Organisation for Economic Co-operation and Development

DAF/COMP/WP3(2017)33

Unclassified **English - Or. English**

4 December 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Report on International Experiences with Class Actions and Private Enforcement

Draft Report by the Secretariat

4-5 December 2017

Mexico requested this Report in the context of a voluntary contribution with a view to analyse how its regime for the private enforcement of competition law compares to international practices.

This version of the Report is circulated in order to present the work the Secretariat is doing on this topic in the context of voluntary contributions; to obtain comments and observations regarding the content of the Report; to seek to identify errors and mistakes that the Secretariat may have made as regards individual jurisdictions; and to obtain input regarding relevant elements that the Report has failed to address.

The Secretariat would like to thank you for your attention and contributions. .

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JT03424113

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Introduction

1. Competition laws employ multiple tools for enforcement. These can include the imposition of monetary or criminal penalties on corporations, civil and criminal sanctions on individuals – such as jail time, pecuniary penalties or disqualification orders –, and injunctions. To these tools should be added an obligation to pay damages for loss caused by anticompetitive conducts. Private actions for antitrust damages often operate alongside public enforcement to deter anticompetitive conduct, while also seeking to "compensate" the victims of cartelization.[1]

2. A frequently used model of optimal deterrence defines the optimal expected sanction, in line with Gary Becker's seminal works on the economic analysis of crime prevention.[2] An optimal sanction should force a firm to internalize the social costs of its behaviour. Hence, the optimal damages award should equal the external harm done by the cartel—i.e., the net harm to persons other than the cartelists. Therefore, in an ideal world the recoverable damages should equal the deadweight loss borne by persons other than cartelists, plus the cartel overcharge.[3] In addition, as the likelihood that a cartel will be detected and that a victim will subsequently (successfully) sue for damages is less than one, the actual damages awarded should be adjusted upward: net harm to others ÷ (Probability of detection × Probability of successful damages action or settlement).[4]

3. If we are still in an ideal world, the various enforcement mechanisms should support each other and, taken together, achieve effective deterrence in the most efficient way. However, private enforcement has played a leading role in competition enforcement in only a few jurisdictions, and particularly in the United States. Instead, in most jurisdictions competition law developed primarily as an

[1] For the US, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) ("But §4 has another purpose in addition to deterring violators and depriving them of 'the fruits of their illegality,' Hanover Shoe, 392 U.S. at 494; it is also designed to compensate victims of antitrust violations for their injuries."); *American Soc'y of Mech. Eng'rs v. Hydrolevel*, 456 U.S. 556, 575-76 (1982) ("[T]reble damages serve as a means of deterring antitrust violations and of compensating victims …"). For the EU, see Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie and others*, EU:C:2013:366, paras. 23-24.

[2] Gary S. Becker 'Crime and Punishment: An Economic Approach', 76 Journal of Political Economy 169 (1968).

[3] See, e.g., Richard A. Posner and Frank H. Easterbrook *Antitrust* (West: St. Paul, Minn., 2nd ed. 1981), p. 550; William M. Landes 'Optimal Sanctions for Antitrust Violations' 50 U. Chi. L. Rev. 652, 656 (1983); William Breit and Kenneth G. Elzinga, 'Private Antitrust Enforcement: The New Learning' 28 J. Law & Econ. 405410-412; Wiliam H. Page 'The Scope of Liability for Antitrust Violations' 37 Stan. L. Rev. 1445, 1455 (1985); Richard A. Posner' *Economic Analysis of Law* (Wolters Kluwer: New York, 9th ed. 2014), §10.14, p. 394.

[4] Jens-Uwe Franck and Martin Peitz 'Towards a Coherent Policy on Cartel Damages' (2017) Centre For European Economic Research Discussion Paper 17-009, p. 12-13.

administrative enforcement tool. In jurisdictions with such an administrative enforcement system, the competition authority plays a central role in enforcing competition law and effective competition enforcement relies almost exclusively on the capacity and ability of competition authorities to detect, investigate, sanction and ultimately deter anti-competitive behaviour. While private enforcement has to date played a minor role in these jurisdictions,[5] it can nonetheless provide a safety net for when public enforcement fails.[6] At the same time, private and public enforcement play different, if complementary roles. Public enforcement is not directly concerned with the compensation of damages suffered by the victims of anticompetitive conduct – reparation for such damages is traditionally the province of civil liability and private enforcement.

4. The present report, prepared in the context of a voluntary contribution project requested by Mexico, provides an overview of international practices regarding private damages claims in antitrust, with the goal of providing an overview of international practices and an analysis of what options are available when seeking to implement an effective private enforcement system for competition law. Throughout the Report, reference will be made to the US and the EU, which are widely perceived to be the leading competition-related norm producers in the world. Examples of other jurisdictions will be used when relevant to address certain specific issues.

5. The Report is divided into two main sections, each of which is in turn divided into individual chapters. The first section contains a high level analysis of the main private enforcement systems around the world. It contains chapters describing the overall background and rationale for private enforcement and general descriptions of the most relevant private enforcement systems across the world (Chapter 1); discussing the interaction between public and private enforcement (Chapter 2); [Chapter 3 is not relevant for comments]. The second section looks in more detail at the various constitutive elements of private enforcement regimes. This section comprises chapters focusing on the mechanisms for obtaining private redress, such as individual claims and class actions (Chapter 4); out-of-court compensation mechanisms (Chapter 5); practical options to ensure the effectiveness of damages claims (Chapter 6); standing to claim for damages (Chapter 7); rules applicable to defendants in such claims (Chapter 8); the means through which it is established that a competition law infringement took place (Chapter 9); the relevant evidence rules (Chapter 10); the rules regarding the causation of damages (Chapter 11); the measure and quantification of damages (Chapter 12); and a final section describing the main economic methods that are used to calculate damages arising from an infringement of competition law (Chapter 13).

[5] OECD (2015) *Relationship between Public and Private Enforcement* DAF/COMP/WP3(2015)14, p. 3-4.

[6] Jens-Uwe Franck and Martin Peitz 'Towards a Coherent Policy on Cartel Damages', p. 12-13.

Part I – Overview of Private Enforcement Systems

6. This first, short section provides a high-level overview of the main competition private enforcement systems around the world. It contains chapters describing the overall background and rationale for private enforcement, which also contains summary descriptions of the competition private enforcement systems most relevant for the purposes of this report (Chapter 1); a discussion of the interaction between public and private enforcement (Chapter2); and an overview of the current situation in Mexico regarding claims for damages and non-contractual civil liability (Chapter 3).

1. Private Enforcement at a Glance

1.1. Background and Rationale for Private Enforcement

7. If by private enforcement we mean reliance by private parties of competition law in litigation, there are arguably three types of private actions involving competition law: where competition law is used as a 'shield', i.e. as a defence against a contractual or other type of claim (e.g. IP related); (ii) where competition law is used as a basis for claims for injunctive relief, including interim relief; and (iii) where competition law is used as a basis for claims for damages.[7] The present report focuses only on claims for damages, even though much of what is relevant for such claims is also relevant for other types of private enforcement.

8. While both public and private enforcement can deter anticompetitive conduct, the objectives and incentives underpinning public and private enforcement are different. Public enforcement primarily pursues the public interest in competitive markets by entrusting a public entity (the competition authority) with the tools and powers to detect, investigate and ultimately punish infringements of the competition law.[8] Private plaintiffs do not sue under competition law in order to improve the general welfare: they sue in order to pursue their own interests.[9]

9. In itself, this situation is not different from that other areas of the law – and the bringing of private claims can be perceived as a public good, a form of identifying more anticompetitive practices than a pure public enforcement system would be able to and of increasing the costs of engaging in anticompetitive practices. Even though claimants bring claims for private interests based on the

[7] Wouter Wils 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future' (2017) World Competition 40 (1) 3, p. 4.

[8] Wouter Wils 'The Relationship Between Public Enforcement and Private Actions for Damages' (2009) World Competition 32(1) 8; OECD (2015) *Relationship between Public and Private Enforcement*, p. 36.

[9] Herbert Hovenkamp *The Antitrust Enterprise – Principle and Execution* (2005, Harvard), p. 58.

harm they believe to have suffered, they are still contributing to public interest objectives by allowing courts to stamp out anti-competitive conduct. In that respect, both private and public enforcement contribute to safeguarding of the public interest in competitive markets.[10]

10. In effect, private enforcement can also play a role in deterrence. It has been argued that deterrence could be as effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable than through public enforcement.[11] The role of private parties is particularly important in jurisdictions that rely greatly on private claims to ensure antitrust enforcement and close the so-called "enforcement gap" created by the perceived inability of public enforcement authorities to effectively deal with all cases due to resource constraints. As a result, such systems often have deterrence-oriented features – such as the award of treble damages in U.S. law. Even in jurisdictions that rely mainly on public enforcement, the possibility of private enforcement is thought to enhance the deterrent effect of competition law by adding costs and risks for wrongdoers.[12]

11. In addition to giving rise to an "enforcement gap", public enforcement is also perceived as being less effective than private enforcement at detecting and prosecuting certain competition infringements – e.g. those involving vertical restraints and monopoly abuses, as well as violations in industries with very specific circumstances.[13] A private party who has suffered a loss as a result of a competition law infringement may be in a better position, and may have better information, to enforce the law than a public official. Closer proximity to the infringement may mean that the costs of detecting possible violations and gathering evidence may be lower than in public enforcement.[14]

12. This is not to say that private enforcement does not have its critics. When compensation exceeding the social costs of the illegal activity are required to deter defendants, this will create incentives for higher than optimal number of individuals seeking to collect such compensation to act as private enforcers and to devote their own private resources to the detection and prosecution of illegal conduct. This would increase the probability of detection, but could also result in over-enforcement and deterrence above socially optimal levels.[15] However, the

[10] OECD (2015) *Relationship between Public and Private Enforcement*, p. 37.

[11] Gary Becker and George Stigler 'Law Enforcement, Malfeasance and Compensation of Enforcers' (1974) J. Legal Stud. 3 1.

[12] OECD (2015) *Relationship between Public and Private Enforcement* – Contribution by BIAC DAF/COMP/WP3/WD(2015)12, p. 3; European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210/2, para. 7.

[13] OECD (2015) *Relationship between Public and Private Enforcement* – Contribution by BIAC, p. 3; European Commission Guidelines on the method of setting fines imposed, para. 4

[14] Kent Roach and Michael J. Trebilcock 'Private Enforcement of Competition Laws' (1996) Osgoode Hall Law Journal 34(3) 461, p. 472, 480.

[15] William Landes and Richard Posner 'The Private Enforcement of Law' (1975) J. Legal Stud (4) 1, p. 15; W.F. Schwartz *Private Enforcement of the Antitrust Laws: An Economic*

prevailing view is still that optimal enforcement requires public and private enforcement to be combined harmoniously. Rather than abandoning private enforcement, it is required that the damages awarded to claimants and the proceedings leading to their award be fine-tuned so as not to divert more private resources than what is socially optimal to the enforcement of public standards.[16]

13. A more serious concern is the use of private enforcement strategically. This risk is somewhat high in competition law, because competitors have incentives to use competition law strategically as part of their business strategies. This requires that the procedures for the enforcement of competition law be carefully designed to prevent their capture by business.[17]

14. If one looks beyond deterrence, private enforcement seeks to provide compensation for victims of competition infringements.[18] While some have criticised compensation as an objective of competition law[19], under most tort systems compensation is a natural consequence of an illicit act that caused damage to a victim.

15. A last advantage of private enforcement is that it provides a means to control public enforcement. It provides protection against the capture of public enforcement bodies: "*Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies.*"[20] It also serves as an important means of ensuring that public enforcers' decisions not to prosecute do not carry excessive costs if mistaken, and does so in a way that does not impose costs on the public agency – since the litigation, and hence the enforcement of competition law, will be pursued by a private party.[21]

Critique (Washington: American Enterprise Institute for Public Policy Research, 1981), p. 9.

[16] Kent Roach and Michael J. Trebilcock 'Private Enforcement of Competition Laws', p. 476; Alison Jones 'Private Enforcement of EU Competition Law: A comparison with, and lessons from, the US' in M Bergström, M Iacovides, and M Strand (eds) *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing, 2016), available on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715796, p. 11.

[17] Joseph Brodley 'Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals' (1995) Mich. L. Rev. 94 1, p. 45-46.

[18] Kent Roach and Michael J. Trebilcock 'Private Enforcement of Competition Laws', p. 480.

[19] W.F. Schwartz *Private Enforcement of the Antitrust Laws*, p. 31-32.

[20] Jerry Mashaw 'Private Enforcement of Public Regulatory Provisions: The 'Citizen Suit'' (1975) Class Action Rep. 4 29, p. 33; quoted in Kent Roach and Michael J. Trebilcock 'Private Enforcement of Competition Laws', p. 481.

[21] Kent Roach and Michael J. Trebilcock 'Private Enforcement of Competition Laws', p. 482-483.

1.2. Overview of Existing Systems

1.2.1. The US System

16. The United States is the OECD jurisdiction which has the longest and most extensive experience with private antitrust enforcement.[22] From the outset, Congress contemplated that private parties would play a central role in the enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as "private attorneys general," and that the antitrust laws should encourage such enforcement.[23]

17. In order for damages to be awarded, the Clayton Act requires that there be a violation, that the plaintiff show causation and an appropriate injury, and that the damages be provable with sufficient clarity.[24] The central feature of private antitrust remedies is its provision for treble damages, which allows plaintiffs in all cases to recover "*threefold the damages by him sustained*."[25] Successful antitrust plaintiffs may, in addition, recover attorneys' fees and, in certain circumstances, pre-judgment interest. The effect of these monetary remedies is reinforced by rules that make defendants jointly and severally liable for damages, i.e. each defendant is liable for the full amount of damages even if several defendants jointly engaged in the unlawful conduct.[26]

18. The number of private claims in the US seems to fluctuate over time in correlation with the attitude of the courts towards private antitrust claims and the level of government enforcement.[27] Under Section 5 of the Clayton Act, a final decree in favour of the government in any public enforcement proceeding shall be *prima facie* evidence of an infringement in any subsequent private action on the same claim.[28] Until the 1950s, there were few private antitrust cases. Supported by the willingness of US courts to expand the *per se* doctrine well beyond naked horizontal price-fixing conspiracies to a wide variety of other horizontal and vertical restraints – which significantly facilitated the plaintiffs' task in private claims – the number of private antitrust actions began to rise significantly in the 1960s and peaked in 1977. Subsequently, the amount of new private antitrust filings declined significantly, perhaps as a reaction to developments in case law restricting the use of *per se* rules and expanding the reach of the rule of reason. Unlike *per se* rules – under which a conduct is deemed automatically unlawful – the rule of reason requires plaintiffs to rely more substantially on economic

[22] OECD (2015) *Relationship between Public and Private Enforcement*, p. 4.

[23] *See* Edward D. Cavanagh 'Detrebling Antitrust Damages: An Idea Whose Time Has Come?' (1987) Tulane Law Review 61 777, p. 782 (stating that Senator Sherman expressed concerns about providing a remedy that would be "commensurate with . . . maintaining a private action").

[24] Herbert Hovenkamp *The Antitrust Enterprise*, p. 66.

[25] 15 U.S.C. § 15(a). On the origins of the treble damages rule, see Herbert Hovenkamp *The Antitrust Enterprise*, p. 57.

[26] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243.

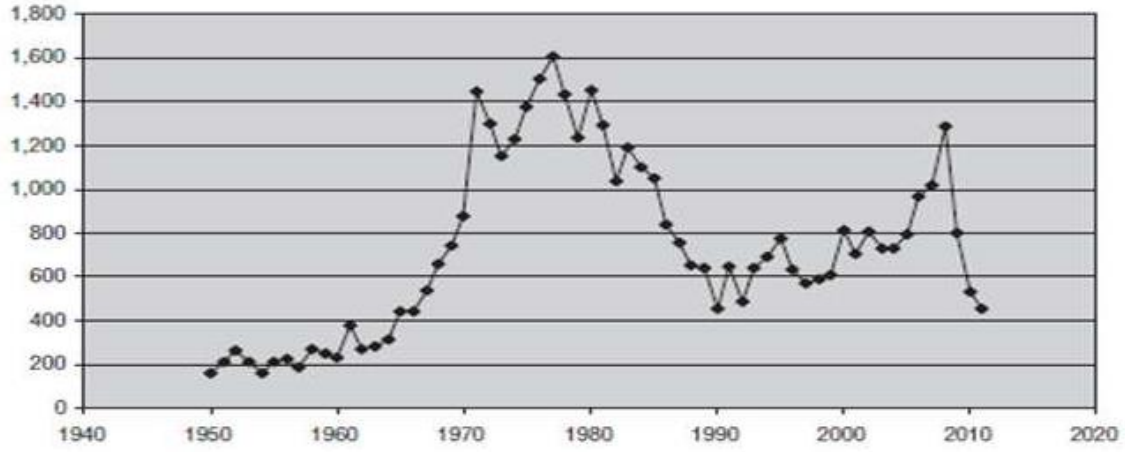
[27] OECD (2015) *Relationship between Public and Private Enforcement*, p. 4.

[28] 15 U.S.C. § 16.

evidence in order to demonstrate the anti-competitive effects of the relevant conducts.

19. In the early 1990s the number of private claims started to increase again, mainly as a result of follow-on claims that benefited from the success of the US Amnesty Programme and from an increase of government enforcement activity regarding criminal conduct (i.e. hard core cartels). More recently, however, the Supreme Court's decision in *Twombly*[29] adopted a stricter standard of "plausibility" that must be met before a private claim for damages arising from an antitrust infringement is allowed to proceed to the evidence discovery phase. This standard requires plaintiffs to plead sufficient facts to state a "plausible" claim for relief at an earlier stage in the proceedings (i.e. before they have had access to evidence disclosed by the defendant). This higher standard has been perceived as underlying a drop in private claims over the last few years.[30]

Figure 1. US private antitrust case (1950 to 2011)



Source: William Kolasky 'Antitrust Litigation: What's Changed in Twenty-Five Years?', 27 ANTITRUST 9 (Fall 2012)

20. Despite these fluctuations, it is commonly held that private actions in the US still represent at least 90% of all federal antitrust cases.[31]

1.2.2. The European Approach

21. Competition law enforcement across Europe is primarily based on public enforcement, but recent years have seen a push to promote private enforcement, including damages claims.

[29] *Bell Atlantic, Inc v. Twombly*, 550 U.S. 544 (2007).

[30] After the *Twombly* decision, the rate of dismissal of antitrust cases increased significantly. In 74% of 378 court decisions between 2007 and 2011 the plaintiff's claims were dismissed at the pleading stage because they did not meet the *Twombly* "plausibility" standard.

[31] Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law* (2015, OUP), p. 14-15.

22. While it was settled in the 1970's that competition provisions could be applied in disputes between private parties, these provisions were engaged mainly as a means to invalidate contractual provisions which parties disputed.[32] It was only with the Court of Justice of the European Court of Justice (CJEU) decision in *Courage* that it was made clear that the "full effectiveness" of the prohibition of restrictive practices pursuant to Article 101 of the Treaty on the Functioning of the European Union (TFEU) "*would be put at risk if it were not open to any individual to claim damages for loss caused to him.*"[33]

23. While there is now a duty imposed by the EU on its Members to allow damages claims for antitrust infringements, it is still the laws of individual Members States that govern such claims. Thus, damage claims are subject to national laws – and usually follow general principles of tort law, even if these are sometimes subject to regulation specific to competition law claims – subject to the proviso that the applicable rules must not render the right to claim damages "*practically impossible or excessively difficult.*"[34]

24. Despite these legislative developments, only few victims of competition infringements have been able to obtain compensation for damages in Europe. During the period 2006-2012, less than 25% of the EU Commission's infringement decisions were followed by damages actions.[35] In the analysis accompanying the Draft Directive on Antitrust Damages Actions, the European Commission summarised the current trend of private enforcement in EU Member States as follows:

> *"Out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012, only 15 were followed by one or more follow-on actions for damages in one or more Member States. In total, 52 actions for damages were brought in only 7 Member States. In the 20 out of 28 Member States, the Commission is not aware of any follow-on action for damages based on a Commission decision. Among those 7 Member States where actions were brought, the vast majority was brought in the United Kingdom, Germany and the Netherlands."*[36]

[32] Wouter Wils 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future', p. 9. See, as an early example of a dispute between private parties before the courts in which a competition provision was invoked as a defence, Case 127/73 *BRT and SABAM* EU:C:1974:25

[33] Case C-453/99, *Courage v. Crehan,* EU:C:2001:465, para. 26.

[34] Case C-453/99, *Courage v. Crehan,* EU:C:2001:465, para. 29. This principle was codified in Article 4 EU Cartel Damages Directive: "*In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law*."

[35] However, it seems that significantly more standalone cases are brought in Europe than follow-on claims. See Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 3, and Chapter 7 below.

[36] Commission Staff Working Document, Impact Assessment Report accompanying the proposal for a Directive (2013), at para. 52.

25. The European Commission has invested in fomenting a "culture" of private enforcement of EU competition law. In order to increase the incentives to seek compensation before the courts, a Directive on Antitrust Damages Actions was adopted on 26 December 2014.[37] According to its Article 3(1): "*Member States shall ensure that any […] person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation of that harm.*" In order to ensure that the right to full compensation is effectively guaranteed, the Directive puts forward a number of measures which intend to facilitate competition damages claims, including rules on: (i) disclosure of evidence; (ii) the evidentiary value of infringement decisions adopted by national competition authorities in follow on claims; (iii) limitation periods; (iv) passing-on defence and standing of indirect purchasers; (v) quantification of harm; (vi) joint and several liability; and (vii) consensual dispute resolution.[38]

1.2.3. Other Approaches

26. While the EU and the US provide the main templates for competition law claims for damages, a number of jurisdictions have adopted private enforcement systems with local characteristics worth describing. The jurisdictions below are presented as examples of the different ways in which one can adapt private enforcement systems to local circumstances.

(i) UK

27. In 2015 the United Kingdom – which already had a functioning private enforcement regime in place – adopted a number of reforms with a view to promote the private enforcement of competition law.[39] A number of reforms are particularly noticeable, and serve to distinguish the UK from other European jurisdictions. Such reforms include:

- Granting the specialist Competition Appeal Tribunal (the "CAT"), which up until then only had competence to hear follow-on claims, jurisdiction to hear stand-alone private damages claims as well;
- Creating an entirely new opt-out procedure for private damages claims. Under this procedure, a representative is entitled to bring on a claim on behalf of a defined class of claimants, either on an opt-in or an opt-out basis. Up until this point, only opt-in claims were available. The CAT will certify whether an action is suitable for a collective action, whether it should be brought on an opt-in or opt-out basis, and whether the class representative is a suitable one.

[37] 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, p. 1 (the 'Damages Directive' or 'EU Damages Directive').

[38] OECD (2015) *Relationship between Public and Private Enforcement*, p. 7.

[39] Through the Consumer Rights Act 2015 (the "CRA") which amended the competition law regime in the UK as regards private actions as set out in the Competition Act 1998 (the "CA").

- Creating a new 'fast track' procedure, which is intended to make it easier, quicker and cheaper for individuals and micro, small and medium-sized entities to seek redress for harm suffered as the result of anti-competitive behaviour;
- Promote Alternative Dispute Resolution (ADR) mechanisms. Although they are not mandatory, ADR mechanisms are a way to ensure that courts are used by claimants as a last resort option. Proposed ADR mechanisms include the establishment of a new opt-out collective settlement regime within the CAT, which should allow businesses to settle cases quickly on a voluntary basis. The Competition and Markets Authority (CMA) was also given a limited role in certifying voluntary redress schemes when a company has been found to have infringed competition law.[40]
- Adopting mechanisms that ensure that private actions complement the public enforcement regime by maintaining consistency between the actions of the CAT and the CMA. The CAT is required to notify the CMA when private actions cases are initiated. The CMA is able to act as an intervener in private actions cases.

(ii) Brazil

28. Brazil has a collective redress system and a double damages system to ensure the right for compensation of consumers who have suffered from a competition infringement. Only governmental and publicly held entities are allowed to file such a claim, but local state and federal prosecutor's offices can represent alleged victims and seek collective redress for anti-competitive conduct.

29. Although Brazil's tort law normally only allows the award of single damage, victims of antitrust misconduct may seek the payment of double damages on the basis of Article 42 of Brazil's Consumer Protection Code. In an effort to promote follow-on antitrust damage actions, in 2010 CADE included for the first time in a cartel decision an order that a copy of the decision be sent to potential injured parties to allow them to recover their losses. As a consequence, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country.[41]

(iv) Spain

30. Although Spain had already adopted competition legislation in 1963, in reality there was no public enforcement until 1989. While it was theoretically possible for victims of anticompetitive violations to bring a claim for damages in court, they could only do so when an infringement decision became final and

[40] The United Kingdom's Competition and Markets Authority has released draft guidance on its new power to approve voluntary payments from lawbreakers to those harmed by their anti-competitive actions. (https://www.gov.uk/government/consultations/redress-scheme-approval-in-competition-cases-draft-guidance).

[41] OECD (2015) *Relationship between Public and Private Enforcement*, p. 11.

definitive.[42] Given that there was no public enforcement until 1989, this meant there was no private enforcement either.

31. The legal reform of 1989, while kick-starting public enforcement, maintained the requirement that a prior final and definitive infringement decision must have been adopted before a damages claim could be brought before the courts.[43] As a result, some of the first few successful competition damages claims based on Spanish Law reported were based on the 1991 Unfair Competition Act, which condemns business conduct in breach of market legal rules – including competition law provisions – as an unfair act.[44]

32. Around 350 cases of private enforcement were brought in Spain since 1999 to 2016. However, the vast majority of these cases were not concerned with damages claims. Instead, the vast majority of them concerned contractual disputes in vertical relationships in which competition law was raised (either by the claimant or the respondent) as a ground for nullity and/or compensation for contractual damages. Almost half of all cases related to petrol supply agreements, and the overwhelming majority were stand-alone claims brought by businesses against other businesses.[45]

33. It was only in 2007 that stand-alone claims for damages were allowed. Nowadays, and as concerns specifically damages claim, Spain broadly follows the European approach.[46] The main example of a successful competition damages claim in Spain concerns a sugar cartel sanctioned by the Spanish competition authority. It was estimated that the cartel caused damages in excess of exceed EUR 25 million.[47] Private claims for damages were submitted by confectioners, and, in the end, EUR 5 million were awarded as damages.[48]

[42] Ley 110/63 de Represión de Prácticas Restrictivas de la Competencia, of 20th July 1963, Article 6.

[43] Ley 16/89 de Defensa de la Competencia, of July 17th 1989 (Official Journal nº 170, of 18th July 1989), Article 13.2.

[44] Unfair Competition Act 3/1991, of 10th January 1991 (Official Gazette nº 10, of 11 January 1991, pages 959-962), Article 15.2. See also Francisco Marcos 'La Aplicacion Privada del Derecho de Defensa de la Competencia por los Tribunales Espanoles' (2014) ICE 91, p. 93.

[45] Francisco Marcos 'La Aplicacion Privada del Derecho de Defensa de la Competencia por los Tribunales Espanoles', p. 96-98.

[46] The EU Damages Directive was transposed by section II of Real Decreto Ley 9/2017, de 26 de mayo.

[47] OECD (2002) 'Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs', available at https://www.oecd.org/competition/cartels/1841891.pdf, p. 97.

[48] Francisco Marcos 'Damages Claims in the Spanish Sugar Cartel' (2015) Journal of Antitrust Enforcement 3(1) 205, p. 212-213.

2. The Interaction of Public and Private Enforcement Systems

34. Competition systems comprise not only competition laws, but also the institutions that enforce them, such as competition law enforcement agencies and ultimately courts. There are also many other critical components that will influence the success of any competition policy system in securing deterrence and compensation, which are highly interdependent. Designing a system that will secure "optimal" deterrence and compensation will depend on each system's characteristics and expectations.[49] One such characteristic is the respective roles of public and private enforcement.

35. Public enforcement can be defined as the enforcement of antitrust laws by a governmental body, for example a competition authority or a prosecutor, to detect and sanction infringements of competition rules. By contrast, private enforcement can generally be defined as litigation initiated by an individual, a legal entity, an organisation or a public entity (such as local government or a government agency) to have a court establish an antitrust infringement and order the recovery of the damages suffered or impose other type of injunctive reliefs. Private enforcement can be triggered by a stand-alone action or by an action which follows on from a public enforcement decision. In most jurisdictions, private enforcement takes preponderantly the form of follow-on claims.[50]

36. There is broad agreement in the literature and in policy documents that individuals and firms who suffer injury from anti-competitive conduct should be entitled to reasonable compensation. At the same time, governments must be very conscious of the importance of striking the right balance between public and private enforcement. Antitrust policy and antitrust law enforcement, including private enforcement, should be viewed as an integrated system in which numerous factors contribute to the complementary goals of deterrence and compensation. A mixed system creates checks and balances: private parties may be able to bring claims when public enforcement is lax, and public agencies may participate as *amicus curiae* in private cases.[51]

37. Identifying the right balance of public and private enforcement is key to ensuring that private enforcement: (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and could discourage socially beneficial

[49] Andrew Gavil 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience'(2007) Journal of Competition and Law Economics 4(1) 177, p. 181, identifies: (1) methods for detecting transgressions of the competition laws, such as investigative authority and leniency programs; (2) the procedural and evidentiary rules that guide agencies, parties, and courts in initiating competition law proceedings, collecting and presenting evidence, and evaluating claims; (3) the existence and scope of public and private rights of action; (4) rules and restrictions on antitrust injury and standing; (5) the severity of penalties, such as criminal sanctions and treble damages, and the scope of authority to impose other kinds of remedies; and (6) the costs of enforcement and public commitment to funding it.

[50] OECD (2015) *Relationship between Public and Private Enforcement*, p. 3.

[51] Edward D. Cavanagh 'Detrebling Antitrust Damages', p. 808.

conduct.[52] This balance will depend on a number of factors, of course, but one of the most important is the local enforcement mix.

38. In a few jurisdictions, and particularly in the United States, private enforcement has long played a central part in the competition law framework. These jurisdictions operate on the basis that private incentives for compensation are ideal tools for deterring competition law infringements, and private enforcement is thus the primary mode of competition enforcement or, at the very least, a crucial complement to public enforcement. In most jurisdictions, however, competition law developed primarily as an administrative enforcement tool that protects the interests of consumers against cartel practices as well as against abuses of market power by large companies. In jurisdictions with such an administrative enforcement system, competition enforcement bodies play a central role in enforcing competition law. Effective competition enforcement relies almost exclusively on the capacity and abilities of competition authorities to detect, investigate, sanction and ultimately deter anti-competitive behaviours. In competition law systems based on strong public enforcement, private enforcement has to date played a minor role.[53]

We shall now review each system in turn.

2.1. Systems Where Private Enforcement Predominates

39. In the US, which is the leading example of a jurisdiction that prioritises private enforcement of competition law, private parties are expected to act as "private attorneys general" and play a central role in the enforcement of the Sherman Act. In order to encourage enforcement, plaintiffs are entitled to treble damages, which allow them to recover "threefold the damages by him sustained."[54] Successful antitrust plaintiffs may, in addition, recover attorneys' fees and, in certain circumstances, pre-judgment interest. The effect of these monetary remedies is reinforced by rules that make defendants jointly and severally liable for damages, and that do not allow the award to be reduced to reflect the passing on of those damages by the claimants.[55] Taken together, the effects of this system are to reward claimants with awards which may be many times the effective damage they have suffered. The objective is to incentivise claimants to uncover antitrust practices by bringing them to court, and to deter would-be infringers by creating a system that makes it costly to engage in anticompetitive conduct.

40. Nonetheless, public enforcement is also important in the US. The antitrust agencies have authority to obtain remedies for antitrust violations. Regarding criminal antitrust violations, the Antitrust Division of the Department of Justice

[52] OECD (2015) *Relationship between Public and Private Enforcement*, p. 3.

[53] OECD (2015) *Relationship between Public and Private Enforcement*, p. 3-4.

[54] 15 U.S.C. § 15(a)

[55] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243.

(DoJ) may seek significant monetary fines and prison terms.[56] For substantive, non-criminal violations, the DoJ and the Federal Trade Commission (FTC) can seek broad injunctive relief to prevent future violations[57] - including requiring the restitution of damages and the disgorgement of profits.[58] Congress has also authorized the antitrust agencies to seek civil fines, but only for breaches of antitrust consent decrees,[59] or for procedural violations such as a failure to file a pre-merger notification.[60] In practice, however, while the DoJ has statutory authority to criminally prosecute all violations of sections 1 and 2 of the Sherman Act, the scope of criminal enforcement has been narrowed over time to 'hard-core' price-fixing, bid rigging or market allocation cartels. For other antitrust

[56] 15 U.S.C. § 1 (authorizing criminal penalties up to $100 million for corporate offenders, and up to $1 million and/or up to 10 years in prison for individuals); 18 U.S.C. § 3571(d) (general statute authorizing criminal penalties up to twice the pecuniary gain, or twice the pecuniary loss caused by a violation).

[57] For substantive, non-criminal antitrust violations, Congress has authorized the DOJ and the FTC to seek equitable relief, including injunctions, temporary restraining orders, and "cease and desist" orders – see 15 U.S.C. § 45(b) (authorizing the FTC to seek "cease and desist" orders against violators); 15 U.S.C. § 53(b) (authorizing the FTC to seek temporary restraining orders and injunctions from the district courts); 15 U.S.C. § 4 (granting the DOJ the authority to "prevent and restrain violations of [the Sherman Act]"); 15 U.S.C. § 25 (granting the DOJ the authority to "institute proceedings in equity to prevent and restrain . . . violations [of the Clayton Act]").

[58] Courts generally have interpreted Congress's express authorization to seek broad equitable remedies, such as injunctions and restraining orders, as implied congressional authorization to seek all equitable remedies—including restitution and disgorgement. In *Porter v. Warner Holding Co*., 328 U.S. 395, 398 (1946). the Supreme Court explained that: "[*u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied*."

[59] Courts can retain continuing jurisdiction over decrees filed by the DOJ pursuant to the Antitrust Procedures and Penalties Act (APPA or Tunney Act). A violation of those decrees "whether litigated or consent, is punishable as contempt of court for which severe penalties may be imposed". The FTC may pursue similar fines pursuant to 15 U.S.C. § 45(*l*). *See, e.g., United States v. Boston Scientific Corp.*, 253 F. Supp. 2d 85, 86 (D. Mass. 2003) (suit initiated by the DOJ on behalf of the FTC resulted in a $7 million fine against Boston Scientific for violation of a 1995 FTC Consent Decree).

[60] *See, e.g.*, 15 U.S.C. § 18a(g)(1) ("Any person . . . who fails to comply with [Hart-Scott-Rodino Act (HSR Act) filing requirements] . . . shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section."). Although 15 U.S.C. § 18a(g)(1) specifically refers to the DOJ's ability to seek civil fines for non-substantive antitrust violations, the FTC can obtain civil fines for similar violations by asking the DOJ to initiate a proceeding on its behalf. *See, e.g., United States v. Hearst Trust*, Complaint for Civil Penalties For Failure to Comply with Premerger Reporting Requirements of the Hart-Scott-Rodino Act, No. 1:01CV02119 (Oct. 11, 2001) (complaint filed at the request of the FTC, which resulted in a $4 million civil fine against Hearst for its failure to comply fully with HSR Act requirements).

violations, US public enforcement is in practice limited to prospective injunctive relief, leaving a deterrence gap to be filled by damages actions.[61]

41. It has been argued that the authority of the U.S. antitrust agencies to seek civil fines should be expanded beyond procedural violations, so that the antitrust agencies could seek civil fines for substantive, non-criminal antitrust violations, just as enforcers in the European Union and others countries do. Against this, it has been held that allowing the government to extract monetary remedies for substantive non-criminal antitrust violations – a role currently fulfilled by private plaintiffs seeking treble damages – could result in defendants making duplicative, excessive payments.[62]

42. It has also been suggested that federal antitrust agencies should increase the use of their equitable powers to obtain disgorgement and restitution remedies. In only eleven antitrust cases between 1980 and 2007 did the FTC seek equitable monetary remedies. The reason for this seems to be, again, that it is expected that defendants will have to pay treble damages, and that the imposition by the FTC of equitable monetary remedies is unnecessary and excessively onerous. Only in certain circumstances – e.g. when obstacles such as statutes of limitations, prohibitions against suits by indirect purchasers, or standing requirements hinder the filing of a treble damages suit – will the FTC seek monetary remedies.[63] In particular, the FTC has issued a *Policy Statement on Monetary Equitable Remedies in Competition Cases* ("the Policy Statement") intended to provide the public with guidance as to when, in its prosecutorial discretion, the FTC will seek such relief. The Policy Statement identified three factors that will govern the FTC's use of monetary equitable remedies: (1) whether the violation was "clear" (i.e., a reasonable party should expect its conduct to be found illegal); (2) whether there is a reasonable basis for calculating the amount of disgorgement or remedy, based on the gains or injury from the violation; and (3) whether use of the remedy would add value because other remedies will either likely fail or provide incomplete relief.[64]

2.2. Systems Where Public Enforcement Predominates

43. The EU is the template of a system where public enforcement predominates. While recent efforts have sought to foment private actions, public enforcement greatly predominates: the enforcement of competition law is pursued mainly by the European Commission and, with greater emphasis since 2003, by national competition authorities of the EU's member states.[65]

[61] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 296.

[62] Id., p. 285.

[63] Id.. p. 286.

[64] FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,822 (Aug. 4, 2003) at 45, 821.

[65] For an overview, see Wouter Wils 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future'.

44. As in the US, public and private enforcement co-exist. However, and unlike in the US where the enforcement agencies limit their sphere of action in order to reflect the priority of private enforcement, in the EU a number of rules ensure the primacy of public enforcement bodies and procedures over the interests of private litigants. For example, where the European Commission reaches a decision in a particular case which has also been brought in civil proceedings before a national court, the national court cannot take a decision running counter to that of the Commission.[66] Furthermore, both national competition authorities and the European Commission may, on their own initiative, submit observations on issues relating to the application of competition rules to a national court which is called upon to apply those provisions.[67]

45. The primacy of administrative agencies is also made evident by the existence of mechanisms for national competition agencies and the European Commission to provide support to courts. The European Commission has an obligation to transmit information it holds to national courts.[68] Furthermore, national court may ask the Commission for its opinion on questions concerning the application of EU competition rules on economic, factual and legal matters.[69]

46. Since public enforcement is the predominant enforcement mode across the world, similar mechanisms of interaction between administrative and judicial bodies can be commonly found. For example, in the UK private actions are a complement to public enforcement. When private claims are brought, the CAT is required to notify the CMA. The CMA has the explicit authority to act as an intervener in private actions cases, while the CAT also has the power to stay cases under investigation by a competition authority.[70] Similarly, in Australia the competition agency (ACCC) is empowered to intervene in any private proceedings brought under the Competition and Consumer Act 2010 – even if, unlike the CMA, the ACCC needs to obtain court leave to intervene.[71] Furthermore, the ACCC may take representative action for compensation on

[66] Subject, naturally, to review of the European Commission's decision by the Court of Justice of the European Union. See 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, Article 16(1).

[67] 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, Article 15(3). The Regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court.

[68] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C 101, p. 54), para. 21.

[69] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C 101, p. 54), para. 27.

[70] OECD (2015) *Relationship between Public and Private Enforcement*, p. 8.

[71] OECD (2015) *Relationship between Public and Private Antitrust Enforcement – Australia* DAF/COMP/WP3/WD(2015)17, p. 9. See s. 163 CCA 2010.

behalf of those who have suffered loss by contravening conduct, and who consent to proceedings being brought on their behalf.[72]

2.3. Areas of Tension between Public and Private Enforcement

47. As noted above, a right balance between public and private enforcement must be found in order to optimise competition law enforcement overall. While the ideal balance in each jurisdiction depends on local characteristics, it is possible to identify a number of topics which generally give rise to tension between private and public enforcement. Some of these are identified below; however, since these will be discussed in greater detail in Part II below, at this point their description is cursory.

2.3.1. Access to Competition Agency File

48. Private claimants need access to the necessary evidence to prove their claim. In the case of follow-on claims, most of this evidence will be in the possession of the competition authority. Appropriate access rules may favour private actions as they allow access to documents important for the claimant's case. However, access to the competition agency's file may imperil an ongoing investigation, may detract from honest and open cooperation by defendants, and may even be illegal in the case of privileged or confidential documents. As a result, the degree of legal protection against disclosure of elements in the competition agency's file may thus differ depending on the type and nature of the relevant information and documents – including the time and conditions under which they are made available.[73]

2.3.2. Leniency and Access to Leniency Documents

49. Advocates of public enforcement often display concerns over the potential impact of private enforcement on leniency applications. Leniency applications have become a crucial avenue for uncovering secret cartels, and there is a concern that exposing potential applicants to civil liability will reduce the incentives of potential leniency applicants to come forward. This risk is compounded by the possibility of access to leniency documents by potential claimants, which may further detract from the effectiveness of the leniency program itself. If leniency documents could be made public, this would mean that a company could avoid a public fine only by exposing itself to an increased risk of private claims. These claims could, in turn, lead to liability for damages exceeding the amount of the fine – which would be compounded by the leniency applicant's additional exposure to joint and several liability damage claims. Given the importance of leniency for successful public enforcement, the OECD has previously said that it is extremely important that the design of the private enforcement system takes

[72] OECD (2015) *Relationship between Public and Private Antitrust Enforcement – Australia*, p. 4. See s. 87 (1B) CCA 2010.

[73] OECD (2015) *Relationship between Public and Private Enforcement*, p. 27-28. For a concise example of this differentiated treatment, see Art. 6 and 7 and the EU Damages Directive.

into account the fundamental need to preserve the effectiveness of these programmes.[74]

2.3.3. Civil Immunity of Leniency Applicants

50. As a general principle, the right to full compensation would imply that the immunity recipient should not be shielded from damages actions or from any reduction of its liability in follow-on actions. However, to preserve the attractiveness of leniency programmes, some jurisdictions have considered necessary to reduce the civil liability of the successful immunity applicant in subsequent damages actions. For example, in the US an immunity applicant is only subject to single – instead of treble – damages, on condition that he also co-operates with private claimants in their damage actions against the remaining cartel infringers.[75] Similarly, the EU Directive on Antitrust Damages Actions limits the civil liability of the immunity recipient only to the damages caused to its direct or indirect purchasers or providers, exempting it from the rules on joint and several liability.[76]

51. The reason for adopting such rules is that immunity applicants are exposed to greater risks of private actions than companies which have not applied for leniency. Having applied for immunity, the successful applicant would normally have no legitimate interest in appealing against the decision of the competition authority which would become final right away – and often much sooner than the infringement decision against the other infringing parties. When combined with the (legal or factual) binding effect that an administrative decision finding a competition infringement may have, the leniency recipient will be an especially 'easy target to sue' in follow-on damage claims. Additionally, because of joint and several liability, the claimant might claim substantial damages well in excess of the amount of the damage caused by the immunity applicant alone. This may affect the incentives of companies to apply for immunity, and hence may require a tempering of the right to full compensation in the interest of protecting public enforcement.

2.3.4. Content of Published Infringement Decisions

52. Infringement decisions are made public in a variety of ways. Decisions can be quite rich with information that can be very useful for a private plaintiff who is planning to bring a damage claim. However, the public version of competition authorities' decisions is often heavily 'redacted' to protect confidentiality rights of the parties involved in the proceeding.

[74] OECD (2015) *Relationship between Public and Private Enforcement*, p. 23.

[75] Section 213(b) of the 2004 Antitrust Criminal Penalty and Reform Act, Pub L No, 108-237

[76] However, in Europe the other injured parties can only claim damages from the successful immunity applicant when they show that they cannot obtain full compensation from the other undertakings that were involved in the same infringement. The amount of the contribution of the successful immunity applicant must not, in any event, exceed the amount of harm caused to his own direct or indirect purchasers or providers. See EU Damages Directive, Art. 11(4) to 11(6).

53. In the absence of effective disclosure mechanisms, the prospects of success of follow-on claims may to a large extent depend on the information made available in infringement decisions. There is therefore a tension between a competition authority's duty and incentives to preserve the confidentiality of commercially sensitive information – in order to facilitate interactions with infringing parties, to maintain their incentives to cooperate in the investigation, and to avoid providing information to market participants that may facilitate collusion – and the interest of potential claimants in gaining access to that information in order to be able to bring a successful damages claim. As a result, there are public interest reasons in support of competition authorities disseminating widely the content of decisions establishing an infringement of competition law – but there are also other reasons for the protection of sensitive or confidential information in those decisions.[77]

3. Competition Damages Claims in Mexico

[No Comments Required]

[77] OECD (2015) *Relationship between Public and Private Enforcement*, p. 36.

Part II - Elements of Private Enforcement Systems

54. This section will look at the main constitutive elements that must be taken into account when setting up a competition private enforcement system, in particular as regards damage claims. The method that will be followed throughout is to identify a relevant constitutive element of damage claims – who can claim damages, what procedural avenues are open to claimants, etc. –, and compare the approaches adopted and the challenges faced by the main jurisdictions when addressing that element.

55. The relevant elements have been grouped in different chapters, each of which looks at different aspects of a competition private enforcement regime. The chapters focus, respectively, on the mechanisms for obtaining private redress, such as individual claims and class actions (Chapter 4); out-of-court redress mechanisms (Chapter 5); practical options to ensure the effectiveness of damages claims (Chapter 6); standing to claim for damages (Chapter 7); rules applicable to defendants in such claims (Chapter 8); the means through which it is established that a competition law infringement took place (Chapter 9); the relevant evidence rules (Chapter 10); the rules regarding the causation of damages (Chapter 11); the measure and quantification of damages (Chapter 12); and a final section describing the main economic methods that are used to calculate damages arising from an infringement of competition law (Chapter 13).

4. Judicial Redress Mechanisms

56. The first step when implementing a private enforcement system is to consider what types of procedural mechanisms will be made available to private parties in their attempts to obtain damages (or other remedies) from infringers of competition law. An initial distinction can be made between judicial litigation and out-of-court dispute resolution mechanisms, such as mediation or arbitration – the former are reviewed in this chapter, while out-of-court mechanisms will be discussed in Chapter 5. For cases brought before judicial courts, an additional distinction which is particularly relevant for competition damages claims is between individual claims and collective redress mechanisms. In this chapter we look at each type of judicial action in turn, before looking at models that combine elements of both.

4.1. Individual Claims

57. Infringements of competition can damage a large number of people, including customers, rivals, suppliers, and even firms operating in related markets. The most likely claimants in a damages claim are consumers, who paid more than they would have absent an infringement of competition law. As a result, consumers are virtually everywhere granted standing to sue for damages arising from such an infringement.

58. However, civil actions brought by consumers face serious limitations which suggest that standing to claim should be extended to other parties. For

example, in many competition law infringements consumer damage may only become apparent after the illegal conduct has already done a great deal of harm. This is not necessarily the case in the event of price fixing, but may arise in other types of infringement – particularly exclusionary practices such as price fixing, exclusionary rebates, fraudulent patent claims, etc. For this type of infringement, consumer injury only occurs very late in the infringement or even only after the infringement has occurred. Furthermore, consumers typically lack information about what occurs in the upstream parts of the market. This makes consumers rather late detectors of infringements (when they are able to detect the conduct at all), and argues in favour of allowing other categories of victims – predominantly rivals of the infringing businesses – to bring claims as well.[78] The matter of who can sue for damages in antitrust claims is relatively complex, and ultimately depends on the applicable rules on standing. This matter is discussed in greater detail in Chapter 6 below.

59. An additional problem with individual claims brought by consumers is that often individual consumers only suffer limited damages. The harm suffered from competititon infringements can be scattered among many potential claimants, particularly when consumer products are at stake. In these cases the amounts of the damage suffered by each potential claimant can be very low and, if claimants can only bring antitrust suits individually, the costs and efforts of filing an individual claim will most likely outweigh the potential gains from a successful claim. Consequently, there will be little incentive for individual victims to bring actions for compensation in respect of "atomised" damages. In order to overcome this collective action problem, jurisdictions across the world have developed mechanisms to promote collective redress.[79] These mechanisms will be reviewed in the next section.

4.2. Collective Redress

60. According to previous work by the OECD:

> *"[c]lass actions, collective actions, or other forms of actions that allow the aggregation of a large number of small claims for damages can be an important element in a competition regime that seeks to effectively deter anticompetitive conduct. They can be a useful form of deterrence. In particular with respect to hard core cartels, class/collective actions could be the only effective mechanism to ensure that consumers with small claims can be compensated. Without such a system, recovery of damages would be limited to plaintiffs that are wealthy and have sufficiently large claims to justify litigation for damages."*[80]

61. Collective actions have a number of advantages. They have a greater deterrent effect than individual actions, as infringers will often have to pay stiff damages to claimants as a result. This is a consequence of the way collective actions provide a solution to the economic obstacle faced by individual claimants

[78] Herbert Hovenkamp *The Antitrust Enterprise*, p. 68-69.

[79] OECD (2015) *Relationship between Public and Private Enforcement*, p. 20.

[80] OECD (2006) *Private Remedies* DAF/COMP(2006)34, p. 16-17.

whose claims are too small to support the cost of litigation – by aggregating a large number of individual claims into a single action. This also allows defendants (and courts) to save the time, energy, and resources required to litigate hundreds or thousands of individual claims. This is not possible under opt-in actions which are not, conceptually speaking, collective actions at all. Opt-in action are merely a form of joinder which is unable to fully address the collective action problem that collective actions seek to address.[81]

62. Nonetheless, critics have argued that class actions are a complex, costly and unproven way of achieving the goals of compensation and deterrence. In some cases they might lead to speculative, opportunistic claims and excessive litigation.[82] An additional challenge relates to the tension between the class-inclusiveness of collective actions and the individual nature of harm suffered. It is often in the interest of claimants to extend the class as much as possible because this may be crucial to the viability of bringing the claim.

63. On the other hand, a collective action can only be brought by reference to a set of individual claims with common characteristics. The concept (and legal test) of commonality is thus often a crucial element in the decision to allow a collective action to proceed.[83] In collective actions related to competition issues, an important challenge for claimants is to establish that all members of a class suffered the same type of harm. For example, while there may be a presumption (based on economic theories) that direct purchasers of a cartelised product will have paid an overcharge, the question of whether a collective action can be brought on behalf of all of them will depend on the legal standard for commonality. It may be that there is commonality merely because an individual was a direct purchaser; or it may be further required that there is an underlying structure underpinning differentiated prices, so that the harm suffered by class members can be identified by a common method or by reference to common evidence[84]; or it may be required that the common characteristics are such as to

[81] Damien Geradin 'Collective Redress for Antitrust Damages in the European Union: Is this a Reality Now?' (2015) George Mason Law Review 22(5) 1079, p. 1087-1088; Spencer Weber Waller and Olivia Popal 'The Fall and Rise of the Antitrust Class Action' (2016) World Competition 39(1) 29, p. 50-51.

[82] OECD (2015) *Relationship between Public and Private Enforcement* – Contribution by BIAC, p. 10; Commission White Paper, "Damages Actions for Breach of EC Antitrust Rules" (2008) 165 at 2-4 (Final).

[83] John H. Johnson and Gregory K. Leonard 'Economics and the Rigorous Analysis of Class Certification in Antirust Cases' (2007) Journal of Competition Law and Economics 3(3) 341, p. 341-342.

[84] Michelle Burtis and Darwin Neher 'Correlation and Regression Analysis in Antitrust Class Certification' (2011) Antitrust L. J. 77 (2) 495, p. 495. This usually requires some fit between members of the same class on the basis of certain models of industrial organisation economics that demonstrates expected harm depending on a number of identifiable characteristics (e.g. no passing on, use for which there is no substitute, or identifiable demand elasticity). On the impact of passing on for class certification in state actions in the US, see John H. Johnson and Gregory K. Leonard 'Economics and the Rigorous Analysis of Class Certification in Antirust Cases', p. 348-350, distinguishing between "sanguine" and "sceptical" judicial approaches regarding whether to grant class

allow an approximately correct allocation of the damages according to individual loss.[85] Furthermore, courts may pursue inquiries with different degrees of intensity regarding whether the adduced evidence, and economic methods and models, will allow harm to be proved by reference to class-wide evidence.[86] In other words, the issue of commonality is ultimately not merely about the identification of common elements between the victims – it is ultimately about balancing the compensatory (or deterrent) goals pursued by the tort system and the limitations that may be introduced to this system in order to ensure its effectiveness. The identification of a threshold at which the disparity of individual interests is such as to override the commonalty of claims will depend on this balancing exercise.

64. In practice, very few countries outside the United States and Canada have extensive experience with class actions or collective redress mechanisms in competition cases. Many countries, however, have shown an interest in establishing collective redress mechanisms as part of their private enforcement regimes. Until 2011, only three countries in Europe (Portugal, the United Kingdom, and Sweden) had introduced mechanisms for collective redress. Since 2011, however, more than half of EU countries have introduced new legislation on collective redress.[87] At EU level, the recently adopted EU Directive on Antitrust Damages Actions does not include a collective redress mechanism – thereby leaving the question on whether to adapt such mechanisms to individual Member States. However, the EU has issued a Recommendation encouraging Member States to set up a national system of collective redress based on opt-in principles.[88] Such actions should be brought by class representatives that fulfil the following criteria: (i) the class representative should have a non-profit nature; (ii) there should be direct relationship between the objectives of the class

certification on the basis of how much scrutiny courts pay to the limitations to identifying "common" as opposed to "individual" harm.

[85] John H. Johnson and Gregory K. Leonard 'Economics and the Rigorous Analysis of Class Certification in Antirust Cases', p. 343-345, 353-356. For an example, see *Walter Hugh Merricks v MasterCard* [2017] CAT 16, paras. 67, 79-89, where a collective action was not allowed partially on the grounds that it was not possible to estimate individual loss through reasonable and practicable means which could be used as the basis for distribution.

[86] William H. Page 'Class Certification in the Microsoft Indirect Purchaser Litigation' (2005) J. Comp. L. & Econ. 1 303, p. 307-308.

[87] Some EU jurisdictions (Bulgaria, Denmark and Portugal) have established opt-out collective redress regimes, while others (Austria, Finland, France, Hungary, Italy, Poland, Spain, Sweden amongst others) have opted for an opt-in system of one form or another. See OECD (2015) *Relationship between Public and Private Enforcement*, p. 20.

[88] See Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under the European Union Law, V. 21: "*The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.*" See also OECD (2015) *Relationship between Public and Private Enforcement*, p. 20

representative and the issue of collective redress; and (iii) the class representative should have sufficient legal capacity and financial resources to represent multiple claimants. Additionally, public authorities should be required or encouraged to conduct collective action on behalf of victims.[89]

65. As noted above, there are two main models for collective redress: an opt-in model and an opt-out model. More recently, intermediate models between pure opt-in and opt-out have begun to emerge. We shall now review them in turn.

4.2.1. Opt-in Actions

66. In an 'opt-in' collective action, victims must expressly elect to join a claim as members of the represented group. The outcome of a court decision in such a claim is legally binding only on the victims who opted into the claim – meaning that an individual who did not opt-in would not benefit from the outcome of the collective action, but will be allowed to pursue his own individual claim even should the collective action fail.[90]

67. A number of examples of opt-in mechanisms can be found in Europe. In the UK, a legal reform in 2002 allowed damages claims to be brought before the CAT by a specified body on behalf of two or more consumers who have claims in respect of the same infringement. In order for the representative body to bring an action on behalf of consumers, it needs their express consent.[91] In France, an opt-in collective action mechanism has been introduced, but it can only be used by a consumers' association following a final decision by the Autorité de la Concurrence (i.e. in 'follow on' claims).[92]

68. A variant of this basic model for opt-in collective actions consists in the transfer of claims to a specialized entity, also known as "claims vehicle." A typical element of these solutions consists in the transfer or sale of claims by a multitude of people harmed by the same anticompetitive practice to a third party that bundles these claims together. This bundling helps to overcome existing economic disincentives and information asymmetries.[93] This is, strictly speaking, a practical alternative to the class actions, group actions, or representative collective actions set out in statute, but it has the same practical effect as an "opt-in" collective redress mechanism.[94] Furthermore, a number of European countries have acknowledged that such a mechanism can be used to bring damages claims

[89] Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under the European Union Law, paras. 4 and 8-9.

[90] OECD (2015) *Relationship between Public and Private Enforcement*, p. 19.

[91] See Section 19 of the 2002 Enterprise Act, which added Section 47B to the 1998 Competition Act. See also Barry J. Rodger 'Why not court? A study of follow-on actions in the UK' (2013) J Antitrust Enforcement 1(1) 104, p. 109.

[92] Law no. 2014-344 of 17 March 2014 (the so-called 'Loi Hamon').

[93] Till Schreiber & Martin Seegers 'The EU Directive on Antitrust Damages Actions and the Role of Bundling Claims By Agreement' CPI Antitrust Chronicle February 2015 (2), p. 2,

[94] Id. p. 5

before the courts.[95] However, the success of claims vehicles depends on legal systems allowing the bundling of claims. Furthermore, this approach model is viable only if cartel victims are identifiable, their number is small enough to make assignment manageable, the claims are substantial enough, and the aggregate amount of individual claims creates a financial incentive for the 'claims vehicle' to proceed to litigation.[96]

69. A problem that a 'claims vehicle' shares with opt-in mechanisms lies in the need to obtain consent from every party bringing the claim. This may limit the number of victims claiming damages – both due to practical difficulties in identifying such victims, obtaining their consent, and time limitations arising from the relevant statute of limitations – which would have as a consequence that some of the illicit gain may be retained by the infringers. Further issues with 'claims vehicles' are that victims do not receive full compensation, and there may be difficulties in obtaining the necessary evidence from victims once these have sold their claims and have no further incentives to cooperate As a result some jurisdictions have adopted opt-out mechanisms for collective redress.[97]

4.2.2. Opt-out Actions

70. Under an "opt-out" collective action, all parties who fall within the definition of the represented group are bound by the outcome of the case unless they actively opted-out of the action. Thus, the claimant who does not opt-out on time is bound by a court decision or out-of-court settlements. If someone opts out of the action, however, it cannot benefit from anything that transpires in the class action – including a share of awarded damages. In practice, the most typical claimants that opt-out in antitrust class actions are large corporate purchasers who may seek to negotiate or litigate with the defendants on their own.[98]

71. Opt-out systems present advantages and disadvantages. A perceived advantage is that opt-out systems may be more effective than opt-in systems in obtaining redress for consumers and SMEs, particularly in situations where the number of injured parties is extremely large. An often voiced criticism, however,

[95] For example, in Finland – see District Court in Helsinki, interim judgment of July 4, 2013 (judgment 6492, reference 11/16750) – and in the Netherlands – Court of Appeal in Amsterdam, judgment of January 7, 2014 (reference 200.122.098/01). In Germany, however, a claim brought by Cartel Damages Claim (CDC) against six companies involved in a German cement cartel was dismissed by the Higher Regional Court of Düsseldorf because CDC would not have been able to cover litigation costs in the event of an unsuccessful outcome. As a result, the defendants would have had to bear all costs in the event of a defeat but would not be (fully) reimbursed in the event of a win – see http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html.

[96] Spencer Weber Waller and Olivia Popal 'The Fall and Rise of the Antitrust Class Action', p. 53-54.

[97] OECD (2015) *Relationship between Public and Private Enforcement*, p. 19; European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], p 28.

[98] Spencer Weber Waller and Olivia Popal 'The Fall and Rise of the Antitrust Class Action', p. 33-34.

is that opt-out systems can fuel an excessive litigation culture, especially if accompanied by other features such as the asymmetric shifting of legal costs in favour of the claimant, punitive damages, broad rights of discovery, and contingency fee agreements.[99] In order to limit this, as a rule 'opt-out' actions can be brought only by qualified entities on behalf of defined group of injured parties – e.g. consumer associations, public bodies such as an ombudsman, or trade associations.

72. Experience in the US and Canada indicates that a serious issue that is often raised in opt-out collective actions is that of the certification of the class representative.[100]

- Rule 23 of the U.S. Federal Rules of Civil Procedure sets outs the requirements for a class action to proceed. Rule 23(a) requires that the class be "so numerous that joinder of all members is impracticable" and have sufficient elements of "commonality" (i.e., the action must raise "questions of law or fact common to the class"). The class representatives must also be "typical of the claims . . . of the class", and they must "fairly and adequately protect the interests of the class". In actions for monetary damages, Rule 23(b) (3) sets out two additional requirements which are relevant for the vast majority of antitrust class actions: the questions of law and fact that are common to the class must "predominate" over individual questions, and a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy".[101]

73. Before a class action can proceed, a court must certify the action. Class certification is a crucial moment that typically determines the outcome of the action. If the class is certified, the action can proceed to discovery and resolution on the merits. Given the amount of damages at stake and the US system for joint and several liability, in practice class certification will very often lead to the parties settling the action. If the court does not certify the class, the action will typically collapse because the individual claims are too small to justify the cost of litigation.[102]

74. As such, it is unsurprising that the certification of class actions in the US amounts to a mini-trial involving extensive discovery, deposition and cross-examination of witnesses, and long and costly hearings.[103] As noted by the American Bar Association:

[99] OECD (2015) Relationship between Public and Private Enforcement, p. 20.

[100] OECD (2015) Relationship between Public and Private Antitrust Enforcement – US DAF/COMP/WP3/WD(2015)11, p. 3.

[101] Spencer Weber Waller and Olivia Popal 'The Fall and Rise of the Antitrust Class Action', p. 33.

[102] Damien Geradin 'Collective Redress for Antitrust Damages in the European Union: Is this a Reality Now?', p. 1089.

[103] Spencer Weber Waller and Olivia Popal 'The Fall and Rise of the Antitrust Class Action', p. 34.

"Modern class certification proceedings routinely involve long evidentiary proceedings preceded by massive discovery efforts, expert economists, and Daubert motion practice. Filing an antitrust case as a class action and properly following through with a motion with any reasonable chance of success should be expected to be a multi-year, multi-million dollar proposition."[104]

- In Canada, almost all the provinces have allowed class actions for over a decade.[105] Ontario – which has been the jurisdiction of choice for national class actions because it has an opt-out regime for national classes – follows a class certification regime similar to Rule 23 of the U.S. Federal Rules of Civil Procedure, but instead of requiring that common issues predominate over individual issues it sets a lower threshold that requires a class proceeding to be 'the preferable procedure for the resolution of the common issues'.[106] While certification applications are not as detailed, costly or lengthy as in the US, they are still onerous exercises. The Supreme Court of Canada held in 2013 that expert evidence would normally be required to determine whether there was sufficient commonality of loss to identify a class which could be represented for the purposes of bringing opt-out damage claims.[107] In particular:

"the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case is question. There must be some evidence of the availability of the data to which the methodology is to be applied."[108]

- Portugal also has an opt-out system, called "ação popular" (*"popular action"*).[109] It is a general procedural mechanism for the protection of diffuse legal interests. Under this procedural form, entities can start claims in which they lack an individual interest in order to protect legitimate public interests. It is an "opt-out" system, whereby the holders of the interests covered by the "acção popular" are publicly notified, namely through a press announcement, and must decide whether or not they

[104] American Bar Association Antitrust Class Actions Handbook (2010, ABA), p. 33.

[105] Ontario was the first province to do so, in 1993.

[106] Ilene Kable Gotts (ed.) The Private Competition Enforcement Review (8th Ed., London 2015) (Ch 8 – Canada), p. 99.

[107] Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57. At para. 113, it was held that: ": "[t]he loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established."

[108] Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57, para. 118.

[109] Law 83/95, of 31 August 1995.

accept to be represented in the action. In the event of failure to opt-out, it will be deemed that the holders of the interests accept to be represented in the action. In practice, however, only one competition law claim has ever been pursued under this mechanism.[110]

[Discussion of challenge of Cy pres allocation of undistributed remedies to be included here. Contributions are welcome, as they are in all other topics covered by this Report]

4.2.3. Mixed Systems

75. A number of jurisdictions have adopted systems that mix elements of 'opt-in' and 'opt-out' regimes. The UK is arguably the most prominent example of this approach.[111]

76. The UK has sought to encourage previously unwilling consumers to pursue claims collectively. Reforms in 2015 created a new procedure that allows collective proceedings to be brought by a representative on behalf of a defined class of claimants, either on an opt-in or an opt-out basis.[112] The statutory proceeding for this mixed-type collective action departs from the usual procedure in several respects. In particular: (i) the class representative need not him or herself be a member of the class; (ii) the many individual claimants within the class do not need to be identified in order for the representative to start proceedings; and (iii) the CAT can award aggregate damages in favour of the represented class, i.e. without undertaking an assessment of the amount of damages recoverable in respect of the claims of each represented person. These features are all the more striking where the proceedings are brought on an opt-out basis, in which case the represented members of the class need not identify themselves individually until after a judgment is issued in their favour, when they can come forward to seek their share of the aggregate damages awarded.[113]

77. The regime contains other safeguards against the development of a "litigation culture". First, it imposes a number of restrictions on who can bring collective actions. Claims can be brought by individual claimants or by genuine representatives of the claimants. They can also be brought by genuine

[110] By Observatory of Competition/CEDU against the main TV sport's channel. This claim is still ongoing at the time of writing.

[111] Another good example is Belgium, which adopted a Collective Redress System in 2014 – see Loi portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des definitions propres au livre XVII dans le livre 1er du Code de droit économique [An Act to Insert a Title 2 "From the Collective Redress Action" in Book XVII "Special Court Proceedings" of the Code of Economic Integration of Duty and Definitions Specific to the Seventeenth Book in the Code Book 1 Economic Law] of Mar. 28 2014, MONITEUR BELGE [M.B.][Official Gazette of Belgium], Apr. 29, 2014, 35201.

[112] OECD (2015) Relationship between Public and Private Enforcement, p. 20.

[113] Dorothy Gibson v Pride Mobility Products Limited [2017] CAT 9, para. 21.

representatives of consumers, such as trade associations or consumer associations, but not by a law firm, third party funders or special purpose vehicles.[114] Furthermore, claimants domiciled within the United Kingdom have the opportunity to opt-out, but those outside the United Kingdom can only be invited to opt-in. Limiting the opt-out principle to within the United Kingdom is intended to lessen the incidence of forum-shopping. Additional safeguards against the development of a litigation culture include precluding courts from awarding exemplary damages in collective proceedings, and the requirement that any damages awarded in opt-out proceedings that not claimed by the represented persons within a specified period must be paid to the charity.[115]

78. The main safeguard put in place, however, is that the CAT, a specialised competition tribunal, must assess the suitability of the class representative, whether the claim is suitable for a collective action, and whether it should be brought on an opt-in or opt-out basis. While collective proceedings may be brought by anyone who proposes to be the class representative, such proceedings may be proceed only on the basis of a collective proceedings order ("CPO") issued by the CAT.[116] Such an order may only be issued in respect of collective proceedings which meet a number of conditions: (i) the claims must be considered by the CAT to raise the same, similar or related issues of fact or law ("common issues") and to be suitable to be brought in collective proceedings ("certification of eligible claims);[117] and (ii) the proposed class representative must be authorised by the CAT on the basis that it is just and reasonable for that person so to act in the proceedings ('authorisation of class representatives')[118]. Two opt-out claims have been brought before the CAT. The first was a follow-on claim, while the second on was a stand-alone claim that relied on an European Commission

[114] OECD (2015) Relationship between Public and Private Enforcement, p. 20.

[115] UK Consumer Rights Act 2015 Schedule 8, parts 1,5 and 1,6. See also Pontus Lindfelt & Stephanie Sahlin 'Private Damages and Collective Redress in the EU — Where do we stand a year after the introduction of the EU Damages Directive?' CPI Antitrust Chronicle January 2016 (1), p. 3.

[116] See Sections 47B(2) and (4) of the 1998 Competition Act.

[117] Section 47B(6) of the1998 Competition Act.

[118] Section 47B(8)(b) of the 1998 Competition Act. Rule 78(3) of the CAT Rules 2015 provides: "*In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including— (a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings; (b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body; (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes— (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide*."

decision.[119] In both cases, a collective proceedings order was not issued by the CAT.[120] The CAT has nonetheless indicated a preference for the Canadian approach to class certification.[121]

5. Out-of-court Redress Schemes

79. The rationale for encouraging voluntary redress schemes or consensual dispute resolution systems is related to the costs and uncertainty of litigation. Competition-related damage claims can be particularly costly, time-consuming, and are more complex than most civil actions. Alternative dispute resolution (or consensual dispute resolution) mechanisms allow victims to settle cases quickly and easily on a voluntary basis.[122] As such, most systems try to promote resolution of claims out of court. This chapter reviews three such mechanisms: (i) voluntary redress schemes; (ii) alternative dispute resolution and settlement schemes; and (iii) arbitration.

5.1. Voluntary Redress Schemes

80. In order to promote the compensation of victims, some jurisdictions consider the voluntary payment of damages to victims as a relevant circumstance when setting administrative penalties. This can take various forms:

- Voluntary Compensation as a Pre-Condition of Immunity – In the US, voluntary compensation is one of the conditions for a company to obtain immunity from prosecution under the DoJ Leniency Policy.[123]
- Voluntary Compensation as a Mitigating Factor in the Setting of Administrative Penalties – Treating voluntary compensation as a mitigating factor when calculating the amount of the pecuniary penalty applied for infringing competition law is a common way to promote voluntary compensation of victims in Europe. For example, the UK may reduce a fine by 5-10% if a business voluntarily redresses its victims.[124] In the Netherlands, the competition authority considers voluntary

[119] *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9; *Walter Hugh Merricks v MasterCard* [2017] CAT 16.

[120] In *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9, the CAT expressed doubts about the extent to which the claim relied on an infringement decision to prove its case. Given permission to amend its application, the claimant abandoned the case. In *Walter Hugh Merricks v MasterCard* [2017] CAT 16

[121] Particularly the approach adopted in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* (2013) SCC 57. See *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9, para. 104-105; *Walter Hugh Merricks v MasterCard* [2017] CAT 16, para. 58-59.

[122] OECD (2015) *Relationship between Public and Private Enforcement*, p. 30.

[123] US Department of Justice, Corporate Leniency Policy.

[124] OECD (2015) *Relationship between Public and Private Enforcement*, p. 33.

compensation to be a mitigating circumstance when setting a fine.[125] In Spain, 'the performance of actions intended to repair the damage caused' is a mitigating circumstance, and the payment of damages before an infringement decision is issued is expressly identified as an actions intended to repair the damage caused.[126] At EU level, the payment of voluntary compensation has been recommended as a mitigating factor[127], while the EU Damages Directive holds that where an infringer has paid compensation as a result of a consensual settlement, a competition authority may consider this as a mitigating factor in setting the fine for that infringer.[128]

5.2. Alternative Dispute Resolution and Settlement Schemes

81. A number of jurisdictions have promoted specific mechanisms to settle damages claim outside of court. This section will not deal with simple settlement agreements – despite such agreements constituting a significant share of how damages claims are solved. The reason for this is that the rules for settlement agreements are usually straightforward and generic, if subject to the laws of the relevant *fora*.[129]

82. Instead, this section will focus on schemes that individual jurisdictions have adopted specifically to incentivise the resolution of competition damages claims out of court. Three such mechanisms seem particularly worthy of our attention:

- The Netherlands has had a successful 'opt-out' collective settlement mechanism since it adopted the Collective Settlement of Mass Damage Claims Act (WCAM) in 2005.[130] The main features of this systems are that: (i) private litigation is settled out of court; (ii) the settlement agreement should include information on the estimated number of class members, compensation amount, eligibility criteria for compensation, methods for determining the compensation amount, and methods for distributing the compensation amount; (iii) the settlement must be approved by a court; (iv) the collective settlement must be published in a newspaper and a notice must be sent to known injured parties by ordinary

[125] Point 49 (c) of the NMA Fining Code 2007.

[126] Article 64.3 of the Spanish Competition Law.

[127] European Competition Authorities' Principles for Convergence on Pecuniary Sanctions (2008), para. 18.

[128] EU Damages Directive, Article 18(3).

[129] OECD (2015) *Relationship between Public and Private Enforcement –UK* DAF/COMP/WP3/WD(2015)8, p. 4.

[130] This system has proven successful. Six collective settlements have been brought before the Amsterdam Court of Appeal, five of which have been declared binding. These included the EUR 1 billion settlement in the Dexia investment products case affecting 300,000 potential claimants, and also a USD 340 million Shell oil re-categorization settlement. The latter settlement applies to investors in 105 jurisdictions who purchased their shares on non-US markets, but excludes US persons and entities.

mail; (v) everyone who falls within one of the categories of the settlement is given the opportunity to opt-out of the settlement within a certain period of time (at least three months).[131]

- In the UK, the 2015 reforms have promoted a voluntary opt-out collective settlement regime within the CAT, which aims to allow businesses to settle cases quickly and easily on a voluntary basis. The settlement of opt out actions requires approval from the court, unlike opt-in actions, with the court standing in to ensure that the interests of the class are being adequately protected. The reforms also granted the Competition and Markets Authority (CMA) a limited role in certifying voluntary redress schemes for companies that have been found to have infringed competition law.[132]
- In the EU, while the EU Damages Directive does not include a collective redress mechanism, it nonetheless includes provisions that promote the settlement of damages out of court. First, the Directive provides for the suspension of limitation periods and of pending court proceedings during settlement negotiations.[133] Secondly, to encourage out-of-court settlements the Directive ensures that an infringer that agrees to pay damages is not placed in a worse position vis-à-vis its co-infringers than it would be had it not settled. This would happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. As result, the Directive clarifies that the effect of partial settlements (e.g. where a claimant settles with only one of the co-infringers) is that the victim's claim is reduced by the settling co-infringer's share of the harm. Furthermore, the victim's remaining claim can only be exercised against non-settling co-infringers, and the non-settling co-infringers cannot recover contribution from the settling co-infringer.[134]

5.3. Arbitration

83. Pursuant to the principle of party autonomy, private parties should be allowed to opt out of the state court system and to submit their disputes to arbitration. There are, however, limits to party autonomy and questions have been raised as to the arbitrability of areas of law that have a strong public policy element. Competition law is one of the areas of law that has historically raised arbitrability issues. Some considered that it was not a proper subject matter for

[131] OECD (2015) *Relationship between Public and Private Enforcement*, p. 31.

[132] OECD (2015) *Relationship between Public and Private Enforcement*, p. 8.

[133] EU Damages Directive, Article 18(1) and (2). This rule was adopted in Spain in near identical form – see Art. 75(3) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[134] However, when the non-settling co-infringers are unable to pay the damages corresponding to the victim's remaining claim, the settling injured party can exercise the remaining claim against the settling co-infringer unless this is expressly excluded under the terms of the consensual settlement – see Article 19 of the EU Damages Directive.

arbitration,[135] and claims involving competition law elements were traditionally considered non-arbitrable.[136] Nowadays, however, it is generally accepted that matters of competition law can be subject to arbitration. In effect, some have gone as far as to hold that the: '[a]rbitrability of competition law has ceased to be a significant issue in international arbitration'.[137]

84. The issue of the arbitrability of competition law was originally played out in the US. Antitrust claims were originally considered to be inappropriate for arbitration as a result of the public nature of antitrust rules, the complexity of antitrust assessments, and the possibility of conflicts of interest on the part of arbitrators.[138] In other words, the concern was that arbitral tribunals were not suitable venues to protect the general interest underlying the US antitrust law regime.[139] This position was reversed by the US Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc,* which held that disputes involving antitrust issues could be subject to arbitration.[140]

85. In Europe, the largest EU jurisdictions – including Germany[141], France[142], Italy[143], Spain[144] and the UK[145] – have recognized the arbitrability of competition

[135] Damien Geradin and Emilio Villano 'Arbitrability of EU Competition Law-based Claims: Where Do We Stand After the CDC Hydrogen Peroxide Case?' (2017) 40(1) 67, p. 67-68.

[136] See, e.g. ICC Award no. 1422, 185; Cour d'appel de Paris, 20 Jan. 1989, *Société Phocéenne de Dépôts v.Dépôts Petroliers de Fos*, (1989) Revue de l'Arbitrage 280, note L. Idot.

[137] Julian D. M. Lew 'Competition Laws: Limits to Arbitrators' Authority' in *Arbitrability: International and Comparative Perspectives* International Arbitration Law Library paras 12-68 and 12-69 (Loukas A. Mistelis & Stavros L. Brekoulakis eds, Kluwer Law International 2009); Damien Geradin and Emilio Villano 'Arbitrability of EU Competition Law-based Claims', p. 70.

[138] *American Safety Equipment Corp. v. J. P. Maguire & Co., Inc*., 391 F.2d 821 (2d Cir. 1968)

[139] Damien Geradin and Emilio Villano 'Arbitrability of EU Competition Law-based Claims', p. 71.

[140] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985)

[141] BundesGerichtHof, 25 Oct. 1966, *Schweißbolzen*, KZR 7/65

[142] Cour d'appel de Paris, 16 Feb. 1989, *Almira Films v. Pierrel;* Cour d'appel de Paris, 29 Mar. 1991, *Société Ganz and others v. Société Nationale des Chemins de Fer Tunisiens*; Cour d'appel de Paris (1er Ch.), 19 May 1993, *Société Labinal v. Société Mors & Westland Aerospace;* Cour d'appel de Paris, 14 Oct. 1993, A*plix v. Velcro* (1994).

[143] Corte d'Appello di Milano, 13 Sept. 2002, *Istituto Biochimico Italiano Giovanni Lorenzetti S.p.A. v. Madaus A.G.*, n. 2090; Corte d'Appello di Milano, 5 July 2006, *Tensacciai S.p.A. v. Freyssinet Terra Armata S.r.l.*, 3 (2007)

[144] Audiencia Provincial de Madrid, judgment n. 324/2004, *Combustibles del Cantabrico S.L. v. Total Spain S.A.*; Audiencia Provincial de Madrid, judgment n. 147/2013, *Camimalaga S.A.U. v. DAF Vehiculos Industriales S.A.U.*

[145] *ET Plus SA & Ors v. Welter & Ors* EWHC, ET Plus SA & Ors v. Welter & Ors [2005] EWHC 2115 (Comm)

law matters. Under EU law, the European courts have also implicitly acknowledged the arbitrability of competition law matters.[146]

86. However, the EU courts have held that standard wording subjecting the regulation of the contractual relation of the parties to arbitration does not suffice to bring competition law claims to arbitration – instead, the parties must explicitly state that such clauses or agreements cover competition damages.[147] This reasoning has been adopted by some national courts,[148] even if it is subject to local variations. In the UK, for example, the usual interpretation of a typical arbitration clause saying that all disputes arising out of a contract should be subject to arbitration is that "*the parties are likely to have intended any dispute (contractual or tortious) arising out of the relationship into which they have entered or purported to have entered to be decided by the same tribunal*".[149] The net effect of the law is that competition law claims will be regarded as coming within an arbitration clause only if they are closely related to a viable contractual claim which has already been, or could be, made. This covers many situations but not cartel damages, because "*the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause*".[150]

[146] In Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055. In this case, the CJEU was asked upon to rule on the question of whether Article 101 TFEU had a a public policy nature within the meaning of Article V(2)(b) of the New York Convention for the purpose of refusing the enforcement or setting aside international arbitral awards. While dealing with this topic, the Court did not raise the issue of lack of arbitrability of EU antitrust claims, thus seeming to implicitly acknowledge that competition law was an arbitrable subject-matter – see Damien Geradin and Emilio Villano 'Arbitrability of EU Competition Law-based Claims', p. 74-75.

[147] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and Others* ECLI:EU:C:2015:335, para. 72.

[148] See, for example, Gerechtshof Amsterdam, 21 July 2015, No. 200.156.295/01.

[149] As Lord Hoffman stated in Fiona Trust v Privalov [2007] 4 All ER 951 at para 13: "…*the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to have entered to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction*."

[150] *Ryanair Ltd v Esso Italiana Srl* [2015] 1 All ER (Comm), para. 53: "*Such reasoning, however, does not carry over into a situation where there is no contractual dispute (by which I intend to include disputes about contracts), but all that has happened is that a buyer has bought goods from a seller who has participated in a cartel. I think that rational businessmen would be surprised to be told that a non-exclusive jurisdiction clause bound or entitled the parties to that sale to litigate in a contractually agreed forum an entirely non-contractual claim for breach of statutory duty pursuant to article 101, the essence of which depended on proof of unlawful arrangements between the seller and third parties with whom the buyer had no relationship whatsoever, and the gravamen of which was a matter which probably affected many other potential claimants, with whom such a buyer might very well wish to link itself.*"

6. Ensuring the Effectiveness of Redress Schemes

87. While the existence of procedural avenues to vindicate a right to compensation is a necessary element of any system of redress, it is not sufficient to ensure the system's effectiveness. Instead, the effectiveness of any system of redress often depends on removing practical obstacles to the bringing of a claim. One obvious way of removing such obstacles is to allow for collective redress actions. However, given the expense and difficulty of making out a damages claim arising from a competition law infringement, the effectiveness of the system often depends on mechanisms that allow for sharing the risk and cost of bringing a claim, and reducing the cost of bringing a successful claim.

88. This chapter will review three such mechanisms: (i) third-party funding; (ii) success-based billing; and (iii) cost-based billing. All these mechanisms have in common that they transfer the risk of bringing a claim to someone other than the victim of the competition infringement.

6.1. Third-Party/ Alternative Funding

89. In the collective actions reviewed above, a class representative usually brings the claim on behalf of the injured party. While this class representative may have the necessary resources to bring a damages claim, very often it will not. The same problem of being unable to support the costs of litigation is faced by individual victims – the exception usually being well-resourced companies.[151]

90. A solution to this problem is third party funding. Third party litigation funding had the potential to provide access to justice, particularly in class actions where it can level the playing field against well-resourced parties. While its adoption is sometimes contentious, it has been gaining traction across the world.

An interesting recent case is *Microsoft Mobile Oy (Ltd) v Sony* [2017] EWHC 374 (Ch), where Sony argued that the dispute should be subject to arbitration and not the civil courts because all the allegedly cartelised supplies by Sony had been made pursuant to an agreement with an arbitration clause requiring "any disputes related to this Agreement or its enforcement" to be arbitrated. To establish that the claim for damages was related to the agreement, Sony advanced an argument against itself that Microsoft had not advanced: Sony argued that, because the relevant prices had been subject to an express obligation that they be negotiated in good faith, and because Sony was subject to a further obligation to disclose events that reasonably may affect its ability "to meet any of its obligations" under the agreement, the operation of a cartel would have been a clear breach of contract (as well as giving rise to civil liability under normal tort law). The Court accepted this submission, holding that it was "very difficult" to see how Sony could have engaged in the conduct complained of in the tort claims without also breaching the contract.

[151] These companies are usually in intermediate markets – i.e. the products affected by the anticompetitive product are inputs that these companies use to create other products which are then sold to final consumers. As a result, most of such claims raise complicated issues of passing-on, which will be discussed in Chapter 12 below.

[Discussion of arguments for and against third-party funding in general to be included here. Contributions are welcome, as they are in all other topics covered by this Report]

91. In Australia third party litigation funding has been deemed lawful.[152] Nonetheless, while third party funders are not subject to specific regulation, it has been recommended that funders be licensed to ensure they hold adequate capital to manage their financial obligations, and that they adopt systems to manage conflict of interest and to provide full disclosure.[153]

92. In the UK, third party funding is generally allowed under English law, but subject to caveats. The circumstances in which third party funding is acceptable in competition damages claims has recently been discussed in the context of the certification of an opt-out collective action.[154] The CAT held that, when deciding whether to allow a collective action funded by a third party, it will want to ensure that the claimant has sufficient funding to pursue the litigation and to bear any liability in costs to the defendant should the action fail.[155] Furthermore, while the law is silent about the recovery of costs by third party funders, the CAT found that it was implicit that the amount of this recovery would have to be allowed, usually through cost orders.[156] A question which arose was whether such costs could be paid out of undistributed funds. As we saw above, there is a requirement in opt-out claims that any damages not claimed by the represented persons within a specified period must be paid to a charity. However, as long as there is a conditional liability for the claimant to pay the third party funder, this can be deemed a cost of the claimant, which can be paid out of the undistributed proceeds subject to order by the court.[157] Even if there is a settlement: "*If the Tribunal considers that the settlement is not reasonable because the amount the funder can recover out of the unclaimed proceeds is excessive having regard to the total amount of the settlement, the Tribunal would decline to approve the settlement on that ground.*"[158]

[152] The High Court decision in Campbell's *Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 ended a period of uncertainty by confirming that litigation funding is not in principle contrary to public policy.

[153] *OECD (2015) Relationship between Public and Private Antitrust Enforcement – Australia,* p. 6.

[154] *Walter Hugh Merricks v MasterCard* [2017] CAT 16.

[155] *Walter Hugh Merricks v MasterCard* [2017] CAT 16, para. 104.

[156] *Walter Hugh Merricks v MasterCard* [2017] CAT 16, para. 115-117.

[157] CAT Rule 94(4) and (5); *Walter Hugh Merricks v MasterCard* [2017] CAT 16, para. 125, holding that recovery out of unclaimed damages of the success fee or 'uplift' element of legal costs "incurred" under a conditional fee agreement is also possible.

[158] *Walter Hugh Merricks v MasterCard* [2017] CAT 16, para. 139.

6.2. Success-Based Billing

93. Yet another mechanism to incentivise claims for damages is to transfer the risk of bringing such a claim to another third-party involved in the preparation of such a claim – the lawyers for the claimants. Such a risk requires that these lawyers be adequately remunerated, and such remuneration will tend to take the form of a percentage of the damages awarded or of a success uplift in the amount of fees they are owed.

94. A first form of success-based billing is contingent-fee arrangements – on which the claimant's lawyers receive a percentage of whatever money is paid to the claimant to resolve the case, but where the payment of any fees is conditional on a monetary award being awarded to the claimants—are common in US private antitrust cases, as they are in other types of cases there.[159]

95. However, contingent-fee arrangements are usually restricted, when not outright prohibited, in most jurisdictions. For example, they are not permitted in opt-out collective actions in the UK.[160] A more commonly allowed practice is to permit an uplift of the lawyers' fees if they are successful, while prohibiting legal practitioners from charging on the basis of the amount recovered (damages-based billing), but instead to merely. This is the situation in, for example, Australia[161].

6.3. Cost Allocation Rules

96. Judicial costs can take various forms. They may include attorneys' fees, and in certain contexts discovery. In any event, how costs are allocated can have a significant impact on the incentives of victims of competition law infringements to bring claims for damages.[162]

97. A system which has used its cost rules to incentivise claims for antitrust infringements is the US. In order to ensure that private parties have adequate economic incentives to undertake costly antitrust litigation, federal competition law in the United States authorizes the award of treble damages, plus attorneys' fees, to prevailing plaintiffs.[163] A plaintiff is considered to be "successful," and an award of attorneys' fees is mandatory, whenever any damages are awarded.[164] In

[159] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243.

[160] OECD (2015) *Relationship between Public and Private Antitrust Enforcement – UK*, p. 7.

[161] OECD (2015) *Relationship between Public and Private Antitrust Enforcement – Australia*, p. 6.

[162] For a summary of the theoretical and empirical literature on the impact of different fee allocation schemes on the incentives to sue, see CEPS, EUR and LUISS, Andrea Renda et al., Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report (2007), pp. 176-192.

[163] *OECD (2015) Relationship between Public and Private Antitrust Enforcement – US*, p. 2.

[164] 15 U.S.C. § 15(a). See also Edward D. Cavanagh 'Attorneys' Fees in Antitrust Litigation: Making the System Fairer' (1988) Fordham L. Rev. 57 51, p. 52.

addition, a plaintiff seeking injunctive relief may, if it "substantially prevails," recover attorneys' fees.[165] A successful defendant, however, is not entitled to recover its attorneys' fees.[166]

98. This has been criticised by some on the grounds that it encourages the filing of frivolous antitrust cases, particularly if successful defendants are not entitled to recover their fees.[167] An argument against this perspective is that the cost of launching an antitrust case can be prohibitive. Expert witness costs are unrecoverable, and considerable capital will be tied up in attorneys' fees for years until any recovery is had.[168]

99. Furthermore, concerns about the effects of granting recovery of attorney fees can be mitigated by the courts being required to only grant "reasonable" fees.[169] Some courts consider factors such as the novelty of the issues in the case, the skill required to perform the requisite legal services properly, the lawyer's experience and reputation, the undesirability of a case, and numerous other factors. Many courts start with a "lodestar" figure, which is the attorney's hourly rate multiplied by the attorney's hours worked. The court then makes adjustments to that lodestar figure if appropriate.[170] When making cost orders, courts should bear in mind that the purpose of awarding attorneys' fees to prevailing plaintiffs is to help ensure that plaintiffs with meritorious claims will have access to counsel to redress antitrust violations. Rules on attorney fees are intended to create incentives for private parties to bring lawsuits prosecuting anticompetitive conduct. Such incentives are less necessary where much of the evidence has been developed as part of a government investigation. In such cases the plaintiff's case is often already made by the underlying criminal conviction. Courts should therefore consider whether the plaintiffs were relying on such evidence, and reduce fees appropriately in such cases to reflect the relative lack of risk of bringing a claim.[171]

[165] 15 U.S.C. § 26

[166] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 250.

[167] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243.

[168] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 437.

[169] Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am., 732 F. Supp. 1209, 1215 (D. Mass. 1990) ("The award of reasonable attorney's fees incurred in prosecution of the antitrust claims . . . is mandatory. This Court must only determine what award is reasonable."), rev'd on other grounds, 932 F.2d 37 (1st Cir. 1991).

[170] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982) ("*The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate*."); see also Report and Recommendations of the Antitrust Modernization Commission (2007), p. 250.

[171] Edward D. Cavanagh 'Attorneys' Fees in Antitrust Litigation: Making the System Fairer', p. 57–58; Report and Recommendations of the Antitrust Modernization Commission (2007), p. 251.

100. European countries have not usually used judicial costs as a tool to incentivise private enforcement. Throughout the EU, on the other hand, a loser-pays rule applies regarding costs.[172] Variation exists, however, regarding the costs with discovery, since Member States are free to choose whether disclosure costs are born by the disclosing party, or are instead fully or partly recoverable by the winning party. National disclosure rules may offer varying incentives for claimants and, thus, Member States can use cost rules to attract or discourage legal actions in their respective jurisdiction.[173] Another tool that can be used regarding costs are cost management and cost capping orders.[174]

7. Claimants and Standing

101. Economic injuries have a way of rippling through markets, creating larger numbers of victims than the typical contract or tortious dispute. The victims are not only consumers, but also rivals, suppliers, and firms operating in complementary market. This creates a broad range of potential claimants.

102. As noted by the US Supreme Court: "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but […] there is a point beyond which the wrongdoer should not be held liable."[175] To an extent, this expresses a principle common to tort law systems across the world, and reflects the need to restrict liability for pure economic loss in order to limit the possibility of socially undesirable restrictions on individual liberty and socially wasteful litigation. If competition law infringers could be held liable for all individual losses that may be causally linked with their wrongdoing, this would entail significant risks of over-deterrence and could result in an undue restriction on commercial freedom.[176]

103. There are rules on standing for non-contractual liability – e.g. on capacity and on the existence of some "interest" or "genuine grievance" – that determine who has standing to sue. Nonetheless, such rules are usually purposefully vague, and hence do not really allow for the exact identification of who has and who lacks standing to sue. As a result, an important question in most jurisdictions is who should have standing to bring a claim in the private enforcement of competition law, and whose loss is too "remote" to allow them to start judicial

[172] Ashurst, Denis Waelbroeck, Donald Slater and Gil Even-Shosham *Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative Report* (2004), p. 116.

[173] Sebastian Peyer 'Compensation and the Damages Directive' (2016) 12 European Competition Journal 87, p. 102.

[174] See example, the first cost-capping decision of the UK's Competition Appeal Tribunal in *Socrates Training Limited v The Law Society of England and Wales* [2016] CAT 10. The court may also disallow all or part of the costs, Civil Procedure Rules 44.1.

[175] *Blue Shield of Virginia v. McCready* 457 U.S. 465, 476-477 (1982).

[176] Jens-Uwe Franck and Martin Peitz 'Towards a Coherent Policy on Cartel Damages', p. 1.

proceedings.[177] This is a question that has led to different approaches around the world.

104. The question about standing to claim for damages in competition law cases can be usefully broken down by looking at three different categories of claimants: (i) direct purchasers; (ii) indirect purchasers; and (iii) other plaintiffs. We review each one in turn below.

7.1. Direct Purchasers

105. Across the world, direct purchasers of products or services that were the object of an infringement of competition law are allowed to sue. In some jurisdictions, however, standing in claims for damages is restricted mainly to direct purchasers.

106. The best example of this is the US. The Supreme Court has limited the standing of parties to sue for antitrust damages, because: "*Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation*."[178] Five factors must be taken into account in deciding whether a plaintiff should have antitrust standing: (1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, in particular whether the plaintiff is a consumer or a competitor in the relevant market; (3) the directness of the injury, including whether determining damages would be too speculative; (4) the danger of duplicative recovery and whether it would be too complex to apportion the damages; and (5) the existence of a class of better-situated plaintiffs or more direct victims.[179] As a result, in "conventional" cases such as cartels, antitrust standing under U.S. federal law is restricted to direct purchasers – with the notable exception of purchasers injured by "umbrella pricing" (for the benefit of whom the appellate courts of at least two circuits have affirmed standing and proximate causation)[180] and exclusionary practices affecting competitors.

7.2. Indirect Purchasers

107. Indirect purchasers are those who acquired products or services that were the object of an infringement of competition law, or products or services

[177] Herbert Hovenkamp *The Antitrust Enterprise*, p. 59.

[178] *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986); *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 532–46 (1983); *Brunswick Corpd. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 489 (1977); *see* 15 U.S.C. § 15(a).

[179] *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540-45 (1983). See ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues (ABA Publishing: Chicago, Ill., 2nd ed. 2010), p. 18

[180] *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1166, fn. 24 (5th Cir. 1979); *United States Gypsum Co. v. Indiana Gas Co.* Inc., 350 F.3d 623, 627 et seq. (7th Cir. 2003). In contrast, a claim for damages due to umbrella pricing was dismissed in *Mid-West Paper Products Co. v. Continental Group* 596 F.2d 573 (3rd Cir. 1979).

containing them or derived therefrom, not directly from an infringer but instead from a direct purchaser or a subsequent purchaser.[181] An example of an indirect purchaser is the customer of the original purchaser from a dominant firm or cartelist. The indirect purchaser will pay more for a product or service made more expensive by the infringement – the added expense arising from the direct purchaser having incorporated its added costs arising from the infringement into the sale price (i.e. "passing on" the added cost).[182]

108. The question is ultimately about which parties in a chain of distribution may sue to recover damages resulting from the same antitrust violation. As an illegal overcharge is passed through a distribution chain, each of the parties in that chain may suffer antitrust injury. For example, when a price-fixing manufacturer overcharges for the goods it sells, the party who purchases the goods directly from that manufacturer pays the overcharge in the first instance. This "direct purchaser" then may incorporate the price-fixed good into the products it sells, and pass on to its distributors all or some portion of the manufacturer's overcharge. In turn, the distributors may be able to pass on all or part of that overcharge to consumers. Because neither the distributors nor the consumers have purchased directly from the price-fixing manufacturer, they are called "indirect purchasers." Thus, the damages from the original antitrust violation may flow from direct to indirect purchasers.[183]

109. The existence of damage suffered by indirect purchasers raises a number of important issues – including:

- How to address passing-on if indirect purchasers are allowed to sue. In order to avoid overcompensation, a passing-on defence or mechanism of some sort – that will very likely add significant complexity to the whole system – must be allowed. This issue is discussed in much greater detail in Chapter 12.3 below.
- Many indirect purchasers are consumers who are disinclined to take large corporations to court. The available empirical evidence shows that indirect purchaser actions are rather rare. Thus, except in certain cases – such as wholesalers who are indirect purchasers – promoting claims by indirect purchasers may require the adoption of some kind of collective redress mechanism.[184] This issue is discussed in Chapter 4.2 above.

110. In policy and academic debates, however, these issues are traditionally framed as a matter of whether indirect purchasers should have standing and, if so, whether any particular rules should apply to their claims. This question will be

[181] Article 2(24) of the EU Damages Directive.

[182] Emmanuela Truli 'Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition Law Infringements' (2016) Journal of European Competition Law & Practice (5) 299, p. 308.

[183] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 265.

[184] Robert H Lande and Joshua P Davis 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 U.S.F.L.Rev. 879; Barry J Rodger (ed.) *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer, 2014).

discussed here; for the benefit of clarity, the question will be reviewed by reference to the main systems that have refused to grant standing to indirect purchasers (i.e. US federal law) and that require that standing be granted to indirect purchasers (i.e. EU law).

7.2.1. Indirect Purchasers Should Not Have Standing – The US Experience

111. In the US, the conclusion that indirect purchasers did not have standing followed a number of judicial decisions regarding the amount of damages that direct purchasers could recoup. The Supreme Court first concluded, in 1968, that an antitrust defendant could not avoid liability to a direct purchaser by arguing that the plaintiff, a direct purchaser, had "passed on" to indirect purchasers the illegal overcharges initially paid by the plaintiff. As a result, direct purchasers could recover all overcharges they suffered from an antitrust violation, even if the direct purchasers passed on some or all the overcharge to their customers (that is, indirect purchasers).[185] Almost a decade years later, the Supreme Court had to decide whether indirect purchasers were allowed to sue for damages in antitrust, and held that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges.[186]

112. There were a number of reasons underpinning this decision not to grant indirect purchasers standing. First, this would mean that the same rule would apply to both claimants and defendants: neither could rely on the passing on of overcharges to either bring, or defend against, a damages claim for antitrust infringements. Furthermore, restricting standing to direct purchasers was thought to promote more effective private enforcement, to avoid the imposition of multiple – and ultimately inconsistent – liability on defendants, and to circumvent the need to engage in the complex economic adjustments required to determine the impact of a competition infringement on indirect purchasers.[187]

113. The same rules have been applied regarding the standing of suppliers of cartelists. These suppliers were not the target of anticompetitive practices, and hence their standing was denied by at least four Circuit courts.[188] However, the courts based their verdicts solely on considerations regarding the effective private enforcement of the antitrust laws. In particular, consumers and competitors in the affected market were available as a class of more suitable plaintiffs than suppliers in the relevant markets. These consumers and competitors were thought to be in a better position than suppliers to identify antitrust violations and to have sufficient self-interest to bring an antitrust suit. In this context, it was further argued that damages claims by suppliers entail risks of duplicative recovery. And, lastly, it

[185] *Hanover Shoe, Inc. v. United Shoe Mach. Corp*., 392 U.S. 481, 494 (1968).

[186] *Illinois Brick Co. v. Illinois* 431 U.S. 720, 728–29 (1977)

[187] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 268.

[188] See the discussion at section 7.3, and fn. **Error! Bookmark not defined.**219 below.

was held that suppliers' damages and their causal connection with an antitrust infringement were too "speculative."[189]

114. It should be noted, however, that these restrictive rules on standing have been challenged, both in court and through political initiative. First, in the very Supreme Court decision that denied standing to indirect purchasers, a vigorous dissent held such an approach frustrated both the compensation and deterrence objectives of claims for damages in antitrust – objectives which were made clear by the granting of treble, instead of merely compensatory damages. The dissent further emphasized that there was evidence of congressional intent that all consumers should be able to recover their antitrust injuries. The dissent was also not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was greater than for other antitrust issues.[190]

115. Furthermore, the federal rules on lack of standing of indirect purchaser have been circumvented at the state level. Through both legislation and court decisions, many states adopted policies that allow both indirect and direct purchasers to sue under state antitrust law to recover damages.[191] In 1976, an act of Congress was adopted that gave a cause of action to indirect as well as direct purchasers, and authorized state attorneys general to sue as *parens patriae* to recover damages on behalf of citizens of their various States.[192]

116. The result has been that direct purchasers typically sue in federal court, while indirect purchasers sue in state court to recover damages resulting from the same antitrust violation.[193] As a result, an act of Congress was adopted in 2005 that allows defendants – under certain circumstances – to move certain indirect purchaser class actions from state to federal court, where they can be consolidated with direct purchaser actions filed in that court.[194]

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[189] Jens-Uwe Franck and Martin Peitz 'Towards a Coherent Policy on Cartel Damages', p. 8-9.

[190] *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 749-760 (Brennan, J. dissenting). See also Report and Recommendations of the Antitrust Modernization Commission (2007), p. 268.

[191] In 1989, the Supreme Court confirmed the validity of state laws permitting indirect purchasers to sue for damages, holding that those laws were not impliedly preempted by federal antitrust law: *California v. ARC Am. Corp*., 490 U.S. 93, 102–06 (1989).

[192] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394-1396, 15 U.S.C. 15c et seq. (1976 ed.). See also *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 756.

[193] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 266, 269.

[194] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711 note). Under CAFA: "[f]ederal jurisdiction, with a few exceptions, now exists over class actions in which (1) minimal diversity exists (that is, where at least one plaintiff and one defendant are diverse), (2) the putative class contains at least 100 members, and (3) the amount in controversy is at least $5 million."

In addition, some indirect purchasers have brought their state law damage claims in federal court under the federal court's supplemental jurisdiction. In these cases, the indirect purchasers have asserted a federal antitrust claim seeking injunctive relief (which is not barred under *Illinois Brick*) and have requested that the federal court hear their state law claims for damages pursuant to the

117. More recently, the Antitrust Modernisation Commission was divided on the merits of allowing indirect purchasers to pursue private enforcement. On the one hand, the current rules on standing of indirect purchasers leave many of those actually injured by antitrust violations without compensation. Indirect purchasers can also bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers. On the other hand, the complexity of estimating damages incurred by indirect purchasers, or the passing on from direct purchasers, remains an important concern. Ultimately, the Antitrust Modernisation Commission was divided on whether to recommend that the current standing rules be maintained, or whether to recommend that standing be extended to indirect purchasers.[195]

7.2.2. Indirect Purchasers Have Standing – the EU

118. In most jurisdictions, indirect purchasers are granted standing to claim damages for competition law infringements. The EU and its Members States provide a good example of jurisdictions where this is the case.[196]

119. The basic rules on standing in Europe are to a large extent the result of decisions by the Court of Justice of the European Union ('CJEU'). In particular, the CJEU has held that the "full effectiveness" of competition law would be put at risk if individuals were not able to claim damages for injury suffered as a result of a competition infringement – and that, as such, private parties had a right to claim for damages in such circumstances.[197] Regarding standing, it has held that: "*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm*" and a prohibited anticompetitive conduct.[198] While it did not address directly whether indirect purchasers should be granted standing, the case law was read mainly as allowing both direct and indirect purchasers to sue.[199]

120. The issue was, however, explicitly addressed by the EU Damages Directive, which in its Article 12(2) explicitly grants standing to indirect purchasers. Given the way EU law works, this means that indirect purchasers will have standing to claim for antitrust damages in every EU Member State.

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court's supplemental jurisdiction. Although this procedure appears to have been used successfully with some frequency in recent years, it can provide only a partial remedy to the problems of duplicative litigation. Plaintiffs may not use it when they cannot seek injunctive relief – e.g. when claiming damages from a price-fixing cartel that has disbanded following criminal prosecution. See Report and Recommendations of the Antitrust Modernization Commission (2007), p. 269.

[195] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 274.

[196] And so does Canada, where the Supreme Court made clear in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* (2013) SCC 57, that indirect purchasers have standing to sue.

[197] Case C-453/99, *Courage v. Crehan*, EU:C:2001:465, para. 26.

[198] Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others* (2006) EU:C:2006:461, para. 61.

[199] Richard Whish and David Bailley *Competition Law* 7th Ed. (2012, OUP), p. 301.

121. Granting standing to indirect purchasers automatically raises the question of how to deal with matters concerning the passing on defence. While the Directive expressly allows such a defence,[200] it also establishes a rebuttable presumption that an overcharge has been passed on by the direct purchaser to the indirect purchaser, whenever the indirect purchaser has prima facie shown that such passing-on has occurred (i.e. that (a) the defendant has committed an infringement; (b) the infringement resulted in an overcharge for the direct purchaser; and (c) the claimant shows that he has purchased affected goods or services).[201] As a result, an indirect purchaser faces a lower standard of proof to demonstrate passing on than do defendants invoking such a defence to limit their liability – with the result that defendants face an increased risk of exposure to cumulative liability before direct and indirect purchasers. In order to prevent the infringer from being subject to multiple liability, or from being able to escape liability, courts must take due account of: (i) actions for damages, and respective judgement that are related to the same infringement of competition law, but that are brought by claimants at other levels of the supply chain; and (ii) relevant information in the public domain resulting from the public enforcement of competition law (e.g. whether it is know that other claimants are likely to sue the infringing party).[202] This topic will be discussed in greater detail in Chapter 12.3 below.

122. It is also worthwhile to shortly mention that Canada has recently, in three decisions by its Supreme Court, granted indirect purchasers standing to claim damages for antitrust infringements, and set out the conditions for class certification when the claim takes the form of a collective action – as already discussed in Chapter 4 above.[203]

7.3. Other Claimants

123. A number of parties other than purchasers may suffer harm as a result of anticompetitive conduct. Whether someone is entitled to compensation should, in the first place, depend on whether there is a causal relationship between the unlawful conduct and the harm – a topic which will be discussed in Chapter 11 below. This is the position in Europe, where the law is that: "*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited*" by competition law.[204] As a result, the potential range of claimants may include upstream suppliers or downstream purchasers from the infringer, whether at the

[200] Article 13 of the EU Damages Directive.

[201] Article. 14(2) of the EU Damages Directive. See also Recital 41 of the Directive.

[202] Article 15 of the EU Damages Directive.

[203] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57; 20 *Sun-Rype v. Archer Daniels Midland Company*, 2013 SCC 58; *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59.

[204] Joined Cases C-295/04 to 298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, EU:C:2006:461, para. 61. See also Article 1of the EU Damages Directive. Canada adopts a similar test – see s. 36 of the Competition Act RSC 1985, c C-34.

intermediary, wholesale or retail levels (e.g. dealers or distributors), including consumers; parties with no involvement in the supply chain who have nonetheless paid higher prices as a result of structural damage to effective competition in the market (e.g. umbrella pricing); competitors; employees; unions and their members; and even, potentially, shareholders.[205]

124. As should be made clear by the extent of potential claimants, framing the question of standing as relating exclusively to causation can have the effect of turning the issue of standing into a question regarding what rules of causation should apply. An example of this can be found in a reference from an Austrian court to the European courts on the topic. The Austrian rules on causation effectively excluded the possibility of establishing causation for indirect economic loss. The European court held instead that, while the conditions for establishing liability for damages – including rules on causation – are for the Member States to determine, these conditions must not detract from the effectiveness of the EU competition rules. As a result, standing will have to be established on a case-by-case basis. National rules on causation may not categorically exclude the right to compensation even when the causal link between the loss and the infringement may have been broken by the autonomous decision of a third-party.[206] The point here is not to demonstrate how the legal rules of causation at the EU and Austrian levels are different – and how, given the constitutional architecture of the EU, this means that the Austrian rules on causation had to be amended. Instead, the point is to make clear how rules on standing can be affected by the choice of rules applicable to the determination of causation.[207]

125. While rules on causation and standing may be related, they are conceptually distinct. The universe of those who will have suffered loss is larger than the universe of those who will be able to establish loss based on the relevant causation tests; and the universe of those who will be granted standing to claim for damages may be narrower still. For example, in the US the test for standing contains both causation-related elements and other consideration. First, the claimant must plead an "injury in fact" – i.e. injury to business or property substantially caused by defendant's actions of the type the antitrust laws were intended to prevent.[208] As a result, standing will only be granted after taking into account: (1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, in particular whether the plaintiff is a consumer or a competitor in the relevant market; (3) the directness of the injury, including whether determining damages would be too speculative; (4) the danger of duplicative recovery and whether it would be too complex to apportion the damages; and (5) the existence of a class

[205] Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 36.

[206] Case C-557/12, *Kone AG and others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317.

[207] Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 29-30.

[208] *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc*. 429 U.S. 477 (1977).

of better-situated plaintiffs or more direct victims.[209] A second example can be found in Canada, which has a very limited scope for the private enforcement other than against cartels. Private party prosecution of such practices is limited to instances of refusal to deal, price maintenance, and exclusive dealing, tied selling, and market restriction. In order to commence a private prosecution before the Competition Tribunal, a party must first obtain leave of the Tribunal, which will only be granted where the Tribunal has reason to believe that the party is directly and substantially affected in its business by the trade practice in question. Leave to commence a private prosecution is rarely sought and even more rarely granted.[210]

126. Despite the possibility of applying strict rules on standing, a number of categories of claimants in addition to purchasers have been widely accepted in most jurisdictions.

127. The first widely acknowledged category of claimants is suppliers. The US applies rules regarding the standing of suppliers similar to the rules it applies to standing of direct and indirect purchasers: as regards monoposonies – i.e., when suppliers are the target of a cartel of buyers – standing is granted only to direct suppliers.[211] At least four Circuit courts have denied standing to suppliers who were not the direct target of anticompetitive practices.[212] In Europe, neither case law by the European Court nor the operative part of the Damages Directive address the situation of suppliers. Yet it is pointed out in recital 43 of the Directive that "infringements of competition law […] may also concern supplies to the infringer (for example in the case of a buyers' cartel)." As the case of a monopsony underpayment due to a cartel by buyers is mentioned only as one conceivable example of possible harm done to suppliers, this wording suggests that the legislature had in mind at least damages done to suppliers due to downstream cartelization by their customers as a possible cause for damages actions.

128. The second widely accepted class of claimants comprises those affected by "umbrella pricing". These claimants include those affected by the fact that an

[209] *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540-45 (1983). See ABA Section of Antitrust Law 'Proving Antitrust Damages: Legal and Economic Issues', p. 18

[210] Ilene Kable Gotts (ed.) *The Private Competition Enforcement Review* (Ch 8 – Canada), p. 101. However, leave has been granted in the past – see the examples provided in OECD (2015) *Relationship between Public and Private Enforcement – Contribution of Canada* DAF/COMP/WP3/WD(2015)9, p. 8-9.

[211] *Mandeville Island Farms v. American Crystal Sugar Co*., 334 U.S. 219 (1948); *Beef Industry Antitrust Litigation* 600F.2d 1148 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980); S*AS of Puerto Rico, Inc., v. Puerto Rico Telephone Company* 48 F.3d 39, 44 (1st Cir. 1995).

[212] *Comet Mechanical Contractors, Inc., v. E.A. Cowen Construction, Inc.* 609 F.2d 404 (10th Cir. 1980); *Exhibitors' Service, Inc. v. American Multi-Cinema, Inc*. 788 F.2d 574 (9th Cir. 1986); *International Raw Material v. Stauffer Chemical Company* 978 F.2d 1318, 1327-29 (3rd Cir. 1992); *SAS of Puerto Rico, Inc., v. Puerto Rico Telephone Company* 48 F.3d 39, 44 (1st Cir. 1995). The suppliers' losses were argued to arise from the restrictive effects that the antitrust infringement caused in downstream markets.

undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected in the absence of the cartel. Entities which raise their prices like this include not only purchasers from non-infringing suppliers, but also suppliers to the cartel and sellers of separate complements.[213] In the US, at least two circuit courts have granted standing to purchasers injured by "umbrella pricing".[214] In Europe, the European Courts have held that domestic law must not exclude compensation of losses resulting from umbrella pricing "categorically and regardless of the particular circumstances of the case" and thereby effectively gave umbrella plaintiffs the right to sue,[215] even if there is doubt at the exact extent of this right.[216]

129. A third category of claimants that may be granted standing are the infringing parties' competitors.[217] The main criticism of allowing competitors to claim is that they may use litigation strategically as an extension of competition in the market.[218] The main advantage of allowing competitors to sue is that allowing claims only when the price effect has occurred may lead to interventions against anticompetitive conduct occurring too late – the competition law infringement may already be over. Competitors are unusually well-placed to detect competition enforcement early – a competitor may feel the effects of the anticompetitive practice before consumers, and it is likely to be familiar with the infringing companies' technologies and costs. More importantly, competitors may suffer significant loss as a result of the competition infringement.[219] As a result, competitors are universally allowed to bring claims in competition law, even if it may be appropriate to adopt measures to prevent the manipulation of the system for strategic purposes (e.g. stringent rules for allowing a claim to proceed).

130. A fourth potential category of claimants, although a very unlikely one, comprises final customers affected by volume effects. Volume effects arise from

[213] Jens-Uwe Franck and Martin Peitz 'Towards a Coherent Policy on Cartel Damages', p. 10.

[214] *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1166, fn. 24 (5th Cir. 1979); *United States Gypsum Co. v. Indiana Gas Co.* Inc., 350 F.3d 623, 627 et seq. (7th Cir. 2003). In contrast, a claim for damages due to umbrella pricing was dismissed in *Mid-West Paper Products Co. v. Continental Group* 596 F.2d 573 (3rd Cir. 1979).

[215] Case C-557/12 *Kone AG and others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317, para 33.

[216] Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009) p. 27; European Commission, SWD(2013) 205, Commission Staff Working Document, Practical Guide, Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty of the Functioning of the European Union, C(2013) 3440, p. 12, note 26; Frank Maier-Rigaud and Ulrich Schwalbe 'Quantification of Antitrust Damages' in David Ashton and David Henry *Competition Damages Actions in the EU: Law and Practice* (Edward Elgar: Cheltenham and Nothampton, MA, 2013), para. 8.024-8.028 and 8.032;

[217] *Associated General Contractors of California v California State Council of Carpenters* 459 U.S. 519 (1983).

[218] Joseph Brodley 'Antitrust Standing in Private Merger Cases', p. 45-46.

[219] Herbert Hovenkamp *The Antitrust Enterprise*, p. 68-70.

the fact that some purchasers are not willing to pay the higher price resulting from anticompetitive conduct, and therefore cease purchasing the affected product altogether. However, these customers would have continued to purchase the product in the absence of overcharge – and hence have suffered a loss in the amount of the consumer surplus they would have enjoyed in purchasing the product at the original price.[220] Identifying victims that suffered loss from the infringement because they did not buy the product at an increased price is very difficult. Demonstrating loss in such cases may be even more difficult, since evidence must be adduced showing that these customers would have acquired the product were it not for the price increase – and the award for damages will further require determining the difference between the price and the customers' use value of the product.[221]

131. A last category of claimants exists is parasitic on the previous ones: special purpose vehicles, or class representatives in collective actions. While both were briefly alluded to in Chapter 25, it is worth looking in a bit more detail at special purpose vehicles. These entities pursue claims on the basis damages transferred to it, directly or indirectly, by some of the victims allegedly harmed in connection with a competition infringement. Given the dispersion of damages suffered by the victims, it is not reasonable for the persons adversely affected themselves individually to sue those responsible. As a result, these entities aim to combine assets based on claims for damages resulting from infringements of competition law – and provide a useful alternative when collective actions are not allowed or feasible. Such an option is common in both the EU[222] and the US[223].

[220] Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 100.

[221] Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 15. It should be remarked that the European courts have acknowledged the possibility of such a loss of-volume harm in the presence of complete pass-on in Joined Cases C-192/95 to C-218/95 *Société Comateb and others v. Directeur Général des Douanes et Droits Indirects* ECLI:EU:C:1997:12, which concerned port fees that were illegally levied in the French territory. While this was not an antitrust ruling, it was held at paras. 31-32 that: "*a trader may have suffered damage as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales*.(…) *In such circumstances, the trader may justly claim that, although the charge has been passed on to the purchaser, the inclusion of that charge in the cost price has, by increasing the price of the goods and reducing sales, caused him damage*." (emphasis is ours)

[222] A good example was Case C-352/13 *CDC v. Evonik Degussa and Ors* ECLI:EU:C:2015:335, where CDC entered into agreements concerning the transfer of claims for damages with 32 undertakings domiciled in 13 different Member States of the European Union or of the European Economic Area, some of which had previously concluded similar transfer agreements with 39 other undertakings.

[223] *Sprint Communications Co. v. APCC Services, Inc.* 554 US 269 (2008), which held that an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor.

132. Data from Europe – where the categories of standing are not as restricted as in the US, being limited only by the requirement that there is sufficient causation between the infringement and the harm suffered – indicates that different categories of victims will claim for damages at different rates.

Table 1. Claimants in Actions for Competition Damages (1999-2013)[224]

Jurisdiction	Total Cases	Direct Purchasers	Indirect Purchasers	Competitors	Umbrella Customers	Others
UK	86	29 (33.7%)	8 (9.3%)	15 (17.4%)	0	34 (39.6%)
Germany	51	23 (45%)	1 (2%)	25 (51%)	0	1 (2%)
France	93	67 (71.4%)	0	11 (13.3%)	0	15 (15.3%)
Italy	299	242 (80.9%)	0	48 (16.1%)	0	9 (3%)
Spain	175	145(82.8%)	0	26 (14.9%)	0	4 (2.3%)

Source: Ioannis Lianos, Peter Davies and Paolisa Nebbia Damages Claims for the Infringement of EU Competition Law (2015, OUP), p. 73.

8. Defendants and the Extent of their Liability for Damages

133. The general rules on liability for damages under tort or civil law require the presence of four elements in order for injured parties to be awarded compensation for loss: (i) the existence of fault (intention or negligence) of the defendant; (ii) the existence of an infringement of the law (illegality); (iii) the presence of damages (which must be quantified); and (iv) a causal link between the breach and the damages.[225] In civil litigation, all four elements must be proved by the claimant in order to have a successful claim.

134. In this chapter, we shall discuss who may be liable for competition damages, the requirements for establishing fault, and rules that rely on specific characteristics of defendants to determine the extent of their liability.

8.1. Identifying the Defendants

135. The question of who the addressee of a damage claim should be in the context of a corporate group tends to go hand in hand with approaches to corporate separateness. Two main approaches can be found.

136. According to the first approach, the autonomy of corporate bodies and legal form must be respected. In jurisdictions that follow this orientation, the mere ownership of 100% of a subsidiary will not suffice to attribute liability to the parent company for that subsidiary's conduct; nor does it create a presumption that the parent company exercises the degree of control over the subsidiary necessary to impute liability on the parent company for the subsidiary's

[224] All jurisdictions, including first instance and appeals, counted as one entry (per case), successful and unsuccessful, and relying either on EU competition or national competition law, or both, from 1 January 1999 to 31 December 2013. If the direct purchaser is also a competitor, this entry is counted as 0.5% for each and included in both columns.

[225] OECD (2015) *Relationship between Public and Private Enforcement*, p. 12.

conduct.[226] As a result, a damage claim should be brought against the exact corporate entity that committed an infringement. This position seems to prevail in European countries such as Germany[227]and the Netherlands[228].

137. A second approach tends to look at the whole corporate group.[229] Under EU substantive competition law, for example, the focus is the economic reality underlying the corporate entity that infringed competition law. European Union competition law infringements are committed by undertakings, which comprise an economic unit.[230] Under EU competition law the legal entity, its officers, and its employees comprise an economic entity vis-à-vis third parties.[231] The unit of analysis is not the specific legal entity that committed the infringement, but the relevant "undertaking", which can include several different legal entities which, by virtue of their structural and contractual links, operate as a single economic unit in a specific market. The parent entity can be held liable for an antitrust infringement in which its (current or former) subsidiary was directly involved under the double condition that the Commission proves that the parent entity: (i) had the capability of exercising decisive influence over the commercial policy of its subsidiary and (ii) in fact made use of such power, having regard to the economic, legal and organisational links between them. In cases of wholly owned subsidiaries (and of shareholding of slightly more than 96%), there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the commercial policy of its subsidiary. In such cases, therefore, it is

[226] OECD (2016) 'Sanctions in Antitrust Cases' DAF/COMP/GF(2016)6, p. 25.

[227] LG Berlin, 6/8/2013, 16 O 193/11 [Kart], WuW/E DE-R 4456, 4467, and LG Düsseldorf, 8/9/2016, 37 O 27/11 [Kart], NZKart 2016, 490, 492. Arguing that this interpretation is contrary to the Damages Directive, see Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law' in Rodger, Ferro and Marcos (eds), The EU Antitrust Damages Directive: Transposition in the Member States (Oxford University Press, due for publication in 2017), draft available at https://ssrn.com/abstract=2998586, p. 8.

[228] Rechtbank Oost-Nederland *Tennet TSO BV, Saranne BV / ABB BV* Ltd, 16 January 2013, ECLI:NL:RBONE:2013:BZ0403; Rechtbank Midden-Nederland East *West Debt B.V. / Schindler, ThyssenKrup et al.*, 20 July 2016, ECLI:NL:RBMNE:2016:4284.

[229] In a recent survey by the International Competition Network, more than half of the jurisdictions surveyed followed a variant of this system. See International Competition Network (2017) 'Setting of Fines for Cartels in ICN Jurisdictions', p. 13.

[230] Case C-41/90*Höfner and Elser v Macrotron,Case* EU:C:1991:161, para 21; Case T-352/94 *Mo Och Domsjö AB v Commission* EU:T:1998:103, para 87; Case C-90/09 P *General Química v Commission*, EU:C:2011:21, paras 34–6 and case law cited.

[231] Officers and employees may not themselves be the addressees of an infringement decision under EU law – Joined Cases 40/73 to 48/73 50/73, 54/73 to 56/73, 111/73, 113/73, and 114/73*Suiker Unie and Others v Commission* EU:C:1975:174, para 539. This position is also adopted in member states such as the United Kingdom: see *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* (also known as *Re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456. *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, at paras 19–23 per Longmore LJ, and para 37 per Lloyd LJ. See Okeoghene Odudu and Albert Sanchez-Graells 'The interface of EU and national tort law: competition law' in Paula Giliker (ed.) *Research handbook on EU tort law* (Elgar, 2017) 154, p. 167.

sufficient to prove that the subsidiary is wholly owned (or nearly wholly owned) by the parent company to establish parental liability. It is then for the respondents to provide evidence rebutting this presumption. Parent and subsidiary will normally be held jointly and severally responsible for the payment of the pecuniary penalty.[232]

138. The corollary of this approach is that, when attributing liability for an infringement, several legal entities belonging to the same undertaking may be held liable.[233] This means that liability will be attributed jointly and severally not only to the offending corporation, but also to its parent company (and, by extension, to the wider corporate group to which the corporation belongs) when the parent was capable of determining the commercial policy pursued by this subsidiary, i.e. when this subsidiary did not independently determine its conduct in the market. For example, given the European Commission's practice of addressing infringement decisions at parent companies, this means that those parent companies – and not only the exact legal entity that infringed competition law – will be liable for damages.[234] A different example of this approach can be found in Spanish law, which imposes liability on company which controls the infringing entity, except if the relevant behaviour is shown not to have been influenced by those parent companies. This may have important ramifications regarding the ability of the respondent to pay damages, and the *fora* in which the damage claim is brought.

8.2. Fault

139. The general rules on liability usually require the defendant to have been at fault (by intention or through negligence) in order for it to be liable for the damages caused by his actions – i.e. the mere fact that the conduct infringed was illegal does not suffice for liability to arise.[235] This subjective element refers to the conduct– i.e. the infringement of competition law –, and not the damages created by the conduct.[236]

[232] See Case C-97/08 P *Akzo Nobel a.o. v Commission* [2009] ECR I-8237.

[233] This can – and has – given rise to serious debates about the implications of extending liability to parent companies regarding such different matters as company and constitutional law. See, with examples from Germany, Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law' in Rodger, Ferro and Marcos (eds), The EU Antitrust Damages Directive: Transposition in the Member States (Oxford University Press, due for publication in 2017), draft available at https://ssrn.com/abstract=2998586, p. 7-8.

[234] Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 52. There is some controversy in Germany as to who is responsible for damages – the legal entity or the wider legal group. See Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p. 8-10.

[235] Okeoghene Odudu and Albert Sanchez-Graells 'The interface of EU and national tort law: competition law', p. 160.

[236] But note that it has been held that in the EU 'competition law infringements may occur without fault' – Okeoghene Odudu and Albert Sanchez-Graells 'The interface of EU and national tort law: competition law', p. 160, by reference to the Case 194/14 P *AC-Treuhand v Commission* EU:C:2015:717, para 31, with reference to Joint Cases C-189/02

140. Given the complexity of the conducts that may infringe competition law, and the nature of the defendants themselves (who are usually corporations), some jurisdictions have decided to alleviate the burden on the plaintiff to prove fault in an antitrust private litigation so as not to make it excessively difficult or practically impossible to exercise the right to compensation.

141. The rationale for alleviating (or exempting) the requirement of proving fault comes from the objective difficulty in proving the subjective circumstances around a competition law infringement. It can be very hard for the plaintiff to show that the defendant committed the anti-competitive conduct intentionally or negligently. Usually, the subjective element is not part of the competition authorities' analysis in a competition case, even when intention or negligence is a requirement in order for an infringement to be found – which does not facilitate follow-on actions either, since the claimant is unable to rely on the existing evidence collected by the competition authority to prove the subjective element of his case. Even though the infringement of competition law has been demonstrated in a decision by the competition authority, the claimant in a follow-on action might not be in a position to overcome an additional hurdle of proving that the misconduct by the defendant was intentional or negligent.[237]

142. In the US, there are two intent standards in antitrust. Some claims require proof merely of the intent to carry out the conduct set forth in the claim.[238] These claims require only that the defendant know that he is taking a particular action, not that he does so with the purpose of bringing about a particular (undesirable) result. Other claims fall under a specific intent standard, requiring the plaintiff to prove that the defendant intended to harm competition. Specific intent is an element of some antitrust wrongs (e.g. attempted monopolisation[239]), while general intent is an element of others (e.g., price fixing other Section 1 conduct[240]).

143. A 2004 study on the status of private litigation in Europe showed that European jurisdictions took different approaches to the burden and standard of proof for fault.[241] In most jurisdictions, the claimant had to establish the

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P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission*, EU:C:2005:408, paras 142 and 143, showing a passive infringement. Fault is required, however, for imposing a fine

[237] OECD (2015) *Relationship between Public and Private Enforcement*, p. 13.

[238] In the first Supreme Court case specifically to address the intent issue, *Nash v. United States* 221 U.S. 1 (1911), the Court rejected the claim that proof of a specific intent to restrain trade or to harm competition was required before a defendant could be found to have violated the Sherman Act. See Ronald Cass and Keith Hylton 'Antitrust Intent' (2001) Harvard Regulatory Policy Program Working Paper RPP-2001-12, p. 10.

[239] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp* 472 U.S. 585 (1985), *Eastman Kodak v. Image Tech. Servs.* 504 U.S. 451 (1992).

[240] For example, *United States v. Socony-Vacuum Co* 310 U.S. 150 (1940) and *United States v. Container Corp. of America* 393 U.S. 333 (1969).

[241] The Study on the Condition on Claim for Damages in Case of Infringements of EC Competition Rules (or Ashurst Study) (2004) was commissioned by the EU Commission to identify and analyse the obstacles to successful action for damages existing in the Member

defendant's fault to obtain damages for non-contractual liability.[242] In all jurisdictions where fault was required, either intention or negligence sufficed to establish fault.

144. This study is particularly useful for our purposes, because it identifies a number of different approaches to fault as a condition of liability for competition law damages:

- Fault is not required for liability to arise.
- The infringement of competition rules will automatically imply that the fault element is fulfilled.
- Fault is an element of competition damages claims, but it is presumed once the claimant has proven an infringement of competition law. Such a presumption is generally rebuttable, i.e. the burden of proof is reversed from the claimant to the defendant which must demonstrate it was not at fault.
- Fault must be shown in relation to the violation of competition law i.e. it must be shown that the infringement was committed negligently or intentionally.[243]

145. Outside Europe, Korea and Japan have both introduced rules to the effect that a previous finding of infringement creates a rebuttable presumption of fault.[244]

8.3. Individual, or Joint and Several Liability

146. When there are multiple tortfeasors who are jointly responsible for the loss – as is often the case in collusive infringements of competition law – they may be either individually or joint and severally liable for damages. In the case of individual liability, the infringing party will only be liable for the share of the damage it caused individually. In the case of joint and several liability, each infringer is liable to the claimant for the entire damage and loss resulting from the competition law infringement – even if it may subsequently recover contribution for their share of the damages from other infringers.

147. In actions for damages for the infringement of competition, the general rule is that co-perpetrators of an infringement are jointly and severally liable, i.e. each defendant is liable for the full amount of damages even if several defendants

States of European Union on the basis of the answers from 25 Member States. It is available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

[242] The exceptions were Cyprus, Czech Republic, Ireland, Slovakia and the UK.

[243] Ashurst Study, p. 50. The EU Damages Directive allowed Member States to maintain conditions such as culpability "insofar as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive".

[244] For Japan, see Article 25 of the Competition Law; for stand-alone claims, the claimant is required to prove the respondents' intentional misconduct or negligence. In Korea, see Article 56 MRFTA.

jointly engage in the unlawful conduct. Thus, as a rule a claimant may recover the full amount of the judgment from any one of the defendants.[245]

148. Joint and several liability is normally coupled with rules on contribution between joint and severally liable parties, and regarding the impact that settlement between a claimant and a defendant may have on the claim. It is here that most systems diverge, so it is worth considering each of these sets of rules in turn.

8.3.1. Contribution Among Defendants

149. Contribution claims permit one defendant to seek "contribution" from another defendant if it has paid more than a "fair" share of the damages. This contribution will be to an amount that reflects the harm that each of the defendants has caused to the claimant. As a rule, a defendant who is jointly and severally liable for damages is able to claim for contribution from other co-defendants or perpetrators. In claims for competition damages, however, this right to contribution from co-defendants has been the subject of restrictions.

150. In Europe, the EU Damages Directive sets out that any participant in an infringement should be responsible towards the victims for the whole harm caused by the infringement, with the possibility of obtaining contribution from other infringers for their share of responsibility. For example, the amount of contribution that a cartel member may recover from the other cartel members shall be determined in the light of "their relative responsibility for the harm caused" by the infringement.[246] This, broadly speaking, reflects the rules already in place in most EU countries.[247] Nonetheless, the Directive creates a number of exceptions from the rule of joint and several liability. One concerns the liability of a full immunity recipient. This topic is covered in greater detail below but, in short, the Directive limits the liability of immunity recipients to the harm caused to its direct and indirect purchasers.[248] Similarly, small- or medium-sized

[245] In the US, see Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243, 251. See *Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 646 (1981) (noting the "judicial determination that defendants should be jointly and severally liable" in antitrust cases, while holding that there is no right of contribution); see also *Flintkote Co. v. Lysfjord* 246 F.2d 368, 397 (9th Cir. 1957) (joint and several liability is both "firmly rooted" and a "well settled principle"). In the EU, see Art.11(1) of the EU Damages Directive, which codifies the practice in most of Europe, where many courts in several Member States have confirmed the joint and several liability of cartel members as joint infringers or co-tortfeasors – see German Federal Court of Justice, judgment of June 28, 2011 (ref. KZR 75/10)—ORWI; Austrian Highest Court of Justice, judgment of February 14, 2012 (ref. 5 Ob 39/11p)—Lifts and Escalators; Spanish Supreme Court, judgment of June 8, 2012 (ref. 344/2012)—Acor. See also Martin Seegers 'Interaction of the Rules on Joint and Several Liability and Settlements under the EU Directive on Damage Actions' (2014) Global Competition Litigation Review 3(2) 140, p. 140.

[246] Article 11(4) of the Damages Directive.

[247] Wouter Wils 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future', p. 26.

[248] Sebastian Peyer 'Compensation and the Damages Directive', p.94.

companies are liable only for the damage done to their direct and indirect purchasers.[249]

151. Even one contribution can be obtained by a joint and severally liable party, there are differences in the procedures through which it may be claimed. On one end, we have the example of Spain, while the defendants may claim contribution from one another, a party which is required to pay damages cannot obtain contribution from another potentially liable companies during the damages claim. Instead, that party will have to start a new procedure in which it will claim contribution from its co-infringers. On the other end is the UK, where a defendant which is joint and severally liable may make a claim against other co-infringers for contribution in the same proceedings.[250]

152. The rules in the US are significantly more restrictive than EU rules regarding contribution. In particular, in the US claims for contribution among defendants are barred in antitrust cases.[251]

8.3.2. The Impact of Settlements

153. Parties in a claim for damages may settle the case. As noted above in Chapter 5, some jurisdictions have promoted specific mechanisms to settle damages claim outside of court. In the context of claims with multiple co-defendants, the question arises of what impact a settlement should have on outstanding claims. In particular, settlement agreements may have an impact on the amounts of outstanding liabilities and on the dynamics of damages claims when the agreements do not cover all of the damages.

154. For example, in the EU if the claimant and a defendant settle, the damage claim is reduced by the full amount of the defendants' share in the claimant's overall loss: it is irrelevant whether or not the claimant received a settlement payment covering the full amount of loss caused by the settling infringer.[252] Is apparent that this rule may lead to compensation payments that are below the actual loss the claimant has suffered. To address this issue, the EU Damages Directive revives the settling defendant's liability if the claimant is unable to obtain full compensation from non-settling co-infringers. However, the liability

[249] This exception applies if the firm has a market share of less than 5 per cent and if *"[…] the application of the normal rules of joint and several liability would irretrievably jeopardize [the small or medium-sized company's] economic viability and cause its assets to lose all their value*". Ringleaders, repeat offenders or firms that have coerced others into participating in the illegal conduct cannot benefit from this exception. See the EU Damages Directive, Art. 11(2). See Sebastian Peyer 'Compensation and the Damages Directive', p.94.

[250] This is called a Part 20 claim, because it is regulated by Part 20 of the Civil Procedure Rules.

[251] See *Burlington Indus. v. Milliken & Co*., 690 F.2d 380, 392 (4th Cir. 1982) (rejecting creation of claim reduction remedy); *Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs*., 635 F.2d 118, 130 (2d Cir. 1980); Flintkote, 246 F.2d at 398; Edward D. Cavanagh, 'Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?' (1987) Vand. L. Rev. 40 1277, p. 13.

[252] Article 19 and Recital 35 of the EU Damages Directive.

for any remaining and uncompensated loss is not renewed when it is expressly excluded in the settlement agreement, which is thus likely to be the default option for settling defendants.[253]

155. In the US, on the other hand, "claim reduction" in antitrust cases – i.e. reductions in the amount of a claimant's total remaining post-trebling claim to reflect settlement payments already made – is seriously limited.[254] The result of the US's rules on claim reduction, when combined with the bar on contribution in antitrust cases, is that if an alleged co-conspirator settles for less than the full amount of damages fairly attributable to it, trebled, non-settling defendants arguably remain liable for more than their "fair" share of damages. This permits plaintiffs to settle with some defendants at an early stage for a relatively small amount of damages, leaving remaining, non-settling defendants potentially liable for nearly the entire damages caused by the joint conduct, trebled. [255] As a result, less culpable defendants may pay an unfairly large share of total damages, while more culpable defendants escape significant (or any) liability.

156. This system has been the subject of numerous criticisms in the US, particularly as regards the pre-litigation dynamics it creates. The combination of rules on joint and several liability, contribution and claim reduction can cause a "race" to settle, potentially exposing defendants that had a small or no role in the overall anticompetitive scheme to a disproportionately large liability.[256] In many cases, plaintiffs offer settlements early on to one defendant – sometimes the one most culpable or with the greatest sales – that bear little or no relationship to that defendant's actual responsibility. The non-settling defendants may have little or no actual culpability, but they nevertheless are forced into settling by the effect of the enormous exposure they face because the earlier sweetheart settlement arrangements have effectively multiplied their potential liability.[257] As a result, defendants are under significant pressure to settle antitrust claims, even those of questionable merit, simply to avoid the potential for excessive liability.[258] This dynamic permits plaintiffs to engage in "whipsaw" settlement tactics, playing

[253] Sebastian Peyer 'Compensation and the Damages Directive', p.94-95; Martin Seegers 'Interaction of the Rules on Joint and Several Liability and Settlements under the EU Directive on Damage Actions' p. 146-147, is critical of these provisions as he considers that the parties cannot assess *ex ante* what their part in the cartel will be taken to be. Instead of facilitating the enforcement of damage claims against cartels, he considers that the EU Damages Directive places an additional burden on the victim, namely the task of determining the internal contribution shares of the cartelist.

[254] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243-244.

[255] Id., p 251-252.

[256] Id., p. 243-244.

[257] Id., p 418.

[258] Edward D. Cavanagh 'Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?', p. 1288–93; Jonathan M. Jacobson 'Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem' (1980) U. Fla. L. Rev. 32 217, p. 220–21.

defendants off one another to race to settle early or be left potentially liable for nearly the full remaining amount of the claims.[259]

157. Although the existing rules can maximize deterrence and encourage the resolution of antitrust claims through quick settlement, they may also over-deter conduct that may not be anticompetitive by exposing individual defendants to potential liability for damages far in excess of the benefits they derived from their conduct.[260] Already in 1981 the US Supreme Court noted that:

> *"Some amici and commentators have suggested that the total amount of the plaintiff's claim should be reduced by the amount of any settlement with any one co-conspirator; others strongly disagree. Similarly, vigorous arguments can be made for and against allowing a losing defendant to seek contribution from co-conspirators who settled with the plaintiff before trial. Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pre-trial proceedings, thus adding new complications to what already is complex litigation."*[261]

158. In 2007, the American Antitrust Modernisation Committee recommended that Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain a reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.[262]

8.3.3. Leniency Applicants

159. Economists have long stressed that an illegal cartel can be deterred by making sure that potential cartelists' incentives to sustain the cartel are not in place, and that potential cartelists cannot trust their partners in this illegal activity.[263] In effect, the issue of deterrence is not fully addressed by focusing on the overall level of fines and damages that the cartel may be liable for. Instead, deterrence is enhanced if there are mechanisms in place that create incentives for cartelists to leave a cartel. This is the main motivation behind leniency and whistle-blower rewards' programs.

160. Incentives to apply for immunity and leniency need not be exclusively related to public sanctions such as prison terms and pecuniary penalties. On the

[259] Edward D. Cavanagh 'Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?', p. 1288–90.

[260] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 252.

[261] *Texas Industries Inc v Radcliff Materials Inc* 451 U.S. 630 (1981), at 637 et seq.

[262] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 244.

[263] Maria Bigoni, Sven-Olof Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo 'Trust, Leniency, and Deterrence' (2015) Journal of Law, Economics, and Organization 31 663, p. 663-666.

contrary, removing liability for civil damages may also increase the incentives for a cartelist to apply for leniency; and maintaining liability for civil damages may limit the effectiveness of leniency programs, since it increases the amount potentially due by every cartelist – including leniency applicants – and thus increases the incentives for the cartel to continue to operate.[264]

161. As a result, many regimes – if not most – limit the liability of leniency applicants for damages. In the US, for example, organizations that participate in the Department of Justice's (DOJ) corporate leniency program are not liable for treble damages, as is the rule, but only for single damages.[265]In the EU, the EU Damages Directive limits the liability of immunity recipients to the immunity recipient's customers alone (i.e. the immunity applicant is not subject to joint and several liability).[266] Only if claimants are not able to obtain full compensation from the other co-infringers will the immunity recipient become liable for the damages caused by its co-infringers.[267]

9. Establishing an Infringement

162. As noted in the beginning of the previous chapter, the general rules on liability for damages under tort law require the existence of a conduct that is unlawful in order for damages to be awarded.[268] One of the main difficulties in claims for damages for competition infringements is to establish that an infringement occurred in the first place. This chapter will focus on this topic.

163. A basic distinction should be made in this regard. On the one hand, there are actions that follow a finding by a competition authority that an infringement occurred ("follow on claims"). As a result of this decision, there already some kind of evidence that an infringement has occurred. However, private parties may start damages claims even in the absence of public enforcement. These are usually called stand-alone claims, and typically the claimant will have to prove that an infringement occurred in order to obtain damages.

164. An additional issue that is discussed in this chapter is the statute of limitations. While technically a procedural point, in practice this is a requirement that an infringement must have occurred within a certain, limited period of time before the claim was brought. Given how long public enforcement can take – or, to be more precise, how long it can take until an infringement decision becomes final –, matters regarding the statute of limitations are very important in practice, particularly in the context of follow on claims.

[264] Jens-Uwe Franck and Martin Peitz 'Towards a Coherent Policy on Cartel Damages', p. 15.

[265] See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2014) [hereinafter ACPERA].

[266] OECD (2015) *Relationship between Public and Private Enforcement*, p. 7.

[267] Sebastian Peyer 'Compensation and the Damages Directive', p.94.

[268] OECD (2015) *Relationship between Public and Private Enforcement*, p. 12.

9.1. Stand-alone claims

165. Establishing that an infringement occurred poses one of, if not the greatest challenge to standalone claimants. Proving that an infringement has taken place is a challenging proposition even for competition agencies set up specifically for that purpose. To establish that a competition law infringement took place requires a claimant to either prove that a conduct which is *per se* unlawful under competition law took place – which is difficult, since those conducts are almost always secret – or to establish that a conduct had negative effects on prices, output or innovation in the relevant market. For example, a claimant will usually have to demonstrate that prices were agreed secretly between cartel members in order to demonstrate that a *per se* infringement of competition law took place. To demonstrate that a conduct is anticompetitive, the claimant will often have to reconstruct a hypothetical competitive market and demonstrate that the conduct had negative effects on market output – which not only requires the deployment of complex economic theories and models, but will often also require knowledge of facts on the commercial activities of the infringer and other players on the relevant market.

166. Given the difficulty of proving an infringement in the first place, one could expect stand-alone claims not to be as common as follow on claims. However, this intuition would be misleading. In the US, a 1988 study found that only roughly one quarter of all the private antitrust suits were based upon prior government cases.[269] More recently, Lande and Davis's study of 40 recent private settlements of $50 million or more demonstrated that almost half of the violations were uncovered by private parties instead of through government enforcement.[270] It also seems that also in the six largest European economies by size, standalone actions for damages significantly exceed the number of follow on claims.

Table 2. Damages Claims in Europe

Jurisdiction	Follow on actions	Standalone actions
Germany	23.5%	76.5%
France	12.9%	87.1%
United Kingdom	28%	72%
Italy	79.9%	20.1%
Spain	12.6%	87.4%
Netherlands	11%	89%

Note: Competition Damages cases introduced in the courts of these jurisdictions from 1 January 1999 to 31 December 2013. Source: Ioannis Lianos, Peter Davies and Paolisa Nebbia Damages Claims for the Infringement of EU Competition Law (2015, OUP), p. 3.

[269] T. Kauper & E. Snyder 'Private Antitrust Cases That Follow On Government Cases' in L. J. White (ed) *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press, 1988), p. 358.

[270] Robert H Lande and Joshua P Davis 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases', p. 879–918.

9.2. Follow-on claims

167. While standalone claims pose the largest challenge for claimants, follow-on claims request the most attention from governments.

168. The US experience shows the importance of follow-on for the development of the treble damages action. While the numbers seem to be lower nowadays, in the 1950s 75% of all individual actions followed on from public enforcement. This evolution perhaps demonstrates that experience developed in follow-on actions is important to the subsequent development of a culture of standalone damages litigation – even if the EU data would seem to disprove this.[271]

169. In any event, the type of anti-competitive practice remains key to whether standalone or follow-on claims prevail, with the more naturally secretive cartel cases predominantly being follow-on actions.[272] This likely reflects the greater difficulty of finding evidence of such infringements when compared to more easily identified behaviour, such as abuses of dominant positions.

9.3. Effect of Infringement Decisions in Civil Damages Claims

170. Claimants in follow-on damages actions must establish the existence of an antitrust infringement as a pre-condition for claiming damages. In other words, absent any specific provision, claimants should re-establish the same facts and circumstances on which the competition authority relied for its infringement decision. Allowing claimants to rely on the findings of a competition authority simplifies the task of the claimant who will only need to focus on showing that it suffered actual damages from the anti-competitive conduct and on their quantification. This can be achieved by granting legally binding effect of competition authorities' decisions in follow-on private actions. [273]

171. As such, one question which is raised by follow-on claims concerns the value of an infringement decision adopted in the course of public enforcement in the context of private claims for damages. There are a number of options, moving along a spectrum from an infringement decision sufficing to establish that an infringement has occurred in the context of claims for damages, to the infringement decision not having any additional evidentiary value in such cases.[274]

[271] Particularly since during the period 2006-2012, less than 25% of the EU Commission's infringement decisions were followed by damages actions – see OECD (2015) *Relationship between Public and Private Enforcement*, p. 5.

[272] Barry J. Rodger 'Why not court? A study of follow-on actions in the UK', p. 104.

[273] OECD (2015) *Relationship between Public and Private Enforcement*, p 18.

[274] OECD (2015) *Relationship between Public and Private Enforcement*, p. 19; Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 45.

9.3.1. Public Infringement Decisions suffice to establish that an infringement occurred in civil damages claims

172. In a number of jurisdictions, the existence of an infringement decision will suffice to establish that an infringement occurred in the context of a damages claim.

173. This is the prevailing approach in the EU. Under EU rules, when national courts rule on matters relating to competition law which are already the subject of a decision by the European Commission, those courts cannot take decisions running counter to that decision.[275] As a result, claimants who bring actions for damages before national courts subsequent to a European Commission decision can rely on the latter directly as irrefutable proof that an addressee of a decision infringed EU competition law.[276] Furthermore, the EU Damages Directive sets out that infringement decisions by national competition authorities will automatically constitute full proof of the infringement before the courts of that same Member State. The logic behind this is that, usually, such decisions will have been the subject of judicial review, and as such they do not affect the separation of powers since the decision on whether the infringement has taken place was adopted by a national court.[277] Even before the Damages Directive entered into force, this approach was already adopted in a number of Member States.[278]

174. Three particular situations merit discussion here. The first is the possibility of using decisions by foreign authorities finding an infringement of competition law to establish an infringement in damages claims. While uncommon, the binding effect of decisions of both domestic and other national competition authorities is recognised as sufficing to establish liability in damages claims in Austria, Germany and Spain.[279]

[275] Case C-344/98 *Masterfoods* ECLI:EU:C:2000:689; Article 16(1) of 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.

[276] Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 45.

[277] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], paras. 148-150. However, as noted by Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 47, this reasoning does not apply to decisions which have not been the subject of judicial appeals.

[278] In 2004, this group included Austria, Czech Republic, Estonia, Germany, Greece, Humgary Slovenia, Sweden (though only as regards individual exemption decisions) and the UK. In Poland, court ruling finding a breach of competition law were binding on civil courts. See Ashurst Study, p. 69.

[279] 7th Amendment of the German Act Against Restraints on Competition (GWB), which entered into force in 1 July 2005, Art. 33 GWB. The binding effect of decisions originating from other member states is limited to the finding of an infringement of either European or German competition law. It does not extend to the finding of an infringement of the national competition law of the member state from which the decision originates – even if it would seem that such findings may have *prima facie* value in line with the

175. A second scenario is that where a final decision by the national competition authority is required before a national court can find that an infringement occurred for the purposes of damages claims. This was the situation in Spain, where until 2007 damages claims could only succeed if the national competition authority had previously issued an infringement decision.[280] However, EU rules solved the issue regarding EU-level infringements, and set out that national courts are empowered to decide on matters of infringement of EU competition law.[281]

176. A third issue concerns the effect of commitment decisions in follow-on damage claims. The European Commission can accept commitments from companies instead of adopting a decision requiring that an infringement be brought to an end.[282] Since a commitment decision does not conclude that there has been an infringement of competition rules,[283] it cannot serve as the basis of a follow on damage claim. However, private claimants may try to adduce the decision as (circumstancial) evidence of an infringement – but the probative value of such a decision will depend on the evidentiary rules of the jurisdiction where the damages claim is brought.[284]

9.3.2. Infringement Decisions as Prima Facie Evidence of an Infringement in Damages Claims

177. This was, until recently, the prevailing approach to infringement decisions across the world. It is still the approach adopted in the US where, under section 5(a) of the Sherman Act, verdicts of US federal antitrust investigations are *prima facie* evidence in tort proceedings.[285] In Australia, Section 83 of the Consumer

Damages Directive. See Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p. 5-6.

For Spain, see Art. 75(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[280] Artículo 13.2 de la Ley 16/1989, de 17 de julio, de Defensa de la Competencia. Doubts about whether similar requirements had to be met before a victim could bring a damages claim also existed in Malta and Ireland – see Ashurst Study, p. 103.

[281] 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, Article 6. See also Fernando Diez Estella and Clara Estrada Meray 'Las Acciones de Danos Derivadas de Ilícitos Competitivos en España: Análisis de Jurisprudencia Reciente' (2014) Comentarios de Jurisprudencia 15 189, p. 192.

[282] Art. 9 of Council Regulation (EC) No 1/2003.

[283] Recital 13 of Council Regulation (EC) No 1/2003.

[284] See Dorin Rat 'Commitment Decisions and Private Enforcement of EU Competition Law: Friend or Foe?' (2015) World Competition 38(4) 527, p. 539-540.

[285] This means that such a final judgment or decree is sufficient in a subsequent private case to establish as an initial matter the facts found in the government proceedings to the extent that the judgment or decree would preclude the parties in the government proceeding from contesting them against one another. In addition, certain antitrust-related findings made by the FTC in administrative litigation can be used as evidence in a subsequent private case against the same defendant. See *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1030-33 (9th Cir. 2001) (recognizing that 15 U.S.C. § 16(a) grants prima

and Competition Act seeks to assist private actions by making findings of fact that established a contravention in competition proceedings *prima facie* evidence of the same facts in later proceedings, including private actions.[286] In the EU, until the Damages Directive was adopted this was a common approach in a number of member states where infringement decisions created a rebuttable presumption of an infringement and of the facts contained in the decision.[287]

178. However, infringement decisions could be granted additional probatory value without this amounting to a reversal of the burden of proof. For example, in France decisions by the competition authority used to be considered crucial evidence; in Lithuania, Malta and Poland, public documents are granted a higher evidential value in law.

179. An interesting peculiarity of the EU system lies in the value it attributes to the decisions of foreign competition authorities. While Austria, Germany and Spain grant them binding effect, as seen above, the EU Damages Directive merely requires Member States to see such decisions as *prima facie* evidence of a competition infringement.[288] As a result of this, foreign decisions have special probatory evidence – in some cases, as in Spain, amounting to a rebuttable presumption that an infringement took place.[289] A similar effect can potentially be granted to a competition authority's decision that is not yet final.[290]

9.3.3. Infringement Decisions Do Not Have a Special Probative Value

180. This is an option that used to be adopted in a number of European countries. This was particularly the case in Spain, where neither infringement decisions adopted by a competition authority, nor high court judgment confirming those decisions, nor the sanctions imposed therein, were deemed to have a binding effect on civil courts. This was a result of national rules that ensured that

facie weight, but not collateral estoppel effect, to FTC findings in subsequent matters to which collateral estoppel would apply had the government itself brought the case).

[286] Australia Competition Policy Review Final Report (Commonwealth of Australia 2015) p. 71, 408. See also *ACCC v Monza Imports Pty Ltd* [2001] FCA 1455; *ACCC v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456, para. 24; *ACCC v ABB Transmission & Distribution Ltd* [2002] FCA 559; *ACCC v Leahy Petroleum Pty Ltd* (No 3) (2005) ALR 301, para. 118; *ACCC v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, para. 107.

[287] An example of this is the Italian judgment 3640/2009 *Inaz Pague* by the Italian *Corte di Cassazione*, according to which a decision by the competition authority only benefitted from the status of privileged evidence of the facts set out therein. In particular, the decision created a presumption of the facts in which the decision is based, but this presumption would be rebuttable. Similarly, in Latvia infringement decisions used relieve the plaintiff of having to prove the existence of a violation but this does not prevent the actual correctness of the decision being called into question. See Ashurst Study, p. 69, and Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 45.

[288] OECD (2015) *Relationship between Public and Private Enforcement*, p. 13.

[289] Art. 15(2) de la ley de Defensa de Competencia.

[290] OECD (2015) *Relationship between Public and Private Enforcement*, p. 19.

judicial magistrates remained independent from all other bodies of the judicial branch.[291]

181. However, this option seems to be less and less common. Spain, again, provides a good example of this. As a result of the transposition of the EU Damages Directive,[292] a new article was added to the Competition Act which provides that an infringement decision adopted by the national competition authority which is no longer subject to judicial review will provide irrefutable evidence that an infringement took place in the context of damage claims – while foreign decisions also create a rebuttable presumption that an infringement did occur.[293]

9.4. Scope of Infringement Decisions' Effect in Damages Claims

182. Even when a decision by a competition authority has binding effect, applying it to damage claims is not necessarily straightforward. Decisions of the competition authority usually include extensive and detailed explanations of the infringement of the competition law investigated by the authority. In a cartel case, for example, this will include a description of the companies involved in the cartel, the mechanisms of the cartel arrangement, the duration of the cartel activity, its geographic scope, and so forth.[294]

183. Which elements of the decision are binding, or have additional probatory value, are questions that can raise practical difficulties. As a rule, the effect of the infringement decision only extends to the subsequent damage actions against the same defendants and for the same antitrust violation as found in the decision (i.e. same geographic scope, duration, etc.).[295] But what is the effect of an infringement decision when the defendant was neither identified in the operative part of that decision, nor the addressee of the decision, but is instead part of the wider corporate group?[296] And what findings of fact does a decision actually contain, other than that there was an infringement?[297]

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[291] '*En el ejercicio de la potestad jurisdiccional, los Jueces y Magistrados son independientes respecto a todos los órganos judiciales y de gobierno del Poder Judicial*» - see Article 12(1) of Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. See also Fernando Diez Estella and Clara Estrada Meray 'Las Acciones de Danos Derivadas de Ilicitos Competitivos en España', p. 194.

[292] Through Real Decreto-ley 9/2017, de 26 de mayo.

[293] Artigo 75 de la Ley de Defensa de Competencia. But note that in Canada, for example, it has been expressly decided that foreign infringement decisions are not binding in proceedings before the Canadian courts – see *Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2014) BCSC 1281.

[294] OECD (2015) *Relationship between Public and Private Enforcement*, p. 18.

[295] OECD (2015) *Relationship between Public and Private Enforcement*, p. 19.

[296] In *Emerson Electric Co v Morgan Crucible Co PLC* [2011] CAT 4, an application to dismiss a damages claim was successful on this basis.

[297] Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd [2011] EWCA Civ 2: *"the significance of a particular passage in the Decision is to be assessed bearing in mind not just what it says but where it stands in the context of the Decision as a whole. A*

184. Some of these difficulties may be eased through statutory provisions and case law. Both EU and UK laws have rules determining the scope of the binding effect of an infringement direction. According to Recital 31 of the Directive, the binding effect in follow-on actions for damages of a finding of infringement made in public enforcement proceedings: '*cover[s] only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction*".[298] In the UK, the 1998 Competition Act facilitated claims by providing, in Section 58, that those findings of fact by the competition authority which are relevant to an issue arising in a court action are binding on the parties – if that decision in which the findings of fact were made is no longer subject to appeal. A court will also be bound by a decision of the national competition authority that any of the competition law prohibitions has been infringed.[299] In the US, courts have set out that the binding effect of infringement decisions following governmental action (also known as collateral estoppel effect) only extends to rulings that are essential to support the liability determinations.[300]

185. Difficulties may yet arise even when there are legal provisions setting out what elements of an infringement decision should be taken into account as binding in subsequent judicial proceedings. A good example of this can be found in a follow on case brought in the UK in connection to an infringement decision by the European Commission. In this case, the legal requirements for a claim for damages to be allowed included whether the defendant had had intent to injure. The question was thus whether the facts included in the European Commission's decision sufficed to find that the defendant had had such intent.[301] At first instance, the court found that intent to injure was implicit in the European Commission's decision. The Court of Appeal, however, rejected this on the basis that the claimant could not rely on material facts that were not within the Commission's findings but were merely consistent with them. Instead, such an inference that the defendant had intent to injure could only be made if no other inference can be made from the facts contained in the infringement decision.[302]

general statement in an introductory passage, or a summary of other material, is likely to be of less force or significance for present purposes than one expressed in more detail in a section where a particular issue is examined directly" – para. 95.

[298] See also the judgment of the English House of Lords in *Inntrepreneur Pub Company (CPC) et al v. Crehan.* [2006] UKHL 38 (para. 64: "*a relevant conflict exists only when the "agreements, decisions or practices" ruled on by the national court have been or are about to be the subject of a Commission decision. It does not apply to other agreements, decisions or practices in the same market*"; and para. 69: "*when there is no question of a conflict of decisions in the sense which I have discussed, the decision of the Commission is simply evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account*".)

[299] Barry J. Rodger 'Why not court? A study of follow-on actions in the UK', p. 109-110.

[300] *In re Microsoft Corp. Antitrust Litig.,* 355 F.3d 322, at 327 (4th Circ., 2004).

[301] In this particular case, under the tort of conspiracy.

[302] *W.H. Newson Holding Limited and others v IMI plc and others* [2013] EWCA Civ 1377. See, for a short yet more detailed discussion of this case, Ioannis Lianos, Peter

186. A recent decision by the Spanish Supreme Court in the context of damage claims against participants in the sugar cartel also clarified the extent to which a decision by the competition authority provides evidence of an infringement. In this decision, the Supreme Court held that since the facts of the anticompetitive conduct are the same for the purposes of private and public enforcement, the facts identified in the infringement decision are very useful for private enforcement purposes. However, any holding by the public enforcement authorities concerning causation and damages calculation should be ignored.[303]

9.5. Ensuring that Potential Claimants are Aware of Infringement Decisions

187. There are public interest reasons in support of competition authorities disseminating decisions establishing an infringement of competition law widely. First, the publication of an infringement decision informs the general public of the competition authority's action and of the reasons behind this action. Secondly, it promotes general deterrence by sending a message to economic operators. Lastly, and more importantly for our purposes here, publicising the decision provides more information to parties who may have been harmed by the anti-competitive conduct. As a result, victims of the infringement have the opportunity to assert their rights against the companies involved in the case and seek redress.[304]

188. An important consideration when publishing an infringement decision – which is also relevant for the scope of the effect that the decision may have on subsequent civil damages claims, as discussed in the section above – is what information the published version of an infringement decision should contain. Public versions of cartel decisions are very important for damage claimants. One of the main hurdles that damage claimants face in competition damages cases – particularly when rules on disclosure are strict – is access to evidence necessary to demonstrate loss. Damage claimants thus view the public version of the infringement decision as an important potential source of evidence and have an interest in getting swift access to a version which is as detailed as possible. Details relating to the function of the cartel, the names of the implicated employees and the cartelised products, the anti-competitive contacts, agreed prices, affected customers, etc., are of particular value to damage claimants.[305] At the same time, authorities often have to have regard to the legitimate interest of undertakings in non-disclosure of their business secrets. As a result, public interest consideration in the disclosure of information contained in an

Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 47-48.

[303] Supreme Court Judgment of 7 November 2013, *Nestle´ et al v Ebro Foods* (STS 5819/2013). See, for details, Francisco Marcos 'Damages Claims in the Spanish Sugar Cartel', p. 215-216.

[304] OECD (2015) *Relationship between Public and Private Enforcement*, p. 34.

[305] Andreas Kafetzopoulos 'European Commission policy on publication of cartel decisions: the latest victory of damage claimants against leniency applicants' European Competition Law Review 36 (2015) 295-297, p. 295.

infringement decision must be balanced against the right of the involved parties to confidentiality when publishing an infringement decision.[306]

189. An additional question is whether the competition framework should promote private enforcement by sending the infringement decision to potential claimants. In 2010, Brazil's antitrust agency, CADE, included for the first time in a cartel decision an order that a copy of the decision to be sent to potential injured parties. Following this initiative, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country.[307] Korea also has similar provision in its competition law, according to which the competition authority can order infringers of the competition law to announce in public or notify known victims of their anti-competitive behaviour of the decision.[308] The competition authority often has imposed this remedial order in decisions condemning anti-competitive conduct.[309]

9.6. Limitation Periods

190. When seeking damages for infringements of competition law, claimants must not only establish that an infringement occurred – they must do so in a timely fashion. Rules limiting the time period during which a potential claimant can bring an action for damages create legal certainty – and that is why they exist in all legal orders. However, limitation periods can also create considerable obstacles to the recovery of damages depending on their duration, on when they start, and on whether or not the duration period can be suspended,. In particular, 'short' limitation periods that begin to run from 'the moment the infringement started' and which 'cannot be suspended' may render the right to seek compensation practically impossible.[310]

The obstacles posed by limitation periods to damages claims were reviewed during the drafting of the Damages Directive in Europe. Prior to the adoption of the Directive, it was for the domestic legal system of each

[306] OECD (2015) *Relationship between Public and Private Enforcement*, p. 34. For a good example of this, see Art. 30 of Regulation No 1/2003, pursuant to which, when publishing its decisions, the Commission must have regard to the legitimate interest of undertakings in non-disclosure of their business secrets; and Art. 16(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), pursuant to which business secrets and other confidential information are not to be communicated or made accessible to third parties.

[307] Ana Paula Martinez and Mariana Tavares de Araujo Levy 'Private Antitrust Enforcement in Brazil: New Perspectives and Interplay with Leniency' CPI chronicle on 16 Apr 2013.

[308] Under Article 5 of MRFTA (Remedial Measures), in case of any act violating the provisions of Article 3-2 (Prohibition on the Abuse of Market Dominance) the KFTC may order the market-dominating company involved to reduce prices, to discontinue the violation, to announce its receipt of a remedial order to the public, and to take other necessary remedial actions.

[309] OECD (2015) *Relationship between Public and Private Enforcement*, p. 36.

[310] OECD (2015) *Relationship between Public and Private Enforcement*, p. 21.

Member State to prescribe the limitation period for seeking compensation for harm caused by an anticompetitive practice, provided that those rules did not impose a very short limitation period that could not be suspended, or otherwise rendered it practically impossible or excessively difficult for victims to seek compensation for the harm suffered.[311] *In practice, there was considerable diversity among countries with regard to the maximum duration of limitation periods, which oscillated between one year (Spain*[312]*) and 30 years (Germany*[313] *and Luxembourg). Addressing this situation, the EU Damages Directive sets out clear limitation period rules so that victims will have more time to bring their action: "Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to him; and (c) the identity of the infringer."*[314]

191. Ultimately, there are three different stages during which the limitation period for competition damage claims run.[315] We shall look at each in turn below.

9.6.1. Commencement of Infringement

192. If the limitation period starts to run on the day when the infringement was committed, it is possible that the limitation period for continuous or repeated infringements would be over even before the infringement is terminated. Accordingly, most systems develop mechanisms to prevent this from happening. In the EU, the Damages Directive provides that the limitation period shall not begin to run before the infringement has ceased.[316] Under US federal antitrust law, the limitation period starts from when the cause of action accrued and lasts four years.[317] However, for a continuing conspiracy, the limitation period restarts each time there is a new and independent act that leads to additional injury to the

[311] Joined Cases C-295/04 to 298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, EU:C:2006:461, para. 81-82.

[312] Prior to the implementation of the EU Damages Directive, the Spanish statute of limitations followed the general limitation period set out in Art. 1968.2 of the Civil Code – i.e. one year since the victim became aware of the harm. See Fernando Diez Estella and Clara Estrada Meray 'Las Acciones de Danos Derivadas de Ilicitos Competitivos en España', p. 192; Carmen Herrero Suarez 'La Transposición de la Directiva de Danos Antitrust – Reflexiones a raíz de la publicación de la propuesta de ley de transposición de la Directiva' (2016) Cuadernos de Derecho Transnacional 8(1) 150, p. 170.

[313] In Germany, the limitation period is three years from knowledge of infringement; ten years from the arising of damage (sec. 33h(3) GWB); or thirty years from the infringement (sec. 33h(4) GWB).

[314] Article 10(2) of the EU Damages Directive,

[315] Here, we follow Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 44.

[316] See, for an example of implementation of this, Art. 75(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[317] 15 U.S.C. § 15b.

plaintiff.[318] In Canada, an action for damages must be brought within two years from "a" day on which criminal conduct was engaged in or the order in question was contravened" or "the day on which any related criminal proceedings were finally disposed of".[319] Because the limitation period runs two years from "a" day on which criminal conduct was engaged in or an order was contravened, a claimant can seek to recover damages for continuing conduct that occurred over a number of years.[320]

9.6.2. Knowledge of Infringement

193. Given the secret nature of many competition law infringements, if the limitation period starts running before the infringement is discovered, damage claims may become time-barred before the harm has even been perceived by the victims. As a result, the majority of jurisdictions start the count for the statute of limitations from the point in time at which the victim became aware of the infringement.

194. As we saw above, under US federal antitrust law the limitation period starts from the moement when the cause of action accrued. The running of that limitation period can be deferred or "tolled" based on different types of equitable or statutory tolling.[321] The most common type of equitable tolling is fraudulent concealment, which provides that the limitation period will be stayed until the claimant discovers the violation, provided that the claimant can prove that: (i) the defendants fraudulently concealed their illegal conduct, and (ii) the claimant exercised reasonable due diligence in trying to discover the violation, given the circumstances. Under (ii), the claimant cannot turn a blind eye or otherwise ignore facts which would cause it to inquire further into the defendants' conduct[322] In practice, it is common for private plaintiffs to assert that the statute was tolled or extended by the deliberate efforts of the defendants.[323]

195. In Canada, limitation periods are based on discoverability principles. While the limitation period for bringing a claim under the Competition Act is two years, such a period will not begin running until the earlier of the day the person fist knew that she or he has a cause of action against the defendant, or the day that a reasonable person under the circumstances would first know that she or he has a cause of action against the defendant (subjective period).[324]

196. In the EU, the Damages Directive sets out that the limitation period cannot start running before the claimants become aware of a number of factors,

[318] *Pace Indus. Inc. v. Three Phoenix Co*., 813 F.2d 234, 238 (9th Cir. 1987).

[319] Section 36 of the Competition Act RSC 1985, c C-34.

[320] OECD (2015) *Relationship between Public and Private Enforcement* – Contribution of Canada, p. 3.

[321] OECD (2015) *Relationship between Public and Private Enforcement*, p. 21.

[322] OECD (2015) *Relationship between Public and Private Enforcement*, p. 21.

[323] Jones Day 'Antitrust Answerbook 2015' (ed. Joe Sims, Kathryn Fenton and David P. Wales) (Practising Law Institute), p. 21.

[324] OECD (2015) *Relationship between Public and Private Enforcement*, p. 21-22.

namely: (a) the behaviour and the fact that it constitutes an infringement of competition law; (b) the fact that the infringement of competition law caused harm to the claimant; and (c) the identity of the infringer. The Directive further sets out a minimum limitation period of five years for a claimant to bring an action for damages, without setting out any maximum limitation period.[325] This minimum limitation period of five years was adopted, for example, in Germany and in Spain.[326]

197. In both Japan and Korea, the limitation period is three years from the moment when the claimant becomes aware of the damage. They have different limits on the maximum statute of limitations from the moment the infringement occurred – 10 years in Korea, and 20 years in Japan.[327]

9.6.3. Following an Infringement Decision

198. This specific limitation period is only relevant for follow-on claims. Given the amount of time that a competition law investigation can take, it is eminently possible that a claim becomes time-barred before the infringement decision becomes final. This is so even if the statute of limitations only starts running from the moment the infringement is over and/or the claimant becomes aware of it.

199. To prevent this, there are often specific rules regarding limitation periods for follow on claims. In the EU, the Damages Directive provides that the limitation period is suspended during the investigation of the competition authority, and actions can be brought until at least one year after an infringement decision becomes final, or proceedings are otherwise terminated.[328] In Germany, a limitation period is suspended if the claimant sues for disclosure of evidence (see below at [-]); a German competition authority takes action with respect to an infringement of competition law; and if the European Commission or the competition authority of another member state or a court acting as such takes action because of an infringement of art. 101 or 102 TFEU or because of an infringement of the national competition law of another member state.[329]

200. In the US, similarly, Section 5(i) of the Clayton Act provides for tolling during the pendency of a government antitrust suit. As a result, claimants may start a claim up until one year after the government suit has ended, if the private

[325] Article 10(3) of the Damages Directive.

[326] In Spain, Art. 75(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia. However, in Germany this limitation period begins to run at the end of the year in which these requirements have been fulfilled (see sec. 33h(2) GWB). This brings the rules on limitation periods for cartel damages in line with the general rules of German law on limitation periods (see sec. 199(1) German Civil Code).

[327] OECD (2015) *Relationship between Public and Private Enforcement*, p. 22.

[328] Article 10(3) of the EU Damages Directive. An example of near identical transposition can be found in Spain, Art. 75(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[329] Sec. 33h(6) GWB. This means that the suspensive effect takes place even if another competition authority takes action with respect to the infringement of another national competition law.

suit is "*based in whole or in part on any matter complained of*" in the government action.[330] Similarly, in Canada the limitation period can start to run on "the day on which any related criminal proceedings were finally disposed of". The bringing of criminal proceedings can revive an otherwise expired limitation period, which can result in the limitation period differing significantly between cases where there has been a criminal prosecution and civil cases without a criminal element.[331]

10. Rules of Evidence

201. Competition cases are particularly "fact-intensive". To determine the extent of damages, the claimants will have to compare the post-anticompetitive conduct world to the situation which would have existed in the absence of the infringement. To establish an infringement of the competition law, it is necessary to show negative effects on prices, output or innovation in the relevant market – even if, as we saw at Chapter 9.3 above, this can be established by reference to a decision by an enforcement body. To prove causation, the claimants would have to identify the precise elements of anti-competitive conduct by an infringer that caused damages to the claimants.

202. A factor that will influence the success rate of private actions is the courts' approach to allocating burdens of pleading, production, and proof. As a rule, the burden is on the claimant to prove damages, if not an infringement.[332] The ability to bring a successful damages claim rests on the claimants' ability to gain access to the necessary evidence. However, it can be extremely difficult for potential claimants, especially if they are merely final consumers, to have access to the factual elements required to demonstrate that they are entitled to antitrust damages. "Structural information asymmetries" are common in competition cases: many of the relevant facts and information required to bring a case are not known to claimants in sufficient detail because these facts are held by the defendant or by third parties.[333] For example, when identifying the extent of damages a claimant will usually have to rely on notes on the price overcharges agreed secretly between cartel members, details on how and when they influenced price and other parameters of competition, or internal documents of the infringer showing his analysis of market conditions and developments. Furthermore, the reconstruction of a hypothetical competitive market to quantify the damage caused by the infringer usually presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market.[334] As a result, evidence needed by the claimant to make his case is often in the hands of the defendant, of a third party, or of the competition authority. The difficulties faced by claimant in

[330] 15 USC § 16(i).

[331] OECD (2015) *Relationship between Public and Private Enforcement* – Contribution of Canada, p. 3.

[332] Andrew Gavil 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System', p. 199.

[333] OECD (2015) *Relationship between Public and Private Enforcement*, p. 14.

[334] European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para. 98.

obtaining all the necessary evidence is widely viewed as a major obstacle to the success of damages actions.[335]

203. As a rule, claims for damages are subject to the general rules on non-contractual liability that apply in each jurisdiction – including rules on evidence. To address the difficulties faced by claimants when bringing claims for competition law damages, however, private enforcement regimes have developed mechanisms that allow potential claimants to gain access to the evidence necessary to successfully plead a private damages case. This chapter reviews the main such mechanisms, including: (i) mechanisms for disclosure of evidence in the possession of defendants or third parties; (ii) access to competition agencies' files; (iii) access to settlement documents; (iv) rules on expert evidence.

10.1. Disclosure

10.1.1. General Rules

204. Disclosure is a procedural mechanism through which a party in a legal dispute or a third party is forced to reveal relevant information to the other party in a case. One of its main functions is to address information asymmetries. As noted above, in competition damages claims is it usual for the infringer to have better information about the actual harm caused to victims. Disclosure operates to correct this asymmetry by forcing a party to disclose evidence to the other party.

205. Disclosure can also be important to promote justice and the quick resolution of disputes. For example, the disclosure of evidence can reduce both disagreements between parties and judicial errors regarding the *quantum* of damages. This is particularly important in follow-on claims – where the dispute is about causation and *quantum* –, where disclosure can serve to both speed up litigation and facilitate settlement negotiations.[336] On the other hand, the possibility of disclosure can raise questions regarding how much and what kind of information should be revealed. This question is closely related to the costs of disclosure which, as the US experience shows, are substantial and can be subject to tactical manipulation by the parties – usually in the form "fishing expeditions", "discovery blackmail", procedural abuses, and attempts to create excessive costs for potential defendants.[337]

206. As a result, it is widely accepted that there should be clear discovery rules that make access to evidence easier while minimising the cost of disclosure

[335] European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para. 96.

[336] Sebastian Peyer 'Compensation and the Damages Directive', p.99.

[337] European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para. 79; Sebastian Peyer 'Compensation and the Damages Directive', p.101. A "fishing expedition" is a strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence for a damages claim might be found. "Discovery blackmail", on the other hand, is a strategy to request very broad discovery measures entailing high costs with the intention to compel the other party to settle rather than to continue the litigation, although the claim or the defence may be rather weak or even unmeritorious.

exercises. Such rules should address how a party should have access to evidence, the minimum level of disclosure, the conditions for obtaining a discovery order by a court, and the methodology to determine the scope of such an order.[338]

207. It can be said that there are two main approaches to disclosure, which mirror the division between civil and common law jurisdictions. According to the first approach – found in jurisdictions such as Belgium, Germany, France, Spain, Korea and Japan – discovery tends to occur during trial and it is generally subject to the requesting party being able to identify specifically the documents he wishes to request.[339] Under the second approach – found in countries such as Australia[340], Ireland[341], the United Kingdom, and the United States – there are mechanisms for mandatory pre-trial discovery which require the parties to disclose relevant categories of evidence to each other. [342]

208. The extent of discovery varies across jurisdictions. Parties in the English courts are only obliged to conduct a "reasonable search" for documents when giving standard disclosure, allowing them to limit the categories of documents that are being searched. Similarly, the prospect of cost management and cost capping may reduce the impact of potential disclosure costs on the innocent defendant.[343] In the US, most discovery can only occur in response to a request by

[338] European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para. 74-76.

[339] OECD (2015) *Relationship between Public and Private Enforcement*, p. 14-15. For Spain, see Carmen Herrero Suarez 'La Transposicion de la Directiva de Danos Antitrust – Reflexiones a raiz de la publicacion de la propuesta de ley de transposicion de la Directive' (2016) Cuadernos de Derecho Transnacional 8(1) 150, p. 159.

[340] In Australia, under general civil procedure rules disclosure must be made of all existing documents that the party has in his possession, custody or power that is relevant to a fact in issue. Furthermore, the Federal Court's rules on discovery allow respondents to ACCC proceedings, and parties to private proceedings, to seek orders relating to the discovery of relevant documents which the ACCC has acquired compulsorily – see Federal Court Rules 2011, Part 20. The ACCC may itself seek discovery orders of material which it has not obtained by its own compulsory processes. The Court will generally fashion any order for discovery to suit the issues in a particular case.

[341] OECD (2015) *Relationship between Public and Private Enforcement*, p. 14.

[342] While mandatory pre-trial discovery is more usually found in common law jurisdictions, it can also be found elsewhere – see, for example, Sweden. Furthermore, civil law jurisdictions contain various examples of mechanisms to make it easier to access evidence through forms of disclosure or through the reversal of the burden of proof. As noted in European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para 90: "*in regards disclosure, many Member States of the civil law/continental legal tradition provide that courts can order opponents or third parties to hand over evidence in their possession, if the claimant specifies this evidence sufficiently and if it is relevant to the case. There are also examples whereby jurisdictions of the civil law tradition reduce, in cases of information asymmetry and under certain conditions, the requirement of specification of means of evidence and allow the taking of evidence in the sphere of the opponent (or third parties) on the basis of more general factual contentions.*"

[343] Civil Procedure Rules 31.7(1)-3. The first cost-capping decision of the UK's Competition Appeal Tribunal was adopted in *Socrates Training Limited v The Law*

the opposing party. More recent reforms in discovery practice have produced rules that impose obligations of mandatory initial disclosure upon the parties, whereby each party is required to produce certain types of information without a prior request by the other party.[344] The reforms also imposed various limitations on the number and length of certain types of discovery. Furthermore, lawyers must – under federal and some state laws - certify that their discovery requests, responses, and objections are warranted and not unreasonable given the context of the particular case; and violators will be subject to sanctions.[345]

209. The problem faced by regimes that do not contain mandatory pre-trial discovery, or that require the parties to identify the specific documents they would like to see disclosed, is that they can make it extremely difficult for potential claimants to have access to the evidence necessary to: (i) assess the extent of the damages suffered, and hence to decide whether it is worthwhile to bring a damages claim; (ii) be able to meet the burden and standard of proof for being able to succeed in a damages claim – or, in some cases, even to bring such a claim or to avoid it being summarily dismissed.

210. Given that in many EU jurisdictions did not provide for mandatory pre-trial discovery, while simultaneously imposing strict rules requiring claimants to assert in detail all the facts of their case and to proffer exactly specified pieces of evidence in support of these assertions, the European Commission concluded that: "*national rules on evidence often have the effect of making it very difficult, if not impossible, for claimants to bring a successful action for antitrust damages*" (…) *a more effective framework for the exercise of the right to compensation for antitrust damage hinges on improved access for victims to evidence in the possession or under the control of the opponent or third persons.*"[346]

211. The Damages Directive puts forward a number of measures which should facilitate competition damages claims in EU Member States.[347] In particular, the Directive allows claimants to ask national courts to order the defendant, a third party or a competition authority to disclose relevant evidence which lies under

Society of England and Wales [2016] CAT 10. The court may also disallow all or part of the costs, Civil Procedure Rules 44.1.

[344] The required disclosures encompass names of persons likely to have "information that the disclosing party may use to support its claims or defences," copies of, or the location of, documents that the disclosing party may use to support its claims or defences, computation of damages sought by the disclosing party, and any relevant insurance coverage. Later in the pre-trial process, other disclosures relating to expert testimony and other trial witnesses may be required. See Federal Rules of Civil Procedure 26(a) (1).

[345] See Federal Rules of Civil Procedure 26(g). For a discussion, see Oscar G. Chase et al. *Civil Litigation in Comparative Context* (Thompson West, 2017), p. 36-38.

[346] European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para 96, 99.

[347] These measures were inspired on rules on obligations to disclose evidence to the opponent in civil litigation in intellectual property disputes included in Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004 L 195/16 – which were, in turn, inspired by obligations of the EU and its member states under TRIPS.

their control.[348] In order to limit the risks and costs inherent to disclosure exercises, the Directive requires claimants to meet several conditions before obtaining a disclosure order from the court. In particular, they should: (i) present all the facts and means of evidence that are reasonably available to them, provided that this shows plausible grounds to suspect that they suffered harm as a result of an infringement of competition rules by the defendant; (ii) show to the satisfaction of the court that they are unable, applying all efforts that can reasonably be expected otherwise, to produce the requested evidence; (iii) sufficiently specify categories of evidence to be disclosed as precisely and as narrowly as possible.[349] Furthermore, judges will have to ensure that disclosure orders are proportionate, and that confidential information is duly protected.[350] In order to ensure that disclosure is effective, the Directive requires Member States to ensure that the national courts are able to impose penalties on parties, third parties, and their legal representatives in the event of any destruction of evidence or failure to comply with obligations for disclosure. These penalties must be 'effective, proportionate, and dissuasive' and may include the possibility to draw adverse inference, to dismiss claims and defences in whole or in part, and to order the payment of costs.[351]

212. In short, the Directive creates disclosure mechanisms that allow access to evidence based on fact-based pleading, combined with strict judicial control of the plausibility of the claim and the proportionality of the disclosure request.[352] Such an approach required a number of changes to the procedural rules of a number of Member States, such as Germany and Spain.

213. Germany is a good example of a jurisdiction where disclosure was quite restricted – in effect, courts only had the power to order the production of certain

[348] Articles 5 and 6 of the EU Damages Directive. The defendant is also awarded such right when it is deemed necessary, e.g. with regard to passing-on defences (see Recital 15). See also Emmanuela Truli 'Will Its Provisions Serve Its Goals?', p. 302.

[349] That category should be identified by reference to common features of its constitutive elements such as the "nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria." – see Recital 15 of the EU Damages Directive.

[350] Article 6(5) of the EU Damages Directive.

[351] Article 8 of the EU Damages Directive.

[352] When determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. In particular, they shall consider: (a) if there is a fumus boni iuris supporting the merits of the claim; (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; (c) whether the evidence the disclosure of which is sought contains confidential information and what arrangements are in place for protecting such confidential information. See Stefano Grasani 'The EU Directive on Antitrust Actions and its Side-Effect on Civil Procedure in the European Union' CPI Antitrust Chronicle January 2015 (1), p. 4. A good example of a disclosure exercise in line with these principles can be found in *Peugeot v NSK et allia* [2017] CAT 2.

records or documents.[353] The legislator therefore had to introduce a new set of rules regarding disclosure.[354] The German legislator went beyond the Directive and introduced a new mechanism allowing claims for the production of evidence.[355] Under this new mechanism, injured parties do not have to bring an action for damages in order to be able to profit from the rules on disclosure of evidence; instead, they can bring a stand-alone action for the disclosure of evidence which is independent of the action for damages.[356] However, the party required to disclose evidence can demand reimbursement of all reasonable expenses from the other party[357] – even if such reimbursement will likely only be due if the damages claim is unsuccessful.[358]

214. In Spain, the regime of access to evidence was as restricted as in Germany. Following implementation of the EU Damages Directive, however, a new section was added to the Civil Procedure Law, setting out special rules applicable to competition damages claims. According to this section, a party in a claim for competition damages can request that the court adopt all necessary measures to gain access to evidence that may prove relevant to the resolution of the judicial proceedings in the possession of the other parties in the proceedings or of third parties.[359] Such request can be made before judicial proceedings start, with the initial claim or the reply to it, or even during judicial proceedings. If the request is made before the claim is brought, the party making the request must specify the future claims for which the evidence may be relevant, as well as

[353] See Art. 142(1) of the German Code of Civil Procedure. The provision translates, roughly, as: "The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference."

[354] Noting that, similarly to the EU, Germany also took inspiration from existing disclosure rules applicable to IP cases, see Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p. 16.

[355] Section 33 (g) (1) GWB. Defendants can also ask for disclosure from the claimant – Sec. 33 (g) (2) (1) GWB. Furthermore, those who may be asked to pay damages can bring a claim for disclosure not only when defending against a damages claim, but also when they have brought – as claimants – an action that no such claim for damages exists (i.e. a negative declaratory judgement) (see Sec. 33 (g) (2) (2) GWB). On the potential for such an action to be used as a delaying tactic by potential defendants, see Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p. 17.

[356] Noting that such an action is less costly than an action for damages, and that it suspends the limitation period (section 33 (h) (6) n° 3 GWB), see Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p. 16.

[357] Section 33 (g) (7) GWB.

[358] Under German law an injured party's damages also include the costs necessary to enforce its claim, and the reimbursement costs can then either be included in or offset against these costs. This means that this claim could be offset against the claim for costs of disclosure by the defendant. Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p. 17 finds that disclosure costs will only have an impact in cases where disclosure is being sought from third parties; otherwise, the costs will have to be borne by the infringer.

[359] Art. 283 bis a) of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

provide the reasons for why the evidence is necessary – by reference to the evidence to which the potential claimant already has access to.[360] Potential sanctions for not complying with a court order requiring disclosure include fines; the court deeming that the facts that the undisclosed evidence were supposed to prove are indeed proved; the disclosing party not being allowed to invoke legal exceptions or making counter-claims in the relevant judicial proceeding; and the costs of the proceedings being imputed onto the party that failed to comply with the disclosure order.[361]

10.1.2. Privileged Documents

215. In actions for competition damages, a large part of the information and evidence relevant to prove the case is likely to be commercially sensitive. Confidential information may be relevant for determining whether there has been an infringement (e.g. data on the market position of the defendant and his cost structure) or for determining the quantum of loss (e.g. pricing data of the defendant or third parties, or pricing strategies).[362] This poses significant challenges regarding the articulation of the right to damages, on the one hand, and the right to protect one's commercially sensitive information, on the other.[363] As noted by the European Commission: "*If addressees of a disclosure order were to be able to invoke a general confidentiality defence to block disclosure of any commercially sensitive information, the access to evidence that is essential for establishing the truth would often become practically impossible. A protection against disclosure without exception would almost inevitably lead to the loss of the damages action by the claimant*."[364]

216. Furthermore, all legal regimes contain evidentiary privileges which render certain types of documentary or witness evidence either inadmissible in civil proceedings or immune from compulsory disclosure. In English law, the most prominent of these privileges is legal professional privilege, specifically litigation privilege. This renders confidential communications that pass between lawyer and client, and between a lawyer and certain third parties, immune from the disclosure

[360] Art. 283 bis e) of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

[361] Art. 283 bis h) of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

[362] European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para. 122.

[363] This links to more general concerns about the diffusion of commercially sensitive information. A good example of this issue, which was covered above in Chapter 9 in more detail, regards information contained in infringement decisions. For the EU, see Article 30 of Regulation No 1/2003, pursuant to which, when publishing its decisions, the Commission must have regard to the legitimate interest of undertakings in non-disclosure of their business secrets; and Article 16(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), pursuant to which business secrets and other confidential information are not to be communicated or made accessible to third parties.

[364] European Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [SEC (2008) 404], para. 123.

obligation.[365] Another important form of privilege includes without-prejudice immunity, which renders communications between parties for the purpose of settlement negotiations inadmissible.[366] Under US law, attorney-client privilege protects communications between attorney and client for the purpose of securing legal advice. Most courts in the United States also offer a more limited protection for materials produced by the lawyer as part of the legal preparation of the case, creating a presumptive privilege for all materials "prepared in anticipation of litigation". Such material is discoverable only upon a showing that the party has substantial need of the information and cannot obtain it through alternative means.[367]

217. The balancing between preserving the confidentiality of some types of information and ensuring that claimants have access to the evidence necessary to bring a damages claim takes different forms depending on the jurisdiction. In the EU, the dominant method is related to the proportionality assessment required for disclosure mentioned in Section 10.1.1 above. Under the Damages Directive, one of the elements that must be taken into account by courts in the context of this proportionality assessment about whether to disclose information is: "*whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.*"[368] Furthermore, courts can resort to a range of measures to protect such confidential information from being disclosed during the proceedings.[369]

218. A good example of the rules applicable to confidential information can again be found in the Spanish transposition of the Directive.[370] Spanish law allows courts to use evidence containing confidential information when relevant to the case, with the exception of evidence covered by lawyer-client privilege. Courts shall balance the nature of, and the applicable provisions for the protection of the relevant confidential information. The court may also adopt measures to protect

[365] In order to fall within the ambit of this privilege such communications must come into being for the purpose of actual or anticipated legal proceedings. Such communications are however admissible if the client elects to waive the privilege or if the communication ceases to be confidential for whatever reason. See Oscar G. Chase et al. *Civil Litigation in Comparative Context*, p. 28.

[366] Except in costs-proceedings i.e., those proceedings following settlement or judgment that are concerned with determining the parties' costs liability; see Oscar G. Chase et al. *Civil Litigation in Comparative Context*, p. 29.

[367] Federal Rules of Civil Procedure 26(b)(3). See Oscar G. Chase et al. *Civil Litigation in Comparative*, p. 38.

[368] Damages Directive, Article 5 (3) (c). See, for an example from Spain, Art. 283 bis (a) (3) c) of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

[369] These "*include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.*" See Recital 18 of the EU Damages Directive.

[370] Art. 283 bis (b) of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

the confidentiality of the information, including not revealing sensible parts of evidence; holdíng closed hearings; limiting the number and type of people allowed to inspect the evidence, such as lawyers and experts subject to confidentiality duties; or order experts to prepare non-confidential, statistically aggregated summaries of evidence.

10.2. Access to Competition Enforcement File

219. Requests of access to a competition agency's file normally occur in follow-on actions that are initiated in parallel to or after a public investigation by a competition authority. Allowing a potential claimant easier access to public enforcement files can be a useful way to facilitate competition damages litigation, particularly as regards follow-on damage actions. The file of a competition authority can include useful information not only on competition enforcement, but also about the amount of damages caused by anticompetitive conduct and the causation link between the infringement and the damage.[371] On the other hand, there are reasons related to the protection of public enforcement that may justify restricting potential claimant's access to the agency's file. For example, access to file rules may treat evidence differently depending on whether it is confidential and non-confidential, or depending on whether the information was submitted as part of a leniency application or of settlement negotiations.[372]

10.2.1. General Rules

220. While the specific rules on disclosure vary across jurisdictions, it is common for claimants to have access to the competition agency's file but for that access to be limited as regards certain categories of information. The reasons to restrict access to evidence contained in the competition authority's file usually relate to the protection of ongoing investigations and of the effectiveness of public enforcement more generally.

221. In Australia, as a rule the ACCC will disclose cartel information contained in its file if a court or tribunal grants it leave. However, the ACCC may refuse to disclose information given to it in confidence if it relates to a breach, or possible breach, of a cartel prohibition ('protected cartel information') on the basis of various criteria. These criteria include the fact that the information was given to the ACCC in confidence, and the need to avoid disruption to national and international enforcement efforts. In the case of information provided by informants, the ACCC must also have regard to their protection and safety, and whether disclosure may deter informants from coming forward in future.[373]

222. The EU has adopted specific rules regarding information which is or was in the hands of a competition authority. In particular, the EU Damages Directive applies different disclosure rules to different categories of documents. While there is a general rule in favour of disclosure, the disclosure of some categories of

[371] OECD (2015) *Relationship between Public and Private Enforcement*, p. 14.

[372] OECD (2015) *Relationship between Public and Private Enforcement*, p. 27; EU Damages Directive, Recitals 32-33.

[373] Australian Consumer and Competition Act, s.157(1B).

information is restricted. To begin with, some documents in a competition agency's file cannot be disclosed to potential claimants at all; this is particularly the case of leniency statements and settlement submissions.[374] Secondly, documents prepared for the purpose of the investigation and withdrawn settlement submissions cannot be disclosed until the competition investigation is closed.[375] Lastly, pre-existing materials – i.e. documents which exist irrespective of the proceeding of the competition authority, including written agreements/contracts, texts of e-mails, minutes of meetings, etc. – can be disclosed because, in theory, this evidence could be discovered by the claimant. Therefore, the EU Damages Directive states that court can order the disclosure of pre-existing materials at any time in actions for damages, even if the pre-existing documents are subsequently included in the materials submitted to the competition agency by a leniency applicant.[376]

10.2.2. Leniency Documents

223. To ensure an effective right to compensation in follow-on actions, claimants should have access to the necessary evidence to prove their claim. Most of this evidence will already be in the possession of the competition authority. However, an unlimited and unregulated access to evidence in the competition authority's file may unduly affect the effectiveness of public enforcement, especially in relation to important enforcement tools like leniency programmes.

224. Leniency programmes have radically changed the ability of competition authorities to detect and investigate cartel activity. The rationale for offering

[374] Damages Directive, Article 6(6). According to Wouter Wils, the rationale for the absolute bar on disclosure of these statements is that : "*[t]he corporate statement would not have existed (and could thus never have been obtained by the competition authority, either through the use of its compulsory investigation powers or from an informer or any other source, nor ever have been obtained by the damages claimant, through discovery or any other means), but for the cartel participant's voluntary act of making a leniency application, thereby facilitating the discovery and punishment of the cartel by the competition authority, as well as subsequent follow-on actions for damages. In such a situation, it does not appear unfair to deny damages claimants the right to obtain the corporate statement, whereas the protection against disclosure of corporate statements in private actions for damages may make leniency programmes more attractive, thus facilitating public enforcement for the purpose of deterrence and punishment.*" See Wouter Wils 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) World Competition 32 (1), p. 19.

[375] Article 6(5) of the EU Damages Directive. This category includes: (i) information that was specifically prepared for the proceedings brought by a competition authority; (ii) information the competition authority has drawn up and sent to the parties; and (iii) withdrawn settlement submissions. This material is protected from disclosure requests until the competition authority has adopted a decision or otherwise terminated the proceedings. Of course, nothing prevents voluntary evidence disclosure by leniency applicants and other defendants after the completion of the competition authority's investigation, if they wish to do so in the context of settlement discussions with private claimants. See OECD (2015) *Relationship between Public and Private Enforcement*, p. 27-29; Sebastian Peyer 'Compensation and the Damages Directive', p. 93.

[376] Articles 2(16) and 6(6) of the EU Damages Directive,. This was adopted closely in Art. 283 (i), (j) and (k) of Ley 1/2000, de 7 enero, de Enjuiciamento Civil.

immunity to a cartelist who decides to break ranks, report the cartel to the authorities and co-operate by providing help to convict the other cartel members, is that the benefits for society derived from such co-operation outweigh the public interest in punishing all the participants in a cartel. These benefits include increased detection rate, destabilising effects on other cartels, cost savings in investigations and prosecutions as a result of the applicant providing evidence directly from within the cartel, the saving of litigation costs, and so on. Taken together, these benefits result in greater deterrence of cartel conduct by the competition authority without the need for corresponding resource investment. For this reason, it is extremely important that the design of the private enforcement system takes into account the fundamental need to preserve the effectiveness of leniency programmes. [377]

225. Disclosing evidence included in the file of a competition authority, and in particular of documents submitted by leniency applicants, may affect the incentives of cartelists to apply for leniency because such disclosure will increase their exposure to subsequent damages actions. If the competition authorities have no control over the scope of the disclosure of leniency materials, the leniency applicant may become an easy target for private claims and be placed in a worse position than other members of the cartel who have not applied for leniency. In order to preserve a strong and effective public enforcement regime, it is necessary to consider how to maintain the balance between preserving the integrity of leniency programmes (and of settlement programmes) and ensuring that claimants can obtain as much information as possible (including from the competition authorities). [378]

226. This balance has been settled in Europe by the Damages Directive, which prevents the disclosure of leniency documents. Prior to the adoption of the Directive, however, the situation was different. In a case dealing with a request to access documents submitted by a leniency applicant, the European courts decided that, in the absence of a binding EU regulation on the issue, it was for the Member States to enact and apply national rules on access to leniency documents, leaving national judges to decide whether to disclose leniency materials 'on a case-by-case basis', balancing the interest pursued by public and private enforcement in each specific instance.[379] While the court provided some guiding principles on how to conduct this balancing,[380] the effect was the development of different approaches by national courts. In Germany, the prevailing position was

[377] OECD (2015) *Relationship between Public and Private Enforcement*, p. 23.

[378] OECD (2015) *Relationship between Public and Private Enforcement*, p. 24.

[379] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECR(2011) I-5161. See also Case T-437/08 *CDC Hydrogene Peroxide*, [2011] ECR II-8251.

[380] Namely, that: (i) Member States must ensure that the rules which they establish or apply do not render the implementation of EU law impossible or excessively difficult; (ii) the national court must balance the principle of effective justice in damages claims and the need to protect the effectiveness of leniency programmes; (iii) it is necessary to weigh on a case-by-case basis the opposing interests of facilitating disclosure of information in order to exercise the right to compensation versus the public interest of uncovering cartels and preserving the attractiveness of leniency programme. See OECD (2015) *Relationship between Public and Private Enforcement*, p. 24.

to refuse access to the file on the grounds that refusal to provide access to the leniency application would not make it 'practically impossible or excessively difficult' to obtain compensation for damages suffered.[381] In the UK, on the other hand, the courts opted instead to require a limited disclosure (i.e. with certain passages redacted) of the confidential version of an infringement decision adopted by European Commission.[382] Such differences in approach will be eliminated once the Directive – and its rules on absolute prohibition to disclose leniency documents, with the exception of pre-existing materials –[383] is implemented.[384]

227. In Korea, as a general rule courts can order the KFTC to disclose documents in relation to private antitrust damage claims.[385] However, it was not clear if this general disclosure rule extended to leniency information. Another doubt was whether this obligation to disclose existed only when the KFTC was the defendant in an administrative appeal against one of its decisions, or whether it also applied to claims for damages. To deal with these questions, in 2007 Korea introduced rules safeguarding the confidentiality of leniency materials. In principle, the identity of the leniency applicant and any information and materials submitted under the leniency programme should not be disclosed to third parties.[386] Exceptionally, however, the KFTC may disclose the identity and/or material submitted by the leniency applicant to other persons if either the leniency applicant agrees or if the information is necessary to file or carry-out a lawsuit in relation to the case concerned.[387]

10.2.3. Settlement Documents

228. In a number of jurisdictions, the competition authority has the power to settle infringement proceedings. Settlements have many advantages. They allow competition authorities to sanction anticompetitive conduct while saving time and resources that would have to be spent in producing an infringement decision and, potentially, defending it in court.

[381] See Amtsgericht Bonn (Local Court Bonn), decision of 18 January 2012, case No 51 Gs 53/09 (Pfleiderer); Oberlandesericht Düsseldorf (Düsseldorf Appeal Court), decision of 22 August 2012, case No B-4. Kart 5/11(OWi) (roasted coffee).

[382] High Court of Justice judgment of 04 April 2012, case No HC08C03243 *(National Grid v ABB Limited*). The National Grid case concerned a long-running cartel in the gas-insulated switchgear market. In 2007, the European Commission fined Siemens, ABB, Alstom, Areva and others €750 million, although some of the fines were later reduced by the General Court. National Grid brought a damages claim at the High Court in November 2008, seeking over £108 million in overcharges plus interest. The parties ultimately decided to settle, and the litigation dissolved in June 2014.

[383] See Chapter 10.1.2 above, and Art. 2(16) and 6(6) of the EU Damages Directive.

[384] Whether this will change the situation in the UK will depend on the outcome of the current Brexit negotiations.

[385] Article 56-2 MRFTA.

[386] Article 22-2(2) MRFTA.

[387] Article 35 Enforcement Decree of MRFTA.

229. The use of settlement proceedings by competition authorities has nonetheless been the object of criticisms. One that concerns here is that settlement decisions are usually quite short, and do not contain sufficient information to significantly assist potential damages claimants in pursuing their claims. As a result, claimants would often like to gain access to settlement documents – which can contain additional evidence that will allow them to sustain a claim for damages. However, it is much less likely that infringers will settle with a competition authority if they know that their settlement documents could be disclosed to potential damages' claimants – which would go against the public enforcement goal of facilitating competition enforcement. As with leniency documents, considering whether to disclose settlement submissions requires balancing between facilitating access by claimants to evidence and protecting the mechanisms of private enforcement.

230. In Europe, the balance was set in favour of public enforcement, and settlement submissions in the competition authority's file can never be disclosed. The exception is settlement submissions which have been withdrawn, which can nonetheless only be disclosed once the public enforcement case is over.[388]

10.3. Expert Evidence

231. The role of economics and economists in establishing the content of competition laws has never been greater than it is today. For much of the last generation, courts and competition authorities have increasingly turned to economic principles and commentary for the ideas needed to shape the content of modern competition laws, regulations, and guidelines.[389] In the increasingly complex litigation world of competition law, courts often need the assistance of economic "experts" in order to acquire specialised information which is otherwise unavailable to them. The need for expertise is the consequence of an epistemic asymmetry between judicial decision-makers (judges and/or jury in the US system) and "experts".[390]

232. The role of experts is different from all other witnesses, because the expert witness is allowed to testify not only on matters of facts which he had personally witnessed but also on inferences from facts or classes of facts that others may have reported and which usually fall outside the scope of a judge's knowledge.[391] Their role is to summarize knowledge that it would be difficult, long and costly for the judge or the jury to acquire on their own; and to provide

[388] Article 6(5) and (6) of the EU Damages Directive. See also OECD (2015) *Relationship between Public and Private Enforcement*, p. 6.

[389] John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases' (2005) Cornell L. Rev. 90 617, p. 618-619; Andrew Gavil 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System', p. 185.

[390] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation' CLES Working Paper 1/2009, p. 8, available at https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles_1_2009

[391] John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases', p. 626.

insights that assist judges in understanding the facts of the case and the possible implications of their interpretative choices.[392] In the field of competition law, methods implemented by economic experts may vary from simple mathematics or basic economic theory to very complex statistical and econometric tools or sophisticated theoretical argumentations which may not be fully understood by non-economist adjudicators such as judges and juries.[393] But even in the face of complex and potentially contradictory expert evidence, it is ultimately for the judge to assess and evaluate the evidence – in accordance with the general rules on the standard of proof, which are discussed in greater detail in Chapter 11.4.1 below.

233. Nonetheless, there are differences in the relation between judges and experts across jurisdictions which should be pointed out.[394] In common law systems, judges act as "gatekeepers" for expert testimony, deciding what is admissible based on standards developed both by case law and statutory law, and ultimately deciding on the matters affected by expert evidence. In civil law countries, for the most part judges invite expert evidence and must then decide on the value of any expert report within the context of the case. In this context, civil law courts are expected to fully justify their reasoning on the scientific matter in issue by explaining to what extent, and why, reliance has been placed on any given expert opinion.[395]

234. Despite this role for judges, the relation between the judge and the expert as regards expert evidence has been compared to that of a principal (the judge) and an agent (the expert).[396] As in any such relationship, there are challenges in aligning the interests of the agent and the principal. Three types of interest that

[392] John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases', p. 627; Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 10, 12.

[393] Juan David Gutiérrez-Rodríguez 'Expert Economic Testimony in Antitrust Cases: A Comparative Law and Economics Study' (2009) International Law, Revista Colombiana de Derecho Internacional 14 221, p. 224.

[394] See Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States no. 8.1. ('*The expert opinion is not binding on the court or on the parties. The court evaluates it freely. The court must verify and determine whether the expert opinion is objectively convincing. In so doing, the court has to consider all objections that have been made against the expert opinion by the parties*) and.8.2 ('*Basically the expert opinion should have the same probative value as other evidence. If the expert opinion is not meant to function as a piece of evidence in the lawsuit but the statements are only meant to help the actual understanding of the judge, the expert's statements have no mandatory binding effect. The judge has the possibility to diverge from the expert's presented position and understanding if he/she has reasonable reasons to do so.'*).

[395] World Bank (2010) 'Comparative Study on Expert Witnesses in Court Proceedings' Report no. 62832-TR, p. 3, 49-53; European Commission for the Efficiency of Justice (CEPEJ) 'Study on the role of experts in judicial systems of the Council of Europe Member States' CEPEJ-GT-QUAL(2014)2Rev, p. 4.

[396] Juan David Gutiérrez-Rodríguez 'Expert Economic Testimony in Antitrust Cases', p. 225.

may cause some form of expert bias have been identified: personal interests, financial interests and intellectual interests.[397]

235. The amounts at stake and the complexity of competition cases have led to the development of an industry of economic consultants. The development of the field of forensic expertise and the professionalization of the role of expert witnesses, with the establishment of multinational corporations specialising in economic consulting, underlines the ongoing transformation of the role of economic expert witnesses and the increased financial pressure on experts to promote their clients' position.[398]

236. Furthermore, it is well known that different approaches to data analysis may lead to different conclusions, depending on the researcher's underlying assumptions and strategies.[399] This arises from the need to address a number of challenges. The (lack of) availability and reliability of information used in the assessment of the evidence is the first problem that an expert faces. The challenge posed by informational gaps created by this obstacle is often overcome through reliance on assumptions. Secondly, when data is available a theoretical model has then to be chosen to analyse it. Different models may render different results with the same data. However, due to the lack or "professional consensus" on many issues relevant for competition analysis, two completely contradicting opinions about the same facts may be legitimately advanced. Lastly, econometrics is not a neutral technique since it depends on the economists' decisions about the kind of data that should be used and about the model and methodology that should be applied. While the use of assumptions and the deployment of theories is a common scientific practice, it means that it is important for courts to identify underlying assumptions and methodological issues in order to be able to assess the experts' theories, methods and conclusions.[400]

237. However, because of the information asymmetry problem, a judge may not able to assess on its own, the veracity and plausibility of each of the economic theories and arguments presented.[401] The challenge, in such a scenario, is two-

[397] Déirdre Dwyer *The Judicial Assessment of Expert Evidence* (CUP, 2008), p. 163. The risk of intellectual bias should not be underestimated. As noted by Learned Hand 'Historical and Practical Considerations regarding Expert Testimony' (1901) Harvard Law Review 15(1) 40, p. 53: '*Human nature is too weak [to remain neutral when presenting a case for a side]; I can only appeal to my learned brethren of the long robe to answer candidly how often they look impartially at the law of a case they have become thoroughly interested in, and what kind of experts they think they would make, as to foreign law, on their own cases*'.

[398] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 17.

[399] Erica Beecher-Monas *Evaluating Scientific Evidence* (CUP, 2007), p. 50. For a detailed examination of how this happens in practice, see Daniel Rubinfeld 'Econometrics in the Courtroom' (1985) Columbia Law Review 85 1048, p.1055-1078.

[400] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 56; Juan David Gutiérrez-Rodríguez 'Expert Economic Testimony in Antitrust Cases', p. 227-228

[401] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 63.

fold: (i) institutional, as regards the alignment of incentives of judges and experts; and (ii) substantive, as regards the assessment of economic expertise into the decision.

10.3.1. Institutional Solutions

238. There are different institutional frameworks that have been adopted to address the asymmetry problem raised by economic expertise in courts. One can distinguish between approaches based on the adversarial process – usually found in common law jurisdictions – and approaches focused on neutral experts, which are typical of civil law jurisdictions. [402]

(i) Subjecting Expert Witnesses to Adversarial Proceedings

239. The appointment of expert witnesses by the parties gives rise to three problems: an increase in the private costs of litigation because of the appointment of experts; an increase in the social costs due to the increasing length of litigation; and the limited independence and reliability of partisan expertise in relation to court-appointed experts.

240. Since the first cost will be partially incurred when deciding whether to bring litigation, and the second is also present when experts are court-appointed, the main issue here is with the lack of independence of the experts themselves.[403] However, if this partiality were to occur it could be balanced by the presence of two opposing experts, the same way cases are balanced by the arguments of opposing counsel. The risk in this scenario is that the judge will ignore their expertise and decide the case using a different approach or on the basis of non-expert intuition. This risk is particularly high for economics – and particularly competition related economics. As noted by Posner: "*the use of economic experts is more problematic is in the areas of economics on which there is no professional consensus. This used to be and to some extent still is the situation with regards to antitrust economics*."[404] Similar concerns have been expressed in England, where a Report prepared in anticipation of a reform of civil procedure noted that: "*(m)ost of the problems with expert evidence arise because the expert is initially recruited as part of the team which investigates and advances a party's contentions and then has to change roles and seek to provide the independent expert evidence which the court is entitled to expect.*"[405]

(ii) Case Management of Expert Witnesses

241. These concerns with impartiality have led to the development of techniques of case management on both sides of the Atlantic.

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[402] Id., p. 65.

[403] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 69.

[404] Richard A. Posner 'The Law and Economics of the Economic Expert Witness' (1999) Journal of Economic Perspectives 13(2) 91, p. 96.

[405] Lord Woolf *Access to Justice, Interim report to the Lord Chancellor on the civil justice system in England and Wales, June 1995*, chapter 23, para 5.

242. In the US, this was achieved through rules on the admissibility of expert evidence. According to Rule 702 of the Federal Rules of Evidence: *"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*" The Rule can usefully be divided into two parts. The first half defines who may testify as an expert, that is, who is qualified to offer opinion testimony. The second half sets forth three specific criteria for evaluating whether an expert's proffered testimony is relevant and reliable, and therefore admissible.[406]

243. This drafting reflects the decision in *Daubert*, where US Supreme Court interpreted a previous version of this rule as requiring that scientific expert testimony be grounded in the methodology and reasoning of science.[407] Courts were thus allowed to control the admissibility of evidence on the basis of a number of factors, namely: (i) whether the evidence is provided by a qualified expert, i.e. someone with sufficient knowledge, skill, experience, training or education;[408] (ii) whether the evidence is reliable. The evidence must be more than "subjective belief or unsupported speculation" and, if scientific, "it must be derived by the scientific method". If technical, courts will need to develop criteria of reliability appropriate to each area of expert testimony; [409] (iii) whether the evidence is relevant and fits the facts. Expert testimony should be sufficiently connected to the facts of the case to ensure that it will be able to assist the jury in resolving the legal dispute. In other words, expert evidence must be relevant to the resolution of issues relevant to the case. The justification should be fact-based and allow for an extensive analysis of economists' models/[410]

244. Furthermore, in *Daubert*, the Supreme Court made clear that the judge should make the threshold determination regarding whether certain scientific knowledge would indeed assist the trier of fact in the manner contemplated by Rule 702. The Supreme Court established a multifactor inquiry that looks at a number of factors that should be taken into account for the purpose of determining whether expert evidence is admissible. A first factor is whether a

[406] Andrew Gavil 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System', p. 190

[407] *Daubert v.Merrell Dow Pharm, Inc*, 509 U.S. 579, at 590 (1993). This should be coupled with *Kumho Tire Company, Ltd & al. v. Patrick Carmichael* 526 U.S. 137 (1999), at 152, which extended the "general gatekeeping obligation" of the judges not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialised knowledge (including economic expertise).

[408] Noting that in most antitrust cases this has not been challenged, but that nonetheless there are cases of proposed experts being disqualified, see John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases', p. 643-645.

[409] *Kumho Tire Company, Ltd & al. v. Patrick Carmichael* 526 U.S. 137 (1999), at 141.

[410] Andrew Gavil 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System', p. 188-190; Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 85.

theory or technique is "scientific knowledge". Second, the court should ascertain whether the theory or technique has been subjected to peer-review and publication. Third, the court should ordinarily consider the known or potential error rate of the relevant models and techniques used to support expert evidence. Fourth, the court should establish whether the theory or technique has "general" or "widespread" acceptance in the relevant scientific community.[411]

245. In the UK, the objective of the "case management" system is to increase the impartiality of the process of expertise by creating instruments that attempt to loosen the links that exist between the expert witness and the parties. Two main mechanisms have been developed in this regard:

- Hot Tubbing – The "hot tub" procedure was developed by the Australian Competition Tribunal in the 1970s. It aims to maintain the basic principles of the adversarial system, while simultaneously allowing for direct interaction among experts. Under this procedure, experts submit written statements after they have received written non-expert evidence but prior to the oral proceedings. After each expert has prepared their evidence, there may be a pre-trial order that they confer, without lawyers, to prepare a joint report on the matters about which they agree and those on which they disagree, giving short reasons as to why they disagree. They may then be called upon to participate in a short seminar or debate before the Tribunal. First, each expert will be asked to identify and explain in their own words how they perceive the main issues. After that, each can comment on the other's exposition. Each may ask then, or afterwards, questions of the other about what has been said or left unsaid. During these "concurrent evidence sessions", the judge, and not the lawyers of the parties, has the control: there is no cross-examination by the lawyers. At a second stage of the procedure, the lawyers take control and they may cross-examine the expert witnesses. The process attempts to emulate the environment of scholarly scientific debate in a colloquium, rather than that of the conventional adversarial proceedings.[412]
- Appointment of Joint Experts – If the issue is not contentious, the parties are encouraged to use a single joint expert. Where the instructing parties cannot agree who should be the expert, the court may either select the expert from a list prepared or identified by the instructing parties or devise a different procedure to select the expert. The procedure makes possible the interaction between experts: *"(t)he court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to identify and discuss the expert issues in the proceedings and to where possible, reach an agreed opinion on those issues*". The Court keeps a dominant role in the process: first, it specifies the issues the experts should discuss; second, it directs the discussion between experts, who

[411] *Daubert v.Merrell Dow Pharm, Inc*, 509 U.S. 579 (1993) , at 593-594.

[412] In reality, there seem to be multiple versions of hot tubbing in practice. A good overview can be found in the Civil Justice Council 'Concurrent Expert Evidence and 'Hot-Tubbing in English Litigation Since the Jackson's Reforms – A Legal and Empirical Study' (2016), available at https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-civil-litigation-review-hot-tubbing-report-20160801.pdf

should complete a statement showing to the Court the issues they agree and the issues and reasons they disagree. However, the reform maintains elements of the adversarial procedure. The content of the discussion between the experts cannot be referred to at the trial unless the parties agree and, even: "*(w)here experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement*."[413]

(iii) Appointment of Court Experts

246. A neutral, court appointed expert will mitigate the risk of bias that undermines the hiring of expert witnesses by the parties. In the US, for example, Federal Rule of Evidence 706 allows a court "on its own motion or on the motion of any party" to appoint experts "of its own selection" or "agreed upon by the parties" to assist in evaluating expert testimony. The typical role of this expert is to assist the trial judge in evaluating the expert testimony proffered by the parties. The court-appointed expert gathers no data, performs no study, and may not even offer any final opinion on the economic merits of the case. Her role will be to evaluate the data-gathering, studying, and opinions of the party experts.[414]

247. Similarly, in the EU the European courts may appoint experts under their rules of procedure "at any time…" and to "any individual, body, authority, committee or other organisation it chooses…".[415] The exclusive use of court appointed experts is common to the inquisitorial systems of continental Europe. For example, the French *code de procedure civile* of 1975 provides only for court-appointed experts (it is however possible for the parties to use shadow experts); the German *Zivilprozessordnung* of 1933 provides only for court experts; and the Italian *Codice di procedura civile* of 1940 gives the opportunity to the Court and to the parties to appoint their own expert (or *consulenti*).[416]

248. Court-appointed experts have the incentive to present a balanced position that would rely on principles and views for which there is a broad consensus in the community of academic economists. The main shortcoming of this approach is that it may preclude the court from having access to multiple valid views, even if this can be mitigated by the appointment of a panel of experts or through the intervention of the parties.[417]

[413] Parts 35.7 and 37.12 CPR. See Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 72.

[414] Andrew Gavil 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System', p. 202.

[415] Article 25 of the Statute of the Court of Justice of the European Union (C 83/210).

[416] Déirdre Dwyer *The Judicial Assessment of Expert Evidence* , p. 184-197.

[417] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 73-75. This procedure raises questions regarding the selection of experts, but that is beyond the scope of this Report.

(iv) Developing Judicial Expertise

249. Increasing recourse to economic analysis in competition has led to a focus in endowing courts with internal sources of economic expertise. This can take a number of forms:

- One approach is to allow courts to appoint assessors or experts to advise them. In the UK, courts have the authority to appoint an assessor, with the aim to assist the court in dealing with the matter of her expertise and to "educate the judge".[418] For courts that benefit from clerking services, a related option would be to recruit economists as judicial clerks.
- A possibility currently foreseen in the EU is to empower courts to obtain support and guidance from competition authorities.[419]
- Yet another approach is the appointment of economists to the bench as judges.
- A related approach is to create or use a specialist competition court to hear damages claims. This was a solution recently adopted in the UK, where the CAT has competence to hear damages claims related to competition law infringements. This approach is also in place in Chile, Chile that has a specialized Competition Tribunal (of judiciary nature) composed of five Justices: three lawyers (with antitrust background) and two persons with undergraduate or graduate education in economics.[420]
- It may be possible to constitute a specific competition law section at the generalist court or proceed by "opinion specialization", i.e. select the judges that will sit in competition law cases only from those judges with expertise in competition law.
- Another approach consists in the systematic training of judges in the analytical methods of competition law economics. This seems to be the situation in France, where appeals from the national competition authority are brought to a single chamber of the court of appeal. In addition, there is a specific number of court of appeals hearing competition cases and the judges of these specialized chambers receive training in competition law and economics

[418] Rule 35.15 CPR

[419] Art. 15 of Regulation 1/2003. It is also foreseen that competition agencies may intervene in judicial proceedings concerning competition matters without being expressly asked to do so.

[420] Article 6 of the Competition Act, Decreto Ley 211 de 1973 [Chile].

11. Causation

11.1. Introduction

250. Causation has received remarkably little attention in the context of competition law. Yet, causation can be one of the most relevant issues in competition litigation, both when determining whether an infringement occurred (e.g. when establishing whether a conduct or practice caused anticompetitive effects), and whether loss (and what amount of loss) was caused by a competition infringement.

251. In law, causation has mainly explanatory and attributive functions. Causation is explanatory insofar as it is concerned with explaining how some event or state of affairs came about; it is attributive because it is used to assign liability.[421] This dual function may help explain why the criteria for the existence of causal connection in law fall into two classes. A first class of criteria focuses on what is commonly known as factual causation – i.e. the identification of the causally relevant conditions minimally sufficient from an empirical standpoint for an outcome to occur.[422] A second class of criteria are concerned with the specific features that a cause must possess in relation to the consequence in order for that causal connection to be recognised in legal proceedings: this is known as causation in law.[423] Taken together, causation in fact and causation in law delimit the scope of legal responsibility for certain acts.[424] The distinction between causation in fact and in law is a common one across the world.[425]

252. Causal relationships can be extremely complex to establish in practice. In the physical sciences and in economics, it is not disputed that causation can be: (i) multivariate, i.e. an event may have multiple causes; (ii) stochastic, when random factors influence the outcome of some event or conduct; (iii) dynamic, if the relevant variables have a dependency relationship with each other over time; or (iv) mutually dependent, if X causes Y but Y also causes X. The economic

[421] Antony Honore 'Causation in the Law' The Stanford Encyclopedia of Philosophy (Winter 2010 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2010/entries/causation-law/.

[422] This builds on John Stuart Mill's theory of causation developed in his *A System of Logic: Ratiocinative and Inductive* (CosmoClassic 2008) (1843), which in turn builds on Hume – see Richard W. Wright 'Causation in Tort Law' (1985) California Law Review 73 1735, p. 1774; Richard W. Wright 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) Iowa Law Review 73 1001, p. 1019-1020.

[423] Antony Honore, 'Causation in the Law'; Michael S. Moore *Causation and Responsibility* (OUP, 2009). p. 83-84.

[424] Ioannis Liannos 'Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe' (2015) Yearbook of European Law 1, p. 9.

[425] Cees Van Dam *European Tort Law* (OUP, 2013), p. 3.

analysis of causation can unearth all these features as regards the relationship between prices, antitrust violations, and other price determinants.[426]

253. In the economic literature, it is common for causation to be established on the basis of probabilistic assessments and for causative investigations to be framed in terms of a search for regularities. However, in law the analysis of causation is often conducted in terms of an "all or nothing" question: either the defendant caused the damages or not. While this may be inappropriate from a strictly explanatory standpoint, it is a natural consequence of the attributive function of causation in law: while statistical regularities may be sufficient – or even necessary – to establish the causation between economic events, tort law requires the concrete instantiation of a specific causal link between two autonomous events.[427]

254. The key challenge in legal proceedings is to prove causation to the requisite legal standard. In most jurisdictions, the key legal test for identifying factual causation is the "but-for" test – i.e. causation will be established only if a loss would not have occurred without an infringement taking place. This is a test of causation that focuses on the 'necessity' of the infringement to the existence of a loss. In recent years, however, legal systems around the world have had to deal with issues where this sort of analysis is insufficient.[428] The paradigmatic examples of this are cases related to the role of exposure to asbestos in the development of certain types of cancer. In these cases, while it was evident that exposure to asbestos significantly increased the risk of developing cancer, courts were nonetheless unable – in light of available scientific evidence – to establish in individual cases that cancer had been caused by exposure to asbestos or, in the case of multiple instances of exposure, which event should be deemed to have caused cancer. As a result, in many jurisdictions tort law relaxed its tests of causation to allow for the assignment of liability reflecting concepts of stochastic causality and proportional damages – i.e. the claimant only needs to show that some damage was caused by the hazardous activity to a certain group of people, which lowers the legal standard for proving that each individual's loss was caused by the hazardous activity.

255. Once causation in fact is established, a subsequent test of causation in law is then applied. Legal causation might be characterized broadly as a class of legal

[426] Hanns A. Abele, Georg E. Kodek & Guido K. Schaefer 'Proving Causation in Private Antitrust Infringement Cases' (2011) Journal of Competition Law & Economics, 7(4) 847, p. 862.

[427] Jen Hellner 'Causality and Causation in Law' *in* Aulis Aarnio, Robert Alexy and Gunnar Berholtz (eds.) *Justice, Morality and Society: A Tribute to Aleksander Peczenik* (1997, Lund) 111, p. 112; Richard Wright 'Proving Causation: Probability v. Belief' in R. Goldberg (ed.) *Perspectives on Causation* (Hart, 2011) 195; Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 9. Statistical connections can however be used to prove causal connections in individual cases, and there is nothing preventing the law from adopting statistical connections as sufficing to establish liability – particularly in risk offences.

[428] This is in addition to lively debates about how best to deal with issues of overdermination (i.e. multiplicity of individually necessary, but only jointly sufficient causes) and of joint determination (i.e. multiplicity of individual sufficient causes).

doctrines that limit liability once a factual causal nexus has been established.[429] Some (factual) consequences of an illegal conduct are 'too remote' from the illegal act, and in these cases the imposition of liability may be thought to be inappropriate. In these cases, one may need to assess whether the causality link should be deemed to have been broken for legal purposes – e.g. by the intervention of an abnormal factor or coincidence – or whether the law excludes the identification of certain classes of events as being causative. For example, a cartel may have caused increased fuel prices, and this increased price may have been the reason why someone decided to take a bus to work instead of driving her car. If that bus gets into an accident and the person suffers physical injuries, the cartel can be said to be a factual cause of that person having suffered injuries. However, it will generally be inappropriate to make the cartel members legally responsible for those injuries. Causation in law prevents this from happening by asking whether a particular event "broke the chain of causation", or whether the causation relationship was "proximate", 'adequate', 'direct', 'foreseeable' or 'too remote'.[430] Beyond the scope of pure causative assessment, policy reasons may operate to limit legal assessments of causality for reasons external to considerations related directly to the existence of causal connections. Lastly, rules concerning the existence of presumptions or the allocation of the burden of proof may also introduce policy considerations in the assessment of causation in fact, eventually operating as alternatives to legal causation tests.[431]

11.2. Causation in Competition Cases

256. Even if a competition infringement is established, this does not necessarily mean that it caused damages to the claimant. A clear distinction should be made between a competition law infringement as such and its economic impact. For example, price fixing is illegal under antitrust law but it may be ineffective in some cases or during some periods of time. Hence, it remains up to the claimant to prove that he suffered loss as a result of that specific instance of price fixing.[432] As a result, some of the main goals of claimants in competition damages cases – and often the only goals, if one is considering a follow-on claim on an infringement decision binding on the court – are to prove that the competition violation caused damages, and to establish the extent of those damages.

257. It is in tort law that one finds the basic tests for proving causation and estimating damages, and the applicable rules on burden and standard of proof. Under tort law, there is a clear distinction between proving the existence of

[429] Alex Broadbent, 'Fact and Law in the Causal Inquiry' (2009) Legal Theory 15(3) 173, p. 184.

[430] Simon F. Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin Tort Law* (6h ed., Oxford: University Press, 2008), p. 245; Antony Honore 'Causation in the Law'.

[431] Antony Honore 'Causation in the Law'; Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 15-16.

[432] Hanns A. Abele, Georg E. Kodek & Guido K. Schaefer 'Proving Causation in Private Antitrust Infringement Cases', p. 851.

damages caused by a competition infringement, and quantifying their amount.[433] However, it is common for the literature on competition damages to deal with the quantification of damages without explicitly considering causation as an autonomous issue.[434] It is clear that a number of methods developed in the literature on the quantification of damages for antitrust infringements are also useful for the analysis of causation. These methods seek to identify the relationship between prices and their determining factors. As a result, an analytical overlap exists between the analysis of causation and the quantification of damages – as is evident from our analysis of economic methodologies in Chapter 13 below. However, causation and quantification are different issues, that should be addressed separately in competition damages claims.[435]

258. Proving that an infringement caused harm is often a difficult and complex exercise[436] – and the difficulty may be greater or lesser depending on the evidentiary regime in place. Proving causation usually relies on the identification of a counter-factual world which servs to demonstrates that, but for the infringement, the claimant would not have suffered loss. For example, in the US a party that is entitled to damages can recover a loss measured by the difference between her actual position and the position she would have been in 'but for' the antitrust violation. Thus, based on the premise that the antitrust infringement did not occur, a hypothetical "but-for world" has to be constructed and compared to the position the plaintiff is actually in. In a standard price-fixing case, the measure of damages is *"the difference between the price actually paid by the [plaintiff] on the contracts and the price it would have paid absent the conspiracy*."[437] In Europe,

[433] *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1982).

[434] As noted in Hanns A. Abele, Georg E. Kodek & Guido K. Schaefer 'Proving Causation in Private Antitrust Infringement Cases', p. 848. See Emily Clark, Mat Hughes & David Wirth 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Analysis of Economic Models for the Calculation of Damages' (Aug. 31, 2004), available at http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf; Jonathan B. Baker & Daniel L. Rubinfeld 'Empirical Methods in Antitrust Litigation: Review and Critique' (1999) Am.L.&EconRev. 1 386; James E. Brander & Thomas W. Ross 'Estimating Damages From Price Fixing' (2006) Can. Class Action Rev. 3 335; Maarten Pieter Schinkel 'Forensic Economics in Competition Law Enforcement' (2008) J. Competition L. & Econ. 4 1; John M. Connor 'Forensic Economics: An Introduction With Special Emphasis on Price Fixing' (2008) J. Competition L. & Econ. 4 31; Theo van Dijk & Frank Verboven 'Quantification of Damages' in Issues in Competition Law and Policy 2331 (W. Dale Collins ed., Am. Bar Ass'n Publications in Antitrust 2006); Jeffrey H. Howard & David Kaserman 'Proof of Damages in Construction Industry Bid-Rigging Cases' (1989) Antitrust Bull. 34 359; and Peter O. Steiner 'Quantitative Methods in Antitrust Litigation' (1984) Law & Contemporary Problems 4669.

[435] Hanns A. Abele, Georg E. Kodek & Guido K. Schaefer 'Proving Causation in Private Antitrust Infringement Cases', p. 849, 867.

[436] As demonstrated by *Arkin v Borchard Lines Ltd* (No 4) [2003] EWHC 687 (Comm), *Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trade Intervening)* [2003] EWHC 1510 (Ch) and *Enron v EWS* [2009] CAT 36, all of which were damage actions which failed because claimants were unable to establish 'but for' causation.

[437] *New York v. Julius Nasso Concrete Corp*, 202 F.3d 82, 88.

similar principles apply. The goal is to compensate victims for competition law infringements; injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. Actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of an infringement, minus the amount of passing on that may have occurred.[438]

259. While counterfactuals seem to provide a solid basis to identify causal effects, they are extremely difficult to apply in practice. Counterfactual propositions consist of initial conditions (the counterfactual antecedent), hypothesized consequences in the but-for world (the counterfactual consequent), and a theory or causal path that explains the linkage between the antecedent and the consequent. In order to be plausible, it is often held that counterfactuals need to be both realistic and reflect minimal changes to the world.[439] These conditions, however, are in tension with one another. A counterfactual is likely to be more relevant if it involves as few changes as possible to the real-world situation – the so-called 'minimal-rewrite rule'. As a rule, this minimum change is the illegal conduct: i.e. the only difference between the actual and counterfactual world is that in the counterfactual world the defendant engaged in legal behaviour.[440] However, this is not as simple as it sounds. Saying that a conduct is illegal is not the same as determining the threshold at which conduct becomes illegal: depending on this threshold, different counterfactuals can be imagined. Secondly, the counterfactual needs to be realistic. As a result, counterfactuals need to take into account additional changes that would have likely happened if the defendant's conduct had been lawful.[441] To change only one condition might be artificial and unrealistic, and therefore other related changes may justified.[442] Lastly, a causal change can be explained by reference to different theories, each of which may lead to the identification of significantly different plausible consequences of the same competition law infringement. As a result, decision-makers will be able to identify multiple, similarly likely counterfactuals in all but the simplest cases. In short, it is often hard to identify causative links. In this context, decision-makers are often forced to fall back on generic legal rules on the

[438] Recital 97 of the EU Damages Directive.

[439] A third concept often identified in the literature is 'cotenability'- i.e. a belief that all changes to the real world observed by reference to the counterfactual are likely to occur as a result of the minimal change required to set up a counterfactual. See Stanford Enciclopedya of Philosophy 'The Logic of Conditionals' (2007), available at https://plato.stanford.edu/entries/logic-conditionals/.

[440] Vivien Rose 'Predicting the Past: Constructing the Counterfactual in Antitrust Damages Claims" (2014) Competition Law Journal 141, p. 143.

[441] 'Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives' in Tetlock and Belkin (eds.) *Counterfactual Thought Experiments in World Politics* (Princeton, 1996), p. 19-23.

[442] Cento Veljanovski 'Credit Cards, Counterfactuals and Antitrust Damages' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023585, p. 6.

standard and burden of proof – and, in particular, on direct evidence of loss which can be extremely hard to come by in competition law cases.[443]

260. To use cartels as an example – which will typically be the simplest damages case –, if the victim is an intermediary instead of a final consumer, its loss will often correspond merely to the lost profits from reduced sales caused by the (cartelised) higher prices. This is because intermediaries will typically have passed part or all of their actual loss (i.e. the price increase) onto final consumers.[444] Even in this simple case, proof of a causal link between the infringement and a loss may be particularly difficult to achieve due to the economic complexity of the issues involved – such as the amount of the higher price, the elasticity of demand, and the rate of passing on of price increases to final consumers.[445] Furthermore, loss may have been suffered by a large number of entities present in the market (e.g. not only direct and indirect purchasers, but also competitors who saw their sales diminish as a result of the higher market prices).

261. The situation gets more complicated the further we move from straightforward cartel cases. Ultimately, courts may find significant difficulties when trying to establish causation. Markets are complex institutions. Complex infringements very often impact on sophisticated supply chains working in highly complex market structures, which make the identification of causative links particularly difficult. While microeconomic and industrial organisation theory are devoted to understanding how markets work and the conditions under which anti-competitive behaviour might occur, even at their simpler level they are technical and complex – and have become even more so with the incorporation of game theory. In effect, a constant complaint is that, under these theories, economists are often able to produce data that is consistent with these theories but are unable to rule out alternative theories.[446] As a result, economic models may demonstrate the likelihood of a loss having been caused by an infringement of competition, but will often be unable to exclude other possible causes – and thereby will be insufficient for a court to establish causation.

262. The combination of complexity of markets, dispersion of losses and difficulty in identifying causal links creates a broad range of potential claimants. Economic injuries have a way of rippling through markets, creating a much larger numbers of victims than the typical contract or tortious dispute. The victims are not only competitors, but also rivals, suppliers, and firms operating in complementary market. As noted by the US Supreme Court: "*An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but […] there is a point beyond which the wrongdoer should not be*

[443] Tony Honore 'Necessary and Sufficient Condition in Tort Law' in D. Owen (ed.) *Philosophical Foundations of Tort Law* (OUP, 1995), p. 372–374.

[444] David Ashton and David Henry *Competition damages Actions in the EU: Law and Practice* (Elgar, 2013), p. 39.

[445] Green paper on Damages actions for breach of the EC antitrust rules [COM(2005) 672 final].

[446] Herbert Hovenkamp *The Antitrust Enterprise*, p. 45-46.

held liable."[447] In other words, liability for pure economic loss must be limited in order to constrain socially wasteful litigation and undue restrictions on individual freedom. If antitrust infringers could be held liable for all individual losses that may be causally linked with their wrongdoing, this would entail significant risks of over-deterrence and, therefore, result in an undue restriction on commercial freedom.[448] This accounts for many rules that deny recovery to those who are too "remote" from the infringement, such as the prohibition of the passing on defence and the lack of standing of indirect purchasers in the US.[449]

263. In short, causation in competition cases can be very difficult to establish, but the reasons underpinning these difficulties also create the conditions for liability to extend very widely in competition cases. In order to deal with this, legal regimes around the world have adopted rules and mechanisms which are specific to the operation of causation in competition cases. We shall now review them.

11.3. National Regimes

11.3.1. USA

264. In the US, a distinction should first be made between the legal tests of causation for the purposes of identifying an infringement, and for the purposes of identifying relevant harm.

265. Regarding the former, courts have developed different tests for causation for the purpose of identifying an infringement when it is necessary to demonstrate that anticompetitive effects were caused by business conduct. These tests include whether the conduct is "reasonably capable of contributing significantly to a defendant's continued monopoly power"[450], that there must not be any likelihood that causes other than the challenged conduct resulted in harm[451], and that the conduct must "increase the likelihood" of a business attaining a monopoly position[452].[453]

266. As regards causation of loss, on the other hand, the general test of factual causation is the but-for test. This test will be met when it is proved that "*the harm would not have occurred absent the [unlawful] conduct*."[454] Given the difficulty of proving causation to this legal standard, a plaintiff is permitted to draw reasonable inferences from the evidence. Furthermore, the standard of proof

[447] *Blue Shield of Virginia v. McCready* 457 U.S. 465, 476-477 (1982)

[448] Jens-Uwe Franck and Martin Peitz 'Towards a Coherent Policy on Cartel Damages', p. 1.

[449] Herbert Hovenkamp *The Antitrust Enterprise*, p. 49.

[450] *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) at 79.

[451] *Rambus Inc. v. FTC* 522 F.3d 456 (D.C. Cir. 2008) at 466–67.

[452] *Broadcom Corp. v. Qualcomm Inc.* 501 F.3d 297 (3d Cir. 2007)

[453] Michael C. Carrier 'A Tort-Based Causation Framework for Antirust Analysis' (2011) Antitrust Law Journal 77 401, p. 402-406.

[454] Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26 & cmt. b (2010).

merely requires that a 'preponderance of the evidence' standard be met, which means that plaintiffs need only to prove that it is more likely than not that the business conduct caused the loss.[455] In addition, some courts have replaced the but-for standard with a requirement that a plaintiff show a: "*reasonable connection between defendant's act or omission and plaintiff's damages or injuries*."[456] Other courts have been satisfied with: "*evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.*"[457]

267. Determining whether loss stems from conduct infringing competition law is straightforward in most cases, but can be problematic when the loss could have arisen from multiple causes.[458] When there are multiple necessary and sufficient causes, each of which would (in the absence of the others) be viewed as the but-for cause, US law deems each of them to be a factual cause of loss.[459] Furthermore, the predominant test is that the conduct must only be a "material cause" or "substantial factor" contributing to the injury[460], even if the practical application of this test differs. One reading of this test is that courts cannot deny a finding of antitrust injury (i.e. causation) just because there are other causes for the loss.[461] Another reading, however, is that the antitrust infringement must constitute a "necessary predicate of the injury", i.e. the claimant must prove that no alternative cause is at the origin of the loss.[462]

268. Concerning causation in law, the Supreme Court has introduced rigorous doctrines of foreseeability and remoteness. Foreseeability limits liability for damages "*of a type that a reasonable person would see as a likely result of his or her conduct*" or, to put it differently, "*harm within the risk*." Under these tests, liability '*is limited to those harms that result from the risks that made the . . . conduct tortious.*"[463] Regarding antitrust, an important doctrine of causation in law is that damages are limited to antitrust injury (an injury "*of the type the*

[455] *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, at 328–29 (2007).

[456] *Houde v. Millett*, 787 A.2d 757, 759 (Me. 2001); *Shackil v. Lederle Labs.*, 561 A.2d 511, 520 (N.J. 1989); *Giuffrida v. Citibank* Corp., 790 N.E.2d 772, 777–78 (N.Y. 2003).

[457] *Ortega v. Kmart Corp*., 36 P.3d 11, 15 (Cal. 2001). See Michael C. Carrier 'A Tort-Based Causation Framework for Antirust Analysis', p. 416.

[458] For a detailed, critical overview, see Michael C. Carrier 'A Tort-Based Causation Framework for Antirust Analysis', p. 409.

[459] Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 27 (2010).

[460] *Zenith Radio Corp. v. Hazeltine Research, Inc*. 395 U.S. 100, 114 n.9 (1969); *Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973); *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 702 (1962).

[461] *Lee-Moore Oil Co. v. Union Oil Co.* 599 F.2d 1299, 1300 (4th Cir. 1979) at 1302; *Costner v. Blount National Bank*, 578 F.2d 1192 (6th Cir. 1978).

[462] This position has been adopted exclusively by the 6th Circuit – see *Hodges v. WSM, Inc* 26 F.3d 36 (6th Cir. 1994), at 39; *Valley Products Co. v. Landmark* 128 F.3d 398 (6th Cir. 1997) at 404.

[463] Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26 cmt. e) (2010), and § 29, cmt j). See *Blue Shield v McCready* 457 US 465 (1982)

*antitrust laws were intended to prevent and that flows from that which makes defendants' acts unla*wful"[464]). This injury must be proved with a "reasonable degree of certainty" by a preponderance of the evidence.[465] The antitrust injury doctrine is important because it limits the harm that can be claimed – i.e. only loss stemming from the competition-reducing / inefficient aspects of a conduct.[466]

11.3.2. Europe

269. In Europe, it is the laws of the Member States that provide the legal basis for cartel damages claims and that lay down the detailed rules governing those legal actions. However, pursuant to the principle of effectiveness embodied in Article 4(3) TEU, which imposes a duty of loyal cooperation between the Member States and the EU institutions, those laws must not render the right to claim damages "*practically impossible or excessively difficult*."[467] This principle was codified in Article 4 of the EU Damages Directive.[468]

270. Causation remains, in the main, a matter for the Member States' laws.[469] The European courts have held that it is for the Member States' laws to prescribe the application of the concept of causal relationship between an illegal restrictive practice and the harm suffered, as long as those rules comply with the principle of effectiveness.[470] As a result, EU law does not exclude *a priori* the possibility that

[464] *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc*., 429 U.S. 477, 489 (1977).

[465] *Mostly Media Inc. v. U.S. West Commc'ns*, 186 F.3d 864, 865 (8th Cir. 1999); *Greater Rockford Energy Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 401 (7th Cir. 1993).

[466] *Brunswick Corp v Pueblo Bowl-O-Mat, Inc* 429 US 477 (1977), at 489; Michael C. Carrier 'A Tort-Based Causation Framework for Antirust Analysis', p. 407. However, this does not exhaust the scope of antitrust injury. For example, in *State Oil v Khan* 93 F.3d 1358 (7th Circuit, 1996), Judge Posner held that *per se* infringements where no welfare loss was observed had to give rise to some kind of damages for the rule to have some domain of application. The result, when this decision was appealed to the Supreme Court, was the substitution of a per se prohibition of vertical maximum price fixing for a rule of reason approach – see *State Oil v Khan* 522 US 3 (1997)

[467] Case C-453/99, *Courage v. Crehan,* EU:C:2001:465, para. 29.

[468] Which sets out that: "*In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law*."

[469] See Recital 11 of the EU Damages Directive: "*All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principle of effectiveness and equivalence*."

[470] Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, EU:C:2006:461, para 64.

Member States will deny compensation for certain types of harm on the basis of doctrines such as remoteness, proximate causation, or directness of injury.[471]

271. A cursory view of the different general tort law regimes of some EU Member States reveals important differences in causation regimes. Probably the only general remark that can be made is that courts tend to take a practical, case-by-case approach to causation. Nonetheless, it would seem that in most Member States similar issues and questions arise such as whether the conduct complained of was really a necessary cause of loss, how predictable the damage suffered was, and whether intervening events were sufficient to exclude liability.[472] We shall now review a few select jurisdictions, after which we shall discuss a number of EU measures that may limit Member State autonomy in this matter in the future.

i. England and Wales

272. In England, as elsewhere, the assessment of causation is sub-divided into two legal tests: causation in fact and causation in law.[473] The test for causation in fact is the "but-for test", subject to a standard of proof on the balance of probabilities – which means that a claimant must show that it is more likely than not that the damage would not have occurred 'but for' the defendant's infringement of competition law.[474] However, and given the limitations described above that strict that 'but for' tests reveal when confronted with situations of causal uncertainty, English law developed a number of alternative factual causation tests.

273. First, there are exceptions to the strict 'but for' test for factual causation in situations where the causal agent and the loss are of the same kind.[475] When more than one potential cause (and tortfeasor) has been identified and the probabilities regarding which of two defendants caused harm are equally split, each of the defendants has to show that his conduct did not produce the harm in order to avoid being found liable.[476] Regarding similar situations of uncertainty where a tortious conduct competes with non-tortious explanations for the claimant injury,

[471] See Recital 11of the EU Damages Directive: "*Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.*"

[472] Ashurst Report, p. 72-73.

[473] Simon F. Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort La*w, p. 244.

[474] Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 23. See *Miller v Minister of Pensions* [1947] 2 All ER 372; *Travel Group Plc & Cardiff City Transport Services* [2012] CAT 19, para. 77.

[475] *Barker v Corus UK Ltd* [2006] 2 AC 572, p. 587 (Lord Hoffman). In situations where multiple distinct causal agents can be in play, the but-for principle would continue to apply and causation will not be established – *Wilsher v Essex AHA* [1988] AC 1974. See Simon F. Deakin, Angus Johnston, and Basil Markesinis *Markesinis and Deakin's Tort Law*, p. 256-257; Rachael Mulheron *Tort Law* (2016, CUP), p. 420-429.

[476] *Cook v Lewis* [1952] 1 DLR 1; *Fitzgerald v Lane* [1987] QB 781.

liability may be imposed upon a defendant whose negligence increases the risk of a particular loss occurring if that risk is subsequently realised, except if the defendant demonstrates that it did not cause the loss.[477] Both scenarios amount to a change in the burden of proof.[478] Furthermore, in situations where the actions of more than one torfeasor were each deemed causes of the loss, the tortfeasors will be found to be jointly and severally liable – which defers matters of apportionment of liability between tortfeasors until after causation has been established.[479]

274. Regarding situations of genuine causal uncertainty[480], an exception to the ordinary application of principles of causation' has been created which is narrowly confined to situations where the potential causes are of the same type, and where there is scientific – as opposed to merely evidential – uncertainty as to the cause of a certain outcome.[481] In these (exceptional) circumstances, it may be possible to establish causation in fact merely by establishing that an event or conduct led to a material increase in risk, because it is (scientifically) impossible to prove a causal link on the balance of probabilities.[482] In such cases, a defendant will be liable only for a proportionate share reflecting its contribution to the total risk, and claimants should seek compensation from each party in relation to the harm that party caused.[483] If the increase in risk is caused simultaneously by a tortious action and by a non-tortious cause, however, the claimant may recover full damages.[484] It is unclear whether such a test extends to competition damages case, and there is an argument that this is limited to situations of physical injury.

275. Regarding causation in law, findings of causation in fact can be limited by reference to two requirements. First, causation will not be established in law when the event is too 'remote' from the defendant's wrongful act. The criterion of "reasonable foreseeability" is traditionally used to limit the effects of causation in

[477] *McGhee v National Coal Board* [1973] 1 WLR 1. This presupposes that it has been established that both the tortious conduct and the non-tortious cause were sufficient causes of loss, but it was unclear which one was the operative cause. It is different from the assessment (on the balance of probabilities) that the conduct was a cause of loss. In such situations there is no liability, unless it is proven that without the conduct harm would have occurred on the balance of probabilities. See Rachael Mulheron *Tort Law*, p. 413.

[478] Simon F. Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law*, p. 250-253.

[479] Simon F. Deakin, Angus Johnston, and Basil Markesinis *Markesinis and Deakin's Tort Law*, p. 224; Ioannis Lianos, Peter Davies and Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law*, p. 23-24.

[480] See generally Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 22-16.

[481] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32.

[482] *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10.

[483] *Barker v Corus UK Ltd* [2006] 2 AC 572. This was reversed by Compensation Act 2006 regarding solely the extent of liability for mesothelioma claims arising from unlawful exposure to asbestos.

[484] *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10.

English law.[485] A loss is to be considered "too remote" if, by its very nature, it could not be foreseen by a reasonable person. Remoteness is also relevant for the determination of the extent of liability.[486] Secondly, since competition damages are usually granted in the context of torts of breach of statutory duty, it must be determined whether the harm suffered by the claimant relates to the statutory duty breached by the defendant.[487] In addition to actual loss, a particular harm that may fall within the scope of situations of pure economic loss such as competition damages is loss of chance.[488] In this context, courts must determine whether the infringement of competition law caused loss related to loss of opportunity or not; however, if it is found that the infringement led to a loss of chance, damages can be quantified in such a way as to reflect the likelihood of the chance coming about.[489]

ii. Germany

276. Since the adoption of the 7th Amendment to the Law against Restraints of Competition (ARC), Article 33(1) of this law provides that whoever causes harm by negligent infringement of competition law shall be liable for compensation. However, the ARC provides no special rules on the assessment of causation. Therefore, the general principles of German tort law apply.

277. In Germany, as elsewhere, the causal inquiry is bifurcated between a factual phase (causation in fact) and a more normative/policy-oriented one (causation in law).[490] As regards causation in fact, German tort law applies a condition-*sine-qua-non* or but-for test. This is then tempered by causation in law requirements of adequacy of the cause to the loss ("*Adäquanztheorie*"). Regarding situations of multiple causality, German law imposes joint and several liability subject to contribution between the tortfeasors. For situations of genuine causal uncertainty, German tort law requires evidence that the defendant created a risk of

[485] This is a straightforward textbook example of a legal transplant: originating from France in the late 18th century, the rule was adopted in the United States and then found its way to England and to the judges of *Hadley v Baxendale* [1854] 9 Ex 341; 156 ER 145.

[486] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)*, [1961] AC 388, 422–423. On the status of the "foreseeability" doctrine in English tort law, see Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, 271–276.

[487] Simon F. Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin Tort Law* (7th edn, Oxford: University Press, 2013), p. 218, citing Lord Hoffmann in *SAAMCO* [1997] AC 191.

[488] *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602. Pure economic loss are losses that bear no connection to personal or physical harm, but relate instead to financial or pecuniary loss.

[489] *Albion Water Ltd v Dwr Cymru Cyfyngedig* [2011] CAT 1, para. 218; rejecting a claim for loss of chance, see E*nron Coal Services Ltd & EnglishWelsh & Scottish Railway Ltd* [2011] EWCACiv 2; *Enron Coal.Services Ltd & English Welsh & Scottish Railway* Ltd [2009] CAT 36.

[490] See, generally, Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 30-36.

harm, and that the claimant suffered or may have suffered a risk-related loss in order to impose liability. Furthermore, the law sets a strict limit in time and space between the defendant's act and the damage, and requires that the particular risk must be likely and apt to cause the concrete damage in the particular situation.[491] If causation is established, liability for the full damage is then due.[492]

278. Rules of causation in law in Germany – and particularly the requirement of adequacy of cause to the loss – have been described by different formulas. For example a cause will be adequate if: (i) it generally increases, in a significant way, the objective probability of a result of the kind which occurred; or (ii) if it could engender the damage in question only under particularly unique, improbable circumstances which would have been disregarded had events followed their usual course. These probabilities are assessed from the point of view of an "optimal observer" which knows all the circumstances surrounding the injurious event which could be known at the time of that event and is furthermore equipped with the general experience of mankind.[493] In addition, German law requires that the damages claimed derive from the sphere of dangers which prevention was the purpose of the infringed provision.[494] The rule postulates that: '*an obligation to make reparation will only arise if the damage claimed, according to its type and its origin, stems from a sphere of danger which the infringed norm was enacted to protect against*'.[495]

279. As regards specifically competition claims under section 33(1) of the German Competition Act, a causal connection between an anticompetitive agreement and the damage suffered must be established. Given the tort principles outlined above, in practice the anticompetitive conduct must be sufficient to cause the specific financial loss suffered and the loss must be connected to the protective purpose of the competition law. In practice, in the case of cartels the direct purchaser can easily prove a causal connection between the cartel agreement and the damage suffered. This is a less stringent approach than that which applies to indirect purchasers, which loss must be proved to have been caused by the infringement of competition law on a case-by-case basis.[496]

[491] Ulrich Magnus 'Causal Uncertainty and Proportional Liability in Germany' in I. Gilead, M. Green, B. Koch *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter, 2013), p. 153.

[492] Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 32-33.

[493] Notes to VI.-4.101 of the Common Frame of Reference referreing to German tort law, p. 3432; Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 31; B. S. Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (Hart, 2002).

[494] Ashurst Report, p. 74.

[495] Notes to VI.-4.101 of the Common Frame of Reference referring to German tort law, p. 3342; Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 32.

[496] Id., p. 34. See also the Bundesgerichtsof's decision of 28 June 2011 (KZR 75/10 – ORWI), which both decided that indirect purchasers were entitled to claim in damages and set out the conditions for a passing on defence to succeed.

iii. Spain

280. As in all the jurisdictions reviewed above, the assessment of causation in Spain proceeds in two steps. A first step focuses on causality in fact and applies a *sine qua non* or but-for test. When it is known that damage has been caused by one or more unlawful conducts but it is unknown which one was the actual casue, the rule is for joint and several liability of all parties except if a party is able to show that there was no causal relationship between its conduct and the damage sustained by the claimant.[497] Joint and several liability also typically applies to joint tortfeasors.[498] The second test focuses on causation in law and looks at whether the infringement is a "natural, adequate and sufficient" cause of loss.[499] Whether this is the case will have to be ascertained by the court according to its conscience – a requirement that has been interpreted as requiring sufficient certainty.[500]

iv. EU

281. While causation is a matter left to the Member States, it is subject to control by the European courts inasmuch as causation can be used to preclude the effective exercise of a victim's right to claim damages for infringements of competition law. A recent question concerning this related to the application of national causation tests that precluded the possibility of claims for damages as a result of umbrella pricing.

282. As noted in Section 7.3 above, umbrella pricing occurs when companies not party to a cartel set their prices higher than would otherwise have been expected in the absence of the cartel. Victims of the cartel in this case include customers of the cartelised product from non-infringing sellers. In the relevant case, a national causation rule of a Member State establishing a directness requirement for causation would have precluded these customers from bringing claims for damages suffered as a result of a cartel. The European courts found that such a national causation rule breached European law. Under EU law, the effectiveness of the right to competition damages would have been: '*put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto*'.[501] This decision limits the autonomy of Member States as regards their rules of causation in law – and in particular rules regarding foreseeability – by holding that damages for

[497] Miguel Martin-Casals and Josep Sole 'Causal Uncertainty and Proportional Liability in Spain' in I. Gilead, M. Green, B. Koch *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter, 2013), p. 301.

[498] Id., p. 302.

[499] Ashurst Report, p. 74.

[500] Miguel Martin-Casals and Josep Sole 'Causal Uncertainty and Proportional Liability in Spain', p. 295.

[501] Case C-557/12 *Kone AG and others v. ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317 para. 33.

umbrella pricing should be available as long as: "*it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel*."[502] The European Court further held that, in the context of a cartel: "*a loss being suffered by the customer of an undertaking not party to a cartel, but benefiting from the economic conditions of umbrella pricing, because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard*."[503]

11.4. Proving Causation

283. Typically, the party that must prove its case and persuade a court bears the burden of proof. Even if the defendant was found guilty of an infringement in the context of public enforcement, the burden of proof – of proving the infringement or, more often, proving that the infringement caused loss – will usually still lie with the claimant. Parties with the burden of proof must provide evidence that meets the standard of proof – the legal standard which must be met in order for a court to find that a fact has been proved.

11.4.1. Basic Rules on the Standard of Proof

284. Common law and civil law jurisdictions differ with regard to the standard of proof.

(a) Civil Law

285. Civil law systems base their rules on the standard of proof on the level of subjective belief of a certain fact that the fact finder should have. The key notion is that the evidence should be enough to persuade the judge, who will adjudicate the case on the basis of his/her personal persuasion at the end of the proceedings, of the facts. [504] The applicable standard is one of *intime conviction*, which applies equally in civil and criminal cases.[505] In France, Article 427 of the Code of Criminal Procedure establishes the principles of 'free appreciation of the evidence' and *'intime conviction*' ('le juge décide d'après son intime conviction ').[506] Section 261 of the German Code of Criminal Procedure states: "*The court*

[502] Case C-557/12 *Kone AG and others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317, para. 34

[503] Case C-557/12 *Kone AG and others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317, para. 30.

[504] French Code de Procédure Pénale, Art. 3531; German Zivilprozessordnung, § 286 I 1; German Strafprozessordnung, § 261, Art. 116 Italian Codice di procedura civile.

[505] Eric Gippini-Fournier 'The Elusive Standard of Proof in EU Competition Cases' (2010) World Competition 33(2) 187, p. 190.

[506] Article 353 contains a clause that must be read to the jury and prominently displayed in the deliberation room in criminal cases, which illustrates this very clearly: "*The law does not ask judges to justify the means by which they have been convinced, it does not set any particular rules by which they must gauge the fullness and sufficiency of the*

shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole". Article 286 of the German Code of Civil Procedure further sets out that: '*Paying due regard to the entirety of the proceedings, including the evidence presented, if any, it is for the court to decide, based on its personal conviction, whether a factual claim is indeed true or not*.' This means that the law requires a firm belief, and the absence of any reasonable doubts on the part of a judge in order for a fact to be found to have been proved.[507] The courts have clarified that even a finding of very high likelihood would not suffice if a judge did not reach a personal conviction about the case at hand.[508] In Spain, Article 741 of the Ley de Enjuiciamiento Criminal sets out that: '*The court, evaluating according to its conscience the evidence reviewed in the proceedings, the arguments of the accusation and defence and the statements of the accused, shall deliver its decision'*.[509] While courts have not interpreted this as requiring full certainty, causation must still be proved with sufficient certainty.[510]

(b) Common Law

286. By contrast, common law countries tend to view proof from a more objective perspective. The main standard of proof is the 'balance of probabilities' or the 'preponderance of evidence', which require that there be a probability greater than 50% - or more likely than not – to satisfy the burden of proof.[511] In the UK, this has been made clear in a number of competition law judgments.[512] In the US, while the predominant test for civil cases is the preponderance of evidence, in some cases the courts require facts to be proved by clear and convincing evidence. For antitrust cases, the normal test seems to apply for proof

evidence; it stipulates that they must search their conscience with sincerity, and serenely and thoughtfully ask themselves what impression the evidence given against the accused and the defence's arguments have made upon their mind. The law asks them only one question which sums up all of their duties: 'What is your personal conviction'?" Translation in Eric Gippini-Fournier 'The Elusive Standard of Proof in EU Competition', p. 191.

[507] Ulrich Magnus 'Causal Uncertainty and Proportional Liability in Germany', p. 158-159.

[508] BGH, 17 February 1970 ('Anastasia Decision'), 53 BGHZ 245, 256 (German Federal Court of Justice) (interpreting s 286 of the German Code of Civil Procedure as requiring 'full judicial conviction in the form of a degree of certainty that silences doubt for practical purposes, even if it does not eliminate them entirely').

[509] Translation in Eric Gippini-Fournier 'The Elusive Standard of Proof in EU Competition', p. 191

[510] Miguel Martin-Casals and Josep Sole 'Causal Uncertainty and Proportional Liability in Spain', p. 295.

[511] Israel Gilead, Michael Green, and Bernhard Koch '*General Report Causal Uncertainty and Proportional Liability: Analytical and Comparative Report*' (2011), p. 20.

[512] *JJB Sports Plc v Office of Fair Trading* [2004] CAT 17, para. 195; *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch) para. 392.

that an infringement caused harm, while the causation test may be somewhat relaxed for proof of the extent of harm.[513]

11.4.2. Relaxing the Standard of Proof

287. As noted in Chapter 10, claimants face significant challenges when trying to meet the burden and standard of proof required to obtain an award of damages for a competition law infringement. Defendants typically have much more information than claimants about the infringement, creating an informational asymmetry that makes it hard for the claimants to provide proof up to the requisite legal standard.[514] In common law jurisdictions, this asymmetry is alleviated by a less strict standard of proof than in civil law jurisdictions and by the possibility of extensive disclosure. For civil law jurisdictions, however, evidentiary rules and the standard of proof can pose significant obstacles to the success of competition law claims.

288. In Chapter 10 a number of evidentiary rules that seek to remedy the information asymmetry between claimants and defendants were described. In addition, jurisdictions influenced by civil law have also adopted a number of rules that make it easier to meet the standard of proof as regards causation of loss.

289. First, there are examples of jurisdictions which relax the rules on burden and standard of proof as regards causation of harm. In Spain, Articles 217(6) and 217(7) of the *Ley de Enjuiciamento Civil* allows the court to take into account the availability of the proof which each of the parties in proceedings must submit, thereby allowing the courts to shift the burden of proof when the other party has better access to the evidence.[515] In Germany, courts consider it *prima facie* evident that cartels lead to higher prices. The claimant therefore did not have to meet the full burden of proof by claiming and – if contested by the defendant – prove that it suffered a loss damages: instead, the courts held that it is the normal and typical sequence of events that cartel infringements cause harm. This did not amount to a reversal of the burden of proof, however, but merely a relaxing of the normal standard of proof. In order to avoid the presumption that cartels cause harm, the defendant only needed to show that the circumstances of the case were considerably different from a normal cartel case, so that damages to claimants could not be seen as the normal and typical consequence of the defendant's behaviour.[516]

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[513] *Bigelow v. RKO Pictures, Inc.* 327 U.S. 251 (1946), at 264-266.

[514] David Bailey 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (2003) CMLRev 40 845, p. 847-849. Bailey points out that: "*the burdens of proof and persuasion should be distinguished from the "evidential" burden. The evidential burden simply denotes the need to adduce sufficient evidence to raise a particular issue. Typically, the party which bears the legal burden of proof will also bear the evidential burden to prove its case, though this is not always so.*" See id., p. 849, fn. 21.

[515] Miguel Martin-Casals and Josep Sole 'Causal Uncertainty and Proportional Liability in Spain', p. 296-297,

[516] See BGH, 28/6/2005, KRB 2/05, NJW 2006, 163, 164 et seq. – *Berliner Transportbeton* I; BGH, 19/6/2007, KB 12/07, NJW 2007, 3792, 3794, para 18 – *SD-Papier*.

290. Secondly, a number of jurisdictions have expressly adopted presumptions that certain infringements of competition law cause loss. In 2008, Hungary introduced a rebuttable presumption that hard-core cartels cause a 10% price increase.[517] More recently, the EU's Damages Directive also introduced a rebuttable presumption that cartels cause harm. [518] This presumption refers only to cartels and not to other infringements such as abuses of a dominant position, following the example of German competition act law.[519] While the infringer may rebut this presumption, it amounts to a reversal of the burden of proof as regards causation of loss. Furthermore, the EU Damages Directive also creates a rebuttable presumption that harm was passed on to indirect purchasers if: (a) the defendant has committed an infringement; (b) the infringement resulted in an overcharge for the direct purchaser; and (c) the claimant shows that he has purchased affected goods or services from the direct purchaser. The combined effect of these evidentiary rules is that claimants benefit from a presumption of the existence of harm, and defendants are subjected to a demanding evidentiary burden to rebut this presumption.[520]

291. As a result of the transposition of this Directive, the laws of a number of EU Member States now contain presumptions that cartels cause loss. In Germany, sec. 33a(2) GWB now establishes a rebuttable legal presumption that cartel infringements cause harm. Unlike the presumption that flowed from the courts' finding it *prima facie* evident that cartels cause harm, rebuttal of this presumption now requires the defendant to prove the opposite of the presumption i.e. that no harm was caused..[521] In Belgium, Parliament also introduced a rebuttable presumption that cartels cause damages.[522]

292. A third way through which proof of causation may be made easier is through reliance on infringement decisions issued by competition authorities. Such decisions usually include extensive and detailed explanations of the infringement of competition law investigated by the authority. In a cartel case, for

[517] OECD (2015) *Relationship between Public and Private Enforcement*, p. 17.

[518] Article 17(2) of the EU Damages Directive. Such a presumption may reflect the Commission's reliance on studies indicating that only 7% of cartels do not lead to overcharging. However, the presumption of harm is limited to the higher prices paid as a result of the anticompetitive conduct or reduced sales leading to a loss of profit. Thus, other types of loss such as reductions in consumer choice, or reductions of innovation or quality, do not benefit from equivalent causal presumptions – see OECD (2015) *Relationship between Public and Private Enforcement*, p. 7; Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 46.

[519] Article 17 of the Damages Directive. See also OECD (2015) *Relationship between Public and Private Enforcement*, p. 15; Emmanuela Truli 'Will Its Provisions Serve Its Goals?', p. 309

[520] Okeoghene Odudu and Albert Sanchez-Graells 'The interface of EU and national tort law: competition law', p. 163-164.

[521] See Article 292 of the German Code of Civil Procedure. Article 33a(3) GWB further declares Article 287 German Code of Civil Procedure to be applicable, which allows courts to estimate the amount of damages. See Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p.10.

[522] Belgian Act on Damage Claims for Breaches of Competition Law.

example, this will often include a description of the companies involved in the cartel, the mechanisms of the cartel arrangement, the duration of the cartel activity, its geographic scope, and so forth. Allowing claimants to rely on the findings of a competition authority simplifies their task not only as regards proving the infringement, but potentially also as regards proving that the infringement caused loss. However, this does not mean that claimants will be exempted from demonstrating that they suffered loss or the extent of damages suffered. Since quantification of harm often proves to be the most expensive and time-consuming aspect of follow-on damages claims, prior infringement decisions will not eliminate the high costs and difficulties faced by claimants.[523]

12. Damages and their Quantification

293. Quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be achieved. In practice, the total overcharge by a cartel is usually used as a proxy for cartel damages, and this can be relatively simple to calculate. However, it is well known that the total overcharge neglects the output effect—i.e., the loss suffered by purchasers who did not acquire a product as a result of the price increase caused by the overcharge.[524] Ideally, a corporation which engaged in anticompetitive conduct should internalize the social costs of its behaviour – i.e., the net harm caused by its conduct. In such an ideal world, the infringing company should at least be forced to pay the deadweight loss borne by persons other than cartelists, plus the cartel overcharge.[525]

294. Given difficulties in quantifying harm, courts will usually only be able to arrive at best estimates relying on assumptions and approximations.[526] This can be done in a number of ways. On the one hand, there may be legal rules allowing or

[523] Sebastian Peyer 'Compensation and the Damages Directive', p. 109.

[524] The economics literature has pointed out that there is no clear relationship between damages awarded on the basis of overcharge and true harm. See, e.g., Frank Verboven and Theon van Dijk 'Cartel Damages Claims and the Passing-On Defence' (2009) Journal of Industrial Economics 57 457; Martijn A. Han, Maarten Pieter Schinkel and Jan Tuinstra 'The overcharge as a measure of antitrust' (2009) Amsterdam Center for Law & Economics Working Paper 2008-08.

[525] This is very widely accepted. See William M. Landes 'Optimal Sanctions for Antitrust Violations', p. 656; William Breit and Kenneth G. Elzinga 'Private Antitrust Enforcement: The New Learning', p. 410-412; Wiliam H. Page, 'The Scope of Liability for Antitrust Violations', p. 1455. Another issue, which need not deter us here, is whether efficiency gains that might occur—e.g., due to savings in production costs—should also be disgorged from the cartelists. Arguing that efficiency gains should also be disgorged see Wouter P.J. Wils 'Optimal Antitrust Fines: Theory and Practice' (2006) World Competition 29 183, p. 191-193; arguing that they should not be disgorged, William M. Landes 'Optimal Sanctions for Antitrust Violations'.

[526] Practical Guide for Quantifying Harm in Actions For Damages Based on Breaches of Article 101 or 102 of the TFEU accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07) ('Practical Guide for Quantifying Harm), p. 9-10.

setting up mechanisms for the estimation of damages. On the other, there are a number of economic tools developed throughout the years for the purpose of estimating damages. A recent summary of such methods was compiled in a Practical Guide prepared by the European Commission to assist courts.[527] This guide sets out various methods which can be used to calculate damages, which are broadly divided into comparator models[528], simulation methods[529], and cost and finance-based approaches[530]. These methods and techniques are based on different approaches, and vary in terms of the underlying assumptions and the variety and detail of data needed. They also differ in the extent to which they control for factors other than the infringement that may have affected the situation of the claimant. As a result, these methods and techniques may be more or less difficult, time-consuming and cost-intensive to apply.[531]

295. In the specific circumstances of any given case, the appropriate approach to quantification must be determined under the applicable rules of law. Relevant considerations may include, alongside the standard and burden of proof applicable, the availability of data, the costs and time involved, and the balance between these costs and the value of the damages claim at stake.[532] A more detailed discussion of these methods will be pursued in Chapter 13 below.

[527] Practical Guide for Quantifying Harm.

[528] The methods most widely used by parties and courts estimate what would have happened without the infringement by looking at the time periods before or after the infringement, or at other markets that have not been affected by the infringement. Such comparator-based methods take the data (prices, sales volumes, profit margins or other economic variables) observed in the unaffected period or in the unaffected markets as an indication of the hypothetical scenario without the infringement. The implementation of these methods is sometimes refined by the use of econometric techniques: Practical Guide for Quantifying Harm, p. 14. The greatest advantage of comparator models is that they use real-life data that are observed on the same or a similar market. A number of specific methods – comparison over time in the same market, comparison with other geographic market, comparison with data from similar product markets, and comparisons across all these dimensions – are reviewed in pages 16 to 32 are reviewed in the Practical Guide for Quantifying Harm.

[529] These economic models are fitted to the actual market to simulate the likely market outcome that would have occurred without the infringement. These models draw on economic theory to explain the likely functioning of a market in view of its main features (e.g. the number of competitors, the way they compete with each other, the degree of product differentiation, entry barriers). Practical Guide for Quantifying Harm, p. 14, 32-35.

[530] These models use production costs for the affected product and a mark-up for a 'reasonable' profit margin to estimate the hypothetical non-infringement scenario; or finance-based approaches that take the financial performance of the claimant or the defendant as a starting point. Practical Guide for Quantifying Harm, p. 14, 35-38.

[531] Practical Guide for Quantifying Harm in Actions For Damages Based on Breaches of Article 101 or 102 of the TFEU accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), p. 11.

[532] Practical Guide for Quantifying Harm in Actions For Damages Based on Breaches of Article 101 or 102 of the TFEU accompanying the Communication from the Commission

296. In practice, and in addition to the identification of harm actually suffered, the amount that a claimant may obtain in damages proceedings can depend on a number of factors. This chapter will review such factors, in particular: (i) the relationship between harm suffered and the amount of damages award; (ii) the scope of the harm that is taken into account when calculating a damages award; (iii) mechanisms that address the difficulties created by the passing on of harm down the economic chain; (iv) the impact of interest; (v) rules regarding the promotion of effective enforcement that may limit the liability of an infringing party.

12.1. Measuring Loss

12.1.1. General Principles

297. Loss suffered by the claimant as a result of the competition law infringement is the primary measure when determining the amount of a damages award. While identifying harm is often a difficult and complex exercise in individual cases – and the difficulty may be greater or lesser depending on the evidentiary regime in place – in abstract there are significant similarities in how different jurisdictions measure harm. Such similarities ultimately arise from the fact that an action for competition damages is usually an action in tort, and that across the world actions in tort have a predominantly compensatory goal, i.e. they seek to put a victim in the situation that it would have been in but for the wrong it suffered.

298. For example, in the US a party that is entitled to damages can recover a loss measured by the difference between her actual position and the position she would have been in but for the antitrust violation. Thus, based on the premise that the antitrust infringement did not occur, a hypothetical "but-for world" has to be constructed and compared to the position the plaintiff is actually in. For example, in a standard price-fixing case, the measure of damages is *"the difference between the price actually paid by the [plaintiff] on the contracts and the price it would have paid absent the conspiracy*."[533]

299. In Europe similar principles apply. The goal is to compensate victims for competition law infringements; injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*), plus interest. Actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement.[534] Loss of profit relates to opportunities that the victim was unable to take advantage of as a result of the infringement.

300. It is worth noting that the European courts made a point of emphasising that loss of profit must also be recoverable given that, in the context of economic or commercial litigation in which competition actions often occur, restricting compensation to actual loss would make reparation of loss suffered practically

on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), p. 39.

[533] *New York v. Julius Nasso Concrete Corp*, 202 F.3d 82, 88.

[534] Recital 97 of the EU Damages Directive.

impossible.[535] To use cartels as an example, the loss that intermediaries suffer often corresponds merely to the lost profits from reduced sales caused by the higher prices, since they will have passed the actual loss (i.e. the price increase) onto final consumers.

301. This principle was codified in Article 3 of the EU Damages Directive. Article 3(1) holds that any natural or legal person who has suffered harm caused by an infringement of competition law should be able to claim and to obtain full compensation for that harm. Paragraph 2 describes what full compensation means: i.e. awarded damages should place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed, and must therefore cover actual loss and loss of profit, plus the payment of interest.[536]

12.1.2. Tools to Assist the Measurement of Loss

302. As noted above, competition damages claims are fact-intensive and difficult to prove. In addition to difficulties in obtaining the necessary evidence to make out a case, victims often also find it difficult to quantify their loss. Quantification of harm in competition cases has always, by its very nature, been characterised by considerable limits to the degree of certainty and precision that can be achieved. Sometimes only approximate estimates are possible. Comparing the actual position of a victim of a competition infringement with the position it would have been in without the infringement is something that cannot be observed in reality. It is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement: all that is possible is an estimate of the scenario likely to have existed without the infringement.[537] As a result, jurisdictions around the world have adopted mechanisms that allow the award of damages even when it has impossible to precisely identify the extent of loss.[538]

(i) Reducing the Burden and Standard of Proof, and Estimating Damages

303. A first tool used for this purpose is to modify the burden of proof, or to lower the standard of proof required for the quantification of the harm arising from a competition infringement. This is justified by a general principle of effectiveness of judicial action, which requires that damages actions should not be rendered practically impossible or excessively difficult. This means that, once it is established that the claimant has suffered harm from the defendant's competition

[535] Joined Cases C-295/04 to 298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, EU:C:2006:461, paras. 93-96, 100.

[536] See also the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), para. 6.

[537] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), para. 9.

[538] This is in line with the trend to facilitate proof of competition damages claims reviewed in Chapter 10 above.

infringement, a court cannot exempt itself from awarding damages simply because the claimant cannot prove in a sufficiently precise manner the amount of loss suffered. As a result, lowering the standard of proof usually entails granting the power to courts to estimate the amount of damages – at least as long as the claimant has made sufficient efforts to prove its claim despite the obstacles to its precise quantification.

304. In the US, courts take into account the "practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries" and acknowledge that "damage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."[539] The jury "may make a just and reasonable estimate of the damage based on relevant data, so long as it is not based upon "speculation or guesswork"."[540]

305. In Europe, the appropriate standard of proof and the required degree of precision in establishing the extent of loss suffered are matters left to the laws of the EU's Member States As a result, the methods courts may use to quantify the harm suffered are also left to the Member States.[541] In practice, there are many examples of courts having the power to estimate damages. For example, German law expressly authorizes judges to estimate the amount of damages, as long as the results are economically reasonable and possible.[542] The judge is thus free to choose which methodology is best suited to approximate reality in a probabilistic sense.[543] In the Netherlands, damages are calculated in the manner considered most appropriate by the judge hearing the case – and profits made by the defendant can be used as a yardstick to determine the amount of damages instead of the victims' losses.[544] Even when they are not used as a yardstick, the defendant's profits from the anticompetitive conduct can be used to assist in the assessment of the extent of a claimant's loss.[545] In Spain, the Supreme Court has acknowledged the '*impossibility of a perfect reproduction of what would have been the situation if there had been no unlawful conduct'*.[546] Recent amendments

[539] *Zenith Radio Corp v. Hazeltine Research Inc* 395 U.S. 100, 123 (1969)

[540] *Bigelow v. RKO Radio Pictures* 327 U.S. 251, 264-65 (1946).

[541] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07), para. 8.

[542] Zivilprozeßordnung [ZPO] [Code of Civil Procedure] Jan. 1877, Reichsgesetzblatt [RGBl] 30, § 287.

[543] Kammergericht [KG] [Higher Regional Court of Berlin] Oct. 1, 2009, Case 2 U 10/03 Kart (F.R.G.). See also Hanns A. Abele, Georg E. Kodek & Guido K. Schaefer 'Proving Causation in Private Antitrust Infringement Cases', p. 850.

[544] Ashurst Study, p. 80.

[545] This was said to be the case in Italy, Lithuania, Luxembourg, Netherlands, Poland and Spain, in the Ashurst Study, p. 80.

[546] Supreme Court Judgment of 7 November 2013, *Nestle´ et al v Ebro Foods* (STS 5819/2013). See, for details, Francisco Marcos 'Damages Claims in the Spanish Sugar Cartel', p. 217-218.

to the competition law have set out that courts may estimate damages when it has been established that the claimant suffered damages but it is impossible or excessively onerous to identify their precise amount.[547]

306. Against this background, the European Commission issued a practical guide on the quantification of harm in actions for damages in Europe. This guide provides insights into various forms of harm typically caused by anticompetitive practices, and sets out information on the methods and techniques available to quantify such harm. Furthermore, the EU Damages Directive requires Member States to ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. In particular, the EU Damages Directive requires Member States to ensure that national courts are empowered to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the available evidence.[548]

307. The use of this type of mechanisms is not restricted to Europe and America. Korean law sets out that, when it is established that damage was caused by a competition law infringement but it is extremely difficult to determine the amount of such damage: "*the court may recognise a reasonable amount of damages based on the gist of entire arguments and the outcome of investigating evidence*".[549] Similarly, in Japan there is a general rule of law that: "*Where it is found that any damage has occurred and it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage*".[550]

(ii) Presumptions

308. In addition to the modifying the normal rules on burden and standard of proof, the EU Damages Directive includes a second tool to make it easier to quantify damages: presumptions. In particular, the EU Damages Directive establishes a rebuttable presumption that cartels cause harm and allows national courts to estimate such harm.[551] In practice, this amounts to a complete reversal of the burden of proof as regards causation. However: (i) the infringer may rebut this presumption; and (ii) the presumption refers only to cartels and not infringements of abuse of a dominant position.[552]

[547] Art. 76(2) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[548] Article 17 of the EU Damages Directive.

[549] Article 57 MRFTA (Determining Damages).

[550] Article 248 of the Code of Civil Procedure – translation included in OECD (2015) *Relationship between Public and Private Enforcement*, p. 16.

[551] Adopted in Spain by Art. 76(3) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[552] Article 17 of the EU Damages Directive. See also OECD (2015) *Relationship between Public and Private Enforcement*, p. 15; Emmanuela Truli 'Will Its Provisions Serve Its Goals?', p. 309.

309. Even before the Directive was adopted, a number of countries already had similar presumptions in place. Some presumptions went merely to causation – i.e. it is presumed that the anticompetitive practice caused harm, as discussed in Chapter 11 above – but, when coupled with the power for courts to estimate damages, their practical effect was to revert the burden of proof regarding not only the existence of damages but also their extent. A good example of this can be found in Germany. As noted above, the German courts had created a presumption that the existence of a cartel provides *prima facie* evidence of harm. At the same time, German courts have a general power to estimate harms. Although the burden of proof lies with the claimant, if the competition law infringement is proven and if the claimant has a plausible story about the damage it suffered, German courts do not hesitate to award damages.[553] The result is that while, technically, the presumption of harm only operated as to causation and claimants needed to prove the amount of damages, in practice the defendant faced a burden to demonstrate that "normal damages" did not follow from its anticompetitive conduct.[554]

310. Furthermore, in some cases the extent of loss is explicitly presumed. For example, in 2008, Hungary introduced a rebuttable presumption that hard-core cartels cause a 10% price increase on the market.[555]

(iii) Assistance from a specialised body

311. A last mechanism that may assist courts in the assessment of damages is for courts to request the competition authority to assist them in this exercise. The EU Damages Directive, for example, provides that a national competition authority can assist on the determination of the quantity of damages upon request of a national court.[556]

12.2. Compensatory, Punitive and Exemplary Damages

12.2.1. Compensatory Damages

312. As we saw above, a successful claimant will be entitled at least to compensatory damages – i.e. the damages award will be equivalent to the harm suffered, since the objective is to put the victim in the position he was before the

[553] OECD (2015) *Relationship between Public and Private Enforcement*, p. 16.

[554] It is worth mentioning that the change from a rule that a cartel provides *prima evidence* of harm to a rule that presumes that a cartel caused harm can have significant practical consequences. In order to refute the *prima evidence* rule, the defendant only needed to show that the circumstances of the case were considerably different from a normal cartel case so that damages to claimants could not be seen as the normal and typical consequence of the defendant's behaviour. However, in order to refute a presumption that a cartel caused harm such as the one inserted into the German Competition law to implement the EU Damages Directive – see section 33a(2) GWB – the defendant now has to prove the opposite of the presumption (as per Section 292 of the German Code of Civil Procedure), i.e. that no harm was caused. See Christian Kersting 'Transposition of the Antitrust Damages Directive into German Law', p.10.

[555] OECD (2015) *Relationship between Public and Private Enforcement*, p. 17.

[556] Damages Directive, Article 17(3).

infringement.[557] The question is whether the claimant should be entitled to additional damages as well.

313. In Europe, where the goal of competition damages is purely compensatory – i.e. damages are awarded with a view to restore victims to the situation they would have been in had the infringement not taken place – the award of damages is limited to the loss to be compensated.[558] As we shall see below, in some Member States punitive or exemplary damages could be imposed as well. However, the EU Damages Directive prohibits "overcompensation, whether by means of punitive, multiple or other types of damages". Instead, compensation is merely intended to place: "a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed".[559] As a result, following the implementation of the EU Damages Directive only compensatory damages can be awarded in the EU.

12.2.2. Punitive and Exemplary Damages

314. In some jurisdictions it is foreseen that the party will be entitled to damages awards in excess of the amount of compensatory damages. This is usually related to punitive goals of private enforcement systems. Hence, it is common in these jurisdictions for private enforcement to be infused with deterrence goals or to compensate for the limitations of public enforcement. The case for damages awards which amounts exceed the victims' losses finds support in various arguments. First, many competition violations are covert; hence, they are difficult to detect and prosecute. Second, competition violations may so dislocate competitive conditions as to make re-creation of a "but for" market as a yardstick for damages impossible. Damages exceeding mere compensation may provide rough justice for injured claimants. Third, competition litigation is both complex and costly, making it a riskier proposition than most other forms of litigation. Punitive damages provide an incentive for claimants to undertake the enhanced risk of litigating private competition cases. Fourth, multiple damages provide a higher degree of deterrence than actual damages. Fifth, some types of competition infringements, such as horizontal price-fixing, serve no purpose other than to destroy competition and therefore should be punished.[560]

315. These reasons presuppose that at least one reason for promoting private enforcement is to punish and deter anticompetitive conduct. The most obvious example of a jurisdiction that imposes punitive damages is the US where, as we saw, private parties are expected to play a central role in the enforcement of competition law, to the point of having been described as "private attorneys general". Section 4 of the Clayton Act allows "*any person (…) injured in his business or property by reason of anything forbidden in the antitrust laws*" to "*recover threefold the damages by him sustained*."[561] Successful antitrust

[557] OECD (2015) *Relationship between Public and Private Enforcement*, p. 7.

[558] Ashurst Study, p. 57, 80.

[559] Article 3 of the EU Damages Directive.

[560] Edward D. Cavanagh 'The Private Antitrust Remedy: Lessons from the American Experience' (2010) Loyola University Chicago Law Journal 41(3) 629, p. 642.

[561] 15 U.S.C. § 15(a)

plaintiffs may, in addition, recover attorneys' fees and, in certain circumstances, pre-judgment interest. The treble damages provision is a direct descendant from the original Sherman Act, passed in 1890, which already included a similar provision.[562] Senator Sherman and others argued that multiple damages should be "*commensurate with the difficulty of maintaining a private action*" and have a punitive effect.[563]

316. The origins of the treble damages rule seem to lie in old English laws against monopolies which, since the 17th century, allowed private persons or firms to sue monopolies and, if they won, to obtain treble damages.[564] Despite its grounding in History and legal practice, the treble damages rule has been the subject of serious criticisms, and there have been proposals to abolish it or apply it selectively only to the most egregious competition law infringements.[565]

317. The first criticism is that antitrust rules are somewhat vague about which conduct is deemed anticompetitive. Imposing treble damages may be considered unfairly punitive in this context, particularly where the law or facts are not clear.[566] Trebling may seem particularly inequitable when liability turns on close questions of law or fact, on a novel interpretation of the law, or on a reversal of prior precedents.[567] A second criticism is that treble damages may result in duplicative recovery and lead to over-deterrence. Much conduct potentially subject to antitrust law may be pro-competitive, or may at least be competitively neutral. The application of treble damages can discourage pro-competitive behaviour by making a company's exposure to damage exceed the benefits of the conduct for the company and its customers.[568] Third, while some argue that the multiplier of damages should be higher than one in covert cases to compensate for the low likelihood of detection, there are many cases where the conduct is not

[562] Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890). See Edward D. Cavanagh 'Detrebling Antitrust Damages', p. 779.

[563] 21 Congressional Records 2456 (1890); Report and Recommendations of the Antitrust Modernization Commission (2007), p. 245.

[564] The English Statute of Monopolies, 21 Jac. I, ch 3 (1623) provided that an aggrieved party: "*shall recover three times so much as the damages which he or they sustained by means or occasion of being so hindered, grieved, disturbed , or disquieted…*". This seems to have influenced Senator Hoar, who added the treble damages provision to the Sherman Act – see Edward D. Cavanagh 'Detrebling Antitrust Damages', p. 782.

[565] For an overview of these criticisms, see Edward D. Cavanagh 'Detrebling Antitrust Damages', p. 791-802. For an overview of these proposals, see also Edward D. Cavanagh 'The Private Antitrust Remedy: Lessons from the American Experience', p. 642-643 and 'Antitrust Remedies Revisited' (2005) Oregon L. Rev. 94 147, p. 175–77.

[566] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243, 247.

[567] Edward D. Cavanagh 'Detrebling Antitrust Damages', p. 794.

[568] Edward D. Cavanagh 'Detrebling Antitrust Damages', p. 792 (stating that mandatory treble damages may far exceed the harm caused). In 2007, however, the Report and Recommendations of the Antitrust Modernization Commission (2007), held that no actual cases or evidence of systematic over-deterrence had been presented to the American Antitrust Modernisation Commission.

covert.[569] Instead, in some cases – such as mergers and most joint ventures, distribution contracts, and single-firm conduct – the probability of detection is close to 100%. In cases where the public is aware of the conduct or the conduct is otherwise overt, there may be no need for multiple damages.[570] Lastly, being subject to mandatory trebling of damages may impair a firm's ability to compete.

318. Despite these criticisms, and periodic efforts to eliminate or limit their availability, treble damages have remained the rule in antitrust cases in the US. Treble damages are thought to serve five related and important goals, summarised in a 2007 Report by the Antitrust Modernization Commission:[571]

(i) Deterrence

319. To eliminate incentives for companies to engage in anticompetitive conduct, the law must ensure that an infringing party risks losing the potential gains from such conduct. Treble damages compensate for the reality that some anticompetitive conduct is likely to evade detection and challenge.

(ii) Punishment

320. The second recognized purpose of treble damages is to punish offenders. This purpose is closely related to deterrence: multiple damages help deter unlawful conduct. Furthermore, anticompetitive conduct not only raises prices but causes allocative inefficiency (e.g. reduced sales) that reduces consumer welfare but is not reflected in damage calculations. Treble damages more fully reflect the harm to society caused by anticompetitive conducts.

(iii) Disgorgement

321. The payment of treble damages results in the disgorgement of unlawfully obtained gains (or profits) arising from anticompetitive conduct – and more – thereby removing incentives for companies to engage in anticompetitive conduct.

(iv) Providing full compensation

322. Given that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover "speculative" damages), treble damages help ensure that victims will receive at least their actual damages.

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[569] Robert H. Lande 'Why Antitrust Damage Levels Should be Raised' (2004) Loy. Consumer L. Rev. 16 329; Report and Recommendations of the Antitrust Modernization Commission (2007), p. 247.

[570] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 248. Edward D. Cavanagh 'Detrebling Antitrust Damages', p.783-788 discusses all these goals of treble damages, with the exception of promoting private enforcement.

[571] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 246-7. See also Edward D. Cavanagh 'The Private Antitrust Remedy: Lessons from the American Experience', p. 631-636.

(v) Promoting Private Enforcement

323. Treble damages create incentives for private enforcement of the antitrust laws. This is thought to be of particular importance in light of limited government resources to identify and prosecute all anticompetitive conduct. Incentives for private enforcement also reinforce the other objectives of treble damages reviewed above.

324. In the EU, while the rule is that only compensatory damages can be awarded following the implementation of the EU Damages Directive, it used to be possible for punitive damages to be awarded as well. The European courts held that, in the absence of Community rules governing the matter, it was for the domestic legal system of each Member State to set the criteria for determining the extent of the damages. Under the principle of equivalence, if punitive damages could be awarded in similar domestic law actions, it must have also been possible to award such damages in actions founded on EU competition rules.[572] Prior to the implementation of the Directive, only Cyprus expressly allowed punitive damages.[573] However, exemplary damages – which are punitive damages by another name – are available in Cyprus, Ireland and the UK. The objective of exemplary damages is to "punish and deter".[574] Like punitive damages, exemplary damages are awarded in addition to compensatory damages for the purpose of "vindicating the strength of the law" and "to teach a wrongdoer that tort does not pay", and should be awarded only if compensatory damages are insufficient to punish the defendant.[575]

325. Exemplary damages have been awarded in the UK in the context of competition law damages. In *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd*, exemplary damages of £60,000 were awarded in addition to compensatory damages because the infringing party deliberately decided to disregard the law and the competition authority had not imposed any penalty.[576] Regarding situations where the competition authority has pursued public enforcement, the High Court held that the principle of *ne bis in idem* precludes the award of exemplary or punitive damages in an action for damages following an infringement decision by a competition authority.[577]

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[572] Joined Cases C-295/04 to 298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, EU:C:2006:461, para. 91-93, 99.

[573] Ashurst Report, p. 84.

[574] *Rookes v Barnard* [1964] AC 1129, at 1221.

[575] *Rookes v Barnard* [1964] AC 1129, at 1221, 1226-1228; *Kuddus v Chief Constable of Leicestershire* [2002] AC 122, para. 62. It is generally accepted that exemplary damages can only be awarded under English law in one of three circumstances: (i) oppressive, arbitrary or unconstitutional action by servants of the government; (ii) conduct calculated to make a profit in excess of compensation payable to the victim; (iii) statutory authorisation for the imposition of exemplary damages. See Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, p. 944–951

[576] *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19.

[577] *Devenish etc. v. Sanofi-Aventis etc.* [2007] EWHC 2394 (Ch) (Lewison J). This is so even when the defendant has not paid any damages as a result of having benefited from a

12.3. Passing On

326. Full compensation in competition cases is intimately connected with the idea of passing on. In the context of distribution or production chains, an illegal overcharge can be passed through the chain, which means that each of the parties in that chain may suffer antitrust injury – and that the extent of loss suffered by parties at each level of the chain is reduced by the amount of overcharge that a party was able to pass on downstream. The question of pass-on does not affect the calculation of the overcharge in itself – only the distribution of the harm caused by the overcharge along the supply chain.

327. An example may be useful to illustrate this. When a price-fixing manufacturer overcharges for the goods it sells, a "direct purchaser" will buy the goods directly from that manufacturer and pay the overcharge. This "direct purchaser" may then incorporate the goods subject to the overcharge into its own products, and sell those products at a higher price to reflect the cost of its inputs (including the overcharge) – thereby passing on to its distributors all or some portion of the original overcharge. In turn, the distributors may be able to pass on all or part of the overcharge to consumers in the form of higher prices. Because neither the distributors nor the consumers have purchased directly from the price-fixing manufacturer, they are commonly called "indirect purchasers." Thus, the damages from the original competition law infringement may flow from direct to indirect purchasers.[578] A compensation-oriented system will often allow indirect purchasers to sue for the damages they suffered. But, to ensure that compensation is allocated with losses effectively suffered, this logically requires that a passing-on or similar defence be made available to defendants.

328. A challenge with passing on is that requires judges to determine exactly who suffered which loss. This creates serious issues, since it is extremely difficult to identify who ultimately bore the harm. The situation is analogous to the intractable problem of determining the ultimate incidence of a tax in Public Finance theory.[579] In both competition and tax contexts, a charge will be shifted in varying degrees backwards to suppliers, employees, and shareholders; or forward to direct and indirect purchasers depending on elasticities of demand and supply in input and output markets. The charge will also create inefficient substitution

leniency program. The High Court also held that restitutionary remedies are not available in cartel damages actions. See also Wouter Wils 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future', p. 25.

[578] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 265.

[579] See the classics S. J. Butlin 'The Incidence of Taxation' (1937) Economic Record 13(1-2) 189, p. 191 ("*Simple and obvious as such equation of the amount of incidence and amount of tax may appear to be, the result is, in most cases, to make the distribution of incidence undiscoverable – not in the sense that there is insufficient information, but in the sense that incidence cannot be isolated even in abstraction*")

effects (deadweight losses) that will be next to impossible to measure with any degree of accuracy and at reasonable cost in any compensation-based regime.[580]

329. Rules that set out that passing on is not a relevant consideration, and that indirect purchasers are not granted standing to sue, concentrate antitrust claims in the hands of those most likely to sue and significantly simplify damages' litigation – allowing difficult issues of remoteness and tracing of injury to be side-stepped, and reducing the costs of litigation.[581] At the same time, such rules will often lead to the ultimate victims of a competition law infringement not being compensated, and to awarding companies which were able to pass on the overcharge a windfall in the form of damages.

330. If a jurisdiction decides that passing on must be taken into account, that jurisdiction will still need to decide which of passing on's functions it will recognise: as a sword or as a shield. As a sword, passing on can be relied on by indirect purchasers who claim harm suffered as a result of overcharges on the purchases of products or services made to them from distributors of the infringing companies, or from other companies which have incorporated goods affected by the infringement into their own products or services. As a shield, passing on can be relied on by defendants who argue that the claimant has incorporated overcharges, or part of them, in its downstream prices of products or services, thus reducing the claimant's loss and the amount of damages that defendants owe to the claimant.

331. Both the shield and sword dimensions of passing on must be present in order for everyone who suffered loss as a result of a tort to be fully compensated – to stop claimants from obtaining compensation that exceeds their loss, and to prevent defendants from paying damages in excess of the damage they caused. At the same time, it is perfectly possible to set up systems without, or with limited recourse to passing on. In such scenarios, some victims may be overcompensated; other victims may be under-compensated, or not receive compensation at all; and infringing parties may have to pay compensation in excess of the harm they caused. Such choices are ultimately matters of policy.

332. From a legal standpoint, one of two things must be allowed in order for passing to be an issue during a claim for damages. First, a defendant in an action for damages must be allowed to invoke as a defence that the claimant partially or entirely passed on the overcharge resulting from the competition law infringement to its downstream customer s– and, hence, that the claimant did not suffer loss (or suffered a smaller loss than what is claimed). Second, indirect purchasers must be allowed to claim for damages for a competition law infringement further up the supply chain. While each of these possibilities is able to trigger passing on issues on its own, given the difficulties that passing on raises in practice and its connection with ideas of compensation of victims, often a jurisdiction will either

[580] William Breit and Kenneth G. Elzinga 'Private Antitrust Enforcement: The New Learning', p. 415; Kent Roach and Michael J. Trebilcock 'Private Enforcement of Competition Laws', p. 491.

[581] Alison Jones 'Private Enforcement of EU Competition Law: A comparison with, and lessons from, the US', p. 7.

not contain either of them or it will contain both.[582] We now review each situation in turn.

12.3.1. Systems that do not take passing on into account

333. The most prominent example of a jurisdiction where passing on is not accepted is US federal law – under which indirect purchasers are not granted standing to sue for antitrust damages under federal law, and defendants are not allowed to invoke passing on as a defence.

334. In a 1968 decision, the Supreme Court held in *Hannover Shoe* that an antitrust defendant could not avoid liability to a direct purchaser by arguing that the plaintiff, a direct purchaser, had "passed on" to indirect purchasers the illegal overcharges initially paid by the plaintiff – i.e. a defendant cannot not use passing on as a shield.[583] As we saw in Chapter 7.2.1 above, the Supreme Court held almost ten years later in *Illinois Brick Co.* that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges – i.e. a claimant cannot use passing on as a sword.[584] One important reason given for this decision was that defendants could not rely on passing on under *Hannover Shoe*. The Supreme Court argued that not granting standing to indirect purchasers meant applying the same rule to both plaintiffs and defendants: neither could rely on the pass on of overcharges to either bring, or defend against, a suit based on federal antitrust law.[585] Underpinning this decision is also the fact that, as seen above at 12.2.2, the goal of damages in US antitrust law is not solely compensation – it is also to deter anticompetitive conduct. The defendants need to pay treble damages. And claimants may not only receive three times single damages – they may also receive damages for which they may not even have suffered any loss, if they were able to successfully pass on the overcharge in the first place.

335. Another reason for the Supreme Court not allowing pass on as a relevant consideration in any of its forms is its assessment that this approach promotes more effective private enforcement and avoids the need to "trace the complex economic adjustments" to determine the impact on indirect purchasers.[586] A dissent to the majority opinion in *Illinois Brick* was based, at least partially, on a different assessment of the complexity and burdens of taking passing on into account. The burden on courts to manage the complexity of estimating the damages incurred by indirect purchasers was emphasized in *Illinois Brick Co.*[587] and has remained an important concern.[588] On the other hand, the dissenters in

[582] This is particularly evident in the Bundesgerichtsof's decision of 28 June 2011 (KZR 75/10 – ORWI), which both decided that indirect purchasers were entitled to claim in damages and set out the condition of a passing on defence.

[583] *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* 392 U.S. 481, 494 (1968).

[584] *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 728–29.

[585] *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 728–30.

[586] *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 730-734.

[587] *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977) at 731–37.

Illinois Brick Co. were not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was any greater than the complexity of other antitrust issues.[589]

12.3.2. Systems that take passing on into account

336. Private enforcement systems that focus on compensation tend to take passing on into account – both as a shield and as a sword. This is the situation in Europe, particularly within the EU, where passing on is frequently raised in competition damages claims. Nevertheless, passing on has not to date been determinative of many case outcomes, and has seldom been subject to a detailed expert quantification. In the majority of cases where the issue has been determinative of the outcome of the case – a recent study put the number of cases at 24 as of December 2016 – passing on had been raised as a defence. In more than half of those, the court rejected the passing on defence entirely, whereas in about 40% of the cases the court determined that the claimant had passed on the overcharge entirely.[590]

337. The EU Damages Directive contains a number of provisions devote specifically to passing on. The Directive sets out that if price increases caused by an infringement have been passed on along the distribution chain, those who ultimately suffered the harm will be the ones entitled to claim compensation, irrespective of whether they are direct or indirect purchasers.[591] The Directive also explicitly confirms that there is a passing on defence, with the defendant having

[588] Particularly in the context of class certification exercises. See William H. Page 'The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick' (1999) Antitrust L.J. 67 1, p. 12–19. Holding that, while recent advances in econometrics and other methodologies have made passing on assessments somewhat more manageable, managing the complexity of damage calculation for direct and indirect purchasers remains a non-trivial problem, see Report and Recommendations of the Antitrust Modernization Commission (2007), p. 274.

[589] *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) at 758-760 (Brennan J, dissenting).

[590] Paul Hitchings 'The EU Pass-On Study' Global Private Litigation Bulletin, Issue 8 (December 2016), p. 4-5. Note that, of the 10 cases in which pass-on was totally successful, three were cases brought before the French courts in which passing on was raised as a defence and where the burden of proof was on the claimant to show that it had not passed on the overcharge. In one case – Danish Maritime and Commercial Court, Case no. U-4-07 *Cheminova A/S v. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB*, judgment of 15 January 2015 – 50% passing on was held to have occurred (reducing the overcharge harm by half) and loss of profits was also quantified and awarded.

A description of a number of follow-on damage cases related to the European Commission's vitamins cartel that addressed passing on issues can be found in Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 119-120. In all cases, the courts did not engage in complex analysis to determine the exact amount of passing on. Instead, they either concluded that 100% passing on must have had occurred, held that the burden of proof had not been met, or did not address the issue at all.

[591] Articles 4 and 12 of the EU Damages Directive.

the burden of proving passing on in such cases.[592] At the same time, the Directive adopts a number of mechanisms to facilitate the administration of passing on. These include a legal presumption of pass-on for indirect purchasers subject to certain conditions; measures to ensure that direct and indirect purchaser claims are rendered coherent so that a defendant does not end up paying more than the harm it has inflicted; a provision allowing courts to estimate passing on; and a requirement for the European Commission to issue guidelines providing guidance to national courts on how to address passing on issues.[593]

(i) Passing On in Theory and in Practice

338. In order to understand the logic of passing on, and why the EU decided to adopt measures to facilitate its administration, it is important to understand the underlying economics. To use cartels as an example, the overall harm suffered by a claimant can be broken down into three elements: the overcharge, the passing-on effect, and the volume effect. Passing on arises as a result of the incentives that firms operating at an intermediary level of a production or distribution chain may have. In particular, a firm in such a position may respond to an increase in its costs with price increases of its own. Economic theory indicates that the strength of those incentives will depend on the type of costs that are affected, as well as on the market environment in which the affected firm operates (including the intensity of competition, buyer power, and the volume effect of the anticompetitive practice).

339. Looking at each of these elements in turn:[594]

- Type of Costs – An overcharge can affect fixed costs and variable costs. It is usually thought that an overcharge affecting variable costs is more likely to be passed on. However, where the overcharge affects a fixed cost of the claimant, it is unclear what impact this may have on the pass-on rate.[595]
- Intensity of Competition – Under textbook conditions of perfect competition and elastic supply (i.e. supply that is highly sensitive to even very small changes in price), 100% pass-on is predicted when an overcharge is 'industry-wide' and all competitors are similarly affected. Conversely, if the overcharges are specific to an individual firm in these

[592] Article 13 of the EU Damages Directive.

[593] Articles 14 to 17 of the EU Damages Directive. See also Cento Veljanovski 'The law and economics of pass-on in price fixing cases' (2017) European Journal of Competition Law (forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903208).

[594] The section below follows closely Benoît Durand and Iestyn Williams 'The Passing-On of Overcharges: An Economic Perspective' Global Private Litigation Bulletin, Issue 8 (December 2016), p. 8-9.

[595] As explained in Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 120: "*fixed costs do not directly determine price in the same way as marginal costs, at least in the short run (in the longer run, many fixed costs tend to become variable). Therefore, a change in fixed costs due to an infringement may not be passed on in the same way*."

conditions there will be not be any scope for passing-on. This may also be the case if, for example, an entire industry is affected by the overcharge but that industry competes with another industry that uses a different upstream input not subject to the overcharge and that can therefore leave its prices unchanged.[596]

340. In practice, few markets fulfil the conditions of "perfect" competition,. For conditions of imperfect competition, predicted pass-on will vary widely depending on the precise market context. Economics also predicts that, even if only one of a number of competitors is affected by the overcharge in circumstances of imperfect competition, that firm will be able to pass on at least part of the overcharge when competition is imperfect – but the extent of passing-on will typically be less than for industry-wide overcharges of the same magnitude. Yet another relevant consideration when estimating the amount of overcharge is the elasticity of demand.[597]

- Buyer power – The amount of passing on will also depend on how the overcharge changes the parameters of negotiations between the parties. The result of buyer power may be slightly counter-intuitive. For example, if customers are so strong that negotiations result in prices anchored to the manufacturer or seller's costs, substantial pass-on of any overcharges affecting those costs may be expected. On the other hand, if the price that a buyer secures from a firm is affected by competition from another firm, the extent to which an overcharge that is specific to the first firm is passed-on may be limited if the customer has the option of switching to the latter firm.[598]
- Volume Effect – The volume effect is also known in economic theory as deadweight welfare loss. Volume effects arise from the fact that some purchasers are not willing to pay a higher price caused by the competition law infringements, and therefore cease purchasing a product they would have acquired in the absence of overcharge.[599] As reviewed above at

[596] See Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. x: "*This result (which can seem counterintuitive) simply follows from the fact that, under perfect competition, prices equal marginal costs in equilibrium. In contrast, for a cost increase that affects only one, or some, of the competitors in the market, the expected pass-on rate would be 0%, since those competitors that do not face the increase can leave their prices unchanged. This may also be the case if, for example, an entire industry is affected by the overcharge but that industry competes with another industry that uses a different upstream input not subject to the overcharge and that can therefore leave its prices unchanged.*" See also same report, p. 117.

[597] See Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 117-118; Benoît Durand and Iestyn Williams 'The Passing-On of Overcharges: An Economic Perspective', p. 8.

[598] Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 121; Benoît Durand and Iestyn Williams 'The Passing-On of Overcharges: An Economic Perspective', p. 9.

[599] Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 100.

> Chapter 7.3, identifying victims that suffered loss from the infringement because they did not buy the product at an increased price is very difficult – and even more difficult to prove, since evidence must be adduced showing that these customers would have acquired the product were it not for the price increase.[600] On the other hand, when a victim of an overcharge is an intermediate seller (i.e. a direct or indirect purchaser of the product), it may suffer harm in addition to the overcharge paid as a result of the volume effect. This loss will relate to profits foregone as a result of the volume reduction in sales caused by the increased price of its products – which, in turn, is the result of the overcharge.

341. The most common case in which volume effects will be raised in court will be those where the claimant is at an intermediate level of a production and distribution chain. However, when the claimant is an intermediate seller, passing-on and volume effects will have opposing impacts. Whilst passing on reduces damages, the volume effect increases those damages. The magnitude of each effect depends on the specific conditions of the market. When the claimant is a monopolist on the downstream market, economic theory indicates that the volume effect will exceed the passing-on effect. In this case, a damages estimate based on a measure of the overcharge alone will understate the harm caused. Outside monopoly, however, the balance of the passing-on and volume effects in imperfectly competitive settings will depend on the strategic interactions between competitors and can lead to higher or lower damages awards depending on the circumstances. [601]

342. The guidance that economics can offer to courts will become more accurate the more information is available about the essential facts of a case. In theory, it is possible to estimate empirically the relevant pass-on rates in the case at hand. In practice, this would require access to data on actual prices and costs at all relevant layers of the supply chain.[602] Given that almost every case will involve imperfectly competitive markets, and that the amount of passing on depends on a multiplicity of different factors, this information seems unlikely to be fully available in practice. Furthermore, the more information is available, the harder and more costly the analysis is likely to become.

343. As a result, the costs and benefits of adopting more or less sophisticated approaches must be balanced carefully. Documentary evidence often drives the assessment of pass-on, because such evidence is required to properly understand the market and the dynamics at play at different levels of the supply chain. Economic evidence is, and should be, used to test the credibility of the factual pass-on evidence and the inferences drawn – but it may be the case that it is

[600] Oxera 'Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 15.

[601] Benoît Durand and Iestyn Williams 'The Passing-On of Overcharges: An Economic Perspective', p. 9.

[602] Oxera 'Quantifying antitrust damages: Towards non-binding guidance for courts, Study prepared for the European Commission' (2009), p. 16.

appropriate to use economic analysis only as a cross-check on the documentary evidence.[603]

(ii) From Economic to Legal Assessments of Passing On

344. In practice, courts seem to be reluctant to engage in full-blown economic analyses of passing on. In the US, the Supreme Court has prohibited passing on defences, and denied standing to indirect purchasers in antitrust cases, at least partially due to concerns with the complexities of calculating passing on. In Europe, passing on is theoretically a relevant consideration when calculating damages awards. Nonetheless, we saw above how few cases have dealt with passing on in practice; and how, even when passing on is taken into account, courts have tended to assign it a round number (usually zero, 50% or 100%) instead of engaging in the complex assessment required to calculate the precise rate of passing on.

345. A number of senior court decisions across Europe have expressly resisted fully adopting an approach based on economic theory to passing on, and have instead developed "legal" approaches of their own based on the more familiar requirements of causality and reasonableness.[604]

346. A number of examples will help to illustrate this point. The issue of passing on came up recently in the UK in the context of a claim by a supermarket chain in respect of excessive fees imposed by a credit card company. The question of whether damages should be awarded hinged on whether the supermarket chain had passed on the excessive fees imposed by the credit card company to its final consumers. [605] The credit card company argued that the supermarket chain had passed on the excessive fees to consumers by increasing the price of its products, and hence suffered no loss; the supermarket chain denied this; and the tribunal eventually rejected the passing on defence because of lack of evidence.[606] More relevant than the result, for our purposes, is that the tribunal created a legal test

[603] Benoît Durand and Iestyn Williams 'The Passing-On of Overcharges: An Economic Perspective', p.9; Jon Lawrence 'Reflections on the EU Pass-On Study' Global Private Litigation Bulletin, Issue 8 (December 2016), p. 13.

[604] Till Schreiber 'Comment on the Study on the Passing-On of Overcharges' Global Private Litigation Bulletin, ISSUE 8 (December 2016), p. 17. See, in the UK, *Sainsbury's v MasterCard* [2016] CAT 11; in Germany, the Bundesgerichtsof's decision of 29 June 2011 in *Orwi*; and', in the Netherlands, the Dutch Supreme Court decision in *Tennet v ABB* ECLI:NL:HR:2016:1483; C/05/244194 *Tennet TSO BV and Saranne BV v ABB BV and ABB Ltd*.

[605] *Sainsbury's Supermarkets v. MasterCard* (Case No 1241/5/7/15) [2016] CAT 11. The claimant was Sainsbury's, a UK supermarket chain; the credit card company was MasterCard; and the excessive fees related to the multilateral interchange fees (MIF) charged by MasterCard to acquiring banks.

[606] In effect, the Tribunal had to consider three pass-on issues: the pass-on of MasterCard's MIFs by card acquirers to merchants; the pass-on of the MIF by Sainsbury's to its customers in the form of higher retail prices; and pass-on when awarding pre-judgment interest. The Tribunal found that the same overcharge had been fully, not, and half passed-on respectively. However, the main issue was whether Sainsbury's had passed on the MIF to its customers, which is what is discussed here..

for passing on which was explicitly held to be different from the economic concept of passing on. The legal test had two elements, both of which need to be demonstrated by the defendant: (i). an "identifiable" increase in the purchasers' prices causally connected with the overcharge; and (ii). a class of the downstream claimants who paid the higher prices. This legal test differs from the economic concept of passing on on a number of dimensions, including: (i) scope: the legal test is only concerned with identifiable increases in prices by a firm to its customers as a result of an overcharge, whereas an economist may define pass-on more widely (e.g. to include cost savings and reduced expenditure); (ii) attitude towards under-compensation: the increase in price must be shown to be causally connected with the overcharge. Because it is concerned with the specific passing on that occurred in an individual case, the economic approach focuses on ensuring that there is no over-compensation and that compensation is allocated exactly in line with losses. The legal approach, with its requirement that passing on be proved, is concerned with under-compensation as well.[607] The imposition of a causation requirement in this context is justified with the concern that: "*any potential claim becomes either so fragmented or else so impossible to prove that the end result is that the defendant retains the overcharge in default of a successful claimant or group of claimants*."[608] As such, the legal approach both takes the risk of under-compensation into account, and seeks to limit it.[609]

347. A second example can be found in the Netherlands, where the passing on defence is generally available. In a recent case concerning a gas insulated gear cartel – which is an input for electricity – TenneT, the Dutch electricity grid operator sued the cartelist ABB for damages. The court found that TenneT likely had passed on the overcharge to its direct customers through higher electricity prices. It also found likely that these direct customers of TenneT passed on this overcharge to the general public in turn. Nevertheless, the court awarded damages for the entire overcharge to TenneT – i.e. it ignored the passing on. The basis for this decision was that the general public is very unlikely to initiate legal proceedings against the cartelist to recover their damages. Instead, since TenneT is a fully-owned entity of the Dutch state, awarding damages to it was found

[607] As the court put it, not doing so would: "*run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation impossible or excessively difficult.*"

[608] In other words, the concern is that purchasers further down the chain will find it hard to prove that they suffer losses as a result of the MIF – so if compensation regimes are to be effective, causation must operate both ways. It can be remarked how this is a mechanism that brings the UK approach closer to the US' concern with reduced enforcement as a result of allowing indirect purchasers to claim for damages.

[609] *Sainsbury's Supermarkets v. MasterCard* (Case No 1241/5/7/15) [2016] CAT 11, para. 484. This case was criticised by Cento Veljanovski 'The law and economics of pass-on in price fixing cases' who argued that the tribunal's distinction between economic and legal approaches is misguided, and arises from a limited understanding of economic passing on.

likely to benefit the general public, including the end users who have suffered damages.[610]

348. A third example comes from Germany, where a passing on defence is allowed but high thresholds are set for defendants raising this defence. In *Orwi*, it was held that a passing on defence will only be allowed if the defendant is able to explain why, based on pertinent market conditions, a passing-on of the cartel surcharge to indirect customers can be reasonably assumed to have occurred. Assuming that this has been demonstrated, a defendant will then have the additional burden of proving that: (i) the claimant has not suffered any other form of disadvantage in connection with the anticompetitive practice, such as a decline in sales as a result of higher prices due to the cartel surcharge (i.e. losses related to volume effect); and (ii) that any increase in price by a claimant which according to the defendant provides evidence of passing on is not, instead, the result of the claimant's entrepreneurial achievements (e.g. the increased price reflects added value due to further processing of the goods or negotiating skills).[611] These requirements have proven to be very difficult to meet in practice.[612]

349. A last example can be found in Spain. In a number of damages claims related to a sugar cartel, it was argued by the defendant that the claimants had not suffered any damage because they had passed on the overcharge to final consumers. The lowers courts were divided: in one decision full damages were awarded because it was found that there was no evidence that there had been any passing on;[613] while another decision did not award damages because passing on had been proved[614]. The Supreme Court eventually held that not only the defendant has the burden of proving that passing-on had occurred, it also has to show both that the direct purchasers have raised the price of their products and that this raise was able to transfer the harm suffered as a result of the cartel overcharge. Furthermore, if the claimant has suffered other loss that he was unable to pass on (e.g. as a result of sales diminution related to volume effect or of loss of competitiveness related to the overcharge), the passing-on defence cannot be accepted in its totality.[615]

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[610] District Court of Gelderland, Mar. 29, 2017 (*Tennet TSO BV, Saranne BV / ABB BV, ABB Ltd.*), available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBGEL:2017:1724 (in Dutch).

[611] See decision of the Bundesgerichtsof of 28 June 2011 (KZR 75/10 – ORWI).

[612] See Mark Swheda 'Plaintiff's paradise? The passing-on defense after the 9th amendment of the German Act against Restraints of Competition (GWB)' at http://www.hlregulation.com/2017/06/14/plaintiffs-paradise-the-passing-on-defense-after-the-9th-amendment-of-the-german-act-against-restraints-of-competition-gwb/.

[613] A decision upheld by Supreme Court – Judgment of 8 June 2012, *Galletas Gullo´n et al v ACOR* (STS 5462/2012).

[614] Judgment of Provincial Court of Madrid (s 8) of 3 October 2011, *Nestle´ et al v Ebro* (JUR/2011/386351).

[615] Supreme Court Judgment of 7 November 2013 – *Nestle´ et al v Ebro Foods* (STS 5819/2013). See Fernando Diez Estella and Clara Estrada Meray 'Las Acciones de Danos Derivadas de Ilicitos Competitivos en España', p. 193-194; Francisco Marcos 'Damages Claims in the Spanish Sugar Cartel', p. 222-223.

350. One can discern a few trends in these cases. First, there is widespread concern with the possibility that passing on allows defendants (i.e. the entities who infringed competition law) to avoid paying damages. As a result, courts seem to favour creating high thresholds that must be met before a passing on defence can succeed. Secondly, economic approaches to passing on have often been reconfigured as matters of allocation of the evidentiary burden – which explains why such defences often either succeed or fail completely (i.e. why passing on is presumed to be either 100% or 0%). In other words, courts have avoided engaging in complex economic analysis and choosing between different economic models, and relied on principles of evidence with which they are most familiar.

(iii) Tools to Facilitate Passing On Assessments

351. Courts have demonstrated reticence in pursuing detailed economic analyses of passing on. Given how costly and difficult such analyses can be, and the institutional constraints under which courts operate, such reticence is understandable. In effect, these constraints may justify the adoption of rules and mechanisms that assist courts in taking passing on into account.

352. A number of such mechanisms are foreseen in the EU Damages Directive. First, the Directive establishes a rebuttable presumption that in some circumstances indirect purchasers suffered loss as a result of the overcharge paid by direct purchasers, and thereby makes it easier for indirect purchasers to prove that passing on occurred.[616] An indirect purchaser is deemed to have proven that harm has been passed on by showing that: an infringement of competition law took place; that the direct purchaser has suffered harm; and that the indirect purchaser has purchased goods or services that were the object, or were affected, by the competition law infringement. It is then for the defendant to show that the harm was not, or was not entirely, passed on to the indirect purchaser. The combined effect of these evidentiary rules is that indirect purchasers often benefit from a presumption of the existence of harm, and defendants are subjected to a demanding evidentiary burden to rebut the presumption.[617]

353. Secondly, the Directive sets out that courts must be allowed to estimate the amount of the overcharge which was passed on.[618] Third, the Directive explicitly imposes the burden of proof of the existence and amount of an overcharge on the defendant.[619] Fourth, in order to avoid both over- and under-compensation, the EU Damages Directive allows national courts seized in actions for damages to take due account of any other actions for damages (and their judgments) that are related to the same infringement of competition law but that

[616] Damages Directive, Art. 14; OECD (2015) *Relationship between Public and Private Enforcement*, p. 6.

[617] Okeoghene Odudu and Albert Sanchez-Graells 'The interface of EU and national tort law: competition law', p. 163-164.

[618] Article 12(5) of the EU Damages Directive.

[619] Article 13 of the EU Damages Directive.

are brought by claimants from other levels in the supply chain, as well of relevant information in the public domain.[620]

354. Lastly, the Directive requires the European Commission to prepare a study on the passing-on of overcharges which can be used by national courts.[621] This study, which was published in 2016, includes an extensive analysis of current thinking on the topic of passing on; a full review of national, EU and US case–law; and an in-depth analysis of economic theory. The Study also sets out and evaluates alternative approaches to quantifying the impact of passing on on damages claims.[622] It concludes with "39 Steps": a checklist providing practical recommendations for national courts, including on how to navigate and manage expert evidence and quantification methods, how to utilize new disclosure mechanisms introduced by the Damages Directive, and how to avoid inconsistent decisions. It is unclear whether courts – and their staff – will always be able to pursue economically-sound passing on analysis, which is why another measure that can be considered is allowing the court to appoint an economic expert. This may be particularly useful when the parties submit conflicting economic models.[623]

12.4. Interest

355. Compensation for damages caused by an infringement of competition law is often claimed after a significant delay, sometimes many years after the damage has been suffered. As a consequence, if a system wants to provide full compensation for damages suffered, the payment of interest is often essential. Interest is routinely added to damages awards to account for the effects of money losing its value over time, as well as for lost opportunities the injured party missed because it did not have this capital at its disposal.

356. The passing of time can be taken into account either as a separate category of damages, (interest), or as a constituent part of actual loss or loss of profit. As a result, in some systems interest begins to run from the time the claim is brought, while in others interest runs from the moment that the loss was suffered.[624]

12.4.1. Compound or Simple

357. Interest rates can be simple or compound. Simple interest is calculated solely as a percentage of the principal sum. Compound interest, on the other hand, is calculated on the principal and on interest accumulated during previous periods.

[620] Article 15 of the EU Damages Directive;.

[621] Article 16 of the EU Damages Directive,

[622] Study on the passing-on of overcharges, available at http://ec.europa.eu/competition/publications/reports_en.html.

[623] See, as an example of this approach, Danish Maritime and Commercial Court, Case no. U-4-07 *Cheminova A/S v. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB* judgment of 15 January 2015.

[624] European University Institute 'EU Law and Interest on Damages for Infringements of Competition Law – A Comparative Report' (2016), p. 18.

358. From an economics perspective, compounding interest is the usual, and conceptually correct, approach. Consider a bank deposit: the amounts which are due as a result of interest on the deposit are added to the bank deposit, and interest is applied during the following period to the increased bank deposit amount. In the short term, the difference may not be significant. However, compound rates have a significantly different effect than simple rates, particularly when the claim has been long-running (as are most competition law claims). A system which awards only simple interest will tend to either over-compensate claimants in short–running cases; or to under-compensate claimants when a case takes a long time to dispose of or when interest rates are high.[625] Given that in some occasions the value of interest can exceed the value of the original damages, this can have a substantial impact on incentives for litigation.

359. Compound interest can be calculated in several different ways, with outcomes changing depending on whether annual, quarterly or monthly periods are used, and on the exact date on which the interest starts running. It may be to avoid this that most jurisdictions opt for simple interest. The main argument for it seems to be that it easier to calculate and will minimise the cost of disputes. In the US, there is no federally mandated interest rate. While the common law rule is that interest is simple, in commercial cases it is often compounded. In Europe, the predominant practice is to award simple interest[626], even though there are numerous exceptions[627] [628].

360. There may be good reasons to apply compound interest in competition damages claim. First, the development of IT systems and the availability of computers can go a long way towards simplifying the calculation of compound interest. Second, simple interest fails to reflect commercial reality. Interest is intended to compensate claimants for the cost of being kept out of their money, and to put them in the position they would have been if damages had been paid

[625] United Kingdom Law Commission 'Pre-Judgment Interest on Debts and Damages' (2004) LawCom 284, p. 31; Oxera 'Quantifying antitrust damages: Towards non-binding guidance for courts, Study prepared for the European Commission', p. 122-123.

[626] In the Netherlands and Poland, compound interest is always applied. In Germany, compound interest may be obtained as part of the calculation of damages. See Ashurst Report,, p.87; and European University Institute 'EU Law and Interest on Damages for Infringements of Competition Law – A Comparative Report', p. 19-30. In the UK, compound interest can be claimed by the parties or awarded at a court's discretion under common law, but parties must demonstrate loss – see *Sempra Metals v. Inland Revenue* [2007] UKHL 34, para. 17, 26, 33-34, 40-49, 94-95, 112, (which contains an extremely detailed, and potentially useful discussion of the pros- and cons- of simple versus compound interest).

[627] In Austria, Czech Republic compound interest can apply once a claim is pending. In Belgium, compound interest may be awarded but courts rarely do so, except if a significant amount of time has lapsed since the date when damages were awarded. In Spain, simple interest is applied to the period between the suffering of harm and the bringing of a claim; once the claim is brought, simple interest applies to both the damages and the interest accrued during the period before the claim was brought. See European University Institute 'EU Law and Interest on Damages for Infringements of Competition Law – A Comparative Report', p. 19-30.

[628] Ashurst Report, p.87.

when they fell due. However, delay in payment means either that claimants need to borrow or that they lose the opportunity to invest, both at compound rates.[629] Third, competition cases typically involve large claims where damages are awarded many years after the harm occurred – this is the type of cases where the use of simple interest is more likely to fail to provide adequate compensation when compared to compound interest.

12.4.2. Time from which interest starts accruing

361. The amount of interest due to a claimant can vary significantly depending on the moment from which it starts accruing. Where an infringement of competition law has caused harm for many years before damages are awarded, this means that the claimant has not earned interest on the lost money for that period of time. Simultaneously, the entity which infringed competition law may have earned returns on the gains from its unlawful conduct during this same period.

362. In practice, four moments can be identified from which interest usually starts accruing in tort actions: (i) the date of the infringement; (ii) the date when the notice to stop the breach or to effect payment is served;[630] (iii) the date when damages claim is brought; and (iv) the date when damages are awarded. In some jurisdictions, multiple options may be available to parties and courts.[631]

363. Pre-judgment interest helps to ensure that a claimant harmed by a defendant's unlawful conduct is fully compensated for its loss.[632] If no pre-judgment interest is available, the infringing party will be entitled to keep its returns from the overcharge, while the claimant will be deprived from the returns it would have been able to make were it not for the competition law infringement.[633] This is the view that has been adopted in the European Damages Directive, and is also common in a number of European countries.[634] It follows from the principle of effectiveness, and the right of individuals to seek

[629] United Kingdom Law Commission 'Pre-Judgment Interest on Debts and Damages', p. 1-2; *Sempra Metals v. Inland Revenue* [2007] UKHL 34, para. 33.

[630] This is traditionally the position under Art. 1100 of the Spanish Civil Code – see Carmen Herrero Suarez 'La Transposicion de la Directiva de Danos Antitrust', p. 172.

[631] Ashurst Study, p. 85-86.

[632] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 249.

[633] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 243.

[634] Including Austria, Belgium, Finland, and Spain. In some member states, interest can only be claimed once a claim is brought, but loss of interest may be taken into account when calculating damages. This is the case in the Czech Republic, Portugal and Slovakia. Lastly, there are some countries such as France, where interest only starts running from the date of the damages award but where courts have nonetheless discretion to hold that interest begins to run from an earlier time; and Sweden, where interest starts running 30 days after the damages claim is brought. See European University Institute 'EU Law and Interest on Damages for Infringements of Competition Law – A Comparative Report', p. 19-30.

compensation for loss caused by conduct liable to restrict or distort competition, that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest – with interest being due from the time when the harm occurred until the time when compensation is paid.[635] However, in practical terms a similar result can be achieved even if interest is only awarded from the date of judgment if the time-value of money is taken into account when calculating damages for lost profits.

364. The situation is different in the US. Prior to 1980, pre-judgment interest was not available for antitrust claims in the US. In 1980, in response to a recommendation by the National Commission for the Review of Antitrust Law and Procedure, Congress amended Section 4 of the Clayton Act to permit courts to award pre-judgment interest when it is "just in the circumstances." The purpose of these provisions was to compensate claimants for dilatory tactics by defendants. The Clayton Act only permits a court to award pre-judgment interest when: (a) a party filed motions or asserted claims "so lacking in merit" that they could only have been intended for delay, or "otherwise acted in bad faith"; (b) a party violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior; or (b) a party engaged in conduct primarily intended to delay litigation or raise its cost.[636]

365. However, in the twenty-six years between 1980 and 2006 since the amendment, there was no reported decision awarding pre-judgment interest in an antitrust case. While this can – and has been – criticised for preventing successful plaintiffs from obtaining full compensation, it can also be argued that in the US system treble damages adequately compensate for the general unavailability of pre-judgment interest in antitrust cases. Furthermore, it has also been remarked that some courts have effectively compensated for the absence of pre-judgment interest by taking into account elements such as inflation and interest paid on borrowed capital when calculating the amount of damages due.[637]

12.5. Reductions in the Amount of Damages

366. While not strictly related to the quantification of damages, it is worth remarking that efforts to promote public enforcement can affect the extent of the liability for damages of some participants in anticompetitive conducts. In

[635] Damages Directive, Recital 12: "*The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.*"

[636] 15 U.S.C. § 15(a). Report and Recommendations of the Antitrust Modernization Commission (2007), p. 248.

[637] Report and Recommendations of the Antitrust Modernization Commission (2007), p. 249. See, *e.g.*, *Law v. Nat'l Collegiate Athletic Ass'n*. 185 F.R.D. 324. at 347–48 (inflation); *Concord Boat Corp. v. Brunswick Corp.*21 F. Supp. 2d 923 (E.D. Ark., 1998) at 935–36 (inflation); *Minpeco S.A. v. Hunt*, 686 F. Supp. 420, 425–27 (S.D.N.Y. 1988).

particular, and as already discussed above in Chapter 8.3.3, some jurisdictions have considered necessary to reduce the civil liability of successful leniency applicants in subsequent damages actions to preserve the attractiveness of leniency programmes.

367. Leniency applicants which co-operate with competition authorities under a leniency programme are more exposed to private actions than companies which have not applied for leniency. There are different reasons for this increased exposure. Generally, the decision against the immunity recipient will become final much earlier than the decision against the other participants in a cartel: the successful leniency applicant would normally have no legitimate interest in appealing against the decision of the competition authority, which will thus become final against him much earlier than it will for the other cartelists. The effect of the infringement decision becoming final earlier in respect of leniency applicants, combined with the binding effect of this decision in follow-on damage claims, will make the leniency recipient an especially 'easy target to sue'. This effect is compounded by the fact that, as a result of joint and several liability, a claimant might claim damages well in excess of the amount of the damage caused by the immunity applicant alone. If increased exposure to damage claims is a direct consequence of submitting a leniency application, the incentives for a cartelist to apply for leniency and to come forward with evidence of a cartel are adversely affected. This might ultimately undermine the attractiveness and effectiveness of leniency programmes.[638]

368. As a result, most jurisdictions have some measures in place to protect leniency applicants in subsequent claims for actions. One such measure is to reduce the leniency applicant's liability for damages. In the Unites States, the successful corporate amnesty applicant is only exposed to single damages rather than to treble damages, on condition that he also co-operates with private claimants in their damage actions against the remaining cartel infringers.[639] The US rule does not sacrifice the claimants' interest in compensation, but rather aims to protect the effectiveness of both the US leniency program and private enforcement. The EU Damages Directive, on the other hand, limits the civil liability of the immunity recipient only to the damages caused to its direct or indirect purchasers or providers – which is an exception to the joint and several liability rule which would make the leniency applicant liable for the damages caused by the other cartelists.[640]

369. A related protection is concerned with ensuring that the leniency applicant is not exposed to liability – and particularly joint and several liability – before the other cartelists. Under the Hungarian Competition Act, an applicant receiving full immunity is only liable for damages if follow-on cartel claimants are unable to obtain full compensation from other cartel members. A successful immunity recipient is still subject to civil liability, but claimants must sue the other cartel

[638] OECD (2015) *Relationship between Public and Private Enforcement*, p. 29-30.

[639] Section 213(b) of the 2004 Antitrust Criminal Penalty and Reform Act, Pub L No, 108-237.

[640] Article 11(4) (a). of the EU Damages Directive,

members first.[641] Under the EU Damages Directive, while the leniency applicant could theoretically be sued before the other cartelists, injured parties other than the direct customers and suppliers of a leniency applicant can only claim damages from the leniency applicant when they show that they cannot obtain full compensation from the other cartelists.[642] Furthermore, the amount of contribution for which the successful immunity applicant is liable cannot exceed the amount of harm caused to his own direct or indirect purchasers or providers.[643]

13. Economic Methods

13.1. Legal Causation and Scientific Methods

370. In order to understand the relevance of economic methods for the determination of legal cases, it is important to understand the relationship between legal and scientific concepts of causation in somewhat greater detail than in Chapter 11. Lawyers can be content with concepts of causation that fall short of the scientific ideal. There are (theoretical) approaches to factual causation that, in order to make law more similar to scientific practices, rely on probability and focus on the contribution of a cause to the risk of harm. This approach presents close characteristics to scientific theories of causation, inasmuch as it focuses on the regularity of the occurrence of types of events in order to infer from this a causal generalization implemented in the specific case examined.[644] This involves the description of a class of events which probability must be shown to have been significantly increased by the condition or conduct in question.[645]

371. There are two potential probabilistic approaches: *ex ante* and *ex post. Ex ante* probabilities underpin the law and economics movement and its approach to the allocation of liability.[646] However, this approach has not been adopted by courts, arguably with good reason – as we saw above in Chapter 11, probabilistic increased-risk concepts cannot be substituted for the actual-causation requirement in the general run of cases without reaching results that are far removed from the

[641] Section 88/D of the Hungarian Competition Act, as amended in 1998.

[642] Article 11(4) (b) of the EU Damages Directive,.

[643] Article 11(5) of the EU Damages Directive,.

[644] Arguing that "this notion is scientific in the sense that it is used in science", but is merely a substitute which: "provides only a thin veneer of scientific respectability" to law, see Antony Honore 'Causation and Remoteness of Damage' *in* A, Tunc (ed.) International Encyclopedia of Comparative Law, vol. XI (Torts) Ch. 7, p. 29.

[645] HLA Hart and Tony Honoré *Causation in the Law* (2nd ed.) (OUP, 1985), p. 482; Antony Honore 'Causation in the Law'; Ioannis Lianos 'Causal Uncertainty and Damages Claims', p. 13-14.

[646] Guido Calabresi 'Concerning Cause and the Law of Torts' (1975) U. Chi. L. Rev. 43; Mark Grady 'A New Positive Economic Theory of Negligence' (1983) Yale L.J. 92 799 ; William Landes and Robert Posner 'Causation in Tort Law: An Economic Approach' (1983) J. Legal Stud. 12 109 ; Stephen Shavell 'An Analysis of Causation and the Scope of Liability in the Law of Torts' (1980) J. Legal Stud. 9 463.

traditional notions of liability that are applied by the courts.[647] Even *ex* post probabilistic approaches, which are associated with inferential statistics[648], lack the attributive element that distinguishes causal explanations from mere probability statements. This attributive element, which has always been essential for tort liability, explains the courts' refusal to admit pure or "naked" statistical evidence as proof of causation or identification.[649]

372. The attributive element of causation also helps explain how scientific rules and *ex post* probabilistic inferences can be used in legal proceedings. For our purposes, it is important to distinguish between three different types of causative propositions which are relevant. First, there are *causal laws*, which are invariable, non-probabilistic causal connection. However, we rarely have recourse to causal laws in practice. Instead, we must have recourse to *causal generalisations*, which list only some of the elements of fully specified causal rules. These generalisations are, as a general rule, arrived at through the decision-maker's knowledge and intuitions about how the world works.[650] In competition law, a name that is often used for the causal generalisation of how the conduct led to damage is "theory of harm". The third concept is *actual cause*, which is the object of the factual causation assessment, and is fulfilled by reference to the facts of the case.

373. Three steps must be followed in order to arrive at an actual cause for purposes of legal proceedings: (i) a cause actually led to an effect, and there is some causal generalisation that connects the relevant type of cause and effect.[651] (ii) proof of actual cause will be assessed by reference to the accepted strength of the causal generalisation, and to the presence and absence of elements that that are usually also found in the relevant causal generalisation linking the identified type of cause and effect; (iii) one must distinguish between different causal generalisations that may be applicable, usually by attacking the presence of conditions deemed necessary for those generalisations to apply.[652] A judgement on what actually happened on a particular occasion is a judgement of whether a causal generalisation was fully instantiated on a specific case. Similarly, when

[647] Richard W. Wright 'Causation in Tort Law', p. 1814; Richard W. Wright 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof', p. 1005-1006.

[648] Which are used to draw conclusions/inferences about the general population from a single study: see Erica Beecher-Monas *Evaluating Scientific Evidence*, p. 60.

[649] Richard W. Wright 'Causation in Tort Law', p. 1741, 1822.

[650] Or, as put more clearly by Learned Hand: "*the major premise, i.e. that which consists the general rule, the jury supply from their common knowledge; the minor premise, i.e. that which supplies the particular instance whose predicate is the subject of the major, the witnesses or other evidence furnish*". Learned Hand 'Historical and Practical Considerations regarding Expert Testimony' (1901) Harvard Law Review 15(1) 40, p. 51.

[651] HLA Hart and Tony Honoré *Causation in the Law*, p. 31-32; Richard W. Wright 'Causation in Tort Law', p. 1741, 1823, 1825.

[652] HLA Hart and Tony Honoré *Causation in the Law*, p. 31-32, 44-48; Richard W. Wright 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof', p. 1045-1047.

parties plead a case, they present facts and frame them in the light of prevailing ideas of normal and abnormal behaviour.[653]

374. Particularistic evidence connects the causal generalisation to the specific case.[654] Choosing among competing explanations depends on the relative plausibility of each causal generalisation in the light of the facts of the case, as measured by reference to a number of criteria: the degree of coverage (that is "the greater the portion of the evidence a story is able to account for the higher its plausibility"), the completeness/consilience of the story (it explains more facts and has less gaps), the coherence of the narrative (that is "the added quality of the individual elements integrating well together to yield a smooth and convincing narrative of events") and finally its probative force (that is "the positive support it receives from the evidence").[655] Framing a case successfully involves successfully fitting in a description of ""specific consequences" within a wider framework of "general coherence."[656]

375. This is why purely probabilistic assessments are not well suited to the determination of legal cases. Such assessments merely look at the relationship between the types of causal generalisation and of effect – they do not assess whether the effect actually occured (which, in itself, often is a requirement of tort liability), do not assess whether other conditions relevant to the causal generalisation to apply are present, and do not distinguish between possible causal generalisations. As a result, probabilistic approaches are, on their own, merely proof of increased risk, and do not provide any information about whether a causal generalisation is reflected in the case at hand, or about whether a causal generalisation is a better explanation than another.[657]

376. In other words, naked statistics are, quite simply, not probative. While probabilistic assessments may be relevant for the (descriptive) purposes of science, they are of dubious relevance for the (attributively inclined) purposes of law, in which judges seek to give a legitimate and persuasive solution to a legal dispute.[658] As noted by the US Supreme Court: "(*s)cientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly… We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance*

[653] John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases', p. 623-624.

[654] HLA Hart and Tony Honoré *Causation in the Law*, p. 31-32, 44-48; Richard W. Wright 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof', p. 1051.

[655] Ho Hock Lai *A Philosophy of Evidence Law* (OUP, 2008), p. 164; Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 135.

[656] To paraphrase Clifford Geertz *Local Knowledge* (1983), p. 175

[657] Richard W. Wright 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof', p. 1046.

[658] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 44.

that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes".[659]

377. On the other hand, probabilities determined *ex post* can help to prove causation when taken together with the particular evidence that instantiates or negates the necessary conditions for a causal generalisation to apply. Scientific models can be tools that assist courts to manage uncertainty together with other logical instruments such as inferences and deductions, and, finally, common sense.

13.2. Competition Law and Economic Methods in Practice

378. In judicial proceedings, the assessment of the evidence should focus on the relative plausibility of competing hypothesis presented by the parties – by reference to the relative "strength of the explanation" provided by each party, assessed taking into account the "inferential interests of the decision-maker" in the context of other evidence or other contrary explanations.[660]

379. In competition law, economic theory plays a large role in determining what the "normal scenario" is, what 'causal generalisations' will be found plausible, and what inferences will normally be taken from the facts – even if, ultimately, it is the decision-maker's intuitions and perceptions regarding the validity and explanatory power of individual theories that will determine the relevant baseline for analysis.[661] In this context, statistical and econometric evidence have an important role which can assist in the drawing of inferences and reversing the burden of proof. The objective of econometrics is "the quantitative analysis of actual economic phenomena based on the concurrent development of theory and observation, related by appropriate methods of inference"[662]. Hence, this method interprets data through economic theories in order to infer effects from selected causes. Its aim is "to obtain knowledge concerning relations that exist in the social reality" through a theory-data – i.e. establish connections between causes and effects.[663]

380. In practice, the econometric assessment of causation in competition law focuses mainly on counter-factuals.[664] As noted above at Chapter 11.2,

[659] *Daubert v.Merrell Dow Pharm, Inc*, 509 U.S. 579 (1993).

[660] Ronald J. Allen, 'The Nature of Juridical proof' (1991) 13 Cardozo L Rev 373; Michael S. Pardo and Ronald J. Allen 'Juridical Proof and the Best Explanation' (2008) 27 Law and Philosophy 223, p. 229, 261; Ho Hock Lai *A Philosophy of Evidence Law*, p. 156; Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 136.

[661] John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases', p. 635, 637-638.

[662] Paul A. Samuelson, Tjalling C. Koopmans, and J. Richard Stone 'Report of the Evaluative Committee for Econometrica' (1954) *Econometrica* 22(2) 141.

[663] Bernt P. Stigum, *Econometrics and the Philosophy of Economics: Theory-Data Confrontations in Economics* (Princeton University Press, 2003), p. 3.

[664] James J. Heckman, 'Econometric Causality' (2008) International Statistical Review 76(1) 1.

counterfactuals are prospective states of affairs which require a degree of prediction and speculation. The evidentiary burden and evidence needed to support different counterfactuals will vary along a continuum of fact and commercial realism to sheer speculation and theoretical abstraction.[665] While focusing on the impact of the anticompetitive conduct, which is the relevant variable, counterfactuals in competition law are complicated by the need to take into account that rivals, suppliers, and customers will also respond to the anticompetitive action.[666] As a result, and as explained in the European Commission's Guidance Paper to Quantification of Harm, a counterfactual: "*is something that cannot be observed in reality; it is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement. All that is possible is an estimate of the scenario likely to have existed without the infringement*"[667] In other words, econometric counterfactuals consist in the assessment of data sets corresponding to a group of transactions to generate best estimates of whether the damage would have occurred in absence of the infringement, and of its amount if it did occur.

381. Economic counterfactuals, usually developed through recourse to econometrics, employ different approaches to data analysis that may lead to different conclusions depending on the researcher's underlying assumptions and strategies.[668] The context and strategies to address the pitfalls of econometric counterfactuals are outside the scope of the present work, and have been extensively addressed elsewhere.[669] Ultimately, the relation between probabilistic assessments and evidence in specific cases is that *ex post* causal probability can be used to determine: (i) the likelihood of the relevant conduct being a cause of the relevant effect; and (ii) the likelihood of competing causal generalisations given the specific facts of the case.[670] The appropriateness of a proposed counterfactual depends on: (a) the underlying 'theory' of competition, or as it is

[665] Cento Veljanovski 'Counterfactual Tests in Competition Law' [2010] Competition Law Journal, p. 5.

[666] John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases', p. 633.

[667] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union 2013/C 167/07.

[668] Erica Beecher-Monas *Evaluating Scientific Evidence*, p. 50;John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases', p. 687-69.

[669] John Lopatka and William Page 'Economic Authority and the Limits of Expertise in Antitrust Cases'; Daniel Rubinfeld 'Econometrics in the Courtroom'; Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union 2013/C 167/07/;

[670] Richard W. Wright 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof', p. 1049-1050.

sometimes called the 'theory of harm'; (b) the 'realism' of the counterfactual; (iii) the evidence in the case.[671]

382. We saw in Chapter 10.3 above how competition cases very often boil down to a choice between the evidence – and interpretation of the data – provided to the court by economic experts. Examining the sufficiency of economic evidence is a complex task that includes different considerations. When doing this, courts may be influenced by the general acceptability of a theory, its established track record in the case law, econometric evidence, and circumstantial evidence such as internal company documents, customer testimony or even the qualifications of the experts.[672]

383. At the same time, in "resolving the battle of the expert witnesses" the Court must ultimately choose the most convincing evidence.[673] For example, a counterfactual needs to reflect the reactions of third-parties to illicit behaviour. Most economic models rely on presumptions of rationality of economic agents, but this is not how courts usually decide cases – instead, when deciding on the relevant counterfactual courts often rely on what the actual behaviour of a third party would have been, based on evidence adduced in court.[674] Some authors have even argued that judges in civil cases identify the most plausible of the competing explanations rather than merely apply pre-confectioned probabilities.[675] This is supported by practice in the English courts, which have held that while epidemiological[676] or statistical evidence can be accepted, its relevance will depend on the court's acceptance of the evidence's creditability[677], and that such evidence cannot in any event serve to reverse the burden of proof[678]. Furthermore, inferences can be made where loss flows from tortious conduct which is of a kind likely to have ordinarily arisen from such conduct – even if the claimant was unable to explain the exact mechanism – as long as other explanations are, on balance, improbable.[679]

[671] Cento Veljanovski 'Counterfactual Tests in Competition Law', p. 6. See also *British Sky Broadcasting Group Plc v The Competition Commission* [2008] CAT 25, para. 81.

[672] Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 123.

[673] *United States v. Oracle Corp*., 331 F. Supp. 2d 1098 (N.D. Cal. 2004), at 1158; Ioannis Lianos 'Judging Economists: Economic Expertise in Competition Law Litigation', p. 117.

[674] Vivien Rose 'Predicting the Past: Constructing the Counterfactual in Antitrust Damages Claims', p. 147-148. See, for a practical example, *Enron Coal Services* [2009] CAT 36, para. 199-210.

[675] Ronald J. Allen and Brian Leiter "Naturalized Epistemology and the Law of Evidence" (2001) Virginia Law Review 87 1491, p. 1527.

[676] *Corby Group Litig* [2009] EWHC 1944 (TCC).

[677] *Reay v British Nuclear Fuels* [1994] 5 Med LR 1 (QB) 12

[678] Rachael Mulheron *Tort Law*, p. 417.

[679] *Drake v Harbour* [2008] EWCA 25, at 28.

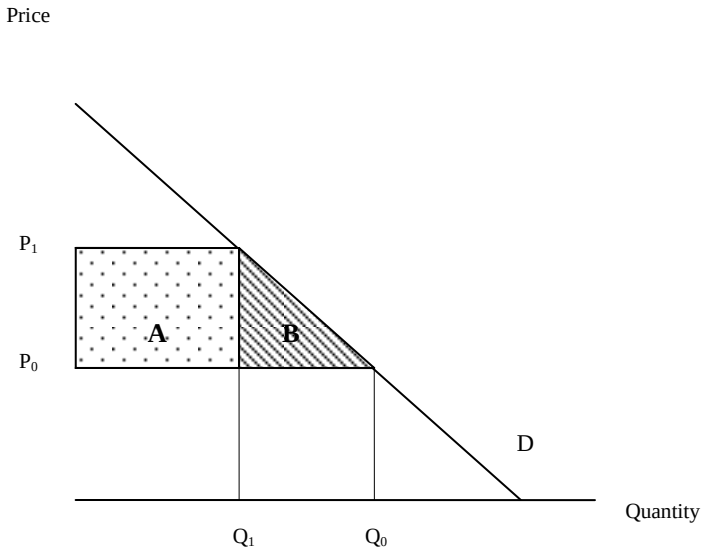
384. Nonetheless, and given the prominent role of econometric models in competition litigation, economic experts have become fundamental in gauging economic data submitted to the court, as they consistently deploy different theories and standard economic models for the creation of different counterfactual scenarios. As such, it is important that courts be aware of the main techniques used in competition litigation. These are reviewed in the section below.

13.3. Different Economic Methods

385. Identifying harm caused by anticompetitive practices is extremely complex, and presents challenges even to well-staffed competition agencies. Competition authorities very often do not use quantitative evidence due to the difficulties inherent to these calculations (such as the unavailability of relevant data). Instead, competition authorities may rely on presumptions to overcome these challenges, leaving damages calculations to private actions in the courts. In any event, the methods that competition authorities use to make estimates or calculations of harm would not necessarily be the same ones used for private damage claims. In private damage claims, the focus may be on the overcharge effect and the pass-on defence. In administrative proceedings, the main emphasis may be on output effects which measure the negative welfare implications of a cartel, or on price effects when consumer welfare is the focus of the calculation.

386. The underlying activity of a cartel is to reduce the quantity of a product that is sold and thus raise price above the level that would otherwise prevail. The cartel will set a price/quantity level that increases its profits, potentially to a level that is close to or equal to a monopoly price in many theoretical models. It would be unprofitable for a cartel to substantially exceed a monopoly price, so the monopoly price may, in practice, be viewed as an upper bound of cartel pricing. The price that would exist absent a cartel, in the more competitive situation, is sometimes called the counter-factual price or "but-for" price, as it represents the price that would prevail absent the cartel. The impact on consumers of a cartel can then be represented according to the Figure below, in which p_1 represents the cartel price, and p_0 the competitive and counterfactual price, with q_1 being the cartel's quantity and q_0 being the counterfactual quantity sold at the lower price p_0.

Figure 2. Illustration of cartel harm to consumers with linear demand



387. The harm to consumers from the cartel is showed in two parts of this figure. The first part of harm relates to the higher price charged for units that are sold in the cartel. This is represented as area A, and is often the object of damage claims concerning overcharges. In addition, consumers at the margin suffer as the price rises above the level that they would otherwise have been willing to pay. This area is represented by a triangle with area B in this simple case of a linear demand function.[680] This area represents a deadweight loss since the loss to consumers in this case is not recaptured by cartelists. This may lead to further claims for damages arising from loss profits from this reduction in demand.

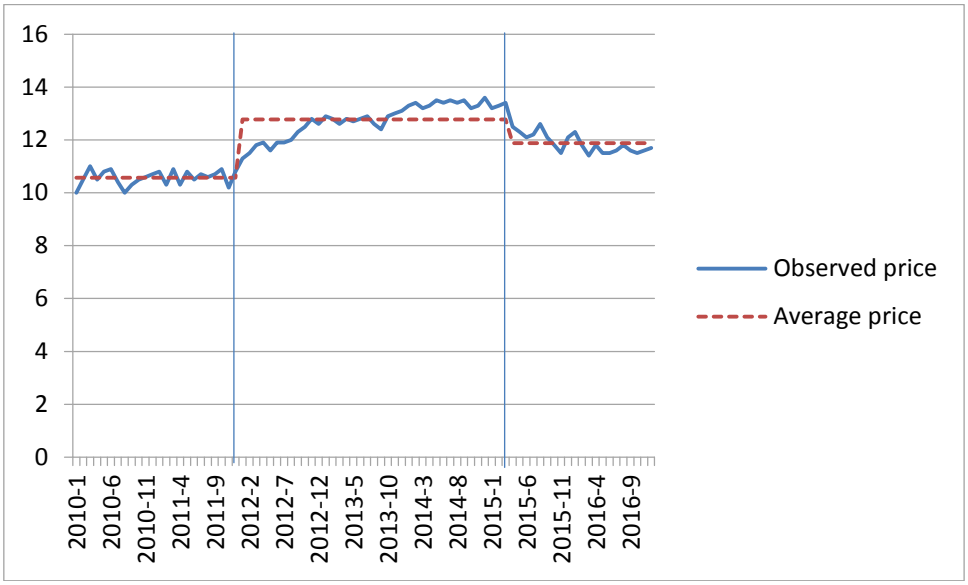
388. The challenge of calculating a cartel price and non-cartel price – let alone the damage from reduced demand – is non-trivial. Several alternative approaches are discussed below.

13.3.1. Simple averages approach

389. In the simplest terms, we can average prices for the cartelised product prior to the cartel period and compare these to an average of prices during the cartel period. The figure below illustrates a hypothetical set of price data and shows one version of average prices.

[680] With a curved demand function, as in a constant elasticity of demand case, the area is not a triangle but can be approximated to a first degree by a triangle or, with more information on the shape of demand, an integral under the demand curve.

Figure 3. Hypothetical cartel price time series



390. In the time series of prices shown in the Figure above, we can see how prices evolved over time for a hypothetical cartelised product. In this figure, there are at least three time periods: pre-cartel, during the cartel and post-cartel. The first vertical line indicates the time at which the cartel began and the second vertical line shows the time at which the cartel ended. The solid price line shows observed prices for the product, while the dotted line indicates the average price across each of the three periods. One approach is therefore to take the pre-cartel price as the expected price during the period of the cartel.

391. This Figure also illustrates some of the challenges of relying on a simple before and after approach, however. First, during the period of the cartel, prices are not steady around the average, but actually increase during the initial period of the cartel. So for a substantial period of time, the cartel prices are well below the average cartel price. This sort of observation can be explained by cartels slowly adjusting their product prices up to a new higher level, to reduce customer dissatisfaction and also reduce likelihood of detection. Second, the pre-cartel period and post-cartel period have different average prices. This raises the question of how to determine the competitive price. Is it only by looking at the price before the cartel? If so, how much time before the cartel should be used? Is it by some combination of the pre-cartel and post-cartel price? If so, how should this combination be calculated? Has there been general inflation over the period of analysis, or specific cost increases related to the product in question that mean the difference between the average cartel price and the pre-cartel price is partly due to cost increases and not to cartel activity?

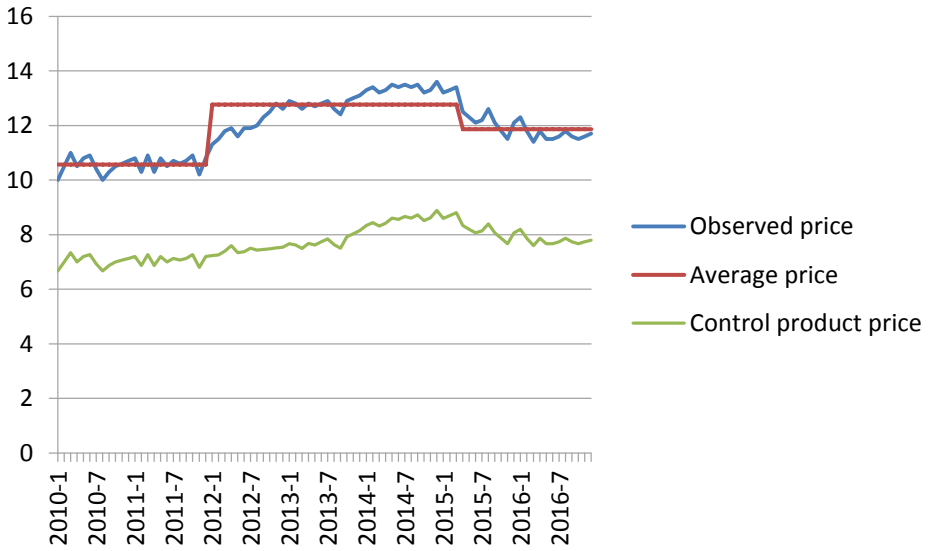
392. The detailed operational questions for implementing an approach using simple averages to distinguish cartel and non-cartel episodes raise many questions, but using simple averages may be appropriate in some circumstances, particularly if additional data is not available. There is often substantial variation in prices over time that may be confused for cartel effects, either underestimating

the effects, or in case of inflation, over-stating them. The existence of such variation suggests that it may be worth having an analysis that is more experimental in approach.

13.3.2. Comparator markets

393. One technique for taking into account cartel impacts that considers variation is to find comparator geographic markets or physical products that would be governed by similar supply and demand conditions as the cartel market. Differences between the two over the period of the cartel may then potentially be explained by the cartel, while similarities would arise from underlying common causal factors that would be distinguished from the cartel. For example, a cartel in steel pipes from 5-10 cm in diameter might raise prices, while not affecting prices for smaller diameter steel pipes made by other companies and not alleged to be affected by a cartel. It could then be useful to compare the price evolution over time of the two types of products. This type of comparison is illustrated by the figure below. This figure shows the price of a "control" product against the observed price of the cartel product and the averages of the cartel product. The control product may be the same product from a comparable but different geography from that affected by the cartel, or it may be a product with a comparable cost structure as that of the cartelised product in the same geography.

Figure 4. Hypothetical cartel price time series



394. The method relies on prices for the cartelised product being causally related to the prices of the control product. In this case, the cartel would be found to have raised prices in the initial period of its operation more than in the control product, and thereafter held a similar variation to that of the control product. Importantly, in this example the control product also experienced substantially higher prices during the period of the cartel than before the cartel (and after the cartel), illustrating that part of the supposed cartel price rise that might have been estimated from a simple comparison of before and after may have arisen from cost or demand drivers independent of the cartel. The comparator approach would

thus help to ensure that external factors affecting pricing, outside the cartel and during the cartel period, are taken into consideration in the calculation of price differences.

395. The comparator approach is valuable and intuitive to understand. It may be subject to limitations, particularly to the extent that there have been changes in variables in one comparator market that occur for reasons that do not arise in the other market(s). In such an instance, a simple comparator approach may be missing variables, suggesting that a means must be found of including all known relevant variables in the analysis. Regression analysis can do this.

13.3.3. Regression modelling

396. An approach for more rigorously taking forward the comparator approach is to estimate, via a regression model, the relationship between the cartelised market and underlying causal variables of price. There are a number of notable approaches that rely on regression modelling. The European Commission's Practical Guide on quantification of harm for courts and parties involved in damages actions can be a useful document for discussing these approaches in greater detail than what is done here.

397. In the first approach, a model is estimated in which the price of the cartelised product is driven by constant cost shifting variables from each period and demand shifting variables from each period, as well as from those periods with the cartel and those without. The dummy variable would take the value of 1 during the period of the cartel and 0 otherwise. The coefficient estimated on the dummy variable can then be dropped, while running the model on the demand and cost shifters over the entire period to calculate the expected prices absent the cartel. The difference between the model's actual and expected prices then yields the difference, period-by-period, between the cartel and counterfactual price.

398. In the forecasting model approach, price-determining variables are again used to estimate a model of price, but this time leaving out observations from the period during the cartel. The model estimated is then applied to data on price-determining variables from the cartel period to estimate an expected price. The difference between the actual price and the forecast price, which is known at each separate time period, is then the price increase from the cartel. This forecasting approach leaves out some information from the model estimation, so it may be considered inefficient from a statistical perspective, potentially leading to less precise estimates. However, if the model form for cartel impacts is more complex than a simple dummy, the results from forecasting may be closer approximations to a true model than those of the dummy, even if cartel period information is ignored for estimating the model.

399. A third approach is to use difference in differences analysis. This can yield relatively simple and elegant predictions comparable to natural experiments in which one variable is changed. The approach looks at the difference between the price in the cartel market during the cartel period and the price in comparator markets during the cartel period. If cost or demand variables are comparable across markets, and only the cartel presence is different, the approach may yield a compelling estimate of cartel impacts, perhaps more than simple time series or cross-sectional based estimates of impact.

400. Yet another approach relies on margin analysis. The underlying rationale for focusing on margins is that cartelists focus to a great extent on increasing their margins during the operation of the cartel. Such an approach would calculate a competitive margin, by some means, and then quantify the difference between that margin and the cartel margin. The difference between the cartel and normal margin could be designed to take into account return on capital in the non-cartel period. Key factors for an appropriate margin analysis are that the costs are appropriate, economically speaking, and that a satisfactory basis is found for determining the competitive margin.

401. A final approach to quantification of harm is to actually calculate underlying demand and cost functions to feed into estimates of a competitive equilibrium and what that would be during the period of a cartel. The competitive equilibrium can be calculated using data, for example, from the non-cartel period. The difference between the simulated competitive equilibrium and the observed outcome during the cartel period will then yield the differences between cartel prices and outputs and those of the competitive outcome. One particular advantage of a simulation is that its information on the demand function's shape can feed into a reasoned estimate of the deadweight loss triangle area B in Figure 2. On the other hand, the data requirements for simulation modelling can be substantially greater than for the prior methods discussed, and the model complexity may be substantially greater than for prior approaches as well.

402. Ultimately, which methodology to adapt will depend on the available evidence and on the case brought before the court, in line with the considerations outlined in the first section of this Chapter.

Part III - Conclusions

14. Conclusions and Policy Recommendations

[To be drafted – no comments required]

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