full binding effect[199].

b. Limitation of the binding effect under article 9(1) of Directive 2014/104/EU only on follow-on damages proceedings

As already indicated[200], the binding effect provided for in article 9(1) of Directive 2014/104/EU, recognizing the binding effect of NCA decisions over courts of their Member State, covers only *follow-on actions for damages*. Thus, in contrast with article 16(1) of Regulation 1/2003 referring to Commission decisions, the rule under article 9(1) does not extend to all private enforcement actions, for example, those seeking other kinds of remedies such as injunctive relief or a declaration of the nullity of an agreement or decision under article 101 TFEU.[201]

Such other remedies unambiguously constitute equally important forms of private enforcement which guarantee the practical effect of EU competition law.[202] Therefore, the non-extension of binding effect to the full sphere of private enforcement may create further inconsistency in the dual enforcement system, endangering thus the effectiveness of private enforcement.

In spite of the above symbolic implication, it has to be acknowledged nonetheless that it was not the aim of the Directive to harmonise rules with respect to all aspects of private enforcement, but rather to set certain rules for the effective exercise of the right to claim compensation.[203] Besides, in most cases NCAs will have already declared the relevant anticompetitive agreement null and void, and will have ordered the termination of the infringement aiming at restoring competition in the market.[204]

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[197] This is also apparent from the wording of article 9(2) which refers to "at least" prima facie evidence; see also Nazzini R., The Effect of Decisions by Competition Authorities in the European Union, 2(2) Italian Antitrust Review (2015), p. 92.

[198] See article 9(2) of Greek Law 4529/2018.

[199] See section 33(4) of the German Competition Act; see also Wright K. *supra* n. 118; Wurmnest W., A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition, 6(8) German Law Journal (2005), p. 1173.

[200] See, *infra*, 1.1.1(b)(ii).

[201] see also Wright K. *supra* n. 118.

[202] Komninos A., 'Transient' and 'Transitional' Voidness of Anti-Competitive Agreements: A Non-issue and an Issue, 28 European Competition Law Review (2007), p. 445.

[203] Article 1(1) of Directive 2014/104/EU, *supra*, n. 73.

[204] See Truli E., *supra* n. 119, p. 806.

c. The limited effect of commitment decisions

Before elaborating on the potential effect of commitment decisions over private enforcement actions, it appears useful to make an introduction as to their evolution and role in the field of EU competition law. Commitment decisions were formally introduced in EU competition law by virtue of Regulation 1/2003, as a flexible mechanism to conclude competition investigations on the basis of concessions offered by undertakings and without finding an infringement. The European Commission had already developed a practice of informal settlements in the context of competition enforcement under Regulation No 17[205], which did not provide for, but did not preclude either, such option. For example, in 1984, the Commission accepted a unilateral undertaking from IBM to modify its business practices regarding System/370, its –then– most powerful range of computers.[206] In thosese proceedings, the Commission had considered that IBM held a dominant position in the market for the supply of two key products for System/370 and that it had abused such dominant position by engaging in bundling practices.[207] IBM eventually came to an informal settlement with the Commission, undertaking commitments which were expected to strengthen competition in the relevant market.

Article 9 of Regulation 1/2003 expressly provided for a legal basis in respect of commitments offered to the Commission and set the basic framework for their enforcement; article 5 included commitment decisions among the decisions which the NCAs are empowered to adopt. It provided undertakings with the possibility to offer commitments aiming to address the competition concerns raised by the Commission, which, if accepted, can be made binding upon the parties subject to the proceedings by virtue of a decision.

The Commission may at its discretion decide to follow the commitments route provided that, from a preliminary assessment, it is convinced that the undertaking concerned is genuinely willing to propose commitments which will effectively address the relevant concerns.[208] Commitments may be of a behavioural or structural nature, but in any case must be unambiguous and self-executing, namely their implementation must not depend upon the will of any third party which is not bound by the commitments.[209] Besides, as clarified in the preamble to

[205] Council Regulation No 17, *supra* n. 164.
[206] See Wils W. P. J., Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003, 29(3) World Competition (2006), p. 346; Commission's XlVth Report on Competition Policy, 1984, paras 94-95.
[207] *Ibid*.
[208] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, para. 121.
[209] *Ibid*, para. 127.

Regulation 1/2003, commitment decisions are not appropriate in cases where the Commission intends to impose a fine[210], such as in the case of hardcore cartel infringements.

In accordance with article 27(4) of Regulation 1/2003, proposed commitments must be market tested, which means that a summary of the case and the commitments or the proposed course of action must be published, in order for interested third parties to submit observations. If, following this process, the Commission is convinced that the proposed commitments are suitable to remedy the competition concerns identified, it then proceeds with issuing a decision making these commitments binding.[211] However, the Commission has a wide discretion in terms of making a proposed commitment binding or rejecting it.[212]

Commitments usually appear as a preferred solution for both the Commission and the undertakings concerned. On the one hand, as acknowledged by the CJEU in *Alrosa*, commitments guarantee procedural economy[213] and are capable of providing a rapid solution to the concerns identified and bringing about faster market changes.[214] On the other hand, the relevant undertakings may retain control over the remedies offered and implemented.[215] In fact, they entail a compromise on their part, as the concessions made may go beyond what the Commission could impose on them by an infringement decision following detailed examination of the respective case.[216]

In recent years, there is an increasing trend of using commitment decisions.[217] Recent examples at the EU level include the acceptance by the Commission of commitments offered by ISDA and Markit on credit default swaps[218], by Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky on cross-border pay-TV services[219], by Amazon on e-books[220] and TenneT on cross border electricity trading[221].

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[210] See recital 13 to the preamble of Regulation 1/2003.

[211] For a detailed analysis of the procedure on commitments, see Dunne N., Commitment decisions in EU competition law, 10(2) Journal of Competition Law and Economics (2014), p. 402.

[212] CJEU, 29.6.2010, *Alrosa*, C-441/07 P, EU:C:2010:377, para. 94.

[213] *Ibid*, para. 35;

[214] Commission Staff Working Paper Accompanying the Communication From the Commission to the European Parliament and Council, Report on the Functioning of Regulation 1/2003, COM (2009) 206 final24.4.2009, para. 13.

[215] Dunne N., *supra* n. 205, p. 405; see also Wathelet M., Commitment Decisions and the Paucity of Precedent, 6(8) Journal of European Competition Law & Practice 2015, p. 553.

[216] *Ibid*, para. 48

[217] Rat D., Commitment Decisions and Private Enforcement of EU Competition Law: Friend or Foe?, 38(4) World Competition (2015), p. 528; See also, on national practice, Schweitzer H., Commitment Decisions: An Overview of EU and National Case Law, e-Competitions Bulletin, Special Issue on Commitment Decisions, August 2012.

[218] Case AT.39745 - CDS Information Market, C(2016) 4583 final, 20.7.2016 and Case AT.39745 - CDS Information Market, C(2016) 4585 final, 20.7.2016.

[219] Case AT.40023 - Cross-border access to pay-TV, C(2019) 1772 final, 7.3.2019.

[220] Case AT.40153 - E-book MFNs and related matters (Amazon), C(2017) 2876 final, 4.5.2017.

By adopting a commitment decision, the Commission does not endorse the previous market behaviour of the undertakings concerned nor does it consider it compliant with competition rules; conversely, the Commission makes no finding on the existence of an infringement and only declares that its concerns have been addressed and that there are no grounds for action at the present time.[222]

Consequently, commitment decisions are not covered by the binding effect prescribed under article 16(1) of Regulation 1/2003[223] or article 9(1) of Directive 2014/104/EU. Besides, recital 22 to the preamble of Regulation 1/2003 makes clear that commitment decisions adopted by the Commission do not affect the powers of the national courts to apply articles 101 and 102 TFEU. Private parties cannot thus rely on a commitment decision in the context of an action for damages before a national court, but must establish, as in the context of a stand-alone actions, the existence of the infringement, the loss suffered and the causal link between the infringement and the loss.

In light of the above, on the one hand, the ever increasing trend of employing commitments in the field of public enforcement –albeit with the exception of hardcore cases– and, on the other hand, the ever increasing focus on follow-on actions for damages may cast doubts on the future practical significance of articles 16(1) of Regulation 1/2003 and 9(1) of Directive 2014/104/EU, at least for a large part of competition infringements, in the absence of *any* effect of the first over the second. Ultimately, this may raise concerns as to the further development of private enforcement, which risks being rendered inferior to public enforcement, at least from a practical standpoint.

This notwithstanding, the preliminary assessment carried out in the context of a commitment decision will contain invaluable guidance on the potential anticompetitive effects of the agreement or practice in question. Although rendering their findings within the scope of an irrefutable presumption would apparently raise proportionality concerns[224], such findings are to be taken into account by national courts. This was also the position expressly taken by the CJEU in its recent case-law. Indeed, in *Gasorba*, where preliminary questions were referred essentially seeking to clarify the legal effects of commitment decisions in domestic judicial proceedings, the

[221] Case AT.40461 – DE/DK Interconnector, C(2018) 8132 final, 7.12.2018.

[222] See recital 13 to the preamble of Regulation 1/2003; see also GC, 12.12.2018, *Groupe Canal + v Commission*, T-873/16, EU:T:2018:904, para. 99; Opinion of AG Kokott, 14.9.2017 in *Gasorba and Others*, C-547/16, EU:C:2017:692, para. 38.

[223] It is recalled that article 16(3) obliges national courts, when ruling on agreements, decisions or practices under articles 101 or 102 TFEU which are already the subject of a Commission decision, to abstain from taking a decision running counter to that Commission decision. See *infra* chapter 1.1.1(a)(ii).

[224] See on this point, Papadopoulou R.-E. *supra* n. 154, p. 1436.

CJEU ruled that national courts cannot overlook this type of decisions.[225] In light of the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of uniform application of EU competition law, national cours must regard the preliminary assessment of the Commission as an indication, if not *prima facie* evidence, of the anticompetitive nature of the agreement or practice at issue.[226] The same considerations should apply with respect to commitment decisions adopted by NCAs.

[225] CJEU, 23.11.2017, *Gasorba and Others*, C-547/16, EU:C:2017:891, para. 29.
[226] *Ibid.*

2.1.2. Implications of the accumulation of fines and damages

Another aspect which may entail the creation of a hierarchy between public and private enforcement concerns the extent of liability incurred by the infringer. The independent nature of the two forms of enforcement of EU competition law implies an accumulation of dual liability on the part of the infringer. Indeed, an undertaking involved in anticompetitive practices may be held liable, on the one hand, to pay a fine or a periodic penalty payment under the provisions of Regulation 1/2003, or the respective national competition provisions, and, on the other hand, to pay full compensation to those having suffered harm due to such practices in the context of private enforcement proceedings. To date, no provision is made in EU legislation on the coordination of such accumulation of liability, which may also raise concerns given its potential to limit the practical effectiveness of private enforcement, as will be analysed below.

Of course, the extent of the ensuing liability is framed within the context of specific principles. In respect of penalties imposed by competition authorities, the CJEU has ruled that they must be effective and dissuasive, but also proportionate.[227] Regulation 1/2003 also provides that the calculation of fines is to be confined within specific thresholds.[228] On the other hand, in the context of private enforcement proceedings, full compensation shall cover the right to compensation for actual loss and for loss of profit, plus interest payment, while it shall not lead to overcompensation.[229]

The EU Courts have addressed the matter of concurrent sanctions only with respect to parallel *administrative* proceedings at the EU and Member States' level. The position adopted in that respect is that the possibility of concurrent sanctions, resulting from two parallel proceedings, each pursuing different ends, is acceptable because of the special system of sharing of jurisdiction between the EU and the Member States with regard to anticompetitive agreements.[230] However, in this case, the Commission must consider, in determining the amount of a fine, any penalties that have already been borne by the undertaking in question in respect of the same conduct.[231]

However, there is currently no specific rule that allows taking into account the potential liability for damages in order to determine the extent of the liability with reference to public enforcement

[227] CJEU, *Commission v Greece*, *supra* n. 34, para. 24.
[228] See article 23(2) of Regulation 1/2003, which provides that for each undertaking and association of undertakings participating in an infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.
[229] Article 2(2) and 2(3) of Directive 2014/104/EU.
[230] See GC, 29.4.2004, *Tokai Carbon v Commission*, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, EU:T:2004:118, para. 132 and case-law there cited.
[231] *Ibid.*

fines. It has been thus argued that an equalisation[232] or coordination[233] mechanism should be introduced to avoid ensuing risks. Such risks have been associated by commentators, firstly, with potential incompatibility with the *ne bis in idem* principle.[234] Nonetheless, this principle, currently enshrined in article 50 CFR, prohibits the imposition of two *criminal* sanctions on the basis of the same facts, which is not the case with respect to the concurrent imposition of a fine with an award of damages.

Implications may, in fact, arise on the interaction of public and private enforcement of competition law in case the imposition of a fine by a competition authority entails a disproportionate burden on the infringers, which endangers the continuation of their business and as a result their possibility to pay compensation through private enforcement proceedings.[235] Thus, it becomes apparent that the lack of rules limiting the extent of concurrent liability through a coordination mechanism between the two forms, private enforcement, which is usually initiated through follow-on actions for damages, may lose its practical effect and be rendered inferior to public enforcement. In light of the above, it would appear advisable to include, for instance, a set-off mechanism in the Commission Guidelines on the method of setting fines[236] as well as in the respective national provisions.[237]

[232] Kloub J., (2009) White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement 5(2), p. 542.
[233] Frese M., s*upra* n. 34, p. 413.
[234] Frese M., s*upra* n. 34, p. 429.
[235] *Ibid.*
[236] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006.
[237] See, on this respect, Papadopoulou R.-E., *supra* n. 154, p. 1437.

2.2. HIERARCHY FROM A PROCEDURAL PERSPECTIVE

2.2.1. Exceptions to the disclosure of evidence held by competition authorities

Directive 2014/104/EU provides for several exemptions to the disclosure of evidence held by competition authorities in the context of private damages proceedings aiming at protecting those authorities' powers of investigation and enforcement and, in more general terms, the effectiveness of public enforcement of competition law. In this respect, the Directive foresees two categories of prohibition of disclosure of evidence: a temporary disclosure prohibition (a) and a permanent disclosure prohibition (b).

a. Temporary disclosure prohibition

Recital 25 to the preamble of Directive 2014/104/EU indicates that disclosure of evidence to private parties seeking to produce such evidence in private damages proceedings should not interfere with ongoing investigations conducted by competition authorities with respect to infringements of EU or national competition law. On this premise, article 6(5) of the Directive provides for three categories of information or documents which the national court may order to be disclosed only after a competition authority has closed its proceedings, by adopting a decision or otherwise.

First, information that was prepared by a natural or legal person specifically for the proceedings of a competition authority (such as replies to requests for information of the competition authority or witness statements), *second*, information that the competition authority has drawn up and sent to the parties in the course of its proceedings (for instance, a Statement of Objections) and, *third*, settlement submissions that have been withdrawn.

Proceedings should be deemed to have been closed where the Commission or an NCA have adopted a decision ordering the termination of an infringement and/or imposing fines, periodic penalty payments or any other penalty or a decision accepting commitments offered by the undertakings involved. On the contrary, proceedings are not closed upon a decision ordering interim measures.[238]

The provisions on temporal prohibition of disclosure signify a balancing between the interest of private parties to be facilitated in the substantiation of their claims for compensation and the

[238] See recital 25 to the preamble of Directive 2014/104/EU.

effective exercise by competition authorities of their competence in the sphere of public enforcement.[239]

b. Permanent disclosure prohibition

In contrast with the above, the Directive guarantees permanent protection from disclosure to those documents which are considered as having great significance for the detection and termination of the most serious infringements of competition law, notably cartels. These are leniency statements and settlement submissions.

Undertakings engaged in cartels would become strongly discouraged from applying for leniency or settlement before the competent competition authority if private parties could gain access to the evidence they submit and use it against them to obtain damages in private enforcement proceedings.[240] Therefore, Article 6(6) of the Directive prohibits national courts from ordering *at any time* a party, or a third party (including thus competition authorities), to disclose leniency statements and settlement submissions. Besides, if only parts of the documents requested contain leniency statements or settlement submissions, only the remaining parts thereof may be disclosed under article 6(8) of the Directive.

The underlying principles behind the provisions of article 6(6) are not novel in the context of leniency. The protection of information obtained through leniency programmes was already envisaged in the framework of cooperation between the Commission and national courts under Regulation 1/2003, as further specified by the Commission in its Notice on cooperation with national courts[241]. Article 15(1) of Regulation 1/2003 stipulates that national courts adjudicating in proceedings for the application of articles 101 and 102 TFEU may request the Commission to transmit to them information in its possession. However, relying on relevant case-law[242], the Commission clarifies in said Notice that it may refuse to transmit information for overriding reasons relating to the need to safeguard the interests of the EU or to avoid any interference with its functioning and independence, especially by jeopardising the accomplishment of the tasks entrusted to it.[243] Indeed, the CJEU had inferred from the principle of loyal cooperation now laid down in article 4(3) TEU that, if a national court is in need of information that only the

[239] See also Papadopoulou R.-E. *supra* n. 154, p. 1434.
[240] See Sauter W., *supra* n. 3, p. 134.
[241] 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, OJ C 127, 27.4.2004.
[242] See CJEU, 6.12.1990, *Zwartveld and Others*, EU:C:1990:440, para. 11; CJEU, 26.11.2002, *First and Franex*, C-275/00, EU:C:2002:711, para. 49; GC, *Postbank v Commission*, *supra* n. 163, para. 93.
[243] See Commission Notice on the co-operation between the Commission and the courts of the EU Member States, *supra* n. 225, para. 26.

Commission can provide, the Commission must provide that information as soon as possible; however, it may refuse to do so, provided that such refusal is justified by the aforementioned overriding reasons.[244] The Commission thus clarifies that it will not transmit information voluntarily submitted by a leniency applicant without the consent of that applicant, which exemplifies that the protection of leniency statements is considered by the Commission as an overriding reason relating to the accomplishment of its tasks.

Although leniency programmes are not governed by EU primary or secondary law, their need and purpose could be inferred from the practical effectiveness of article 101 TFEU. The procedure regarding leniency programmes before the Commission is currently regulated by a soft-law instrument, the Leniency Notice of 2006[245]. Although soft-law instruments laying down rules of practice, such as the Leniency Notice, are not formally binding upon the Commission, they impose a limit on the exercise of its discretion, as has been established by the CJEU in its settled case-law.[246]

According to the Notice, the Commission will grant *immunity* from any fine to an undertaking which discloses its participation in an alleged cartel, provided that it is the first to submit evidence enabling the Commission to conduct a targeted inspection or find an infringement of article 101 TFEU.[247] In addition to the other conditions specifically provided for in the Notice for immunity, the undertaking must have ended its involvement in the alleged cartel immediately following its application and shall cooperate 'genuinely, fully, on a continuous basis and expeditiously' throughout the whole administrative procedure.[248] Furthermore, the Commission may grant a *reduction* of fines ranging between 20 to 50% to other participants in a cartel which provide to the Commission evidence of the infringement having a 'significant added value' in relation to the evidence already in its possession.

The mission entrusted upon competition authorities to enforce competition rules against hardcore infringements, such as cartels, appears to be strongly enhanced by, if not dependent on, the leniency tool. Other investigation powers, such as on-site investigations (*dawn raids*) may only

[244] CJEU, *First and Franex, supra* n. 226, para. 49.
[245] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, (2006 Leniency Notice).
[246] CJEU, 28.6.2005, *Dansk Rørindustri and Others v Commission*, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paras 209, 211, 213 and 250; CJEU, *Schindler Holding and Others v Commission*, *supra* n. 127, paras 58, 67-69; CJEU, 26.1.2017, *Mamoli Robinetteria v Commission*, C-619/13 P, EU:C:2017:50, para. 51; On a comprehensive analysis on the role of soft-law in the EU legal order, see Papadopoulou R.-E., Soft Law in the European Union Legal Order, Nomiki Vivliothiki, 2012 (in Greek).
[247] See 2006 Leniency Notice, *supra* n. 245, para. 8.
[248] *Ibid*, para. 12(a) and (12(b).

lead to the discovery of existing documents and are less efficient from a resources point of view[249].

At the EU level, most cartels have been detected through the Commission's leniency programme.[250] With respect to recent practice, on 21 February 2018, the Commission imposed a total of 546 million Euro in fines for cartel participation in three different cases concerning the maritime transport of cars and the supply of car parts, all of which were commenced upon applications for leniency.[251] The undertaking which revealed the existence of the cartel received full immunity and avoided a fine of approximately 203 million Euro.[252]

Besides, the Commission recently submitted a Proposal for a Directive[253] aiming at harmonising national laws on the protection afforded to persons reporting on breaches of EU law, including leniency applicants. The Commission considered that current whistleblowers' protection is fragmented between Member States and uneven across policy areas, which entails that insufficient protection in one Member State may have spill-over effects over other Member States and the EU as a whole.[254] By strengthening such protection, the Commission expects to further increase its own as well as the NCAs' ability to detect and bring to an end, *inter alia*, infringements of EU competition law.[255]

The importance of leniency programmes, as described above, may explain the option of the EU legislature to preclude any possibility of disclosure of evidence collected through leniency in private enforcement proceedings. However, it may be questioned whether this legislative option

[249] See Migani C., *Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement*, (2014) Global Antitrust Review, p. 95, stating that "'direct force' such as dawn-raids at business premises can produce only existing documents and are very expensive, since the authorities would need an in-depth research before locating any relevant information, and 'compulsion', i.e. threatening sanctions for refusal to cooperate, although being less costly and not limited to existing documentation, risks unreliability of information".

[250] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Report on Competition Policy 2017, COM(2018) 482 final, 18.6.2018, p. 3.

[251] Cases AT.40009 *Maritime car carriers*, C(2018) 983 final, 21.2.2018; Case AT.40113 *Spark plugs*, C(2018) 929 final, 21.2.2018; Case AT.39920 *Braking systems*, C(2018) 925 final, 21.2.2018.

[252] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Report on Competition Policy 2018, COM(2019) 339 final, 15.7.2019, p. 5.

[253] Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM/2018/218 final, 23.4.2018.

[254] *Ibid*, recital 4.

[255] *Ibid*, recital 15.

conforms to previous case-law of the CJEU on the matter. Two cases are relevant in this respect: *Pfleiderer*[256] and *Donau Chemie*[257].

In the first case, Pfleiderer had submitted a request to the Bundeskartellamt in order to obtain full access to documents which related to a cartel found on the decor paper sector, with the view to preparing civil actions for damages. However, this request, by which access to leniency material was also sought, was rejected. In the context of proceedings initiated by Pfleiderer against the decision refusing access to the file, a preliminary reference was made to the CJEU. The CJEU found that in circumstances such as those at issue it is necessary 'to weigh the respective interests in favour of disclosure of the information and in favour of the protection of information provided voluntarily by the applicant for leniency' on a case-by-case basis.[258]

In *Donau Chemie*, the CJEU was called to examine whether the principle of effectiveness precludes a provision of national law under which access to the file of antitrust proceedings, including to leniency documents, is made subject to the consent of all the parties to such proceedings without thus allowing national courts to weigh up the interests involved. The CJEU made clear that the risk that such a disclosure may entail for the effectiveness of a leniency programme cannot justify a refusal to grant access to evidence.[259] On the contrary, the Court emphasised that the refusal is liable to give the infringing undertakings, which may have already benefited from immunity from fines, the opportunity also to circumvent their obligation to compensate for the harm caused, to the detriment of injured parties. On this basis, the CJEU reaffirmed that a refusal must be based on overriding reasons relating to the protection of the interests relied on and applicable to each document to which access is requested.[260]

It appears hard to reconcile the conclusions reached by the CJEU in the above judgments with the provision of article 6(6) of Directive 2014/104/EU, which imposes a permanent prohibition of disclosure.[261] A possible solution could be to interpret that provision in light of the principle of proportionality and allow a balancing exercise to be made. However, it is questionable whether the letter of that provision, which is framed in strict terms[262], allows for such an

[256] CJEU, 14.6.2011, *Pfleiderer*, Case C-360/09, EU:C:2011:389.
[257] CJEU, *Donau Chemie*, *supra* n. 141.
[258] CJEU, *Pfleiderer*, *supra* n. 241, paras 30-31.
[259] CJEU, *Donau Chemie*, *supra* n. 141, para. 46.
[260] *Ibid*, para. 47.
[261] See also Papadopoulou R.-E., *supra* n. 154, p. 1434.
[262] Article 6(6) provides that national courts '*cannot at any time* order' the disclosure.

interpretation. It remains to be seen what position the CJEU will take in case the matter is brought before it.[263]

Finally, the option of the EU legislature to permanently prohibit disclosure of settlement submissions[264] can be explained on the same grounds as those underlined above with respect to leniency. The settlement procedure provides the possibility for parties in antitrust proceedings to acknowledge their participation in a cartel and contribute to expediting the closure of proceedings. The Commission considers that settlement may allow it to handle more cases with the same resources, thereby fostering the public interest in the delivery of effective and timely punishment, while increasing overall deterrence.[265] Considered fundamental for the effective function of public enforcement, settlement submissions are permanently protected under article 6(6) of Directive 2014/104/EU, increasing the implications that the system of disclosure of evidence has on the role and function of private enforcement.

2.2.2. The passing-on defence as a potential threat to the effectiveness of private enforcement

a. Recognition of indirect purchaser standing and of the passing-on defence

As noted at the outset, the CJEU proclaimed in *Courage* the right of *any individual* (emphasis added) to claim compensation for the harm suffered due to an anticompetitive practice or agreement.[266] Besides, in *Otis*, the CJEU confirmed that this right requires only the establishment of a causal link between the infringement of competition rules in question and the harm suffered, without any contractual relationship between the claimant and the infringer being necessary.[267] On these premises, article 12(1) of Directive 2014/104/EU provides that compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer.

[263] See CJEU, 2.3.2016, *Evonik Degussa v Commission*, C-162/15 P, EU:C:2016:14, delivered following the enactment of Directive 2014/104/EU: in para. 111 the CJEU reaffirmed its conclusions, albeit not in the specific context of article 6(6) of Directive 2014/104/EU.

[264] See 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, OJ L 171, 1.7.2008; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008.

[265] Commission Notice on the conduct of settlement procedures, *supra* n. 248, para. 1.

[266] CJEU, *Courage*, *supra* n. 43, para. 26.

[267] CJEU, *Otis*, *supra* n. 91; see also Dunne, N., *supra* n. 59, p. 1.

Besides, article 3(3) of the Directive stresses that full compensation shall not lead to overcompensation. As a means to avoiding overcompensation, article 13 provides for the passing-on defence, which means that the defendant in an action for damages can invoke as a defence against a claim for damages that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. Indeed, in the absence of such defence, purchasers who passed on the overcharge downstream in the distribution chain would be unjustly enriched if they were also awarded compensation for the harm caused by the same infringement.

The approach followed may create uncertainty for direct purchasers, who will be able to receive compensation for actual loss only up to the amount of the overcharge which was not passed-on, given inter alia that the calculation of the exact portion of the overcharge which was passed-on would be a complex exercise.[268] Most importantly, indirect purchasers may have limited or no incentive to initiate actions for damages if the amount they may actually recover is deemed insignificant. In light of the above, the recognition of indirect purchaser standing and of the passing-on defence may cast doubt over the practical effectiveness and the role that private enforcement proceedings may ultimately have.

b. The need for harmonisation on collective redress mechanisms

In light of the above disincentive that the recognition of indirect purchaser standing and of the passing-on defence may entail, it becomes apparent that the only possible remedy to such situation would be to provide for harmonised rules on collective redress mechanisms, which, in essence, would allow for representative or collective actions by multiple claimants. In the absence of specific rules in the Directive, it remains for the national procedural laws of Member States to govern the exercise of such actions.

The only EU law instrument currently applicable with respect to collective redress is a Recommendation adopted by the Commission in 2013, which however is not binding upon Member States.[269] The Recommendation advocates in favour of the use of an opt-in collective redress system, providing for an exception for the use of opt-out where this is required by reasons of sound administration of justice.[270] Thus, apart from its non-binding nature, the

[268] See also Zygimantas J., A More Forceful Collection Redress Schemes in the EU Competition Law, (2016) European Journal of Law Reform 18(4), p. 456.

[269] 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 L 201, 26.7.2013.

[270] *Ibid*, para. 21.

Recommendation is formulated in a broad way which leaves considerable leeway to Member States as to the application of its principles.[271]

In view of increasing pressure on the need to address collective redress at the EU level, the Commission recently published a proposal for a consumer collective redress Directive which seeks to make significant improvements in this field.[272] The proposal provides that Member States may designate qualified entities that will be able to initiate representative actions, namely actions for the protection of the collective interests of consumers, *to which the consumers concerned are not parties*, proposing thus an opt-out model. However, although the proposal suggests that the directive be applicable over actions against infringements of fifty-nine EU law instruments[273], it is regrettable that it currently makes no reference to Directive 2014/104/EU, leaving thus open the question whether it will eventually form the basis for an EU-wide collective redress system for competition law infringements, that could promote the effectiveness of private enforcement.

[271] See Biard A., Collective redress in the EU: a rainbow behind the clouds?, (2018) ERA Forum 19, pp. 192-193.
[272] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final, 11.4.2018.
[273] *Ibid*, Annex A.

CONCLUSIONS

The examination of the dual system of enforcement of EU competition law from two contrasting perspectives allows drawing important conclusions on the interaction between its two limbs as well as its potential future development. Public enforcement has been traditionally pursuing the public interest of guaranteeing undistorted competition in the internal market through coercive means, being though in constant search of new, alternative tools to deter and punish competition infringements. Private enforcement is in turn inherent in the nature of the EU legal order, which confers directly effective rights on its individuals and sets up a decentralised judicial system entrusted with the mission to safeguard them. Although notably aiming at protecting private interests, through the award of compensation to those having suffered harm due to anticompetitive behaviours, private enforcement admittedly also promotes the public interest by strengthening the implementation of competition rules and discouraging practices which are liable to infringe them. Thus, the two enforcement systems complement each other and work as a whole aiming at convergence.

Several rules and principles serve to form this convergence, first of all, fundamental EU law principles, such as the duty of sincere cooperation and the requirement of uniform interpretation and application of EU competition provisions. In more specific terms, coherence is promoted through particular legislative measures, such as Directive 2014/104/EU on damages actions, which seek to harmonise procedural and substantive aspects of private enforcement and increase its effectiveness, but also to specify the framework of its interaction with mechanisms of public enforcement. Coherence is to be achieved, in particular, through the binding effect of decisions of competition authorities over damages proceedings. Recognition of such effect is not to be perceived as subjecting private to public enforcement, but rather as a rule which allows it to function effectively and fulfil its role. Furthermore, the disclosure of evidence held by competition authorities becomes a procedural lever facilitating the effective exercise of the EU right to competition, given *inter alia* the dependence of the latter on the establishment of complex legal and economic concepts and the shift towards an effects-based approach.

Despite their complementary nature and the absence of any formal, *de jure* hierarchy, it can be inferred that a common private enforcement culture across the EU is not yet as mature as the respective public enforcement culture. Considerable fragmentation still exists, due to the limited harmonisation of rules in this field or the reluctance towards more decisive legislative solutions, which may impinge upon the effective function of private enforcement. The lack of binding

effect of infringement decisions adopted by foreign NCAs over damages proceedings is indicative of this reluctance, complicating the substantiation of claims in respect of anticompetitive practices with cross-border elements. Besides, invoking forum-shopping risks as a justification for not recognising such an effect is hard to reconcile with the principle of mutual trust that should prevail between Member States and their judicial and administrative bodies. In any case, further harmonisation, rather than reluctance –which entails that a wide scope of matters remains governed by diverse domestic laws– would appear more appropriate to address any such ensuing risks.

Furthermore, there are circumstances where the interests of public and private enforcement may compete to each other. Most notably, disclosure of evidence collected through leniency or settlement, which could be desirable in the context of private enforcement proceedings, is precluded under article 6(6) of Directive 2014/104/EU in order to safeguard the practical effect of these procedures in the context of public enforcement. However, this should not be necessarily perceived as an indication of an *a priori* precedence of public over private enforcement, but rather as the outcome of a balancing exercise carried out by the EU legislature. In this respect, it could be argued that it is not the interest of private parties in obtaining compensation which is balanced against the interest of fostering effective public enforcement, but the potential to achieve overall enforcement against a situation where both of the systems fail. In other words, if access to evidence in these cases was to be allowed, those involved in hardcore infringements would have considerably reduced incentive to cooperate with competition authorities and thus such infringements could remain unsubstantiated or even undiscovered. In this scenario, neither public nor private enforcement achieve any of their objectives. In contrast, the encouragement, notably, of leniency may restore competition in the market through public enforcement and, as a result of unveiling the relevant anticompetitive practices, allow also for the mechanisms of private enforcement to be, at least, initiated.

Further to the above, although the harmonisation pursued through Directive 2014/104/EU has been a decisive step, this does not imply that further legislative initiative is not desirable or needed. The acknowledgment of indirect purchaser standing and of the passing-on defence may ultimately diminish the practical effect of private enforcement actions, as the overcharge incurred by an indirect purchaser situated downstream in the distribution chain could be insignificant and thus create no incentive for pursuing compensation alone. Therefore, the introduction of an EU wide regime for collective redress is arguably a necessity for the system of private enforcement to be rendered complete.

Leaving, however, current practical implications aside, it may be concluded that public and private enforcement of EU competition law are equal complements forming one cohesive system, whereas the one may appear to take precedence over the other only if this is dictated by the need to ensure the effectiveness of the system as a whole. Of course, the tension which may arise under certain circumstances between the two enforcement forms is not expected to end, as it may be deemed inherent in the duality of the system itself. Thus, further issues will need to be addressed in the future both through the function of the EU legislature and the case-law of the CJEU. However, this appears rather natural given the dynamic nature of the EU legal order, which is constantly evolving towards more effectiveness, consistency and integration.

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