

Competition Law

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Table of Contents

1. Introduction, 1.1. EU Law and National Law, 1.2. Public and Private Enforcement, 1.3. Overview — 2. Legal Fundamentals, 2.1. European Union Law, 2.1.1. Legislation, 2.1.2. Case Law, 2.1.3. Legal doctrine, 2.2. Competition Law in the Member States, 2.2.1. Starting Point, 2.2.2. Legal Basis of Private Claims, 2.2.3. Cessation and Damages, 2.2.4. Burden of Proof, 2.2.5. Punitive Damages, 2.2.6. Conflict of Laws, 2.2.7. Criminal Law Sanctions? — 3. Perspectives to Strengthen Private Enforcement of Competition Law, 3.1. Standing, 3.1.1. Direct Purchasers, 3.1.2. Indirect Purchasers and the Problem of ‘Passing On’, 3.1.3. Consumers and Consumer Associations, 3.2. Coexistence of Public and Private Procedures, 3.2.1. Direct Effect of Competition Law Rules, 3.2.2. Legal Authority of Administrative Decisions, 3.2.3. Coordination of Public and Private Enforcement, 3.3. Leniency Policy, 3.3.1. Reduction of Damages in Favour of Leniency Applicants?, 3.3.2. Protection of Confidentiality, 3.3.3. Remaining Tensions — 4. Outlook — Bibliography

1. Introduction

The term “competition law” is ambiguous. It encompasses fields of law which form—in most countries—two separate branches. Unfair competition law protects the fairness of the competitive process whereas antitrust law seeks to secure the existence of competition itself. Unfair competition law is

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dealt with in another part of this book,¹ whereas this chapter addresses antitrust law. The term “competition law” will be used here in the narrow sense comprising solely antitrust law. Substantive competition law in Europe normally contains rules for three kinds of behaviour, i.e. restrictive agreements (e.g. cartels), the abuse of dominant positions (e.g. exclusionary conduct of a monopolist), and, thirdly, the control of mergers and acquisitions.

There are two important features of competition law in Europe: Firstly, there are independent sets of competition law on two levels, on the one hand the European competition law in the Treaty on the Functioning of the European Union (TFEU) and in the related regulations, and on the other hand the national competition laws of the Member States. Secondly, the enforcement of competition law in Europe has almost entirely been a matter of administrative law while private enforcement of antitrust law is (contrary to the situation in the USA) of less significance. Both traits are about to change.

1.1. EU Law and National Law

As regards the coexistence of EU and national competition law, it is true that there have not been European directives on the harmonization of *national* antitrust law up to today. For transactions which affect only domestic markets or third countries (not being members of the EU/EEA), the national legislator is free in shaping competition law. Since European competition law is not applicable in these cases, the Member States could theoretically adopt or maintain completely different rules. For cross-border transactions between EU Member States, the primacy of EU law (and Art. 3 (2) of the European Cartel Regulation 1/2003) merely provides that national competition law may not be applied with a result that contradicts European competition law. However, there is a strong actual influence of EU law on national competition law. Different rules for cross-border and internal transactions would lead to an unequal treatment, especially with regard to large firms on the one hand and small and medium enterprises on the other hand. Such differences are hardly communicable. Therefore there is a heavy pressure on the Member States to bring their national competition law into line with European competition law. Some legal orders even explicitly provide that national competition law has to be interpreted in accordance with European competition law (Italy, UK). As a result, national competition law codes converge to EU competition law.

1. See Thomas M.J. Möllers (in this volume).

1.2. Public and Private Enforcement

Public Enforcement is the most visible form of competition law enforcement. Competition authorities sometimes carry out dawn raids and impose fines. Private enforcement is less spectacular: The most frequent use of competition law in private actions is made on the defence side by invoking the nullity of a contract as the result of a competition law violation. Less developed is the active use of competition law by bringing a cease and desist claim or an action for damages.

The view is widely accepted that private remedies should be strengthened in Europe.² This opinion is not only shared by the vast majority in the scholarly debate, but has been endorsed by the European institutions. In its *Courage*, *Manfredi* and *Pfleiderer* judgments, the European Court of Justice has underlined the importance of private enforcement.³ The European legislator has justified Regulation 1/2003 (bringing about a fundamental reform of competition law enforcement) in part with the aim of strengthening the decentralised application of European competition law by private remedies.⁴ Finally, in 2008, the European Commission has published a White Paper on Damages Actions for Breach of the European Competition Rules which explores the main obstacles to private damages claims and proposes different options in favour of a stronger role of private remedies.⁵ The European Commission has announced legislative measures in order to stimulate private enforcement.⁶

2. For an overview see Behrens/Hartmann-Rüppel/Herrlinger (eds.), *Schadenersatzklagen gegen Kartellmitglieder*, Baden-Baden 2010; Ehlermann/Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust*, Oxford 2003; Heinemann, *Private Enforcement in Europe*, in Zäch, Heinemann, Kellerhals (eds.), *The Development of Competition Law: Global Perspectives*, Cheltenham 2010, 300–318; Möschel/Bien (eds.), *Kartellrechtsdurchsetzung durch private Schadenersatzklagen?*, Cheltenham 2010. For an opposing view see Wils, *Should Private Antitrust Enforcement be Encouraged in Europe?*, *World Competition* 473 (2003).

3. ECJ, 20.9.2001, C-453/99, *Courage and Crehan* [2001] ECR I-6297; ECJ, 13.7.2006, *Joined Cases C-295/04 to C-298/04, Manfredi* [2006] ECR I-6619; ECJ, 14.6.2011, C-360/09, *Pfleiderer* [2011], 48(5) CMLR 219.

4. Monti, *Private Litigation as a Key Complement to Public Enforcement of Competition Rules* (2004), 17.9.2004, SPEECH/04/403, at europa.eu/rapid/searchAction.do.

5. European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2 April 2008, COM(2008) 165 final. See also European Commission, *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, 19.12.2005, COM(2005) 672 final. Cf. Bulst, *Of Arms and Armor—The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law*, 2 *Bucerius L. J.* 81 f. (2008).

6. See Bulst, *Schadenersatz wegen Kartellrechtsverletzungen*, Baden-Baden 2006, 117 f.

1.3. Overview

In this chapter, an overview on private competition law enforcement in Europe shall be given.⁷ We will see that—in the absence of explicit EU law rules—it is still up to national law to provide private parties with effective remedies. This is equally true for the private enforcement of national *and* European competition law. The reasons for the underdevelopment of private competition law remedies will be explored thus uncovering the major issues at stake in European private competition law.⁸

2. Legal Fundamentals

2.1. European Union Law

2.1.1. Legislation

EU primary law hardly contains private law in the proper sense. Competition law is an exception. Art. 101 (2) TFEU declares agreements or decisions prohibited by Art. 101 TFEU to be automatically void. However, the treaty as well as secondary legislation rest silent about other private law consequences of a violation of European competition law. Therefore, it is up to the national law of the Member States to provide for private remedies not only for the violation of national competition law, but also for breaches of the European competition rules.

One of the reasons underlying the modernization regulation 1/2003 is to spur the decentralized application of competition law before the national courts. As from 1 May 2004, Art. 101 (3) TFEU has become directly applicable. The notification and authorization system being valid before has been transformed into a system of legal exceptions. In this context, Art. 2 Regulation 1/2003 allocates the burden of proof: Authorities and private plaintiffs have to prove the infringement of Art. 101 (1) or 102 TFEU whereas the enterprise invoking Art. 101 (3) TFEU has to prove the prerequisites of this rule. It is not clear, though, whether the new cartel regulation contributes to the strengthening of private remedies.⁹ In future, the defendant can directly

7. The overview is based on Heinemann, Part II—Remedies in Antitrust Law, in Möllers/Heinemann (eds.), *The Enforcement of Competition Law in Europe*, Cambridge 2007, 387–658, presenting and analysing country reports of 15 EU Member States.

8. For an overview on the pitfalls of private enforcement see Zäch/Heizmann, *Durchsetzung des Wettbewerbsrechts durch Private*, Poznan 2005.

9. Sceptical Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regula-*

invoke Art. 101 (3) TFEU. Even if he has to prove the prerequisites of this exception, this increases the risk for the plaintiff.¹⁰

2.1.2. Case Law

The European Court of Justice has limited the freedom of the Member States to shape private remedies for competition law violations. In its *Courage*-decision—confirmed by the *Manfredi* judgment¹¹—the court has established the principle of *equivalence*. Private law actions based on the violation of European competition law must not stay behind what would be awarded due to a violation of national competition law. Here, it is national law having an influence on European law in so far as the consequences of a violation of EU law are partly guided by national law.

The court has added the principle of *effectiveness* to the principle of equivalence according to which national law must not render practically impossible or excessively difficult the exercise of rights conferred by EU law.¹² For example, the English courts had to change their practice according to which actions for damages based on a competition law violation are excluded from the start for a party which participated itself in the restrictive agreement. Damages can only be refused to participants who carry ‘significant responsibility’ for the violation of competition law.

2.1.3. Legal Doctrine

In legal doctrine, the *Courage*-decision has led to a controversy on the nature of private remedies in the case of a violation of European competition law. Some authors draw a parallel to the liability of member states according to the principles of the *Francovich*-case¹³ and qualify the action for damages resulting from the violation of European competition law as a claim directly deriving from EU law.¹⁴ On the other hand, the predominant opinion holds

tion Replacing Regulation No.17, in Hawk (ed.), Fordham Corporate Law Institute, New York 2001, note 110.

10. Under previous law, the defendant normally could not invoke the efficiency defence. When the restrictive agreement had not been notified to the Commission, the application of Art. 101 (3) TFEU was excluded from the outset.

11. See *supra* note 3.

12. ECJ, *Courage*, *supra* note 3, n. 29, confirmed by ECJ, *Manfredi*, *supra* note 3, n. 62.

13. ECJ, 19.11.1991, Joined Cases C-6/90 and C-9/90, *Francovich/Italy*, [1991] ECR I-5357.

14. See e.g. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford 1999, 152; Keßler, *Private Enforcement—Zur deliktsrechtlichen Aktualisierung des deutschen und europäischen Kartellrechts im Lichte des Verbraucherschutzes*, WRP

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the traditional view that such claims are rooted in national law which is simply modified by EU law via the principle of effectiveness.¹⁵ No matter which opinion one shares: Up until now the subject of private remedies has not yet been regulated in European secondary law. Uncertainties in the application of private remedies are the consequence. In our outlook, this problem will have to be dealt with (see below part 3).

2.2. Competition Law in the Member States

2.2.1. Starting Point

All 27 EU Member States have competition law rules which—in substantive law—have a structure similar to European competition law: There are rules on the three kinds of behaviour mentioned above. In addition, in some Member States, stricter rules on unilateral behaviour exist, e.g. the exploitation of a state of economic dependence (France, Germany).¹⁶ In every Member State, there are one or several competition authorities watching over the respect of competition law rules and endowed with the competence to instruct and to sanction anti-competitive behaviour. Besides this, everywhere the possibility of private enforcement exists, at least in theory. However, all over Europe, public enforcement of competition law by state authorities clearly prevails. This is partly due to the absence of incentives in view of the uncertainty of private law suits regarding legal costs awards and the distribution of the burden of proof. Another reason is the strong position of administrative

1061, n. 2.3.1 (2006); Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, 39 *Common Market L. Rev.* 465 ff. (2002); Mäsch, *Private Ansprüche bei Verstößen gegen das europäische Kartellverbot—“Courage” und die Folgen*, *EuR* 825, 841 f. (2003). In this sense already the Advocate General van Gerven, in ECJ, Case C-128/92, *Banks/British Coal Corporation*, [1994] ECR I-1209, differing van Gerven, *Of Rights, Remedies and Procedure*, 37 *Common Market L. Rev.* 501, 503 (2000).

15. Alexander, *Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht*, Tübingen 2010, 327; Lettl, *Der Schadensersatzanspruch gemäß § 823 Abs. 2 BGB i.V. mit Art. 81 EG*, 167 *ZHR* 473, 476 (2003); Weyer, *Schadensersatzansprüche gegen Private kraft Gemeinschaftsrecht*, 13 *ZEuP* 318, 325 f. (2003); Wurmnest, *Das Gemeinschaftsdeliktsrecht in der aktuellen Rechtsprechung der Gemeinschaftsgerichte*, 1 *GPR* 129, 135 (2003/04). Equally in this sense European Commission, *Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*, OJ 2004 C 101/54, n. 10.

16. Pursuant to Art. 3 (2) s. 2 Regulation 1/2003, Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by enterprises.

enforcement. The administrative proceeding is not only without cost to the applicant, but in addition gives access to a mechanism for the clarification of evidence and the imposition of sanctions.

On the other hand, there are also strong arguments in favour of civil proceedings: Injunctive relief in particular civil courts may be faster and more efficient. Moreover, administrative law is characterised by the ‘opportunity principle’: the applicant does not know in advance whether the antitrust authority will decide to take action. Consequently, it is often advisable (from the claimant’s perspective) to adopt a dual approach. The results of administrative proceedings are first to be awaited; then civil law proceedings are pursued on that basis (so-called *follow-on* actions).

2.2.2. Legal Basis of Private Claims

Although everywhere private remedies for competition law violations exist, the legal basis for such remedies varies considerably. While, in some countries, there are special antitrust claims, in other countries resort is had to general civil law. Special antitrust claims exist for example in Germany, Ireland, Italy, Spain, and Sweden, while in Austria, Denmark, France, the Netherlands, and the UK general tort law (in conjunction with competition law interdictions) is relied upon. It may also be the case that unfair competition law is extended to cover antitrust infringements. These differences are of a merely constructive nature and have no apparent influence on the result. Also in those countries which have their own competition law basis for claims, general civil law is relied upon to clarify matters which have not found a special rule. Nevertheless, it would seem advisable to introduce specific competition law claims in all national legislations. This serves on the one hand the interest of clarity, since an explicit legal basis emphasizes that such private law claims do exist. On the other hand, it will enable the legislator to provide for certain rules which apply specifically to competition law, thus removing problems which may arise in the field of private enforcement of competition law only.

2.2.3. Cessation and Damages

If all the requirements for a private law claim are fulfilled, the aggrieved party can demand cessation by the violator. If the infringer is additionally at fault then a claim for damages will result. The typical requirements for a damage claim are a) the competition law violation, b) the loss, c) causation of the loss by the legal infringement, as well as d) fault. National legislations in most European countries assume that the loss to be recovered includes the actual

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losses (*damnum emergens*) as well as loss of profit (*lucrum cessans*).¹⁷ Thus, at least in theory, the legal prerequisites exist to ensure private enforcement of competition law. However, the obstacles are not so much in theory, but in practice, especially as regards the burden of proof.

Before raising this subject, another point has to be explored which—in some countries—severely affects the availability of damages. Often, in the case of restrictive agreements, the injured party has itself participated in the anticompetitive behaviour. This is for example the case in vertical agreements, where restrictive clauses on exclusivity or prices are agreed upon. Does the involvement of the claimant affect his damage claim? Based on principles like *ex dolo malo non oritur actio* or *nemo auditur propriam turpitudinem allegans* some countries regard the claimant's participation as highly significant, and the complete exclusion of compensatory claims is considered possible (Greece, Sweden, UK). In other countries the own participation is considered under the aspect of contributory liability and may lead to a reduction or even complete exclusion of the compensatory claim. On the other hand, if the claimant's responsibility is set low, the reduction of the compensatory claim may not apply at all (Germany, Hungary, Poland, Portugal).

The consequences of the claimant's involvement is a prominent example for the influence of EU law on national tort law: According to the—already mentioned—*Courage*-decision of the ECJ, compensatory claims for the violation of the cartel prohibition are not excluded simply because the claimant is party to the distorting agreement. On the other hand, compensatory claims may be excluded if the claimant “bears significant responsibility for the distortion of competition.”¹⁸ National law has to abide by this decision, and probably will do so also for purely domestic cases.

2.2.4. Burden of Proof

The limited status of private claims in Europe is due among other things to the difficulty of producing evidence for the four elements mentioned above. All these preconditions have as a rule to be established by the claimant. Only in Ireland and the UK are there comprehensive duties of discovery. With regard to the evidence question there is therefore a divide between common

17. As regards violations of European competition law, this follows from the principle of effectiveness, see ECJ, Manfredi, *supra* note 3, n. 95.

18. See ECJ, *Courage*, *supra* note 3, n. 31.

law and civil law countries.¹⁹ It would certainly be too simplistic to say that in common law countries the claimant can file a claim in the hope that the evidence will be revealed by the respondent. But there is at least a certain alleviation of the burden of proof in these countries.²⁰ In civil law countries, by contrast, the claimant must undertake intensive preparation of his case. He has to research all the evidence himself. If he realises that he will not be able to produce comprehensive evidence, he is advised not to persist with the claim. As the evidentiary difficulties are often unavoidable and result in an unjustified advantaging of the respondent, special consideration should be given to better access to evidence and to the easing of the burden of proof according to the general rules of evidence. Most European countries provide for flexibility regarding the calculation of quantum. If through no responsibility of the aggrieved party the precise calculation presents difficulties, then the courts often have the discretion to estimate the extent of losses incurred.²¹ In all countries only losses actually incurred can be claimed, but not the profits gained by the infringer. In certain countries, however, infringer profits can be cited as the starting point for the calculation of losses (Germany since 2005, Sweden).

2.2.5. Punitive Damages

Another difference between common law and civil law countries is the question of punitive damages. With the exception of Ireland and the UK, no punitive damages are awarded. Whether punitive damages should be introduced generally in Europe for competition law infringements is highly controversial. The predominant view in Europe rejects punitive damages, as they cannot be reconciled with the compensatory principles of damages claims. The supporters of punitive damages on the other hand point to the possibility

19. Woods/Sinclair/Ashton, Private Enforcement of Community Competition Law: Modernisation and the Road Ahead, 10(2) Competition Policy Newsletter 31, 34 (2004).

20. Therefore there is a strong incentive to claim before British courts. See (particularly with regard to the vitamin cartel) Bulst, The Provimi Decision of the High Court: Beginnings of Private Antitrust Litigation in Europe, 4 EBOR 623 (2003); Id., Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht, 14 EWS 403, 404 (2004): this incentive is strengthened by the possibilities for exemplary damages and group actions under English law.

21. Moreover, the European Commission is elaborating a paper supposed to guide national courts when it comes to determining damages, see European Commission, Draft Guidance Paper: Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, Brussels 2011.

of treble damages in the USA and thereby strengthened incentives to make use of the possibility of private enforcement. As a compromise against the background of European circumstances, the introduction of double damages has been suggested.²² However, the topic of punitive damages is no longer part of the European reform proposals.

2.2.6. Conflict of Laws

If a restrictive behaviour has cross-border effects, the question arises of which national (or supranational) competition law regime is to be applied.²³ As regards public enforcement, it is clear from the outset that a competition authority can only apply its own national (or supranational) competition law. In private law however, it is recognised world-wide, even if not universally practised, that the court of a country can be called upon to apply foreign law. Conflict of law rules determine which legal regime is applicable in the individual case. In practice however there are almost no court decisions in which a court has applied foreign antitrust law.²⁴ This is not only due to the scarcity of private enforcement in Europe, but also to the lack of clear legal rules on this question. For a long time, Switzerland has been the only country having adopted a special conflict of law rule in the field of antitrust law: “Claims based on a restraint of competition are governed by the law of the state in whose market the restraint has direct effects on the injured party.”²⁵ Thus, competition law of the *lex fori* may be applied only to the extent that effects are perceived domestically. For effects in other countries, the respective competition rules of these countries apply. The EU has adopted a similar rule in Art. 6 (3) of the Rome II Regulation:²⁶ “The law applicable to a non-contractual

22. Monopolkommission (Germany), Das allgemeine Wettbewerbsrecht in der 7. GWB-Novelle, Sondergutachten, 2004, at www.monopolkommission.de/sg_41/text_s41.pdf, n. 75, 126, 131.

23. A further problem concerns international procedural law, i.e. which country’s courts have jurisdiction in an international case. For these international questions, cf. Basedow/Francq/Idot (eds.), *International Antitrust Litigation*, Oxford-Portland 2012; Bulst, *supra* note 20, 403; Mäsch, *Vitamine für Kartellopfer—Forum shopping im europäischen Kartelldeliktsrecht*, IPRax 509 (2005).

24. Basedow, *Who Will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation*, 2 EBOR 443, 461 (2001); Schwartz/Base-dow, *Restrictions on Competition*, in *International Encyclopedia of Comparative Law*, vol. III, Tübingen et al. 1995, chp. 35, sec. 103, 109, 112.

25. Art. 137 of the Swiss Law on Private International Law.

26. Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) of 11 July 2007, OJ L 199/40. See

obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.” However, under certain conditions, the plaintiff has the possibility to base his claim entirely on the *lex fori*.

2.2.7. Criminal Law Sanctions?

In 2002, Ireland introduced comprehensive penal law sanctions (fines and custodial sentences) for competition law infringements, as did the UK in the Enterprise Act 2002 concerning the ‘dishonest’ participation of directors and employees in certain hard-core cartels. France has similar rules. In this respect, the three countries provide an exception in Europe: Only in individual cases and under narrowly specified circumstances are there criminal law rules in the EU Member States. There is even a contrary trend to be recognised. Countries which originally had criminal antitrust rules abolished them in connection with their accession to the EU (Finland, Sweden). However an intensification of the discussion is apparent under the influence of Anglo-American legal development, which gives high importance to criminal law sanctions.²⁷ A parallel to private law sanctions may be seen in that both criminal law and private law occupy a subordinate position in anti-trust law. While private law could already be further developed within the existing law, it would require legislative measures for the introduction or strengthening of criminal law sanctions. There is no Europe-wide consensus in this question. As the competence for criminal law lies with the Member States, countries with extensive competition law experience could lead the way.

Basedow, Jurisdiction and Choice of Law in the Private Enforcement of EC Competition Law, in Basedow (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn 2007, 229 f.; Mankowski, *Das neue Internationale Kartellrecht des Art. 6 Abs. 3 der Rom II-Verordnung*, RIW 177 (2008).

27. See Dannecker/Jansen (eds.), *Competition Law Sanctioning in the European Union - The EU-Law Influence on the National Law System of Sanctions in the European Area*, The Hague et al. 2004; Heinemann, *Kriminalrechtliche Individualsanktionen im Kartellrecht?*, in Kunz/Herren/Cottier/Matteotti (eds.), *Wirtschaftsrecht in Theorie und Praxis—Festschrift für Roland von Büren*, Basel 2009, 595 f.; Wils, *Is Criminalisation of EU Competition Law the Answer?*, in Zäch/Heinemann/Kellerhals (eds.), *supra* note 2, 250 f.

3. Perspectives to Strengthen Private Enforcement of Competition Law

3.1. Standing

The risk of private litigation increases if there are no precise rules on standing, i.e. on the question who can take legal action. The question of standing is far from clear in Europe. Enterprises generally have standing if they are directly affected by a competition law infringement as competitors or direct contractual partners, e.g. as suppliers or purchasers. In other constellations there may be restrictions. For example the legal position is not clear of those businesses which are neither competitors nor contractual partners but indirect purchasers. Equally diverse is the question of standing of consumers or of consumer associations. In order to enhance private enforcement, it is essential to specify the preconditions for bringing an action.

3.1.1. Direct Purchasers

All over Europe, direct purchasers have standing for an own claim if they are adversely affected by a restrictive agreement on the preceding market level. They may apply for an injunction or demand damages.²⁸

3.1.2. Indirect Purchasers and the Problem of 'Passing On'

Less clear is the situation of indirect purchasers. The legal situation varies considerably between the Member States. In some countries indirect purchasers are denied standing as a matter of principle regardless of whether they be enterprises or consumers.²⁹ Other states regard indirect purchaser claims as possible provided an enterprise is concerned. Only a minority of countries extend standing to indirect purchasers within their broadest definition, that is including consumers.³⁰

28. An exception was Germany where, according to the view of the majority of courts, claims were only possible if the restriction of competition was directly aimed at the purchaser. This rule excluded private claims in case of industry-wide cartels not directed against a particular enterprise. As it made not much sense to exempt the most blatant cartels from civil liability, the law was changed in 2005.

29. This corresponds to the indirect purchaser rule of US-American law, see US Supreme Court, *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977).

30. In this sense see the legislative changes in Germany since 1 July 2005, and Sweden since 1 August 2005. These reforms may be interpreted as a tendency to strengthen the rights of consumers in competition law.

The question of standing for indirect purchasers is closely linked to the problem of “passing on”. Can the respondent defend himself against a competition claim on the grounds that the claimant has shifted the overcharge (the increase in price due to the cartel agreement) onto the next market level? If standing to indirect purchasers is denied, the passing on defence should not be accepted because otherwise nobody could claim the overcharge.³¹ The same is true vice versa: If the passing on defence is accepted, the indirect purchasers should have standing because otherwise the infringer would not be liable.³²

The legal situation in Europe is unclear in this respect, and there are (with the exception of the new competition law in Germany³³) no special rules on the subject. The application of general considerations of compensation law leads rather to a recognition of the passing on defence, that is, awarding the direct purchaser only the actual and final loss incurred. If this viewpoint is shared there is a compelling necessity to also admit indirect purchaser claims. Otherwise there would be serious gaps in the protection offered by private enforcement.

Even if the opposing standpoint is taken, with the tendency to exclude the passing on defence, it should not be concluded from this that the indirect purchaser has no claim. This would seriously jeopardize the practical effectiveness of private enforcement. Frequently, the direct purchaser has no incentive to file a claim against the cartel members, e.g. for the very reason that

31. Cf. US-American law: In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the US Supreme Court had excluded the passing on defence. This led to the indirect purchaser rule in *Illinois Brick*, *supra* note 29. Otherwise, the same damage could have been demanded twice.

32. This is the situation in Switzerland: the passing on defence is accepted, but standing to consumers is denied so that a liability gap occurs, see A. Heinemann, *Consommation et concurrence—Améliorer le statut juridique des consommateurs et de leurs associations en droit des cartels*, in Ojha/Vulliemin (eds.), *Le droit de la consommation dans son contexte économique*, Lausanne 2009, 45, 58–59. A legislative proposal, currently discussed, aims at filling this gap.

33. § 33 (3) s. 2 of the German Act Against Restraints of Competition (GWB) 2005 provides: “If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service.” The preparatory works show, that this text does not categorically exclude the passing-on defence. It simply clarifies that even in the case of passing-on damage occurs initially. The question if the damages might be compensated by the benefits received was left over to the courts. The German Federal Court of Justice has decided that the passing-on defence is admitted, and that the competition law infringer bears the burden of proof that damages were compensated through the resale, see Bundesgerichtshof, 28.6.2011, ORWI, NJW (2012) 928.

he was able to shift the loss onto the next commercial level or because he does not wish to harm the business relationship to the supplier. If the direct purchaser waives its own legal action and if indirect purchaser claims are excluded *a priori*, private enforcement would be brought to a complete standstill.³⁴ In our view, it should follow from general principles of compensatory law, that if several claimants are possible, then recovery must be apportioned. Otherwise there would be a multiplied burden on the violator, which would be tantamount to punitive damages.

Finally, it should be added that, in the *Courage*-decision, the ECJ has stated that “the full effectiveness of art. 85 of the Treaty [today: Art. 101 TFEU], and in particular, the practical effect of the prohibition laid down in art. 85(1) would be put at risk if it were not open to **any individual** to claim damages for loss caused to him by a contract or conduct liable to restrict or distort competition.”³⁵ This ruling is not compatible with denying standing to indirect purchasers.

3.1.3. Consumers and Consumer Associations

In some countries, only enterprises, but not consumers, will be seen as falling within the protection of competition law. The fear is wide-spread that otherwise the circle of potential claimants would become immeasurably wide. The result is paradoxical: Although competition is intended to bring about the best results for the consumer in the interest of consumer sovereignty, these very consumers are denied standing. This path should not be followed. Besides the arguments already mentioned, the consumer, as the typical ultimate user, cannot pass on his losses to a subsequent market level.

However, the incentives for individuals to pursue such claims are small. Although the macroeconomic harm of cartel arrangements is immense, the resulting harm to the ultimate consumer can be so fragmented that the pursuit of an independent claim is not worthwhile. Therefore, standing should be granted to consumer associations, not only for cessation claims, but also for compensatory claims. The consumer associations should (with the exception of a costs award) not be allowed to retain the moneys for themselves and should also not have to surrender it to the state, but rather it should directly benefit the consumer. This could be done by means of a registration system in which consumers have to establish the degree to which they have been

34. See on this subject the detailed study of Bulst, *supra* note 6.

35. See ECJ, *Courage*, *supra* note 3, n. 26 (author’s emphasis), confirmed by ECJ, Manfredi, *supra* note 3, n. 60; ECJ, *Pfleiderer*, *supra* note 3, n. 28.

affected. In order to limit administrative expenses flat-rate amounts should be possible.

Moreover, consumer associations should also have standing in administrative proceedings. In this way the problem of ‘buying up’ of procedural rights could be resolved. This is in the first place significant in connection with merger control. In many jurisdictions, the approval of mergers can be challenged by other enterprises, with the consequence that considerable delays can ensue. Therefore it happens in practice that the would-be merging parties settle with the claimants: in return for payment or the provision of other benefits the claimants withdraw their legal remedies so that the merger can be implemented. Such a practice is problematic because the legality of the merger is not adjudicated on competition-related grounds but rather by an extra-judicial settlement between enterprises frequently of the same sector. If the consumer associations had standing in their own right, the basis for such a settlement between the interested enterprises would be withdrawn: even if the competitors withdrew their claims the association could still maintain its objection.

3.2. Coexistence of Public and Private Procedures

As in most EU Member States the possibility of private enforcement exists, it may well be the case that a civil proceeding runs parallel to administrative proceedings. The co-existence of both enforcement forms is not always peaceful.³⁶

3.2.1. Direct Effect of Competition Law Rules

The history of competition law may be characterized by the development from the *misuse principle* to the *interdiction principle*: competition rules following the interdiction principle are directly applicable whereas rules following the misuse principle presuppose imperatively a prior decision of the competition authority. This has an impact on private litigation: In legislations following the misuse principle the injured party has to await the authority’s decision before going to a civil court.³⁷

36. A. Heinemann, Interferenzen zwischen öffentlichem Recht und Privatrecht in der Wettbewerbspolitik, in Epiney/Haag/Heinemann (eds.), *Challenging Boundaries—Essays in Honor of Roland Bieber*, Baden-Baden 2007.

37. In Switzerland, the situation is more complicated since a notion of “misuse principle” is prevalent which deviates from the international understanding. For details see A. Heinemann, *Konzeptionelle Grundlagen des Schweizer und EG-Kartellrechts im Vergleich*,

Today, the opinion is wide-spread that an effective competition law must provide for rules following the interdiction principle—at least for the most important antitrust violations. Consequently, the victims may go immediately to court without waiting for activities of an authority.

This has not always been universally recognised. In Spain, until a fundamental reform in 2007, administrative proceedings took priority. The injured party had first to apply to the administrative authority. Only after a successful administrative proceeding he could seek redress through a claim in the civil courts. Slightly different is the situation in Sweden: There, a private claim before the ‘market court’ is only admissible if the administrative authority has refrained from a claim on its own behalf. Private claims before the general civil courts are possible at any time. But to avoid a stay of proceedings, it is advisable for plaintiffs to present a certificate by the administrative authority confirming that there are no plans for official intervention. The plaintiff will therefore generally turn to the antitrust authority as a matter of course because he needs such a certificate. The situation is different again in Greece where the administrative antitrust proceeding has priority as a matter of fundamental principle. A cessation claim can therefore not be pursued before a civil court. The position is different for a compensatory claim, in that here the antitrust authority has no competence and claims for damages are possible before the civil courts.

It seems evident that the goal of strengthening private enforcement can only be achieved if stand-alone proceedings are possible. The relationship between public and private enforcement should therefore be based on the principle of independence. Private claims should not be regarded as an appendix to public enforcement, but as a remedy of equal value. This view is shared by the European legislator who has underlined the “essential part” of national courts in applying the EU competition rules.³⁸

3.2.2. Legal Authority of Administrative Decisions

On the other hand, the evidentiary challenge for the claimant could be reduced by formally binding civil courts to the findings of competition authorities if there already has been public enforcement. Otherwise the plaintiff would run the risk that the civil court comes to another result than the competition authority. In EU law, e.g., national courts and competition authorities are bound by decisions of the European Commission which already have

in Weber/Heinemann/Vogt (eds.), *Methodische und konzeptionelle Grundlagen des Schweizer Kartellrechts im europäischen Kontext*, Bern 2009, 46 f.

38. Recital 7 in Council Regulation (EC) No. 1/2003.

been adopted or will probably be taken in the future (Art. 16 of Regulation 1/2003).

Only in some countries are the civil courts formally bound by rulings of the antitrust authority (as it is the case in Greece, Hungary and Germany), although in fact the civil courts normally do not deviate from the findings of the antitrust authorities. German legislation goes one step further by binding German courts even to respect the findings of the competition authorities of other Member States.³⁹

3.2.3. Coordination of Public and Private Enforcement

Other measures are necessary to coordinate public and private enforcement. In many countries, civil courts have to inform competition authorities on pending cases. As far as European competition law is concerned, Art. 15 (3) Regulation 1/2003 gives competition authorities of the Member States the right to submit *amicus curiae* briefs to the courts. In many countries, competition authorities have this right also as far as national competition law is concerned. Thus, competition authorities can contribute their perspective to private proceedings albeit their statements are not binding.⁴⁰

On the other hand, the existence of a private law process does not exclude the initiation of administrative proceedings. In most countries, civil courts have the right, but not the obligation to stay proceedings until the competition authority has taken a decision. As far as the violation of EU competition law is concerned, Art. 16 (1) s. 3 Regulation 1/2003 cautiously states that “the national court may assess whether it is necessary to stay its proceedings”. It seems hardly imaginable though, that a national court does not stay proceedings if it gains knowledge about a relevant Commission procedure.

39. § 33 (4) s. 1 GWB: “Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority—or court acting as such—in another Member State of the European Community”.

40. Competition authorities have further possibilities to enhance private enforcement, see A. Heinemann, *The Rise of a Private Competition Law Culture*, in Basedow/Terhechte/Tichý (eds.), *Private Enforcement of Competition Law*, Baden-Baden 2011, 224f. For example, the European Commission itself has brought a law suit before a Belgian civil court in order to ask for damages in a case where the EU has become the victim of a cartel; see the references in Advocate General Cruz Villalón, *Opinion in case C-199/11—Otis and others*, 26.6.2012.

3.3. Leniency Policy

Tensions may arise between proceedings for the imposition of administrative fines and private actions for damages. Many competition authorities operate leniency programmes providing for the reduction of fines or complete immunity from fines for “whistle blowers”, i.e. for undertakings cooperating with the authorities by submitting information and evidence for the existence of prohibited practices.⁴¹ The goal is to unsettle cartels: the earlier evidence is produced the greater the advantages are. Hence there are incentives to report prohibited practices as soon as possible to the competition authority.

These incentives would vanish if the whistle blower ran the risk of being sued for damages by means of the information he previously revealed to the authorities (and which possibly triggered an administrative decision binding civil courts). Consequently, the question has to be asked how this contradiction can be resolved or at least attenuated. The problem can be tackled in tort law or in administrative law.

3.3.1. Reduction of Damages in Favour of Leniency Applicants?

In the Green Paper on Damages Actions, the European Commission had put up for discussion the proposal to provide for a rebate on any damages claim against the leniency applicant and to liberate him from joint liability.⁴² The Commission gave two arguments: Without the whistle blower the injured parties would not have known the existence of the prohibited practice, or would at least have gained knowledge only later. Besides, due to the revelation, other infringers can be identified who are liable without restriction. In the White Paper, the Commission did not hold on to the reduction of damages, but “puts forward for further consideration” the idea to limit liability to claims by the whistle-blower’s direct and indirect contractual partners.⁴³

This proposal is very doubtful. Pragmatic reflections typical for administrative proceedings and for the fixing of fines are transferred into private law. It does not seem consistent with the compensatory goal of tort law to reduce a damage claim because the perpetrator has cooperated with a public authority.⁴⁴

41. On the European level see Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006, C 298/17.

42. Green Paper, *supra* note 5, 10 Option 29 and 30, in conjunction with the Annex to the Green Paper, n. 235 f.

43. White Paper, *supra* note 5, 10.

44. In this sense European Commission, Leniency Notice, *supra* note 41, n. 39, s. 2: “The fact that immunity or reduction in respect of fines is granted cannot protect an

3.3.2. Protection of Confidentiality

Tensions between administrative and private law should be resolved on the administrative level, i.e. by appropriate rules on leniency policy. The European Commission has adopted such rules in the Leniency Notice 2006 providing for the confidentiality of corporate statements. The leniency applicant may request that his statement is given orally, and is recorded and transcribed by the Commission. Only the infringer gets access to the statement. The information may only be used for the purposes of the administrative proceeding pending against him.⁴⁵ The information is transmitted to the national competition authorities only if these guarantee the same protection.⁴⁶ As regards leniency programs on the national level in the EU Member States, the ECJ has highlighted the conflict between, on the one hand, the interest in effective leniency programs “as useful tools [. . .] to uncover and bring to an end infringements of competition rules”, and, on the other hand, the contribution of damages actions “to the maintenance of effective competition in the European Union”.⁴⁷ The court has not anticipated the result of this weighing exercise. It is up to the national courts to weigh the respective interests taking into account all relevant factors of the single case.⁴⁸ On this basis, the German courts have held that the confidentiality of corporate statements has to be safeguarded, and that the information is therefore not available for damages actions.⁴⁹

3.3.3. Remaining Tensions

However, these rules cannot prevent that the administrative proceeding will possibly be closed by a decision of the competition authority which may be introduced into a private damage claim against the leniency applicant. This shows that leniency policy is the most prominent example for frictions between public and private enforcement which cannot be avoided completely. The deeper reason is the utilitarian approach of leniency programmes:

undertaking from the civil law consequences of its participation in an infringement of Article 81 EC”.

45. In accordance with the Commission Notice on the rules for access to the Commission file, OJ 2005 C 325/7.

46. European Commission, Leniency Notice, *supra* note 41, n. 31 f.

47. ECJ, Pfeiderer, *supra* note 3, n. 25, 29.

48. *Ibid.*, n. 31.

49. Oberlandesgericht (Higher Regional Court) Düsseldorf, 22.8.2012, case V-4 Kart 5+6/11 (OWi).

Sanctions are remitted or reduced although later cooperation cannot undo infringements committed in the past.

4. Outlook

In summary it may be said that in Europe the administrative law enforcement of competition law is of prime importance, whereas private enforcement has to catch up. Due to the absence of sufficient incentives there is a lack of case law. As a result, many legal questions are open: Should the infringer be able to invoke the fact that the injured party passed the damage on to the downstream market? Should indirect victims be compensated? Should consumer protection associations be given standing? Should it be possible to calculate damages on the basis of the violator's profit? Should punitive damages be introduced into European tort structures? Should there be an alleviation of burden of proof in case of complex causal connection of economic factors? The risk of private actions is increased by these legal uncertainties.

On the other hand, private enforcement might increase—and, in fact, has already increased in some countries—under the impression of particularly ruthless cartels. E.g., the international vitamin cartel has triggered a large number of private actions in different jurisdictions.⁵⁰ Private competition law litigation could be considerably strengthened by the experiences gained in these procedures. Based on the relatively dense discussion in legal doctrine, some national legislators already have adopted stricter rules. The European legislator should be open to the ideas presented by the European Commission in the White Paper on damages actions. But even with clearer legal rules it will take a long way to ensure systematic compensation of cartel victims.

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50. For the United Kingdom see Bulst, *supra* note 20, 623; for vitamin actions in Germany see Id., *Private Kartellrechtsdurchsetzung durch die Marktgegenseite—deutsche Gerichte auf Kollisionskurs zum EuGH*, *NJW* 2201 (2004).

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