The Impact of the Damages Directive on the Enforcement of EU Competition Law

A Law and Economics Analysis

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De invloed van de schadevergoedingsrichtlijn op de handhaving van het Europees mededingingsrecht

Een rechtseconomische analyse

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List of Abbreviations

ABA	American Bar Association
AC	Aggravating Circumstances
ACD	Polish Competition Damages Act
ADR	Alternative Dispute Resolution
AG	Advocate General
BA	Basic Amount
BGH	Federal Court of Justice (*Bundesgerichtshof*)
CAT	Competition Appeal Tribunal
CCP	Greek Civil Code of Procedure
CEPS	Centre for European Policy Studies
CEPS Report / Impact Study	CEPS, EUR, and LUISS, Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios
CJEU	Court of Justice of the European Union
CLES Research Paper Series	*Centre for Law, Economics and Society (University College London) Research Paper*
COCP	Estonian Civil Procedural Rules
CPA	Spanish Civil Procedure Act
D	Damages
DA	Croatian Damages Act
DA	Czech Damages Act
Danish Act	Danish Act No. 1541 of 13 December 2016
DCA	Spanish Competition Damages Act
DCC	Dutch Competition Act
DES	Diethylstilbestrol
DNCA	Slovenian Draft National Competition Act
EC	European Communities
EEC	European Economic Community
EU	European Union
EUR	Erasmus Universiteit Rotterdam
F	Fines
FCO	Federal Cartel Office (*Bundeskartellamt*)
GCLC Working Paper	*Global Competition Law Center Working Paper*

Greek DA	Greek Damages Act
GWB	Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*)
HCA	Hungarian Competition Act
ITP	Inability to Pay
KartG	Austrian competition law code (*Kartellgesetz*)
LCA	Lithuanian Competition Act
LUISS	Libera Università Internazionale degli Studi Sociali Guido Carli
MA	Massachusetts
MC	Mitigating Circumstances
NCA	National Competition Authorities
NESS	Necessary Element of a Sufficient Set of Conditions test
NJW	*Neue Juristische Wochenschrift*
OJ	Official Journal
PT	Portuguese Competition Act
QUT Law Review	*Queensland University of Technology Law & Justice Journal*
SCA	Slovenian Competition Act
SDI	Specific Deterrent Increase
SEC	Security
SME	Small or Medium-sized Enterprises
SSRN	*Social Science Research Network*
TFEU	Treaty of the Functioning of the European Union
UK	United Kingdom
US	United States of America
ZPO	German Code of Civil Procedure (*Zivilprozessordnung*)
ZPOmK-1	Slovenian Competition Act

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Chapter I
Introduction

A. Background

The European competition rules are contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (**TFEU**). European competition law is enforced by both competition authorities and private parties. While 'public enforcement' means that competition rules are applied by the European Commission, national competition authorities (**NCA**), or courts, 'private enforcement' refers to the application of competition rules in disputes between private parties. Private enforcement can take different forms, notably by declaring an agreement void because it violates Article 101 or 102 TFEU (*competition law as a shield*), injunctive reliefs, or damages actions (*competition law as a sword*). This book focuses on the latter.

While in the US, competition law is predominantly enforced by private actions, public enforcement has traditionally played a predominant role in the EU competition regime. Whereas private enforcement means that private individuals will have to bring an action against the infringer before the national court, competition authorities can make extensive use of their investigatory powers to reveal an infringement and fine the participating infringers. In the majority of private enforcement cases in Europe, plaintiffs claim damages after the Commission or an NCA has found an infringement (*follow-on*). In only a small number of cases, plaintiffs first request the court to establish the finding of an infringement before claiming compensation for potential damage (*stand-alone*).

The right balance between private and public enforcement has been discussed in extensive academic literature[1] and also received particular attention in political debate.[2] In recent years, sig-

[1] For an overview, see CEPS, EUR, and LUISS, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' [2007] Final Report (**Impact Study**) <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 6 March 2021>. See also Gary S. Becker and George J. Stigler, 'Law Enforcement, Malfeasance, And Compensation of Enforcers' (1974) 3 The Journal of Legal Studies 1-18, who argue that deterrence would be achieved more effectively if private individuals enforced the law. Conversely, Wils argues that private damages claims are not an effective enforcement mechanism. See Wouter J P Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 World Competition 473-488.

[2] An overview of the history of the debate is available at the DG Comp website: http://ec.europa.eu/competition/antitrust/actionsdamages/index.html> accessed on 8 March 20201. See also CEPS, EUR, and LUISS, (n 1).

nificant steps have been taken at the European level to foster private enforcement, eventually leading to the signing into law of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (**Directive**).[3] The Directive emphasises that the effectiveness of the competition enforcement regime requires the interaction of private enforcement actions under civil law and public enforcement by competition authorities.[4] On the other hand, the Directive also recognises that, in line with previous case law of the Court of Justice of the European Union (**CJEU**),[5] the full effectiveness of Articles 101 and 102 TFEU requires that *anyone* can claim compensation before national courts for harm caused to them by an infringement of those provisions.[6] In the proposal for the Directive, the Commission expressly described the objectives of the Directive as two-fold: (i) optimising the interaction between public and private enforcement of competition law; and (ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they have suffered.

The Directive refers to the right of compensation, not as an objective in isolation but as an instrument contributing to the overall effective enforcement of the competition rules. The effectiveness of an enforcement regime can be evaluated based on various criteria, such as whether an offender has been adequately punished (retributive justice). From an economic perspective, the most relevant criterion for the assessment of the effectiveness of enforcement is its ability to deter future infringements. Against that background, the Commission's Fining Guidelines are committed to set fines at a sufficient level to achieve deterrence: *'Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 [now 101] and 82 [now 102] of the EC Treaty [now TFEU] (general deterrence)'*.[7] At the same time, private enforcement can serve deterrence, as civil liability can help to raise the overall cost of violating the competition rules, and thus prevent anticompetitive practices. At the other extreme, civil liability in addition to fines can create unproportionally high costs and thus result in over-deterrence.

[3] 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 [2014] OJ L349/1.
[4] Ibid, recital 6.
[5] C-557/12 *Kone and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317, para 21 and the case law cited therein.
[6] Directive, recital 3.
[7] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2, recital 4.

The significance of private enforcement for deterrence has also been recognised by the CJEU. In *Courage*, the CJEU had already referred to the compensation of individuals (damages) as an instrument contributing to the effective enforcement of the competition rules by discouraging agreements or practices which distort competition.[8] More recently in *Skanska*, the CJEU relied explicitly on Advocate General Wahl's opinion and emphasised that *'actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct'*.[9] In his opinion, Wahl further expressed that actions for damages form an integral part of the competition enforcement system, which *'(taken as a whole) aims primarily at deterring undertakings from engaging in anticompetitive behaviour'*.[10] It follows that the provisions of the Directive must be assessed against the objectives of private enforcement set out in the case law and during the legislative process, namely to compensate victims of competition infringements and to effectively integrate private and public enforcement in an overall enforcement system to deter other infringements.

B. Research Objectives

This study seeks to analyse the impact of the Directive's provisions on the EU leniency programme, the sanctions for competition infringements, and the allocation of civil liability among joint infringers. This study focuses on these three areas of the competition enforcement system because they are likely to be impacted the most by an increased attractiveness of damages claims and the corresponding increase of civil liability for competition infringers. This book studies the effects of an anticipated rise of civil damages actions and the solutions opted for by the Directive to overcome potential negative effects for an effective enforcement system.

In particular, the study examines the following questions:

- Distribution of civil liability: What does the Directive propose for the distribution of civil liability between multiple infringers? How should the individual responsibility for the damage be measured, relative to the co-infringer's responsibility?
- Leniency incentives: To what extent can the rise of damages actions undermine the incentives of firms to apply for leniency and reveal a cartel? Are the Directive's attempts to

[8] Case C-453/ 99 *Courage Ltd v Bernard Crehan* [2001] ECLI:EU:C:2001:465, para 27.
[9] Case C-724/17 *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al.* [2019] ECLI:EU:C:2019:204, para 45.
[10] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy et al.* [2019] ECLI:EU:C:2019:100, Opinion of Advocate General Wahl, para 80.

protect leniency statements from disclosure sufficient to ensure the attractiveness of the leniency programme? If not, how can leniency incentives be protected without jeopardising the right to full compensation?

- Damages and fines: How does an increase of civil liability affect the overall liability of infringers of competition law? How can civil liability be integrated into the methodology for the calculation of fines?

C. Contribution and Methodology

The analyses in this book contribute to the discussion on the shaping of an optimal enforcement regime in the EU and more specifically on the adjustments to the enforcement system that have become necessary following the implementation of the Directive. The legislator intended for a review of the impact of the Directive by the Commission by the end of 2020. However, as will be shown in the next chapter, the rules transposed by Member States vary significantly as regards their temporal applicability. In other words, in many Member States it will still take years before the new rules will become applicable. Based on this lack of empirical evidence, the Commission concluded that by the end of 2020 it could not carry out a meaningful evaluation of the Directive.[11] But the Commission also notes that there exists sufficient empirical evidence that shows that the number of damages actions has significantly increased since the entry into force of the Directive.[12] In line with this evidence, the working hypothesis of this book is that the number of damages actions and the civil remedies awarded will continue to rise in the coming years. Parts II-IV of this book analyse the implications of an increased civil liability on the EU leniency programme, the methodology for calculating fines, and the distribution of the liability among joint infringers.

It should be recalled from section A above that the Directive has two objectives, namely optimising the interaction between public and private enforcement of competition law and ensuring that victims of infringements can obtain full compensation for the harm they have suffered. The Directive's objective to optimise the interaction between public and private enforcement can be best measured in terms of the deterrence effect that the EU enforcement system together with Directive's provisions can achieve. In addition, the interplay between the enforcement system

[11] Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2020] SWD(2020) 338 final 2.
[12] Ibid.

and the Directive's rules should also guarantee victims' right to receive compensation for their losses caused by the competition law infringement. In order to ensure that the Directive's objectives are achieved, a difficult balancing act between deterrence of infringements and compensation of victims is required. This book addresses the balancing of these two objectives and studies the impact of the Directive's provisions on the leniency programme, the fining methodology, and the distribution of civil liability. For that purpose, this study assumes that optimal enforcement should be defined by the abovementioned objectives set out in the Directive and during the legislative process, namely that it

(1) achieves deterrence of new infringements and
(2) guarantees the right to full compensation of victims of competition infringements.

Before the implications of the Directive can be analysed in terms of deterrence and compensation, it is necessary to define the terms 'deterrence' and 'compensation' and specify how both can be determined and measured for the purpose of analysing the effectiveness of EU competition law enforcement. Private parties predominantly enforce competition rules by bringing actions for damages, which in turn, in most Member States, are claims under Tort law. However, the goals of Tort law do not necessarily coincide with the two objectives of the Directive. Compensation of victims for losses suffered due to an activity of the injurer (e.g., a negligent driver causes an accident) is not the central goal of Tort law. In fact, Tort law has turned out to be a rather expensive means of compensating harm, since it requires a well-functioning judicial system, which involves high costs.[13] Insurance, on the other hand, is much cheaper and a quicker system for compensating victims, and therefore, a victim's first-party insurance would be preferable over tort liability if the only goal is the compensation of victims.[14] In the literature on the economic analysis of Tort law, Tort law's goals are described as threefold: the minimisation of primary accident costs (deterrence), secondary accident costs (optimal risk spreading and bearing), and tertiary accident costs (administrative costs).[15]

[13] Steven Shavell, *Economic Analysis of Accident Law* (Harvard University Press 2009) 263.
[14] Giuseppe Dari-Mattiacci, 'Tort Law and Economics' in Hatzis Aritides (ed) *Economic Analysis of Law: A European Perspective* (Edward Elgar 2003).
[15] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press 1970) 26ff. An additional goal referred to by Calabresi is *justice*, although he admits that justice is difficult to define: *'The fact that what is unfair is easier to define than what is fair, like the fact that what is fair in one system may be unfair in another, indicates that it would be better to examine the requirements of accident cost reduction first and then to see how various untried methods and systems suggested by that goal compare in terms of fairness with the system we use today – how, in other words, they comply with our general sense of fairness and whether they are more or less likely to create specific instances of injustice than the current system'*.

I. Deterrence

The main goal of Tort law is to give the injurer appropriate incentives to refrain from an activity that harms the victim (i.e., incentives for optimal precautions). In other words, any person who engages in an activity creates externalities, which are the probability that others may suffer losses as a result of that activity. Tort law is an instrument for providing behavioural incentives to avoid such losses; that is, to internalise these externalities. As a result of the threat of being held liable under Tort law, actors incorporate possible losses of others in their decision on how much care to take, and how often to engage in an activity.[16] By taking more care or reducing the activity, the actor lowers the risk that the victim is injured and thus also the expected losses. However, it is the injurer who decides on the level of precaution or whether and how often to engage in an activity, and the injurer bears the costs of such a decision. The victim, on the other hand, benefits from the precautions taken by the actor to lower the risk of losses to the victim. Therefore, if the actor who bears the costs of the precaution also benefits from the decision, then he or she will take the optimal level of precaution. By contrast, when either costs or benefits are external, the decision will not take into account all the costs and benefits involved. Tort law internalises these externalities to optimise the level of precaution.[17] An optimal activity is taken when the marginal benefits of reducing the activity level equal the marginal costs thereof (i.e., a reduction in the expected losses of the victim).[18] In other words, the actor will reduce the level of activity or take additional precautions until the total cost (e.g., the cost of precaution and expected accident costs) in doing so is equal to the victim's benefit. Hence, if the actor perceives the probability that a loss will occur to be low, the actor will take fewer precautionary measures. The reason is that Tort law does not pursue the goal of *absolute deterrence* but the goal of *relative deterrence* through tort remedies.[19] As Cooter and Ulen (2011) explain, *'tort law often aims to internalize costs, such as the risk of accidents. Once costs are internalized, actors are free to do as they please, provided that they pay the price'*.[20]

The goal of *absolute deterrence* is common in criminal law. Criminal law imposes sanctions (or punishments) and is different from compensation under Tort law, which shifts the victim's costs of an activity to the actor. Sanctions in criminal law make the injurer worse off without

[16] Louis Visscher, 'Tort Damages' in Gerrit De Geest and others (eds) *Encyclopedia of Law and Economics* (2nd edn, Edward Elgar 2009).
[17] Guiseppe Dari Mattiacci (n 14) 4.
[18] Louis Visscher (n 16) with reference to extensive literature.
[19] Francesco Parisi, Daniel Pi, Barbara Luppi, and Iole Fargnoli, 'Deterrence of Wrongdoing in Ancient Law' (2020) Roman Law and Economics.
[20] Robert D. Cooter and Thomas Ulen, *Law and Economics* (6th edn, Pearson Education Inc 2011) 462.

directly benefitting the victim.[21] In contrast to tort remedies, sanctions are tailored to the benefit of the infringer and the probability of detection. Equally, the EU enforcement regime of competition law is based on the infringer's gain from the competition rule infringement. The internalisation of external costs of an activity is not a proper means to deter infringements when the expected benefit of the activity outweighs the costs. In other words, a thieve cannot be deterred by the requirement that he returns the stolen good whenever he gets caught. For deterrence to be effective, the law must impose enough punishment so that the expected net benefit of the crime to the criminal is negative.[22]

In competition law, the assessment of optimal enforcement was mostly influenced by the seminal work of Gary Becker who applied the rational choice model to law enforcement.[23] Becker assumes that undertakings choose to commit an infringement only on the basis of the expected utility, taking into account the gain (e.g., higher profits) and the probability and level of sanctions it will then face. Thus, the underlying logic is that undertakings act rationally, balance the costs and benefits of their conduct, and abstain from a certain conduct if the expected costs exceed the potential gains. Following Becker's optimal enforcement theory, the optimal penalty for cartels is equal to the deadweight loss plus the wealth transfer to the cartel (or other undertakings) from the victims.[24] However, when *'the enforcement costs are positive and the probabilities of detection and punishment are less than perfect, optimal penalties should, according to the optimal deterrence model, exceed the social (efficiency) cost of the violation so as to correspond to the efficiency loss caused'*.[25] For deterrence to work, the minimum sanction must be equal to the expected gain from the infringement multiplied by the inverse of the probability that the infringement will be detected and the penalty effectively imposed. In other words, the sanction must render the expected gain from the infringement equal to zero.

As explained at the beginning of this chapter, in the EU the competition enforcement regime is a mixed private and public enforcement system. Public authorities impose sanctions and punishments, mostly fines and in some Member States also criminal sanctions,[26] against the in-

[21] Cooter and Ulen (n 20) 459-60.
[22] Ibid.
[23] Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy. Becker's original analysis was adapted to antitrust law enforcement by William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652-678.
[24] Ioannis Lianos, Peter J Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press 2015) 7.21.
[25] Ibid; see also Jindrich Kloub, 'White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement' (2009) 5 European Competition Journal 528–9.
[26] In some Member States (e.g., Austria and Germany) only some specific infringements such as 'bis rigging' are sanctioned under the criminal code. In Bulgaria, Estonia, Ireland, Malta, Romania, Slovakia, and the UK criminal sanctions exist for cartel infringements.

fringer, whereas private parties enforce competition rules through tort remedies, namely compensation in the form of damages. Following Becker's work on the optimal deterrence model, it has been debated whether public or private enforcement regimes are better suited to achieve deterrence.[27] Others have favoured a mixed system where private enforcement complements a public enforcement regime.[28] Much of the literature is based on the US system, and arguably the conclusions reached in analyses of the US system are not transferable to the EU regime. In Europe, private enforcement is predominantly based on follow-on claims after the authority has already imposed a fine. This reality is also mirrored in the Directive's approach, which focuses nearly entirely on follow-on actions. As a result of this practical characteristic of the EU regime, the analysis in this study focuses on follow-on situations.

As shown above, the preliminary goal of both tort and competition law is deterrence by setting incentives in a way that maximises total welfare. An optimal enforcement regime deters by alleviating the 'moral hazard' problem resulting from the divergence between the infringer's incentives and the socially desirable incentives.[29] In an enforcement regime that is heavily reliant on public authorities to detect and sanction infringements, deterrence is largely dependent on the effectiveness of the public enforcement system. In fact, in an enforcement regime that has deterrence as its sole goal, public enforcement might achieve deterrence more effectively.[30] At the same time, at least in the law & economics literature, the primary goal of tort law is perceived to be the deterrence of socially undesirable losses by providing behavioural incentives to avoid such risks of losses. Thus, in a mixed public and private enforcement regime such as the EU competition regime, two fields of law primarily aim at and contribute to deterrence of socially undesirable losses. Both regulate the behaviour of individuals by setting incentives to maximise total welfare. As a result, the efficiency of a mixed enforcement system such as the EU competition regime must be assessed by taking into account the behavioural incentives set by sanctions as well as tort remedies. For that reason, this book studies the deterrent effect of the interplay of the public enforcement system and the private enforcement system under the Directive's rules based on Becker's optimal deterrence model.[31]

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[27] Gary S. Becker and George J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 The Journal of Legal Studies 1–18; William M. Landes and Richard A. Posner, 'The Private Enforcement of Law' (1975) 4 The Journal of Legal Studies 1–46; A. Mitchell Polinsky, 'Private Versus Public Enforcement of Fines' (1980) 9 The Journal of Legal Studies 105–127.

[28] See for example R. Preston McAfee, Hugo M. Mialon and Sue H. Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) 92 Journal of Public Economics 1863–1875.

[29] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 24) 7.18.

[30] See for example Wouter P J Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 World Competition 473-488.

[31] It should be noted that the optimal sanction will be lower for risk-averse firms than for risk neutral firms. This study assumes – as a general rule – that firms are risk neutral, which means that deterrence will only be effective if the expected sanction exceeds the gain.

II. Compensation

In contrast to the objective of deterrence, public enforcement is not well placed to achieve the Directive's objective of corrective justice, namely the compensation of victims. First, victims have better information on the harm they suffered, particularly because the information necessary for the estimation of the harm generally rests with the victim.[32] Second, the proceeds from the public authority's sanctions are not distributed to the victims but stay with the state. Public enforcement redistributes gains away from the infringer, which may promote the distributive justice objective but does not facilitate the Directive's goal of corrective justice.[33] The transfer of wealth from the infringer back to the victim is better achieved through tort law, assuming that courts estimate the damage with sufficient accuracy. As discussed above, insurances are generally a more efficient means to compensate victims, but because insurance is not available for victims of competition infringements, tort remedies – assuming there is a functioning court system – are the second-best alternative to compensate victims. Thus, the Directive's objective of compensation of victims can only be achieved through private enforcement. For that reason, the incentives to deter competition infringements in the mixed public and private enforcement regime in the EU must ensure victims' right of full compensation through tort remedies. This study examines the effectiveness of the Directive's provisions in light of the deterrence objective as an efficiency requirement as well as their effectiveness in terms of ensuring victims' right of full compensation. As compensation of victims in competition cases will only be achieved through tort remedies, the Directive's goal of compensation must prevail. In other words, this book studies how the Directive's rules, sanctions, and tort remedies interplay in terms of regulating incentives to achieve deterrence while simultaneously guaranteeing that tort remedies can fully compensate victims.

Admittedly, the meaning of *full* compensation is not straightforward. The ability to claim compensation might be limited for legal reasons such as in a fault-based tort system, in which victims also need to prove fault of the infringer. Equally, other legal instruments such as foreseeability or adequacy to limit the *but-for* test for establishing a causal relationship between the infringement and the harm prevent the compensation of the entire harm. The definition of losses that can be compensated depends on the legal rules of the individual jurisdiction. It follows from the case law of the CJEU that anyone who has suffered harm caused by an infringement

[32] For example, a comparison of the actual prices with the counterfactual prices requires information on the actual prices the victim has paid (including rebates and discounts) prior, during, and after the infringement as well as the turnover and products that were purchased during that period.
[33] See also Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 24) 7.40.

of competition law should be able to claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest.

As discussed above, tort remedies should generally provide full compensation to the victims because only then will the injurer internalise all negative externalities and tort remedies that effectively deter wrongdoings.[34] The goal of prevention of an infringement requires that the expected costs of an infringement are at least equal to the gains from the infringement. This suggests that compensation should be based on the gains of the infringer. Polinsky and Shavell (1994) argue instead that compensation based on the harm is a better proxy because if damages are based on the infringer's gain and courts underestimate the gain, the incentives for the injurer are inadequate to prevent the infringement.

In competition cases, where firms collude to artificially increase prices (price fixing cartels) above the market level in order to generate higher profits, purchasers from the colluding firm will have to pay higher prices for the cartelised goods which increases their costs (i.e., the overcharge). In markets where firms face a downward-sloping demand curve, demand decreases where prices increase. This means that the increased cartelised price will be above the reservation prices of some customers. Therefore, in parallel to the economic theory of monopolies,[35] the quantity of products supplied will be less than that which would be supplied on a competitive market. In economic terms, the increased cartelised price creates a loss of consumer surplus that is referred to as the deadweight loss.[36] Hence, the increased cartelised price or in turn a reduction of output leads, on the one hand, to a harm in terms of an overcharge for purchasers from the cartel and, on the other hand, to a reduction of consumer welfare for those customers with reservation prices below the cartelised price.

In addition, if as a result of the increased cartelised price the (direct) purchaser also increases the price of her products, i.e., if the direct purchaser is able to pass-on the overcharge to the next level on the supply chain, the demand of indirect purchasers will equally decrease. Thus, where direct purchasers can pass-on the overcharge, they will suffer from an output effect[37] in terms of reduced demand by indirect purchasers. This translates into a profit loss suffered by direct purchasers due to the reduced sales resulting from passing-on.[38] The output effect at all

[34] Louis Visscher (n 16) 5.
[35] Simon Bishop and Mike Walker, *The Economics of EC Competition Law* (Sweet & Maxwell 2010) 2-013.
[36] See chapter VI, D.II on a more detailed explanation of the deadweight loss.
[37] The Commission also refers to it as the "volume effect" in its Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser [2019] 2019/C 267/07.
[38] Ibid. See also Franziska Weber, 'Tackling Pass-On in Cartel Cases: A Comparative Analysis of the Interplay Between Damages Law and Economic Insights' (2020) 16 European Competition Journal.

levels of the supply chain can be calculated relatively easy by multiplying the experienced reduction in sales with the profit margin that the purchaser would have had per unit in the situation *but for* the infringement.

For the purpose of corrective justice, the wealth transfer that needs to be corrected (compensated) are therefore the overcharge that was either paid by the direct or indirect purchasers, the output effect if the direct purchaser was able to pass-on the overcharge, and the losses that result from the loss of consumer surplus. Thus, the right of full compensation must ensure that direct purchasers can claim compensation for the overcharge they had to pay because of the cartelised price, i.e., compensation for the actual loss (*damnum emergens*), and in cases of passing-on of the overcharge to indirect purchasers the loss in profit due to the output effect, i.e., compensation for loss of profit (*lucrum cessans*). Moreover, it must be ensured that other claimants that have suffered actual loss or loss in profit as a result of the deadweight loss caused by the increased cartelised price are not hindered from claiming compensation.

For the purpose of the analysis in this book, the *full* compensation refers to the compensation of the overcharge paid by direct and/or indirect purchasers. However, it must nevertheless be ensured that victims have the right to claim compensation for the output effect[39] in cases of passing-on and other losses in relation to the loss in consumer surplus. The methodology for this study is therefore to test whether the Directive's provisions together with the administrative fines set adequate incentives not to enter into a cartel without jeopardising victims' ability to recover *at least* the overcharge (plus interest).[40] Since in this book's analyses the overcharge that was paid by the victim constitutes the illicit gain of the cartelist as well as the victim's harm, the terms harm and gain are often used interchangeably for simplicity and better readability.

III. The Problem of Over-Enforcement

An enforcement regime in which sanctions and tort remedies are imposed for the same violation also poses the risk of resulting in an excessive level of enforcement, also referred to as 'over-deterrence'. Over-deterrence creates inefficiencies because it creates significant costs. Lianos et al. (2015) list seven types of costs that may result from over-deterrence, namely the additional cost of law enforcement may be higher than the cost that the additional anticompetitive practice

[39] This study will specifically consider the output effect only where it is necessary for the analyses of the proposed adjustment to the fining methodology in chapter VII.

[40] If the injurers were not obliged to pay interest for the period the victims were deprived of the amount of the overcharge, victims would not be fully compensated; see Steven Shavell, *Economic Analysis of Accident Law* (Harvard University Press 2009) 141.

deterred would have imposed on society; as a result of high sanctions and damages, firms will spend a disproportionate amount of resources to ensure compliance; where damages are awarded beyond the harm that was suffered, claimants may have an incentive to bring *'dubious'* claims; an excessive fine may lead to the insolvency of the undertaking, which may have negative welfare effects if it excludes an effective competitor; excessive fines may affect shareholders and stakeholders who were not aware of the illegal conduct; high fines and damages may deter efficient commercial practice; and enforcement errors will become costly in a system with high sanctions or damages.[41] Enforcement errors may be of two sorts: the enforcement body wrongly concludes that there is an infringement (false positive or error type I) or it falsely concludes that there was no wrongdoing and does not punish an infringement (false negative or error type II).[42] Admittedly, cartels are in very rare cases welfare enhancing, and it is therefore unlikely that the cost of enforcement errors for society will be particularly high. This is particularly true for price-fixing cartels that cause an illicit overcharge, which is the type of infringement the analysis in this book focuses on. Nevertheless, if sanctions/damages are disproportionately high and it is not as obvious for firms, as for by object types of infringements, to ascertain whether authorities consider an efficient cooperation between the firms to be legal, it is likely that the firms will refrain from efficient cooperation. Thus, over-deterrence is less likely to also deter obvious legal conduct but less obvious and potentially efficient conduct in the 'grey zone'. For example, assume that engineers from competing firms meet to exchange ideas for new technologies for ways to move towards more sustainable production methods. If sanctions are high and there is a risk that the enforcement body will conclude that such an exchange of information is anticompetitive, the engineers will likely not meet at all.[43] The social costs of deterring more sustainable manufacturing in the industry is certainly higher than the elimination of a potentially anticompetitive (not price relevant) information exchange. Lianos et al. (2015) conclude that there can be over-deterrence in two instances, namely

> *'if (i) the sanctions are larger than the cost to society (e.g., overcharge, harm to innovation, reduction of quality, and consumer choice) due to the violation divided by the probability of the violators being found guilty and (ii) the marginal cost of sanctioning cartels is larger than the marginal revenue to society from eliminating them'*.[44]

[41] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 24) 7.45ff.
[42] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 24), 7.48.
[43] The exchange of information between competitors can amount to an infringement of competition rules even where those exchanges are not ancillary or dependent to an existing cartel agreement if the information exchange artificially increases transparency in the market, facilitates coordination between competitors and results in restrictive effects on competition; see Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] 2011/C 11/01, para 65.
[44] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 24) 7.55.

Hence, there is a possibility that in a mixed private and public enforcement regime such as the EU, in which private enforcement has only recently come into effect and on top of an existing public enforcement system designed for deterrence, the combined punishment (sanction + damages) can result in over-deterrence. The same risk applies to situations of overcompensation where courts award damages exceeding the harm that was caused. Although the risk of over-deterrence is low in hardcore cases (e.g., price-fixing cartels) in which under-deterrence is probably more likely because of the low probability of detection, this study sporadically and where necessary discusses the problem of over-deterrence for conduct in the 'grey zone'.

In addition, other criteria are taken into account where necessary for the analysis, namely administrative efficiencies and distributive justice goals. It should be noted that a rule may achieve full compensation and sufficient deterrence, but to do so it might become so complex that its use over-burdens administrative bodies and ultimately hampers effective enforcement. For that reason, where necessary the legislative proposals in this study are also assessed in terms of their usability in practice (administrative efficiency). Equally, the proposals in this study are adjusted for distributive justice consideration where appropriate and necessary.

D. Limitations

It is not the goal of this study to analyse whether all of the Directive's provisions fully achieve the deterrence objective in every scenario. This study focuses on three main areas where private and public enforcement interact and proposes solutions that align the main objectives of private enforcement: deterrence and compensatory justice. Further points of interaction exist between public and private enforcement that may undermine either the deterrence or compensation objective. For example, one may think of the impact of the limited scope of commitment decisions in follow-on damages actions.

Moreover, the analysis is limited to well-organised *hardcore* price-fixing cartels. It is assumed that such cartels are operated effectively in secrecy and are therefore difficult to discover. The rationale behind the focus on this particular serious type of infringement is to examine the Directive's effectiveness in terms of its primary goal of deterrence. Admittedly, there are good legal considerations that justify not punishing overall to the maximum but reducing the sanctions for less serious infringements.[45] The impact of less serious infringements, which may

[45] See for example Harold Houba, Evgenia Motchenkova and Quan Wen, 'Legal Principles in Antitrust Enforcement' (2018) 120 The Scandinavian Journal of Economics 859-893.

justify a deviation from the level of sanction of the optimal enforcement theory, goes beyond the scope of this analysis. The impact of the adjustments proposed in this book on other types of infringements, in particular abusive behaviour (Article 102 TFEU), should be developed in further research.

The analysis is based on the rational choice theory and does not include other moral or behavioural aspects. Some have argued that behavioural aspects should be included in the theory of deterrence.[46] The underlying assumption of this study is that firms decide to participate in a well-organised *hardcore* cartel or to leave the same cartel on the basis of a cost–benefit analysis. Firms that go through the effort to put in place mechanisms to strengthen the organisation of a cartel (e.g., monitoring and punishment mechanisms) so that it can operate effectively in secrecy are equally likely to have put in place decision-making processes that circumvent individual biases that affect the firms' profits. For those reasons, it is more likely that for those firms the possible consequences of enforcement are more important drivers of compliance than moral views. However, moral views are more relevant for individual informants blowing the whistle, which should be developed in further research.[47]

E. Structure of the Book

This book is composed of four parts and seven chapters. Each part of the book focuses on a different aspect of the research question.

Part One provides the background for the analysis in this book. Chapter II describes the legislative process that ultimately led to the entry into force of the Directive before outlining the Directive's provisions in more detail. The remainder of the book then examines more closely those provisions that are relevant for the respective analysis. A particular focus of the chapter lies on the implementation of the Directive's provisions into national laws. The aim is to show that despite the Directive's objective to create a level playing field in Europe, there still exists some substantial divergence between Member States. It is important to be aware of this divergence because the analyses in the following parts of the book focus on the Directive's rules assuming they are applied universally across Europe. The effectiveness of the adjustment to the enforcement regime proposed in this book might therefore be affected by different rules appli-

[46] See for example Anthony Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8 QUT Law Review 364; Christopher Harding, 'Cartel Deterrence: The Search for Evidence and Argument' (2011) 56 The Antitrust Bulletin 345-376.

[47] In April 2019, the European Parliament approved the Proposal for a Directive on the protection of persons reporting on breaches of Union law [2018] OJ L305/17.

cable between Member States. The analyses in the remaining parts of the book refer to some national rules that are likely to influence the results of the study by way of example.

Part TWO addresses an issue that the Directive has intentionally left to national courts, namely the allocation of civil liability among joint infringers. Chapter III contrasts the distribution of liability in Europe with the situation in the US (no-contribution rules). It outlines the debate in the US surrounding the no-contribution rules, in particular the objections that have been raised against excluding contribution and arguments in favour of deterrence. Chapter IV picks up, *inter alia*, on those considerations raised in relation to the no-contribution rule and examines different methods for the quantification of relative responsibility. It proposes a method for determining contribution that satisfies, on the one hand, the conditions set out in the Directive and scores best in terms of deterrence. Chapter V then focuses more closely on how the allocation rule proposed in the previous chapter might need to be adjusted according to the roles of the infringers in the cartel. It reviews the Commission's practice in adjusting the fines for mitigating and aggravating factors and proposes a methodology that adjusts the share of contribution accordingly.

Part THREE turns to the effects of the Directive on leniency incentives. Although the Directive attempts to protect leniency recipients by protecting leniency statements from disclosure, the analysis in chapter VI shows that the additional civil liability is likely to have a stabilising effect on well-operated cartels. It shows that firms have an incentive to reveal the infringement and to cooperate even in cartels with a low detection rate if immunity/leniency recipients are offered immunity or reductions from the civil liability proportionate to the reductions from fines granted to immunity/leniency recipients. Furthermore, it shows that the proposed proportionate damages alternative is better equipped to reconcile the goal of compensation and deterrence compared with the current approach under the Directive.

Part FOUR examines the overall impact of damages action on the calculation of fines. A potential rise of civil liability following the implementation of the Directive in addition to fines are likely to create an overall level of sanctions that is no longer proportionate to the harm and likely to create over-deterrence, which may reduce welfare-enhancing transactions. Chapter VII proposes a new methodology for the calculation of fines that reconciles fines and damages irrespective of how private enforcement may develop in future. The proposal takes the potential civil liability into account for the calculation of fines. It is shown that the proposed methodology scores better in terms of deterrence than the current situation while guaranteeing the right to full compensation.

PART ONE

The Implementation of Directive 2014/104/EU: A New Level Playing Field in Europe?

Chapter II
The Implementation of Directive 2014/104/EU: Harmonised Rules on Competition Damages Litigation in Europe?

Directive 2014/104/EU (also '**the Directive**') marks the beginning of a new era for the still underdeveloped regime of private enforcement of Competition Law in Europe. After many years of preparation and two major public consultations, the Commission published its proposal for a directive on 11 June 2013. The Directive 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 was finally adopted by the Council on 10 November 2014 and signed into law on 26 November 2014. The Directive set a time frame for Member States to transpose the new rules into national law until 27 December 2016.

The Directive aims to establish a level playing field among EU Member States by harmonising rules for damages actions across Europe. The focus of this chapter lies on the new rules for damages claims introduced by the Directive across Europe, in particular the scope of the harmonised rules and the transposition of the new rules into national law. The analysis of the implementation of the Directive's rules reveals that despite the objective of establishing a level playing field for competition damages action in the EU, substantial divergence still exists across Member States. Hence, this chapter aims to set the scene on the one hand for the more detailed analysis of the Directive's rules in the remaining chapters of this book and, on the other hand, as a basis for further research. As this study analyses the Directive's rules under the assumption that the rules transposed into national law do not deviate from the scope of the Directive, the review of the implementing legislations in this chapter provides a starting point for further research on how the proposals in this book may be affected by specific national rules. Moreover, the analysis in the remaining chapters refers to some of the deviations in national laws. For more details on the rules and a comparative analysis, the reader should refer back to this chapter.

It is divided into three sections: Section A summarises the background to the Damages Directive, its objectives, and the tensions the Directives attempts to resolve. Section B introduces the new (harmonised) rules under the Directive and provides examples of how these rules have been transposed into national law. This section focuses in particular on national rules going beyond the scope of the Directive and rules that lag behind the Directive's standards or (poten-

tially) even conflict with the Directive's provisions. Section C reviews how national courts could approach divergences from the Directive, particularly in relation to the temporal application of the new provisions, in light of recent case law of the European Court of Justice (**CJEU**) and the potential consequences for a uniform level playing field in Europe.

A. Background: The Path Towards Harmonised Rules in Europe for Actions for Damages for Competition Law Infringements

European competition law is enforced by both competition authorities and private parties. In contrast to the Sherman Act (Section 15) and the Clayton Act (Section 4) in the US, [48] the primary competition rules in the TFEU are silent on the question whether victims of competition infringements can claim compensation. Articles 101 and 102 TFEU merely refer to the conduct that constitutes a competition violation and do not expressly state whether victims of competition violations have standing to claim compensation.

However, the importance of private enforcement[49] was acknowledged in the early stages of EU competition law. The Deringer Report 1961 on the possible approaches for the implementation of Article 101 TFEU (ex Article 85 EC) highlighted the benefits of private actions for the enforcement of the competition rules.[50] In the study on national remedies for the infringement of competition law of 1966, the Commission showed that the original Member States of the EEC were capable of remedying damages from competition infringements.[51] After these initial steps, it took until the 1990s before the Commission referred back to the issue of private enforcement. In the 1993 Notice on cooperation with national courts, damages are mentioned briefly as a contribution to deterrence of competition infringements: *'companies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages or interests in such an event'*.[52] More explicitly, the 1999 Modernisation Paper states that national

[48] 15 U.S. Code Chapter 1 - Monopolies and Combinations in Restraint of Trade.
[49] In this book, 'private enforcement' refers to damages actions of victims of competition infringements with the purpose of compensating those who suffered harm. While enforcement theories generally focus on preventing future infringements (deterrence), the primary objective of damages actions is to compensate victims. In Europe, the vast majority of damages claims follow the infringement decisions and aim to achieve compensation through judgment. Thus, the effects of damages actions on the enforcements of the competition rules play only a subordinate role.
[50] See Arved Deringer, 'Rapport Sur La Consultation Relative À Un Premier Règlement 'Application Des Articles 85 Et 86 Du Traité De La C.E.E.' (Assemblée parlementaire européenne 1961) para 123; see also Arved Deringer and Claus Tessin, 'Das erste Kartellgesetz des Gemeinsamen Marktes' (1962) 15 Neue Juristische Wochenschrift 989-993.
[51] Commission de la CEE, Collection, Etudes Série Concurrence No. 1 'La reparation des conséquences dommageables d'une violation des articles 85 et 86 du Traité instituant la CEE' [1966].
[52] Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty [1993] OJ C39/6, para 16.

courts are to some extent better equipped for certain enforcement tasks: *'The national courts for their part are in a better position than the Commission to accede to certain requests by complainants: they can act rapidly through interlocutory proceedings and, unlike the Commission, can grant damages to those who have been the victims of infringements'*.[53]

However, no clear guidance was given in relation to the standing of victims of EU competition infringements until the CJEU preliminary ruling in *Courage v Crehan* in 2001.[54]

I. The right of any individual to claim damages for a breach of competition rules after *Courage* and *Manfredi*

The Court, for the first time, declared that *'any individual can rely on a breach of Article [101 TFEU]'*[55] and has the right to claim damages for loss caused by the breach. The Court drew its reasoning in support of a broad standing, which includes all potential victims of an Article 101 TFEU infringement from the notion of 'full effectiveness' of the competition rules. The Court stressed that national courts are under an obligation to *'ensure that those rules take <u>full effect</u>'* and to protect the rights those provisions confer on individuals. The court reiterated the principle of 'full effectiveness':[56]

> *'The full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to <u>any individual</u> to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'*.[57]

Moreover, the Court commented more generally on the role of private enforcement on the competition enforcement regime:

> *'Indeed the existence of a right [to claim damages for loss caused by the breach of Article 101 TFEU] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the Community'*.[58]

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[53] White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027 [1999] OJ C132/15, para 46.
[54] Case C-453/ 99 *Courage Ltd v Bernard Crehan* [2001] ECLI:EU:C:2001:465.
[55] Ibid para 24.
[56] Ibid para 25.
[57] Ibid para 26.
[58] Ibid para 27.

The CJEU in its *Courage* judgement refers to the right of compensation of individuals (damages actions) as an instrument contributing to the effective enforcement of competition rules. The Court does not refer to compensation as an individual goal of the EU enforcement regime but as part of the overall objective of deterrence. The latter, however, has been predominantly ignored by the vast majority of commentators and neither the Directive takes due account of the deterrence effect of private enforcement. Just recently, the CJEU found clearer words in *Skanska*.[59] The court referred to Advocate General Wahl's opinion and confirmed that *'actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct'*.[60] In the paragraph of the AG's opinion the CJEU expressly refers to, Wahl highlights that deterrence is what both public and private enforcement equally strive to achieve: *'[A]ctions for antitrust damages form an integral part of the enforcement of EU competition law, a system that (taken as a whole) aims primarily at deterring undertakings from engaging in anticompetitive behaviour'*.[61] Following the CJEU's clear affirmation of deterrence as a goal of private enforcement of EU competition rules, the Directive's rules must also be evaluated in terms of their deterrent effect.

Arguably, the *Courage* ruling has extended the principle of state liability for damages for failure to transpose a directive into national law established in *Van Gend en Loos*, *Francovich*, and *Brasserie du Pêcheur*.[62] In *Francovich* the applicants brought actions against Italy for the failure to implement a directive. The CJEU held that compensation by Member States for harm caused to individuals by breaches of EU Law for which the state can be held responsible (principle of state liability) was indispensable for the full effectiveness of EU law:

> *'It must be held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible'*.[63]

[59] Case C-724/17 *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al*. [2019] ECLI:EU:C:2019:204.
[60] *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al*. (n 59) para 45.
[61] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy et al*. [2019] ECLI:EU:C:2019:100, Opinion of Advocate Genral Wahl, para 80.
[62] Case C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; Joined Cases C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECLI:EU:C:1991:428; Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECLI:EU:C:1996:79. For a discussion on the expansion of the principle of state liability in *Courage* (n 8), see also Ioannis Lianos, Peter J Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press 2015) 2.20-2.31.
[63] Joined Cases C-6/90 and 9/90 *Francovich v Italy* [1991] ECLI:EU:C:1991:428, para 33.

In *Brasserie du Pêcheur*, the Court reiterated from its *Francovich* judgement that state liability was indispensable for the full effectiveness of EU Law before stressing that this *'is all the more so in the event of an infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provisions whose breach caused the damage sustained'*.[64] The Court clarifies that following the reasoning established in *Francovich*, whereby compensation for the breach of EU Law is indispensable for the full effectiveness of EU rules, the liability of states must also apply to the breach of directly effective EU Law.

Courage was the logical next step to extend the state liability to compensate for violations of directly applicable EU (Competition) Law to violations of private individuals. First, the Court referred to its very early ruling in *Van Gend en Loos* and reiterated that the Treaties have created their *'own legal order',* which courts are bound to apply.[65] It then emphasised the importance of the competition rules in Article 101 TFEU before repeating the provision's direct effect between individuals and the rights it creates for individuals that must be safeguarded by national courts.[66] It follows from the duty of Member States to ensure that those rules take full effect that individuals must be able to claim compensation for losses caused by a violation of Article 101 TFEU.[67]

In 2006, the CJEU further clarified the scope of the right to compensation in its *Manfredi* ruling.[68] The ruling followed a preliminary reference from an Italian court, which sought clarification on the parallel application of national and EU competition law and to the extent third parties can rely on Article 101 TFEU to claim damages for the harm suffered from an infringement of the EU competition provision. The Court built on the findings in *Courage* and held that any individual can rely on the invalidity of an agreement or practice prohibited under Article 101 TFEU, and can claim compensation for the harm suffered where there is a '*causal relationship*' between that harm and an agreement or practice prohibited under Article 101 TFEU.[69] However, in *'the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which indi-*

[64] Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECLI:EU:C:1996:79, para 22.
[65] *Courage Ltd v Bernard Crehan* (n 54) para 19.
[66] *Courage Ltd v Bernard Crehan* (n 54) para 23.
[67] *Courage Ltd v Bernard Crehan* (n 54) paras 25-26.
[68] Joined Cases C-295/04 and 298/04 *Manfredi and Others v Lloyd Adriatico* [2006] ECLI:EU:C:2006:461.
[69] *Manfredi and Others* (n 68) paras 59-61.

viduals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)'.[70] Thus, the court reiterates the right that *anyone* has a right to compensation where there is *causal relationship* between the loss and the competition violation and as long as there are no EU rules governing the exercise of that right, *'it is for the domestic legal system of each Member Sate to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of "causal relationship", provided that the principles of equivalence and effectiveness are observed'*.[71]

The same is true for the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 101 TFEU.[72] With regard to the scope of damages that a domestic court may award, the Court stated that – in the absence of Community rules governing the matter – exemplary and punitive damages must be awarded for breaches of Community competition rules if such damages may be awarded pursuant to similar actions founded on domestic law (principle of equivalence).[73] Furthermore, it follows from the principle of effectiveness 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.[74]

In *Kone*, the CJEU was offered the opportunity to clarify the question of *who* under EU law had the legitimacy to claim damages for violations of EU competition law.[75] The Austrian Highest Court (Oberster Gerichtshof) referred to the CJEU for a preliminary ruling on the question of whether a claimant who had not purchased goods from the cartelists themselves but from their competitors was entitled to claim damages. In the proceeding before the national court, the claimant argued that the cartel made it possible to maintain a price on the market that was higher than it would otherwise have been but for the existence of that cartel and, as a result, not only the cartelist but also their competitors benefited from that market price. This phenomenon is described in the economic literature as 'umbrella pricing'[76] and while the possibility of its occurrence was not disputed between the parties, it was disputed whether it was permitted to claim such damages under EU law. Under Austrian Tort law, such loss was not attributable to

[70] *Manfredi and Others* (n 68) para 62.
[71] *Manfredi and Others* (n 68) para 64.
[72] *Manfredi and Others* (n 68) para 81.
[73] *Manfredi and Others* (n 68) paras 92-93.
[74] *Manfredi and Others* (n 68) para 95.
[75] C-557/12 *Kone and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317.
[76] See for example Roman Inderst, Frank Maier-Rigaud and Ulrich Schwalbe, 'Umbrella Effects' (2014) 10 Journal of Competition Law and Economics 739.

the parties to the cartel on legal grounds because – as was the view of the national court – losses resulting from umbrella pricing fall outside the protective scope (*'Schutzzweck der Norm'*) of the EU competition rules.[77] Thus, there was no 'context of unlawfulness' (*'Rechtswidrigkeitszusammenhang'*), a requirement under national Tort law, and thus, the cartelists cannot be held civilly liable for such losses.[78] The Court, following Advocate General Kokott, held that Article 101 TFEU prohibits

> *'the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel (…)'*.[79]

The Court explained that it is correct, in principle, that it is – in the absence of EU rules – for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of the *'causal link'*. Member States and national courts must, however, ensure that Article 101 TFEU is fully effective:

> *'The full effectiveness of Article 101 TFEU would be 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 (…)'*.[80]

The wording of the judgement in conjunction with the facts of the case as well as Advocate General Kokott's opinion clarified that the categoric exclusion of the right to claim damages for legal reasons under domestic law was contrary to the objective of Article 101 TFEU.

In 2019, despite the court's previous answer in *Kone*, the same Austrian court referred a very similar question to the CJEU in *Otis*.[81] The preliminary reference again concerned the elevator and escalator cartel as well as the question of *who* has the legitimacy to claim damages. This time, the question raised was whether a claimant who was not active on the market that was affected by the cartel could claim damages. The claimant, the Province of Upper Austria, granted promotional loans for the financing of building projects and claimed that as a result of the cartel the costs connected with the installation of lifts were inflated, and as a result, the Province of Upper Austria had to grant higher loans. That money was then not available for other investments. Under Austrian law the incurring of liability for such pure economic losses

[77] C-557/12 *Kone et al v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:45, Opinion of Advocate General Kokott, para 54.
[78] Ibid.
[79] *Kone et al v ÖBB-Infrastruktur AG* (n 75) para 37.
[80] *Kone et al v ÖBB-Infrastruktur AG* (n 75) para 33.
[81] C-435/18 *Otis and Others v Land Oberösterreich and Others* [2019] ECLI:EU:C:2019:1069.

(*Vermögensschäden*) requires the occurrence of a loss that the violated law intended to prevent (*Schutzzweck der Norm*); thus, the question was referred whether Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the market affected by a cartel are also included in the protective scope of Article 101 TFEU.

The CJEU first returned back to its previous case law from which it follows that any person is entitled to claim compensation for the harm suffered where a *causal relationship* exists between that harm and the violation of EU competition law, and that where those requisites are fulfilled national legislation must recognise that right.[82] In parallel to *Kone,* the Court held that the full effectiveness of Article 101 TFEU would be seriously undermined if potential victims were from the outset systematically deprived of the possibility of requesting compensation.[83] Thus, national law cannot be interpreted to exclude persons from the right to claim compensation who are not active as suppliers or customers on the market affected by a cartel. Although Advocate General Kokott had previously already set out in the *Kone* case that, in her opinion, the requirement of *'Schutzzweck der Norm'* under national law cannot be interpreted in a way that hinders the effectiveness of Article 101 TFEU,[84] she used the opportunity to further elucidate the prerequisites of a *causal relationship* that are governed by domestic law and those that stem directly from Article 101 TFEU. Kokott was likely prompted to explore the dividing line between aspects governed by domestic law and those stemming directly from EU law after the confusion that followed Advocate General Wahl's opinion in *Skanska*.[85] In *Skanska*, the question was referred to the CJEU of whether the person *liable* for compensation is to be determined under EU or domestic law.[86] The CJEU followed Advocate General Wahl who held that the person liable for compensation for a competition violation was governed directly by EU law and not domestic law. Wahl interpreted the case law of the CJEU as meaning that the question of the *existence* of a right is governed directly by EU law while the *application* and the detailed rules are governed by domestic law. The controversy, however, followed from Wahl's statement that *'where the constitutive conditions of the right to claim compensation are at stake (such as causation), such conditions are examined by reference to Article 101 TFEU'*.[87] This statement seemed to be in direct contradiction to *Manfredi* where the CJEU held that the concept of

[82] *Otis and Others v Land Oberösterreich and Others* (n 81) paras 23, 26.
[83] *Otis and Others v Land Oberösterreich and Others* (n 81) para 27.
[84] *Kone et al v ÖBB-Infrastruktur AG* - Advocate General Kokott, (n 77) paras 54ff.
[85] *Vantaan kaupunki v Skanska Industrial Solutions Oy et al*. – Opinion of Advocate General Wahl (n 61).
[86] *Vantaan kaupunki v Skanska Industrial Solutions Oy et al*. (n 59). The judgment and its effects on the person liable to compensate victims are discussed in more detail below in Section B.VII.
[87] C-435/18 *Otis and Others v Land Oberösterreich and Others* [2019] ECLI:EU:C:2019:651, Opinion of Advocate General Kokott, para 41.

'causal relationship' was governed by domestic law, which had to respect the principles of equivalence and effectiveness.

In her opinion in *Otis*, Kokott made an attempt to resolve what at first sight seemed to be a contradiction. First, she referred back to her opinion in *Kone* where she explained that the division of competence between Union and domestic law follows the division between the substantive claim and the procedural enforcement of that right.[88] Consequently, the CJEU in *Skanska* held that the person who is liable for compensation relates to the very existence of the substantive claim and must therefore be determined by Union law.[89] The Tort law figure of 'causal relationship', on the other hand, is not limited to the question of whether a certain damage is factually attributable to a certain event and thus only the enforcement of the right to compensation. Instead, causation is a legal figure with different layers and may also include – at least in some jurisdictions – other *normative* requisites which relate to the question of whether the damage claimed is sufficiently connected with the purpose of the rule of law infringed (*Schutzzweck der Norm*).[90] Such normative requirements relate to the substantive right and not to the procedural rules laid down for the enforcement of such substantive rights. Thus, national legal instruments that limit the causal relationship – such as the requirement under Austrian law of a sufficiently close connection between the violation of a legal rule and the loss – cannot be decisive for the protective scope of Art. 101 TFEU. Instead, a uniform interpretation of the prohibition of competition violation across all Member States is necessary to ensure the full effectiveness of EU competition rules.[91]

From this differentiation it follows that only the finding of causality on the basis of the factual circumstances is governed by the domestic procedural rules. Thus, the wording *'detailed rules (…) on the application of the concept of "causal relationship"'* in *Manfredi* must be understood as relating to the enforcement and not the existence of the right to compensation. By reference to the CJEU and Advocate General Wahl in *Skanska*, Kokott concluded that the question of *who* is entitled to claim compensation for *which* damage and *who* is obliged to compensate that damage is a matter of EU law.[92] Thus, besides the *Schutzzweck der Norm,* other domestic legal figures such as the 'lawful alternative' (*rechtmäßiges Alternativverhalten*) or limitations of the type of damages that will be compensated are inapplicable in competition damages actions because they equally limit the right to claim compensation governed by EU law. Only the remain-

[88] *Otis and Others v Land Oberösterreich and Others* - Opinion of Advocate General Kokott (n 87) para 44.
[89] *Otis and Others v Land Oberösterreich and Others* - Opinion of Advocate General Kokott (n 87) para 46.
[90] *Otis and Others v Land Oberösterreich and Others* - Opinion of Advocate General Kokott (n 87) para 50.
[91] *Otis and Others v Land Oberösterreich and Others* - Opinion of Advocate General Kokott (n 87) paras 54-55.
[92] *Otis and Others v Land Oberösterreich and Others* - Opinion of Advocate General Kokott (n 87) para 60.

ing question of *how* that damage may be claimed and compensated is determined by domestic law. This, in particular, leaves the question of the standard of proof to domestic courts; for example, how many expert opinions of what kind or what level of scientific evidence are required.[93]

The CJEU followed the reasoning of Kokott, although it limited its answer to what was strictly necessary in the case by holding that it is not necessary that the loss suffered from a competition violation must, in addition, have a specific connection with the 'objective of protection' pursued by the EU competition rules.[94] However, the determination of whether in the individual case the claimant actually suffered a loss and whether the claimant adduced the necessary evidence to demonstrate the existence of a causal connection between the loss and the cartel at issue remains for the national court to be determined.[95]

II. The Commission's initiatives to harmonise private enforcement in Europe

In 2005, the Commission published its Green Paper on damages actions for a breach of EU antitrust rules, which was accompanied by a Staff Working Paper. The Green Paper expressed the Commission's understanding of damages actions as serving mainly two purposes,

> *'namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence)'.*[96]

Thus, in its Green Paper the Commission acknowledged that an effective private enforcement regime should not only guarantee the compensation of victims but also contribute to the deterrence of future infringements. Any harmonised private enforcement regime in Europe would therefore have to ensure an effective accommodation of both compensation of victims and the deterrence of infringers.

The publication of the Green Paper was preceded by the publication of the Ashurst study in 2004, which was conducted for the Commission.[97] The study analysed the different national rules for damages actions in Europe and concluded that private enforcement of competition law

[93] *Otis and Others v Land Oberösterreich and Others* - Opinion of Advocate General Kokott (n 87) para 57.
[94] *Otis and Others v Land Oberösterreich and Others* (n 81) para 31.
[95] *Otis and Others v Land Oberösterreich and Others* (n 81) para 33.
[96] Damages actions for breach of the EC antitrust rules [2005] (SEC(2005)1732 (**Green Paper**) 3.
[97] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (Ashurst 2004) <https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 4 March 2021.

was *'totally underdeveloped'* in the EU.[98] The Green Paper's objective was to *'identify the main obstacles to a more efficient system of damages claims'* and outlined potential options to overcome those obstacles to *'improve damages actions both for follow-on actions (e.g., cases in which the civil action is brought after a competition authority has found an infringement) and for stand-alone actions (that is to say actions which do not follow on from a prior finding by a competition authority of an infringement of competition law)'*.[99] The Green Paper received considerable interest from legal scholars and antitrust practitioners in Europe, who provided their opinions and contributions. Among the respondents to the Green Paper, there seemed to be a general understanding that a private enforcement regime must foremost ensure compensation for victims of competition infringements.[100]

Based on the responses received to the Green Paper and a further study on the impacts of a more effective private enforcement regime in Europe from a law and economics perspective (**Impact Study**),[101] the Commission published the White Paper in 2008, which was accompanied by a more detailed Staff Working Paper.[102] Lianos et al. (2015) argued that while the Green Paper did not take a clear position on whether priority should be granted either for compensation of victims or deterrence, the White Paper's primary objective appears to be the compensation rationale. In fact, the White Paper states that the *'primary objective (…) is to improve legal conditions for victims'* and *'full compensation is, therefore, the first and foremost guiding principle'*.[103] The White Paper acknowledges, however, that compensation of victims *'inherently also produce[s] beneficial effects in terms of deterrence'*.[104] The Impact Study further examines the interplay of compensation and deterrence. The White Paper contains several legislative proposals to foster a uniform level playing field in Europe, *inter alia*, the disclosure of documents, the binding effect of NCA decisions, and collective actions (standing of indirect purchasers). After another public consultation, the Commission published its first Draft Directive in June 2013.[105] The proposal advanced two goals: (i) optimising the interaction between public and

[98] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 62) 2.35.
[99] Green Paper (n 96) 4.
[100] Eddy De Smijter and Denis O'Sullivan, 'The Manfredi Judgment of the ECJ and How it Relates to the Commission's Initiative on EC Antitrust Damages Actions' (2006) 3 Competition Policy Newsletter 23; Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 62) 2.34.
[101] CEPS, EUR, and LUISS, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' [2007] Final Report (**Impact Study**) <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf>.
[102] White Paper on Damages Actions for Breach of the EC antitrust rules [2008] SEC(2008) 404 (**White Paper 2008**); Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules [2008] SEC(2007) 1376.
[103] White Paper 2008 (n 102) 3.
[104] Ibid.
[105] Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and

private enforcement of competition law; and (ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they have suffered. In other words, the proposal no longer focuses solely on the compensation objective, but equally strives to find the optimal interaction between private and public enforcement. In its proposal the Commission has shifted its focus on what it intends to achieve with a uniform level playing field for private enforcement in Europe. While the new rules must ensure that victims receive compensation for the harm suffered, the new private enforcement regime should not undermine the effectiveness of public enforcement. In the Impact Assessment Report accompanying the proposal, the Commission states as a reason for the shift in its approach the legal uncertainty as to whether leniency statements can be disclosed in damages actions which followed the *Pfleiderer* ruling of the CJEU.[106] In *Pfleiderer*, the Court held that in the absence of EU rules, it is for the national courts to decide on a case-by-case basis whether to allow the disclosure of leniency documents. Chapter VI analyses the new disclosure rules in more detail and tests the new rules on the Directive's two objectives, namely compensation of victims and deterrence of future infringements (private enforcement).

The following chapters analyse the interplay of both objectives and the impact of the new rules on the deterrence objective in more detail.[107] The remainder of this chapter focuses on another guiding principle that the White Paper stresses, namely the harmonisation of actions for damages in Europe and building of a *'legal framework for more effective antitrust damages actions (…) based on a genuinely European approach'*.[108]

III. The Commission's initiatives for a collective regime for Competition Damages

A main reason for the delay of the 2013 Draft Directive and subsequently the entering into force of the final Directive was the debate on the introduction of collective actions in Europe. The 2013 Draft Directive was accompanied by a Recommendation for Collective Redress.[109] The Recommendation was not restricted to EU Competition Law infringements but applied to vio-

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the European Union [2013] COM (2013) 404 (**Proposal for a Directive on Certain Rules Governing Actions for Damages**).

[106] Commission Staff Working Document Impact Assessment Report Damages actions for breach of the EU antitrust rules accompanying the proposal for a directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2013] SWD(2013) 203 final 5.

[107] See for example chapter VI for an analysis of the impact of the disclosure of documents to victims of competition infringements (goal of compensation) on the effectiveness of private enforcement (deterrence).

[108] White Paper 2008 (n 102) 3.

[109] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60 (**EC Recommendation 2013**).

lations of rights granted under Union law.[110] Earlier initiatives for the introduction of collective redress proposed in the Green Paper and White Paper were limited to the application for competition violations only. The debate on how best to introduce a harmonised system of collective actions arose in parallel to the initiatives taken to foster private enforcement. In the discussions, collective actions were seen as a cornerstone for the development of a competition culture in Europe.[111] The Green Paper already sought opinions on whether to introduce an instrument for bringing collective action – which was then termed *'special procedures'* – and how such a procedure should be framed.[112] It proposed either to allow actions for consumer associations without depriving individual consumers of bringing actions or to introduce special provisions for groups of purchasers who are not final consumers.[113] It did not, however, include the option of collective action by end-consumers. The likely reason for the unwillingness to empower a group of end-consumers was the fear of the negative experiences from US-style class actions, particularly the principal–agent problem.[114] In the US, attorneys (agents) who act on behalf of victims (principals) have different interests. Typically, class action attorneys act as entrepreneurs and make a substantial investment hoping to obtain a generous fee. Attorneys often propose contingency fee arrangements under which the attorney receives a percentage of the total amount of damages awarded in a judgement or settlement. It therefore may be appealing for the attorney, who receives a percentage of the settlement as fee, to settle the case early *'if the private costs of pursuing the claim outweigh the expected increase in the fee to be received'*.[115] The principal–agent problem is exacerbated by the opt-out scheme under which every member of a group of similar suited persons ('the class') must actively exclude herself from the class. Generally, in opt-out regimes the class is larger than that in opt-in regimes and many victims may not even be aware of damages actions. Attorneys may bring frivolous suits and spend too little effort in securing the victims' rights.[116]

The White Paper elaborated further on the necessity for collective actions in Europe, but stressed that a *'genuinely European approach'* must be taken and that the policy choices must be *'rooted in European legal culture and traditions'*.[117] The accompanying Staff Working Pa-

[110] EC Recommendation 2013 (n 109) Article 1(1).
[111] David Ashton, *Competition Damages Actions in the EU* (Edward Elgar Publishing 2018) 11.79.
[112] Green Paper (n 96), question H, opinions 25 and 26.
[113] Ibid.
[114] Roger Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 Maastricht Journal of European and Comparative Law.
[115] Roger J. Van den Bergh, *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017) 417.
[116] Ibid 416. For a more detailed analysis of the principle–agent problem see Roger Van den Bergh (n 114).
[117] White Paper 2008 (n 102) section 1.2.

per explicitly addresses the principal–agent problem experienced in opt-out regimes.[118] It proposes a European alternative to US-style class actions consisting of opt-in collective action as well as representative actions by qualified entities on behalf of individuals or businesses. Such qualified entities might include consumer or trade associations.[119] However, the White Paper does not deal with the issue of how the awarded damages in a representative action would be distributed between the represented victims, despite stating that a key issue is the distribution of awarded damages, especially because the distribution becomes more difficult the more loosely the group of victims is defined.[120] By contrast, the distribution of the awarded damages would cause no issue in opt-in actions because the claimants would be individually identified.[121]

The proposals of the White Paper were followed by an Information Note of the Commissioners of Justice, Competition, and Consumer Policy on 5 October 2010. In the note, the Commissioners stressed the need for a *'coherent European approach to collective redress'* which *'while serving the purpose of ensuring a more effective enforcement of EU law, fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law'*.[122] The European model would have to avoid abusive litigation as it occurred in the US with its 'class action' system. For that reason, the Commissioners opposed the introduction of 'class actions' along the lines of the US model.[123]

The Commissioners then opened a public consultation with the publication of the consultation paper on collective redress in February 2011. The approach of the consultation was no longer limited to competition law infringements, but also covered other areas of EU law. Besides questions as to the necessity of a collective redress regime, the Commissioners sought responses on the issue of whether to introduce a system of opt-in or opt-out.[124] In its response to the public hearing, the European Parliament stressed that *'uncoordinated EU initiatives of collective redress'* would result in a *'fragmentation of national procedural and damages laws'*. The collec-

[118] White Paper 2008 (n 102) para 58.
[119] White Paper 2008 (n 102) para 49.
[120] White Paper 2008 (n 102) para 47.
[121] White Paper 2008 (n 102) para 59. Part TWO takes a closer look at the other side of the same medal, more specifically the distribution of liability among joint and several liable infringers in joint competition infringements such as cartelists.
[122] Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli 'Joint information note: Towards a Coherent European Approach to Collective Redress: Next Steps Joint information note by Vice-President Viviane Reding' [2010] SEC(2010) 1192, para 10 (**Joint Information Note**).
[123] Joint Information Note (n 122) para 17.
[124] Joint Information Note (n 122). The responses to the public consultation were summarised in the Prof Dr Burkhard Hess, Prof Dr Thomas Pfeiffer and Mitja Mertens, 'Evaluation of Contributions to the Public Consultation and Hearing: Towards a Coherent European Approach to Collective Redress' (University of Heidelberg 2011) Study JUST/2010/JCIV/CT/0027/A4.

tive redress system should therefore be a horizontal framework that takes due account of the legal traditions of the Member States.[125]

Together with the proposal for a directive on damages actions, the Commission adopted its recommendations on common principles for collective redress in June 2013.[126] The recommendations left it open for Member States whether to introduce collective redress actions, but set out the principle for collective redress that should be common across the Union.[127] The recommendation followed its earlier approach and opted for a combination of representative actions and 'opt-in' collective redress.[128] In addition, the recommendations contain other measures the Commission considers necessary *'to avoid the development of an abusive litigation culture in mass harm situations',* such as the (general) prohibition of contingency fees[129], prohibition of punitive damages[130], or the 'loser pays principle'[131]. Other suggestions for harmonisation are aimed at facilitating the group of claimants more directly. As such, in follow-on actions the claimant should not be prohibited from seeking compensation because the limitation periods had expired during the investigation of the authority (suspension).[132]

Member States were due to transpose the recommendations by 26 July 2015.[133] Only Belgium,[134] France,[135] and the UK[136] introduced new or amended existing rules on collective redress before the expiry of the deadline in 2015. Others have engaged in reform efforts (e.g., Malta and Slovenia) and some Member States (e.g., Lithuania and Germany) have introduced new rules for a collective redress regime after the deadline in July 2015.[137] The Commission

[125] Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' [2012] P7_TA 21 paras 15-16.
[126] EC Recommendation 2013 (n 109).
[127] Ibid, recital 13.
[128] Ibid, paras 4 and 21.
[129] Ibid, para 30. If a Member State exceptionally allows for contingency fees, Member States must ensure that appropriate national regulations are in place.
[130] Ibid, para 31.
[131] Ibid, para 13.
[132] Ibid, para 34. This corresponds with the principle in Article 10(4) Directive 2014/104/EU.
[133] Ibid, para 38.
[134] Loi du 28 mars 2014 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 définitions propres au livre XVII dans le livre 1er du Code de droit économique <http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&table_name=loi&cn=2014032825&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=(text+contains+(%27%27))> accessed on 8 March 2021.
[135] Loi n° 2014-344 du 17 mars 2014 relative à la consommation <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028738036&categorieLien=id> accessed on 8 March 2021.
[136] Consumer Rights Act 2015.
[137] For example, in Lithuania the rules on collective redress are contained in Article 49 of the Lithuanian Civil Procedure Code (LCPC), namely the mechanism linked to the protection of the public interest, and in chapter 24/1 of the LCPC, namely the rules on group action proceedings. In Germany, a Model Declaratory Action (*'Musterfeststellungsklage'*) entered into force on 1 November 2018, which followed the Dieselgate scandal. The *Musterfeststellungsklage* is a light version of the Commission's recommendations, allowing only for collective redress in the form of a declaratory lawsuit (i.e., requesting the court to rule on the existence of a violation).

committed itself to assessing the implementation of the Recommendation by 26 July 2017 and reporting whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.[138] On 25 January 2018, the Commission published its assessment and concluded that the existing individual redress mechanisms are inadequate in 'mass harm situations' affecting large numbers of consumers in the EU.[139] The Commission found that overall the recommendation only resulted in limited legislative activities. Even in the seven Member States where reforms were enacted, these reforms have not always followed the principles of the 2013 Recommendation. Despite the Recommendation, the findings demonstrate that most Member States have not introduced any collective redress mechanisms in their national systems. In fact, *'[t] here are 9 Member States that do still not provide for any possibility to collectively claim compensation in mass harm situations as defined by the Recommendation'*.[140] In other Member States that *'formally provide for such possibility, in practice affected persons do not use it due to the rigid conditions set out in national legislation, the lengthy nature of procedures or perceived excessive costs in relation to the expected benefits of such actions'*.[141] Against the background of the assessment, the Commission issued a proposal for a directive on representative actions for the protection of the collective interest of the consumer on 11 April 2018.[142] The proposed directive is part of the 'New Deal for Consumers' launched in April 2018 by the European Commission, which aims to ensure stronger consumer protection.[143] On 7 December 2018, the Committee on Legal Affairs passed a report on the proposed directive and, on 26 March 2019, the European Parliament adopted the proposed directive as amended by Parliament at first reading under the ordinary

Victims of such a violation who have participated in the *Musterfeststellungsklage* must still bring an action to quantify their individual damage. The Act is available in German here <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl118s1151.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl118s1151.pdf%27%5D__1557073401362> accessed on 8 March 2021.

[138] Ibid, para 41.

[139] Report from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) [2018] COM(2018) 040.

[140] Ibid, p. 20.

[141] Ibid.

[142] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [2018] SWD (2018) 96 final – SWD (2018) 98 final.

[143] The New Deal also comprises a broader Directive amending and four 'modernising' existing consumer protection directives (the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU, the Unfair Contract Terms Directive 93/13/EEC, and the Price Indication Directive 98/6/EC). See also the European Commission, 'A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement Brussels, IP/18/3041' (2018) <http://europa.eu/rapid/press-release_IP-18-3041_en.htm> accessed 4 March 2021.

legislative procedure.[144] The proposed Directive builds on the previous Recommendations and sets out rules enabling qualified representative entities to seek representative actions aimed at the protection of the collective interests of consumers.

The Council and Parliament on 4 and 24 November, respectively, formally endorsed the directive which entered into force on 24 December 2020 (**Directive on representative actions**).[145] However, the new Directive on representative actions has only a limited scope. Representative actions must relate to a limited set of European directives and regulations on consumer protection which are set out in Annex I to the Directive on representative actions. According to Annex I, competition infringements are not covered by the new rules on representative actions. The Directive on representative actions encourages Member States to make the provisions of the directive applicable to other areas not falling within its scope and some Member States may extent the rules to competition infringements in the future.[146] In light of the limited scope of the directive, we will likely find a fragmentation of rules on collective redress for competition damages in Europe.

B. The Rules of Directive 2014/104/EU and the Implementation into National Laws

The Directive was adopted by the Council on 10 November 2014 and signed into law on 24 November 2014. Member States were supposed to transpose the new rules into national laws by 27 December 2016 (Article 21 (1)). Most Member States failed to implement the new rules within that timeframe. On 24 January 2017, Letters of Formal Notice were sent to 21 Member States that had failed to implement the Directive. Reasoned Opinions were sent to seven Member States that still had not transposed the new rules by 13 July 2017. By the end of 2017, four of those seven Member States had transposed the new rules. Bulgaria, Greece, and Portugal adopted the necessary measures in the first months of 2018. The infringement procedures were closed on 8 March 2018.[147]

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[144] European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [2019] TA/2019/0222 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP:P8_TA(2019)0222> accessed on 8 March 2021.

[145] Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1.

[146] Ibid, recital 18.

[147] A summary of the status of implementation and links to the implementing legislations are available <http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html> accessed 8 March 2021.

I. The legal basis

As discussed above, in the Draft Directive of 2013 the Commission expressed that the Directive's objective is two-fold: (i) optimising the interaction between public and private enforcement of competition law; and (ii) ensuring that victims of infringements of EU competition rules can obtain full compensation for the harm they have suffered. The Directive states Articles 103 and 114 of the TFEU as the legal basis for the new rules, because they aim at harmonising the differing procedural rules (1) for a more effective enforcement of Articles 101 and 102 TFEU and (2) *'to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market'*.[148] As for the more effective enforcement, the new rules are based on Article 103 TFEU, which entitles the Council, on a proposal from the Commission and after consulting the European Parliament, to lay down the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU.[149]

In the view of the Commission, the second aim of a *more level playing field* goes beyond the mere effectiveness of the enforcement of the Competition rules. The Commission fears that uneven private enforcement may disincentivise undertakings to exercise their rights of establishment and distribution of goods and services in Member States where the right to compensation is enforced more effectively.[150] The differences between the private enforcement regimes may therefore negatively affect competition and the proper functioning of the internal market.[151] The objective of ensuring undistorted competition in the internal market by approximating national substantive and procedural rules is not ancillary to the objective of ensuring a more effective enforcement of Articles 101 and 102 TFEU. Accordingly, the Commission has based the new rules not solely on Article 103 but also on Article 114 of the TFEU, which entitles the European Parliament and the Council *'to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'*.[152]

Article 114 TFEU may be a sufficient legal basis only if there is a genuine link between the adopted measure and the removal of existing obstacles in the internal market.[153] It requires that the approximation (i.e., the harmonisation of rules) is necessary to overcome the adverse effects

[148] Directive, recitals 8-9.
[149] Article 103(1) TFEU; Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 62) 3.05.
[150] Directive, recital 8.
[151] Ibid, recitals 7-8.
[152] Article 114(1) TFEU.
[153] Case C-376/98 *Germany v Parliament and Council* (*Tobacco Advertising* case) [2000] ECLI:EU:C:2000:544.

of the differing rules within the internal market.[154] However, while the competence for competition rules necessary for the functioning of the internal market lies exclusively with the EU, the harmonisation of laws under Article 114 TFEU is an area of shared competence.[155] Both the EU and Member States are entitled to legislate if the EU has not introduced harmonised rules. The Directive modifies not only national rules concerning the right to claim damages for infringements of EU competition law but also for infringements of national competition law, at least where national and EU competition rules apply in parallel and the infringement has an effect on trade between Member States. However, it would be impractical – and result in perpetuating legal uncertainty – for a court to separate aspects of the same claim into national and EU competition law so as to apply different rules on damages to each aspect.[156] The Directive, therefore, has harmonised the rules for damages actions for infringements of EU competition law or national law where the latter is applied in parallel with EU competition rules.[157]

The following parts of this section introduce the new harmonised rules of the Directive for damages actions for infringements of EU competition law and the measures that were taken by Member States to transpose the Directive's provisions into national law. A particular focus lies on the divergences between the implementing laws of Member States and potential violations of the Directive, particularly where Member States have not transposed the provisions to the requisite standard. Thus, this study is not intended to contribute through providing a detailed analysis of the implementing legislation of each Member State; instead, its objective is to show areas where Member States have taken different approaches that risk undermining a unified level playing field in Europe. For that purpose, the next section introduces the Directive's provisions and illustrates if and how Member States may have deviated from those provisions and also whether the provisions have been interpreted differently across Europe. Because of the scope of the provisions and the complexity of transposing those in national rules, this study is limited to an exemplary overview of the national rules. The greatest divergence was noticed in relation to the temporal application of the new provisions.

This study is mainly based on the two comprehensive studies on the implementation of the Directive that were available – as far as the author is aware – at the time of writing. The first study was undertaken by Piszcz (2017) on the implementation in Central and Eastern European coun-

[154] Jacobien W Rutgers, 'European Competence and a European Civil Code', in Arthur S. Hartkamp, Martijn W Hesselink, Ewoud Hondius, C Mak, Edgar Du Perron (eds) *Towards a European Civil Code* (4th edn, Kluwer 2004).
[155] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 62) 3.07.
[156] Ibid.
[157] Ibid, 3.08.

tries, which mainly relies on the draft implementing legislations.[158] The second study was edited by Rodger, Sousa Ferro, and Marcos (2018) and outlines the implementing laws of 16 Member States.[159] In addition, where available and appropriate, the author evaluated publications in English journals on the implementation in specific Member States and interviewed legal experts of specific Member States. The study is structured in parallel to the rules of the Directive.

II. The scope of the directive

> *Article 1*
> ***Subject matter and scope***
> *1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.*

Article 1(1) repeats the two objectives that the Directive intends to achieve through the harmonisation of national rules under which compensation can be obtained for harm caused by infringements of EU competition law: full compensation of 'anyone' who has suffered harm caused by an infringement of competition law and the fostering of undistorted competition in the internal market. Article 2 defines *inter alia* the meaning of an 'infringement of competition law' and 'national competition law':

> *Article 2*
> ***Definitions***
> *For the purpose of this Directive, the following definitions apply:*
> *(1) 'infringement of competition law' means an infringement of Article 101 or 102 TFEU, or of national competition law; (…)*
> *(3)'national competition law' means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, (…)*

As discussed in the previous section, the Directive also applies rules on damages actions for the infringement of national competition law, if the national rule applies in parallel to EU competition rules. On the other hand, the Directive does not oblige Member States to also harmonise national rules applicable solely to national competition law. However, all Member States have broadened, or are in the process[160] of broadening, the scope of application to include at least

[158] Anna Piszcz, *Implementation of the EU Damages Directive in Central and Eastern European Countries* (University of Warsaw Faculty of Management Press 2017).
[159] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos, *The EU Antitrust Damages Directive* (Oxford University Press 2019).
[160] For example, the Netherlands; see Jeroen Kortmann and Simon Mineur, 'The Netherlands' in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019) 275.

also infringements of national competition law.[161] France, for example, has broadened the scope even further to include prohibitions of other anticompetitive practices (e.g., abuse of economic dependence).[162] Furthermore, Austria, Hungary, and Slovenia have broadened the scope to competition laws of other Member States, which is particularly interesting for forum shopping purposes.[163]

> *Article 3*
> ***Right to full compensation***
> *1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.*
> *2. Full compensation shall 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. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.*
> *3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.*

Article 3 specifies the general principles of Article 1 that *'anyone'* has a right to full compensation. Articles 1, 3, and 4 of the Directive summarise the CEUJ's principles in *Courage, Manfredi,* and *Kone* (see section A.I above). An infringer of competition law may face claimants from upstream suppliers to downstream purchasers as well as anyone who has suffered harm irrespective of whether the claimant was part of the same supply chain (e.g., 'umbrella pricing'). Article 3(2) repeats the ruling in *Manfredi* that victims of an infringement of competition law are not only entitled to compensation for the actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.[164] Arguably, the CJEU in *Manfredi* accepted punitive damages provided the national rule adhered to the principles of effectiveness and equivalence.[165] With Article 3(3) there is now a EU provision in place which prohibits punitive damages or any other types of damages that lead to overcompensation. Article 4 summarises the principle of effective-

[161] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos, 'Transposition Context, Process, Measures, and Scope' in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019) 429.
[162] Muriel Chagny, 'France', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019) 105.
[163] *Austria*: Section 37c (1) KartG (Austrian competition law code); *Hungary*: Section 88/C(2) HCA (Hungarian Competition Act); see also Csongor István Nagy, 'Hungary', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019) 182; *Slovenia*: Article 3 DNCA (Slovenian Draft National Competition Act). 'Breach of competition law' is defined as a breach of Article 6 or 9 DNCA, Article 101 or 102 TFEU, and articles of national legislation of the Member States (no EEA States' national law – or their respective competition agencies and their decisions – is mentioned) prohibiting concerted practices or the abuses of a dominant position in the sense of Articles 101 and 102 TFEU; see Ana Vlahek and Klemen Podobnik, 'Slovenia', in Anna Piszcz (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017). 269.
[164] *Manfredi and Others v Lloyd Adriatico* (n 68) para 95.
[165] *Manfredi and Others v Lloyd Adriatico* (n 68) para 84.

ness and equivalence set out by the CJEU in *Courage*.[166] Across Europe, victims already had a right to be compensated at least from primary EU Law. However, in some Member States the right that victims can receive compensation as well as the right to receive interest from the time the harm was caused was not codified before the transposition of the Directive. For example, in Denmark[167] a new provision on the calculation of interest was introduced, and in Lithuania[168] the implementing legislation literally follows the Directive, since different calculations of interest could be applied under national law. In most Member States, it was not viewed as necessary to include a similar provision in the transposing legislation.

In some jurisdictions, however, the national law contains additional normative conditions that claimants need to meet before they can claim compensation. For example, the 9th amendment to the Competition Act in Germany, which implements the Directive, has maintained the requirement that the legitimacy to bring a damages action is limited to persons *affected* by the infringement (*'Kartellbetroffenheit'*).[169] The law defines the affected persons as *'competitors or other market participants impaired by the infringement'*.[170]

Courts in Germany have initially applied *prima facie* evidences and assumed that a person's purchases were affected by the infringement if they fell within the relevant product, temporal, and geographical scope of the cartel as typically described in infringement decisions of the antitrust authorities. In its *Schienenkartell I* judgement of 11 December 2018, the Federal Court of Justice, the *Bundesgerichtshof* (also **BGH**), raised the evidential bar for affectedness.[171] The FCJ held that at least in quota- and customer-sharing cartels, plaintiffs can no longer rely on *prima facie* evidence because such evidence could only be applied where it is empirically established that events occur so frequently that there is a 'very high probability' they are present in every individual case (i.e., the event *typically* occurs). Because of the diversity and complexity of agreements restricting competition, it is not sufficiently certain that anticompetitive agreements are actually implemented in every transaction with a customer. A plaintiff may, however, be able to rely on a factual presumption (*tatsächliche Vermutung*), which has a 'strong indicative significance' for the assessment of evidence but nevertheless requires an overall assessment of all relevant facts of a case. The judgement did not bring much clarity about the meaning of affect-

[166] *Courage Ltd v Bernard Crehan* (n 54).
[167] Section 3(3) Act No. 1541 of 13 December 2016 (**Danish Act**). See also Henrik Peytz, 'Denmark Implementation of Directive 2014/104' (2018) 5 Wirtschaft und Wettbewerb 264.
[168] Jurgita Malinauskaite, 'Lithuania' in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 241.
[169] Section 33a(1) together with section 33(1) German Act Against Competition Restraints (**GWB**).
[170] Section 33(3) GWB.
[171] BGH, Judgment of 11 December 2018, KZR 26/17 – *Schienenkartell I*.

edness. The FCJ, however, seemed to separate the affectedness of the person from that of every individual transaction while accepting a reduced standard of proof by way of a factual presumption only for the latter.[172] With this interpretation, the FCJ significantly limited the group of persons with legitimacy to claim compensation.[173]

Just over a year later, the FCJ had to rule on the same legal questions concerning yet again the same cartel. In *Schienenkartell II,* the FCJ partly abolished its reasoning in *Schienenkartell I* and held that the affectedness of each individual transaction is no longer a necessary requirement for the legitimacy of a person to bring an action.[174] The shift in the court's reasoning was triggered by the CJEU's judgement in *Otis* and Advocate General Kokott's opinion (for a detailed discussion, see section A.I above). The CJEU essentially repeated its reasoning in the 2014 judgement of *Kone* and reconfirmed that domestic law cannot be interpreted so as to categorically exclude civil liability irrespective of the causal connection between the infringement and the loss.[175] In her opinion, Kokott seemed to specifically address Member States with a German law background to explain that any normative restrictions by domestic law would violate the right to claim compensation under EU law. Domestic law is limited to the procedural rules for the finding of causality on the basis of the factual circumstances of the case. With reference to the *Otis* judgement and Kokott's opinion, the FCJ abolished the requirement of the affectedness in every single transaction. However, it confirmed that it remains a requirement for the claimant to prove with the necessary full standard of proof under the domestic rules of procedure the affectedness of the person having suffered the loss. Arguably, in light of the CJEU's clear wording in *Otis*, the requirement under domestic law of an *affected person* remains to unduly limit the group of persons with legitimacy to claim compensation. The restriction is difficult to align with the CJEU' case law which provides that *'any person is … entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and [the competition law infringement]'*.[176]

[172] Rüdiger Lahme and Andreas Ruster, 'Das ungeschriebene Merkmal der Kartellbefangenheit' (2019) Neue Zeitschrift des Kartellrechts 196-197.
[173] Germany's Ministry for Economic Affairs feared that the concept of affectedness as interpreted by the BGH in *Schienenkartell I* would seriously hinder the right to compensation under EU law. For that reason, in its 10th amendment of the GWB a presumption of affectedness was introduced for all transactions that fall within the relevant product, temporal, and geographical scope of the cartel (Section 33a(2) 4th sentence).
[174] BGH, Judgment of 28 January 2020, KZR 24/17 – *Schienenkartell II*.
[175] *Kone and Others v ÖBB-Infrastruktur AG* (n 75) para 30.
[176] *Otis and Others v Land Oberösterreich and Others* (n 81) para 23 and the case law cited therein.

III. Disclosure of evidence

Article 5
Disclosure of evidence
1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence (…)

The Directive recognises that claimants' right to compensation in competition cases is hindered by the information asymmetry between the claimant and the infringers, since the anticompetitive conduct tends to be secret.[177] For that reason, the Directive considers it appropriate that claimants are afforded the right to obtain disclosure of relevant evidence without having to specify the specific document that is required to prove the claimant's case. Article 5(1) provides the general rule for a claimant to obtain disclosure from a defendant or third party. Disclosure must be granted by a national court where the claimant has presented *'a reasoned justification'* to support the *'plausibility'* of a damages claim. The reasoned justification must itself be *'relevant'* and based on *'reasonably available facts and evidence'*. Article 5(2) provides that national courts should be able to order the disclosure of specified items (e.g., a specific document) or a *'relevant category of evidence'* provided that the evidence is circumscribed *'as precisely and as a narrowly as possible'*. Article 5(3) also requires that the disclosure of evidence is subject to a proportionality test. When applying the proportionality test, the national court must take into account the extent to which the claim or defence is supported by available facts and evidence,[178] the scope and cost of disclosure,[179] and whether the evidence contains confidential information.[180] The list is neither exhaustive (*'in particular'*) nor is the application of the proportionality test limited to those three factors. Instead, the wording of Article 5(3)(b) (*'preventing nonspecific searches for information which is unlikely to be of relevance for the parties in the procedure'*) suggests that the proportionality requirement is designed to prevent nonspecific investigations where the claimant has no evidence at all to support his or her case ('fishing expeditions')[181] and to prevent the abusive use of the disclosure rules to pressure defendants into settlements even though the claim may be weak or unfounded ('discovery blackmail'). The wording in recital 23 is even broader (*'nonspecific or overly broad searches'*), confirming that the proportionality requirement is intended to prevent the abusive use of disclosure.[182] Ashton

[177] Directive, recital 15.
[178] Directive, Article 5(3)(a).
[179] Directive, Article 5(3)(b).
[180] Directive, Article 5(3)(c).
[181] David Ashton (n 111) 4.54.
[182] Ibid, 4.56. The same wording was already used in the explanatory memorandum of the Commission's proposal, which also refers more specifically to the potential risk of abusive disclosures (*'the proposed Directive avoids*

(2018) argues that the more restrictive language in the Directive, as compared with the 2013 Proposal as well as the emphasis on the 'relevance' of the requested evidence in the Directive, show how hesitant Member States were about opening up traditional disclosure regimes.[183] Additionally, the Directive includes measures to protect confidential information,[184] the legal professional privilege,[185] and to provide judicial review for the disclosure decision as well as the right to be heard for the person from which disclosure is ordered.[186] On 22 July 2020, the Commission published a Communication on the protection of confidential information by national courts, in which the Commission picks up some of the examples for measures to protect confidential information listed in recital 18.[187] The Communication proposes in particular the redaction of confidential information, the setting up of confidentiality rings following the example of the UK, the appointing of experts to review confidential information, and the provision of a non-confidential summary for the parties.

This cautious attitude of Member States can be seen especially in the approaches taken for the transposition of the disclosure rules. Some Member States have specified the requirements for disclosure of evidence to prevent an overly broad disclosure of evidence by national courts. For instance, Estonia has specifically codified that courts shall not accept evidence which contains business secrets or confidential information where the disclosure of the information is not proportionate to the evidence the information provides.[188] Germany has, in addition to the factors stated in Article 5(3) of the Directive, expressly codified that so-called 'fishing expeditions' for information not relevant to the damages claims,[189] the binding effect of infringement decisions, and the effectiveness of public enforcement in general are specific factors to be taken into account for the proportionality test.[190] Moreover, Portugal has included specific provisions on how to apply the proportionality test as well as a list of examples of proportionate means for disclosure.[191]

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overly broad and costly disclosure obligations that could create undue burdens for the parties involved and risks of abuses'); Proposal for a Directive on Certain Rules Governing Actions for Damages (n 105) 14.

[183] David Ashton (n 111) 4.56.

[184] Directive, Article 5(4) and (5).

[185] Directive, Article 5(6).

[186] Directive, Article 5(7).

[187] Communication from the Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law [2020] OJ C242.

[188] Section 238(3) COCP ('Estonian Civil Procedural Rules'). See also Evelin Pärn-Lee, 'Estonia', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 118.

[189] The Directive also refers to 'fishing expeditions' in recital 23.

[190] Section 33g (3) No 3-5 GWB.

[191] Articles 12(1) to (7) PT (**Portuguese Competition Act**). See also Miguel Sousa Ferro, 'Portugal', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 312-313.

By contrast, some countries did not view it as necessary to transpose the Directive's criteria into national law. In the Netherlands, for example, the legislator found that the existing rules on disclosure were already broader than the rules under the Directive. It therefore only transposed the rules on access to information contained in a competition authority's file (Article 6).[192] In Ireland, many of the provisions already existed under national law with different terminology.[193] While some Member States have not implemented all or some of the provisions because of (broader) pre-existing rules, the implementing legislation in the Czech Republic seems to lag behind the required standard of the Directive: the Czech Damages Act only refers to the disclosure of specific documents and does not expressly allow the disclosure of a category of documents, which limits the scope of the disclosure significantly compared with the Directive.[194]

For the protection of confidential information, only some Member States have codified specific measures that courts should apply to protect confidential information. Austria has substantiated such measures by listing examples (e.g., the redaction of confidential information; exclusion of the general public; limiting of the number of parties and their representatives who may examine the documents; and appointment of an independent expert who may summarise the evidence without the confidential information).[195] Belgium also refers to the possibility of redacting sensitive passages in documents, experts summarising evidence without the confidential information,[196] and in-camera hearings with a limited number of people accessing the information.[197] In addition, Belgian case law has previously protected confidential information by providing access to documents without the possibility of making copies or by allowing a person subject to professional secrecy to distinguish between confidential and non-confidential documents.[198] Cyprus has included a non-exhaustive list that also includes access under supervision and experts summarising the evidence excluding the confidential information. In addition, Cyprus – similar

[192] Jeroen Kortmann and Simon Mineur, 'The Netherlands', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 280.
[193] Mary C Lucey, 'Ireland', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 200.
[194] Michael Petr, 'Czech Republic', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 99.
[195] Section 37j (6) KartG.
[196] Furthermore, the implementing legislation of Greece refers to the possibility of experts compiling a nonconfidential summary of the evidence in question, Article 4(5) Greek Damages Act (**Greek implementing legislation**) in connection with Article 391 CCP (**Greek Civil Code of Procedure**). See Maria Ioannidou, 'Greece', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 174.
[197] The same rules have also been codified in other countries, such as Luxembourg (Article 3 (2) of the Luxembourgish Transposition Act); see Caroline Cauffman, 'The Implementation of the Antitrust Damages Directive in Luxembourg' (2017) SSRN Electronic Journal 16.
[198] Caroline Cauffman, 'Belgium', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 68.

to Croatia – lists the possibility of keeping confidential information in a sealed envelope that can only be opened by the court and designated parties.[199] France refers to the possibility to exclude the public from the proceeding to restrict access to the evidence, and the ability of courts to adapt the reasoning of the decision (i.e., the shortening of the reasoning) to protect confidential information.[200] Greece, like other Member States, also refers to the possibility for the court to appoint an expert who summarises the evidence without the confidential information, with the interesting twist, however, that in such a case, the parties may not appoint a technical expert.[201] Another possibility is the requirement of all parties to sign a non-disclosure agreement, which seems to be common practice in Hungary.[202] In Lithuania, the court may order the parties not to use the confidential information for any other purpose than for the claim in question or that the information may not be copied and/or disseminated. To ensure that parties do not receive confidential information in the first place, the court may also order a party to prepare non-confidential versions of the evidence.[203] Slovenia's implementing legislation contains the possibility to submit non-confidential versions and the restriction of people accessing confidential information. In addition, experts, auditors, and lawyers representing a party in the proceeding may access the information for their expert opinions and to represent their clients but are prohibited from disclosing the confidential information to the parties.[204] Spain included a list of rather broad measures that include the possibility to redact confidential information in the evidence, to hold non-public hearings, to limit persons with access to the evidence, to instruct experts to summarise the evidence, to provide non-confidential versions of the court's decision, and to provide access to legal counsel and experts subject to the obligation not to disclose the information.[205]

Other Member States have not codified specific measures for the protection of confidential information. In the Netherlands, Sweden, and the UK it was viewed as not necessary to imple-

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[199] Greece: (n 196) *Cyprus*: Maria Ioannidou, 'Cyprus', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 97. *Croatia*: Article 7 DA (**Croatian Damages Act**); Vlatka Butorac Malnar, 'Croatia', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 77.

[200] Art. L. 483-2 of the French Commercial Code; Muriel Chagny, 'France', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 120.

[201] Article 391 CCP; Maria Ioannidou (n 196) 174

[202] Peter Miskolczi Bodnár, 'Hungary', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 148.

[203] Article 52(5) LCA (**Lithuanian Competition Act**); Jurgita Malinauskaite, 'Lithuania', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 243-44.

[204] Article 62a(6) ZPOmK-1 (**Slovenian Competition Act**); Ana Vlahek and Klemen Podobnik, 'Slovenia', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 286.

[205] Article 283bis b) (5) CPA (**Spanish Civil Procedure Act**); Francisco Marcos, 'Spain', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 350.

ment specific rules because those countries already had existing rules on the disclosure of evidence in place. In the UK especially, the disclosure of evidence is well established, including measures to protect confidential information through so-called 'confidentiality rings'.[206] In countries such as Germany and Bulgaria, where courts are relatively inexperienced when it comes to the protection of confidential information, legislators have nevertheless refrained from introducing specific measures. This may be seen as problematic because in both countries evidence that has been added to the court's file can – as a general rule – be accessed by all parties to the proceeding. Thus, civil courts with limited experience of keeping confidential information secret (e.g., with the exception of specific procedures in patent litigation proceedings) may be inclined to rely on the general civil procedure rules, which do not allow for the protection of confidential information.

In relation to the protection of information that is legally privileged as required by Article 5(6) of the Directive, most Member States viewed it as not necessary to implement specific rules. Instead, it seems that in most implementing legislations, legally privileged information would be considered under the general proportionality test. Some Member States have, however, codified specific rules: in Austria, evidence protected under legal privilege or evidence that may not be disclosed under criminal procedural rules may only be disclosed to the court. The court will then weigh the interests of the parties and assess whether the information may be disclosed to the other parties.[207] Furthermore, the Croatian transposing legislation specifies that the pre-existing rules on legal privilege will continue to apply in competition damages litigation.[208] However, the scope of the national rules of Member States may in some cases lag behind the much wider scope of the legal privilege principle under EU law. For instance, the Estonian existing rules only protect the communication of external lawyers with undertakings and do not include documents emanating from the undertaking and provided to external lawyers.[209] In Portugal, on the other hand, the scope of the existing rules is broader than the EU standard and also includes the communication with in-house lawyers.[210] Interestingly, Malta has also broadened the protection of legally privileged information and included not only national and EU rules on the protection of legally privileged information but also rules of other Member States.[211]

[206] See CAT Rules 2015, Rule 53(2)(h).
[207] Section 37j(7) KartG.
[208] Vlatka Butorac Malnar (n 199) 74.
[209] Section 256 of the Civil Procedure Act; Evelin Pärn-Lee (n 188) 120.
[210] Miguel Sousa Ferro (n 191) 323.
[211] Section 5(4) Competition Act (CAP. 379) Competition Law Infringements (Actions for Damages) Regulations, 2017, L.N. 117 of 2017.

Article 5(8) clarifies that the disclosure rules of Article 5 are rules of minimum harmonisation,[212] and thus, Member States are not prevented *'from maintaining or introducing rules which would lead to wider disclosure of evidence'*. Some Member States have made use of the possibility to broaden the scope of the disclosure rules to *'pre-trial disclosure'*. Under these rules, claimants can request the disclosure of evidence in preparation for a damages action. Countries that included the possibility of pre-trial disclosure in their disclosure regime include the Czech Republic,[213] Estonia,[214] Germany,[215] Portugal,[216] and Spain[217]. In the UK[218] and Ireland[219] a pre-trial disclosure regime already existed prior to the Directive.

Article 8 provides that Member States impose effective, proportionate, and dissuasive penalties for the failure or refusal of a party to disclose evidence or its destruction, to comply with the obligation to protect confidential information, or for the breach of the limits on the use of the evidence provided for in this Directive. The penalties introduced by some Member States are without question not sufficient for effectively ensuring compliance with the disclosure rules. For instance, courts in Latvia can impose a maximum fine of only 40 EUR, which is certainly too low as a dissuasive penalty against an undertaking.[220] Furthermore, the fines in Lithuania and France against entities can only reach up to 10,000 EUR, which is low considering the amounts of damages generally claimed in competition damages proceedings.[221] Moreover, in other countries the level of penalties is not sufficient to ensure compliance with the disclosure rules. In Poland, the level of fines cannot exceed 20,000 PLN (approx. 4,700 EUR);[222] in Esto-

[212] Under minimum harmonisation rules, Member States are obliged to implement the minimum standard of protection as provided for by the directive but are allowed to retain or introduce higher national standards (more favourable rules); see Francesco de Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 Common Market Law Review 9-30.
[213] Michael Petr (n 194) 98.
[214] Section 244 of the Civil Procedure Act.
[215] Section 33(g) GWB.
[216] Article 13 Proposal Transposition Act.
[217] Article 283bis.e)1 CPA.
[218] CAT Rules 2015, Rule 62.
[219] Order 32 of the Rules of Procedure for the Circuit Court <http://www.courts.ie/rules.nsf/6cc6644045a5c09a80256db700399505/3da9fc05aa299af580256d940061e1c0?OpenDocument> accessed on 8 March 2021 and Order 31 of the Rules of Procedure for the High Court and Supreme Court <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/cc15c27a9413d3a980256d2b0046b3db?OpenDocument> accessed on 8 March 2021.
[220] Julija Jerneva and Inese Druviete, 'Latvia' in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 171.
[221] Lithuania: Article 52 (9) LCA; see also Jurgita Malinauskaite (n 168) 244. France: Article R.483-14 of the Commercial Code; see also Muriel Chagny (n 200) 120.
[222] Article 28 ACD. Maciej Bernatt and Maciej Gac, 'Poland', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Publishing 2019) 294.

nia, fines cannot exceed 3,200 EUR;[223] and in Slovakia,[224] the fine for refusing to provide documents is as low as 500 EUR, or 2,000 EUR in case of a repeated offence.

Some Member States distinguish between fines imposed against legal entities and against individuals, the latter being set significantly lower. For instance, fines for individuals in Croatia range between approximately 67 and 6,700 EUR and for legal entities between approximately 1,400 EUR and 1% of the entity's total turnover in the previous business year.[225] Similarly, fines for entities in Romania range between 0.1% and 1% of the turnover for legal entities and between RON 500 and 5,000 for individuals (up to approximately EUR 1,200).[226] The Czech Republic has also limited fines to 1% of a legal entity's turnover.[227] Austria[228] and Greece[229] have introduced penalties up to 100,000 EUR. The penalties in Italy,[230] Hungary,[231] Bulgaria,[232] and Portugal range between 150,000 EUR and 255,000 EUR. In Portugal and Spain, courts may also impose daily penalties until full compliance is achieved.[233] In Belgium the penalties range between 1,000 EUR and 10,000,000 EUR. [234] Another effective but potentially unproportionate penalty is imprisonment, which can be imposed, for example, in Cyprus[235] and Denmark.[236] Germany, on the other hand, has not introduced a specific fine or an administrative penalty but a right for the party requesting disclosure to receive damages for the losses caused by the obstructing party.[237] It remains to be seen whether the mere right to claim damages is actually an effective tool for ensuring compliance with the disclosure rules, especially because the request-

[223] Sections 46 and 279(3) of the Lithuanian Civil Procedure Act.
[224] Article 102 of the Civil Disputes Code (Civilný sporový poriadok - Act No, 160/2015 Coll.); see Ondrej Blažo, 'Slovakia', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 258.
[225] Art. 10(2) of the Croatian Draft Antitrust Damages Act; Vlatka Butorac Malnar (n 199) 75.
[226] Art. 8 of ORDONANȚĂ DE URGENȚĂ nr. 170 din 14 octombrie 2020privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în materie de concurență, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996 (**Romanian Emergency Ordinance 2020**), published on 16 October 2020. See also Valentin Mircea, 'Romania', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 243.
[227] Sec. 20 Czech Damages Act; Michael Petr (n 194) 103.
[228] Section 37m KartG.
[229] Article 5(2) of the Draft Damages Act.
[230] 15,000 to 150,000 EUR; see Susanna Lopopolo, 'Italy', The EU Antitrust Damages Directive (Oxford University Press 2019) 218.
[231] 50,000,000 HUF (approx. 160,000 EUR). Peter Miskolczi Bodnár (n 202) 147.
[232] Anton Petrov, 'Implementation of the EU Damages Directive in Bulgaria' (2018) SSRN Electronic Journal 20.
[233] In Portugal fines range between 1,020 and 255,000 EUR and the daily penalty between 510 and 51,000 EUR; see Miguel Sousa Ferro (n 191) 312-313. In Spain daily fines range from 600 to 60,000 EUR per day of delay. Spain also has a variety of other penalties in place, including the obligation to pay legal costs for both the disclosure proceeding and the main proceeding and criminal prosecution for judicial disobedience; see Francisco Marcos (n 205) 351.
[234] Art. XVII.81 of the Code of Economic Law. Caroline Cauffman (n 198) 70.
[235] Maria Ioannidou (n 235) 98.
[236] Henrik Peytz (n 167) 265.
[237] Section 33g(8) GWB.

ing party will be required to quantify and litigate the damage. The requesting party is likely to face the same information asymmetry that the new disclosure regime is attempting to overcome in the first place.

IV. Disclosure of evidence contained in the authority's file

> *Article 6*
> ***Disclosure of evidence included in the file of a competition authority***
> *(…)*
> *5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:*
> *(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;*
> *(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and*
> *(c) settlement submissions that have been withdrawn.*
> *6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:*
> *(a) leniency statements; and*
> *(b) settlement submissions.*

The Directive provides additional rules that apply for the disclosure of evidence included in the file of a competition authority (Article 6(1)). 'Competition authority' is defined as the Commission or any national competition authority (**NCA**) or both.[238] Article 6 provides different degrees of protection for different categories of evidence.

Article 6(6) prohibits the disclosure of leniency documents and settlement submissions to any party at any time ('blacklist'). The prohibition of disclosure was introduced in the proposal, which was published only shortly after the CJEU's judgements in *Pfleiderer* and *Donau Chemie* at a time when uncertainty prevailed as to whether leniency statements could be disclosed.[239] In its proposal, the Commission already viewed the disclosure of leniency statements as highly problematic and detrimental to the leniency programme.[240] The absolute prohibition of the disclosure to protect the public enforcement regime is an integral part of the Commission's objective to optimise the interaction between public and private enforcement. Article 7(1) provides a further safeguard for effective public enforcement. Leniency statements and settlement submissions are at least deemed inadmissible in court if the evidence has been obtained solely through access to the file of a competition authority.

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[238] Directive, Article 2(8).
[239] The situation following *Pfleiderer* (Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECLI:EU:C:2011:389) and other case law on disclosure of leniency statements and the effects of the Commission's approach to deterrence and compensation are discussed in more detail in chapter VI.
[240] Proposal for the Directive on Certain Rules Governing Actions for Damages (n 105) explanatory memorandum Section 1.2.

Article 6(5) provides temporary protection for information prepared during a competition authority's investigation ('grey list'). The temporary protection includes information that was prepared specifically for the proceedings of a competition authority (thereby excluding pre-existing information), information that the competition authority has drawn up and sent to the parties in the course of its proceedings, and settlement submissions that have been withdrawn. Such information may only be disclosed after the competition authority has closed its investigation.[241] Some Member States have broadened the scope of the protection. For example, the Czech Republic has modified the provisions: the implementing Act does not only protect information prepared specifically for the proceeding but also protects all information submitted during the proceeding. The Act does not require that the information prepared by the competition authority was sent to the parties. Furthermore, as Petr states, the information is protected *'as long as the competition authority's decision closing the investigation has not entered into force. Presumably therefore, should the investigation [be] concluded before a formal investigation was initiated, and thus without a decision, such information may never be disclosed'*.[242] Italy, by contrast, has introduced the possibility for courts to suspend the proceeding when there is a pending request for disclosure before the national competition authority. This has not been foreseen explicitly by the Directive, but the Italian legislator considered this an oversight of the Directive and the suspension to be necessary to guarantee the right to apply for disclosure before the NCA.[243]

Article 7(2) of the Directive introduces protective measures to guarantee the protection of the information obtained prior to the closing of the investigation in national courts. Although Member States are free to introduce different protective measures to the same effect (minimum harmonisation) as those mentioned in Article 7, only some Member States went beyond the protective scope of the Directive. For example, Greece also introduced a fine of up to EUR 100,000 to be imposed against a party that has introduced the evidence mentioned in Articles 7(1) and (2).[244]

The wording in Article 7 has led to some uncertainty as to the protection of settlement submissions. The Directive places the 'settlement submission' under the 'blacklist' but 'settlement submissions that have been withdrawn' are placed under the 'grey list'. This likely was an oversight from the Commission. The Commission likely feared that the potential disclosure of

[241] As noted by David Ashton (n 111) 4.117, Article 6(5) is likely to also apply to evidence provided for a commitment decision (Article 9 Regulation (EC) No 1/2003). Arguably, this follows from Recital 25 of the Directive, which refers to a decision adopted under Chapter III of Regulation No 1/2003. Article 9 falls under Chapter III of Regulation No 1/2003.
[242] Michael Petr (n 194) 101.
[243] Susanna Lopopolo (n 230) 216.
[244] Article 7(4) of the Greek Damages Act.

withdrawn settlement submissions could adversely impact infringers' willingness to cooperate.[245] It subsequently attempted to correct the mistake in a Notice.[246] Nonetheless, uncertainty remains as to whether withdrawn settlement submissions are to be treated differently to settlement submissions falling under the blacklist. Most Member States have not addressed the issue but simply transposed the same questionable differentiation from the Directive. For example, Croatia[247] and Germany[248] have stringently followed the wording of the Directive. Other Member States have refused to implement the same differentiation. Austria,[249] for example, has only implemented the blacklist prohibition without specifically addressing 'withdrawn' settlement submissions. Portugal has implemented the same wording but found a 'work-around' to correct the Directive's flaw. The Portuguese implementing legislation allows access to 'withdrawn' settlement submissions after the closure of a proceeding, but at the same time the Competition Act has been revised such that an undertaking that proposes a settlement does not have to withdraw its settlement submission.[250]

Article 6(4) specifies additional criteria to be considered by national courts when assessing the proportionality of a disclosure request for evidence contained in the authority's file that is not blacklisted, or if grey-listed the public proceeding has come to an end. For the disclosure of such information, Member States ought to take into account how specifically the requested evidence has been formulated, whether the disclosure is requested in relation to an action for damages, and the need to safeguard the effectiveness of public enforcement. Provided that the proportionality test strikes in favour of disclosure, the evidence contained in the file must be disclosed by the competition authority ('white list'), unless a party or third party is reasonably able to provide

[245] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos 'Transposition: Key Issues and Controversies' in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Publishing 2019) 451-452, who argue that the subsequent soft-law document has deprived the provision of its *effet utile*.

[246] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases, OC C 167/1 (2 July 2008) as amended by Communication from the Commission [2015] OJ C256/2.

[247] Vlatka Butorac Malnar (n 199) 77.

[248] Section 33g (5) No 3 GWB.

[249] Section 37k (4) KartG. Section 37b No 5 KartG, *'a voluntary presentation by an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure'*. However, from the wording it is unclear whether withdrawn settlements are also included. The broad wording *'drawn up specifically to enable the competition authority to apply a simplified or expedited procedure'* could mean that withdrawn settlements are also protected because originally they were drawn up for the mentioned purpose. Furthermore, the objective of the Directive to foster private enforcement without jeopardizing the effectiveness of public enforcement also confirms the interpretation. On the other hand, withdrawn settlements are not mentioned, and the wording of *'acknowledgement'* and *'renunciation to dispute'* suggests that the statement needs to be final, which would exclude withdrawn settlement submissions from the blacklist.

[250] Similarly, following the amendment to the Commission Notice (n 246) settlement submissions can no longer be withdrawn unilaterally by the parties that have provided them.

that evidence.[251] The prohibition to disclose evidence *'only where no party or third party is reasonably able to provide that evidence'* was seen as too restrictive by some Member States. In Portugal, it was even argued that such a restriction would violate the constitution, and thus, the draft bill included a wider wording allowing courts in general to order disclosure if no other party can reasonably provide that evidence. However, this wording did not make it into the final legislation, which returned to the restrictive wording of the Directive.[252] In Spain, concerns were raised that the principle of subsidiarity – that is, that the competition authority may only disclose evidence where no other party has disclosed the evidence – may conflict with the obligation of parties to the public proceeding to keep information from the proceeding secret.[253] Arguably, former parties to the infringement proceeding may claim that it is legally impossible for them to disclose the requested evidence. Thus, the rules on disclosure of evidence contained in an authority's file is likely to conflict with national rules on confidentiality in public enforcement proceedings. It remains to be seen how courts will balance the interests, given that the Directive specifically lists the effectiveness of public enforcement as a factor to be taken into account by courts when deciding on a request for disclosure of evidence under Article 6.

Article 6(11) allows competition authorities to state their views on the proportionality of disclosure requests and submit observations to the national court before which a disclosure order is sought. There exist some discrepancies in relation to the authority's own initiative. Belgium does not expressly mention that the competition authority can act on its own initiative.[254] Instead, the court may request the competition authority to submit a written observation. It remains to be seen how national courts will react to observations submitted on an authority's own initiative in Member States that expressly require the court to request such submissions.

V. Effect of national competition authorities' decisions

Article 9
Effect of national decisions
1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.
2. (…) where a final decision (…) is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence (…).

[251] Directive, Article 6(10).
[252] Miguel Sousa Ferro (n 191) 312-313.
[253] Article 42 of DCA. See Francisco Marcos, 'Transposition of the Antitrust Damages Directive into Spanish Law' (2018) Working Paper IE Law School 31.
[254] Caroline Cauffman (n 198) 69-70.

A claimant's evidential burden is further eased in follow-on action claims where the infringement was already determined in a prior infringement decision. Article 16(1) Regulation No 1/2003 – which codified the *Masterfoods* ruling[255] – renders Commission decisions binding for national courts. Under the *Masterfoods* doctrine, national courts cannot take a decision on agreements, decisions, or practices under Articles 101 and 102 TFEU that were already the subject of a Commission decision running counter to that decision adopted by the Commission. It follows that in damages actions following an infringement decision, national courts are bound by the infringement decision of the Commission. Thus, the Commission decision is irrebuttable proof that the defendant has infringed Article 101 or 102 TFEU. Thus, the court is left to rule on the remaining requirements for the finding of the defendant's damages liability, in particular the causation between the infringement and the damage.[256]

If a national court has serious doubts on the legality of the Commission's decision, it can refer a preliminary reference to the CJEU. Furthermore, if the decision has been challenged before the EU Courts (Article 263 TFEU), the national court should stay its proceeding pending final judgement in the action for annulment by the EU Courts.[257]

Article 9(1) extends the binding effect for national courts provided by Article 16(1) Regulation No 1/2003 to decisions of national competition authorities in the same Member State. Thus, the decision of a national competition authority is irrebuttable proof of the infringement in national courts of the same Member State (*'deemed to be irrefutably established'*). Like Article 16(1) of Regulation No 1/2003, Article 9 applies to 'final' decisions that can no longer be appealed.[258] In its proposal for the Directive, the Commission envisaged extending the binding effect to decisions of national competition authorities of other Member States.[259] However, this was watered down in the adopted Directive to *prima facie* evidence for decisions of national competition authorities of other Member States (Article 9(2)). This turnaround followed strong opposition during the legislative process against the more ambitious rule, which also reflects the mistrust of some Member States in the legal systems and procedural standards of other Member States. The difference between Article 9(1) and (2) is quite significant because it means that decisions of NCAs will be irrefutably deemed proof within the same Member State, while in other Member States defendants can still invalidate the findings of the decision.

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[255] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECLI:EU:C:2000:689.
[256] On causation see chapter VII, D.VI.
[257] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 62) 3.39.
[258] Article 2(12) Directive defines 'final infringement decision' as an infringement decision that cannot be, or that can no longer be, appealed by ordinary means.
[259] Proposal for the Directive on Certain Rules Governing Actions for Damages (n 105) Article 9.

Another shortcoming of Article 9(2) compared with Article 9(1) is the scope of the *prima facie* evidence. In relation to Article 9(2), recital 35 refers to a *'prima facie evidence of the fact that an infringement of competition law has occurred'*, while recital 34 states that the irrebuttable proof of decisions of national competition authorities cover the *'nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court'*. Thus, the scope of the binding effect of the infringement decision within the same Member State is significantly broader than the binding effect of a decision in another Member State in terms of the evidential value (irrebuttable presumption vs. *prima facie* evidence) as well as the findings covered by the binding effect. Moreover, as a result of the opposition in Parliament, the Commission departed from a presumption for decisions of other Member States altogether. The Commission could also have opted for an *irrebuttable* presumption for decisions in the same Member State and a *rebuttable* presumption for decisions of other Member States. Instead, it deliberately reduced the evidential value of foreign decisions below that of a presumption. At first glance, the effects of a rebuttable presumption and *prima facie* evidence seem to be structurally similar. However, a *prima facie* evidence allows for a lower standard of proof and thereby facilitates the proof as part of the assessment of evidence.[260] The *prima facie* evidence is based on the experience that if a certain event occurred (e.g., objects found in the surgical wound of a patient) in the natural and ordinary (*typical*) course of events also a particular cause or consequence occurred (e.g., medical malpractice). Therefore, unknown facts are inferred from known facts. On the other hand, a presumption of law shifts the burden of proof to the other party. Moreover, the standard of proof for a rebuttal is generally lower for a *prima facie* evidence than it is for presumptions. The invalidation of a presumption (of law) requires a formal rebuttal of the consequence of the presumption (i.e., that there was no competition law infringement), namely one based on the general standard of proof in that jurisdiction (e.g., 'balance of probabilities', 'plausibility', and 'convinced'). For the rebuttal of a *prima facie* evidence, it is sufficient if the defendant proves that a different (*atypical*) course of events is more likely. In that case, the burden of proving the infringement remains with the plaintiff. Thus, for the rebuttal the formal standard of proof in civil proceedings is replaced by a lower standard of likelihood (i.e., that a different course of events was more likely than the typical course of events).

It is worth noting, however, that Article 9(2) is a minimum harmonisation rule; thus, Member States are free to provide a similar binding effect for decisions of national competition authorities

[260] See for example Ulrich Spellenberg, 'Rom I-VO Art. 18' in *Münchener Kommentar zum BGB* (8th edn, 2021), paras 25-27; Ingo Saenger, '§ 286' in Ingo Saenger (ed) *Zivilprozessordnung* (8th edn, 2019), paras 38ff.

from other Member States. Germany[261] and Austria[262] have in fact applied the same evidential standard in civil proceedings for infringement decisions of authorities from other Member States; that is, the court shall be bound by the finding that an infringement has occurred in a final decision by the national competition authority, the European Commission, or the competition authority – or a court acting as such – in another Member State of the European Union. However, at least in Germany the binding effect of decisions from courts and authorities of other Member States does not extend to the finding of an infringement of national competition law but is limited to German and European competition law.[263] In the Czech Republic,[264] Denmark,[265] Croatia,[266] France,[267] Greece,[268] Hungary,[269] Latvia,[270] Portugal,[271] Romania,[272] Slovakia,[273] Slovenia,[274] and Spain,[275] if a competition authority of another Member State finds a violation of competition law in a final decision, the violation will also be presumed to have occurred in a civil proceeding unless the defendant can rebut the presumption ('rebuttable presumption'). Belgium,[276] Cyprus,[277] Estonia,[278] Finland,[279] Ireland,[280] Italy,[281] Lithuania,[282] Luxembourg,[283] Malta,[284] the

[261] Section 33b GWB.
[262] Section 37i KartG stipulates a binding effect of final decisions of a *competition authority* or a court regarding an infringement of competition law. Section 37b No 3 KartG defines a *competition authority* as the cartel court, the Federal Competition Authority, the Federal Cartel Attorney, the European Commission, and *other competition authorities according to Regulation Nr.1/2003*.
[263] In Austria, the definition of competition law infringement in Section 37b No 1 KartG includes national law of other EU Member States that predominantly pursues the same objectives as Articles 101 and 102 TFEU.
[264] Sec. 27(2) DA; Michael Petr (n 194) 104.
[265] Section 7(2) of the Danish Act.
[266] Vlatka Butorac Malnar (n 199) 78.
[267] Article L 481-2 para 2 C.Com.
[268] Article 9(2) Greek DA.
[269] Section 88/R(2) HCA; see Csongor István Nagy (n 163) 185.
[270] Article 250.69 (2) of the Amended Civil Procedure Act.
[271] Miguel Sousa Ferro (n 191) 316.
[272] Art. 9(2) Romanian Emergency Ordinance 2020; Valentin Mircea (n 226) 243-244. The author describes the evidential rule as a 'relative presumption' that seems to differ from the irrefutable presumption applied to infringement decisions of national courts in Romania.
[273] Act 350/2016.
[274] Article 62g SCA.
[275] Article 75(2) of the DCA.
[276] Article XVII.82 §2 of the Code of Economic Law.
[277] Maria Ioannidou (n 235) 92.
[278] Section 272(1)-(2) of the Civil Procedure Act.
[279] Sari Rasinkangas and Christian Wik, 'The Implementation and Impact of the EU Antitrust Damages Directive in Finland' (2018) 1 Wirtschaft und Wettbewerb 309 (311).
[280] Mary C Lucey (n 193) 203-5.
[281] Susanna Lopopolo (n 230) 219.
[282] Jurgita Malinauskaite (n 168) 246.
[283] The wording of the Luxembourgish Competition Act is somewhat unclear as it does not explicitly refer to *prima facie* evidence, but it instead states that decisions of NCAs of other Member States must be assessed together with any other evidence brought forward by the parties. Cauffman argues that the word *'preuve'* in the competition act must be interpreted as a *'evidence'* and not as proof of the infringement in itself, which suggests that foreign decisions are treated as *prima facie* evidence; Caroline Cauffman, 'Luxembourg', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 263.
[284] Article 9(2), L.N. 117 of 2017, Competition Act (CAP. 379), Competition Law Infringements (Actions for Damages) Regulations, 2017.

Netherlands,[285] Poland,[286] Sweden,[287] and the UK[288] have implemented only the minimal evidentiary value required under the Directive, namely *prima facie* evidence of the occurrence of the infringement. Bulgaria even refused to implement any provision on the evidential value of foreign competition authorities' decisions in domestic damages actions.[289]

In terms of the scope of the binding effect, Article 9 only refers to the *'infringement of competition law found by a final decision'* without clarifying which (other) aspects of the requirements for the civil damages claim may be covered by the binding effect. For that reason, Italy deemed it necessary to expressly limit the scope of the binding effect to the nature and the material, personal, temporal, and geographical extent of the infringement.[290] Hence, it clarified that the binding effect does not extend to other requirements such as the causal relationship between the infringement and the damage. It should be noted, that Advocate General Wahl in *Skanska* suggested that the causation may also follow directly from Article 101 TFEU – which is directly applicable – and thus should be determined under EU law rather than national law. In the view of Wahl, both the determination of the person liable for the infringement and the causation are *'consecutive conditions of liability governed by EU law'* and should therefore be inferred directly from Article 101 TFEU.[291] In her opinion in *Otis*, Advocate General Kokott interpreted Wahl's statement as referring solely to the requisites for the right to claim compensation; that is, the necessary elements of Articles 101 and 102 TFEU to find the infringement.[292] It remains for the court to find that there was actual causation between the individual loss and the violation of EU competition law based on the facts of the individual case. Consequently, those elements

[285] Jeroen Kortmann and Simon Mineur (n 192) 279.
[286] An explicit implementation of the probative effects of decisions of foreign states was held to not be necessary because the Polish Code of Civil Procedure already allowed courts to refer to decisions of other NCAs. However, the probative value under the existing rules are likely to lag behind the *prima facie* evidence required by the Directive; see Maciej Bernatt and Maciej Gac (n 222) 294. As Piszcz and Wolski argue, this was likely caused by an incorrect translation of '*prima facie* evidence' as a 'factual presumption' in the Polish version of the Directive, which are distinct evidentual rules; Anna Piszcz and Dominik Wolski, 'Poland', in Anna Pisczc (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 228. In fact, a similar debate arose in Germany after the *Schienenkartell I* judgment of the Federal Court of Justice (BGH, judgment of 11 December 2018, KZR 26/17). Prior to the implementation of the Directive, civil courts generally relied on the Commission's and NCA's decisions as *prima facie* evidence that plaintiffs in the factual, personal, and temporal scope of the cartel were affected and suffered harm. The *Bundesgerichtshof* overruled this jurisprudence and held that it cannot be assumed that cartels 'typically' cause harm as it is required for *prima facie* evidence. In its judgment of 28 January 2020, the *Bundesgerichtshof* reversed its position and abolished the requirement to prove the affectedness of every transaction for the legitimacy of claiming compensation (BGH, judgment of 28 January 2020, KZR 24/17 – *Schienenkartell II*).
[287] *Prima facie* evidence already exists under national law; Lars Henriksson, 'Sweden', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 374.
[288] Barry Rodger, 'United Kingdom', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 390.
[289] Чл. 105, Закона за защита на конкуренцията. Anton Petrov (n 232) 26.
[290] Susanna Lopopolo (n 230) 219-21.
[291] *Vantaan kaupunki v Skanska Industrial Solutions Oy et al.* – Opinion of Advocate General Wahl (n 61) paras 60-66.
[292] *Otis and Others v Land Oberösterreich and Others*- Opinion of Advocate General Kokott (n 87) paras 45-46.

of causation that are necessary to establish an infringement of EU competition law in the first place are governed under EU law and equally form part of the infringement decision as the remaining requisites under Articles 101/102 TFEU. In theory, the questions of causality (such as the effect of the infringement on the market) also form part of the binding effect of the infringement decision. Thus far, the CJEU has not ruled on the scope of the binding effect of infringement decisions in actions for damages before national courts. It remains to be seen whether the CJEU will – as suggested by AG Wahl – hold in the future that other requirements for the civil claim fall directly under Articles 101 and 102 TFEU, which would then also become binding for national courts.

In some Member States (Belgium, Bulgaria, Italy, and Portugal), the fact that civil judges may be bound by the findings in final decisions of competition authorities raised constitutional concerns. In those Member States, the transposition of Article 9 led to the concern that the binding effect of competition authorities' decisions could undermine the independence of the judge and violate the constitutional principle of the separation of powers. It is likely that the CJEU will have to clarify the constitutional implications in future preliminary references.

VI. Limitation periods

> *Article 10*
> ***Limitation periods***
> *2. 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 it; and*
> *(c) the identity of the infringer.*
> *3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.*

As described above (Section A.I), the CJEU in *Manfredi* held that in the absence of Community rules, it is for Member States to prescribe the limitation period in accordance with the principle of equivalence and effectiveness. Thus, in accordance with these principles, the length of the limitation periods may not render it *'practically impossible or excessively difficult'* to seek compensation.[293] The Directive considers a relative limitation period (i.e., where the limitation begins to run only after the claimant has gained knowledge) of 5 years sufficient for the claimant to exercise his or her right to seek compensation (Article 10(2)). Nearly all Member States have transposed the minimum length of 5 years for the limitation periods as required under the Di-

[293] *Manfredi and Others v Lloyd Adriatico* (n 68) para 78.

rective.[294] In other Member States where longer limitation periods already existed under the existing laws, amendments to the existing limitation periods were seen as unnecessary. The limitation periods remained unchanged in the UK, where claims are time-barred after 6 years in England, Wales, and Northern Ireland and after 5 years in Scotland. Furthermore, in Ireland[295] and Cyprus,[296] the existing 6-year limitation periods remain unchanged, whereas in Latvia[297] and Luxembourg,[298] the existing limitation periods even last as long as 10 years.

The limitation period begins to run only after the claimant 'knows or can reasonably be expected to know of the behaviour and the fact that it constitutes an infringement of competition law; of the fact that the infringement of competition law caused harm to it; and the identity of the infringer'. In Germany,[299] the wording differs slightly from that of the Directive in the sense that gross negligence is already sufficient for the time-barring period to begin to run. Thus, the rules on the beginning of the limitation periods could fall short of the Directive's stricter knowledge requirement ('reasonably expected to know') and cause the limitation periods to begin to run earlier compared with under the Directive. In any case, it remains to be seen how courts apply the gross negligence standard in practice, particularly in light of the principle of effectiveness.

Moreover, the relative limitation period cannot start to run before the infringement has ceased. This rule is of particular importance for *'continued and repeated infringements'*.[300] If the limitation periods started to run at the time the infringement was committed, it would be possible

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[294] Austria: Section 37h KartG, Belgium: Article 2262*bis* § 1 Civil Code, Bulgaria: Art. 114(3) Obligations and Contracts Act (Закон за задълженията и договорите), Croatia: Article 12 Law on Compensation Procedures for Violations of Competition Law (Zakon o postupcima naknade štete zbog povreda prava tržišnog natjecanja, koji je Hrvatski sabor donio na sjednici 30. lipnja 2017), Czech Republic: Michael Petr (n 194) 90; Denmark: Henrik Peytz (n 167) 266; Estonia: Evelin Pärn-Lee (n 188) 112 , Finland: Sari Rasinkangas and Christian Wik (n 279) 311; France: Article 2224 Code Civil; Germany: Section 33h(1) GWB; Greece: Article 8(1) Damages Act; Hungary: Section 88/T Hungarian Competition Act, Italy: Article 8 of Legislative Decree No. 3/2017, Lithuania: Article 49(1) Competition Act; Malta: Article 10(1) of the Competition Law Infringements (Actions for Damages) Regulations (2017), L.N. 117 of 2017; Netherlands: Article 193s Implementation Act; Poland: Article 9(1) Law on claims for compensation for damages caused by competition violations; Portugal: Article 6(1) Law No 23/2018; Romania: Article 10(1) Government emergency ordinance of 31 May 2017; Slovakia: Article 5(2) Competition Damages Act; Slovenia: Article 62j Law Amending the Competition Act; Spain: Article 74 Competition Act; and Sweden: Lars Henriksson (n 287) 366.

[295] Section 9(3) European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, S.I. No. 43 of 2017.

[296] Law 66(I) of 2012, *Law to Provide for the Prescription Actionable Right – Limitation Periods for Miscellaneous Causes of Action*; see also Maria Ioannidou (n 196) 165.

[297] Julija Jerneva and Inese Druyiete (n 220) 161. The authors note, however, that some uncertainty remains as to whether the ten years limitation period under Civil Law or the three years limitation period under Commercial applies to Competition Law cases. The application of the latter would indeed be in violation with the five years minimum period under the Directive.

[298] Article 189 Commercial code. See also Caroline Cauffman (n 197) 20. Similar to the situation in Latvia, in Luxembourg seems to exist some uncertainty as to whether the general limitation period of 30 years or the limitation period applicable to business transactions of ten years applies to competition cases.

[299] Section 33h (2) No 2 GWB: *'should have obtained knowledge without gross negligence'*.

[300] *Manfredi and Others v Lloyd Adriatico* (n 68) para 79.

that in the case of continued and repeated infringements the limitation period would expire before the end of the infringement and any claim for damages would be time-barred. For that reason, Article 10(4) requires Member States to *suspend or interrupt* the limitation period when a competition authority has taken action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. Furthermore, as a matter of minimum harmonisation, Member States must ensure that the suspension ends *'at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated'*.[301] Therefore, even in the case that the infringement has ceased and the claimant has gained knowledge about the infringer and the infringement (subject to the conditions set out in Article 10(2)(a)-(c)), the limitation periods will be suspended (or interrupted) from the beginning of the investigation of the competition authority until one year after the end of the investigation (decision or terminated otherwise). It should be noted that a *final decision* also includes the decisions after an appeal; that is, a decision that cannot be appealed by ordinary means (Article 2(12)). Thus, the limitation periods can in some instances last well over 10 years.

Member States have taken heterogeneous approaches in relation to the implementation of this provision. Some have opted for an interruption of the limitation periods, which means that in some countries the limitation period restarts after the interruption. This is the case, for example, in Spain,[302] where the interruption will trigger an additional 5 years until the claim becomes time-barred. In Belgium, it seems to be unclear whether the legislator opted for the suspension (i.e., the limitation period continues after the suspension period has expired) or for the interruption. The Dutch version of the transposing legislation refers to the term 'gestuit', which would mean an interruption, while the French version and the Explanatory Memorandum refer to suspension ('schorsing' in Dutch).[303] Furthermore, in the Netherlands the wording has led to confusion. The legislation refers to extension ('verlenging'), which raises the question of whether the Dutch concept is in line with the concept of interruption and/or suspension in Article 10(4) Directive.[304] In France, Article 10(4) was implemented by amending existing time-barring rules. The amended text refers to the 'interruption' of the limitation periods but limits the effects

[301] Article 10(4) Directive.
[302] Francisco Marcos (n 205) 340.
[303] Caroline Cauffman, 'The Implementation of the Antitrust Damages Directive in Belgium' (2017) 4 Maastricht European Private Law Institute, Working Paper 20.
[304] See Jeroen Kortmann and Simon Mineur (n 160) 277. Article 6:193t (2) DCC (translated) reads as follows: *'Any act of a competition authority in the context of an investigation or proceedings relating to the infringement to which the claim pertains, is a ground for an extension of the limitation period. The extension starts the day after the limitation period has lapsed. The duration of the extension is equal to the period of time needed for the establishing of a final infringement decision, or other ending of the proceedings, to be extended by one year*'.

of the interruption *'until the date on which the decision of the competent competition authority or the court of appeal can no longer be the subject of an ordinary appeal'*.[305] This wording seems to be in violation of the Directive, which requires that the interruption/suspension should end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.[306]

Conversely, the transposition of Article 10(4) Directive by way of suspension has also led to uncertainties in some Member States. Austria has implemented the suspension for the duration of 'investigational measures' (*'Untersuchungsmaßnahmen'*) but has not defined its meaning or when such an investigational measure may begin. The wording is therefore likely to create uncertainty in relation to the beginning of the limitation periods. Most Member States have opted for the minimalistic approach and applied the suspension of the limitation period until one year after the decision has become final or after the proceedings are otherwise terminated. The Czech Republic[307] and Germany[308] have also applied the suspension of the limitation period for the duration of disclosure proceedings.

A problem was raised in the context of the suspension and joint infringements, namely which limitation period of which infringer would be suspended if not all the joint infringers appeal the infringement decision.[309] This might be of particular relevance for immunity recipients who generally have no interest in an appeal against the infringement decision. In *Deutsche Bahn and others,* the Commission intervened in the case with an *amicus curiae* observation before the UK Supreme Court in support of a narrow interpretation of the *ad personam* scope of the suspensive effect of an appeal against an infringement decision.[310] The Commission took the position that the limitation periods of a claim should only be suspended if the defendant was an addressee of the decision and has appealed the infringement decision himself. Thus, an appeal by a co-infringer would not have suspensive effect. Furthermore, under Article 18(1), limitation periods must also be suspended for the duration of any consensual dispute resolution process. Article 18 expressly states that such suspension should only apply with regard to those parties

[305] Article L. 462-7(4) C.Com. (translated): *'Any act aimed at investigating, recording or punishing anti-competitive practices by the Competition Authority, a national competition authority of another Member State of the European Union or the European Commission shall interrupt the limitation period for civil proceedings and compensation proceedings brought before an administrative court on the basis of Article L. 481-1. The interruption resulting from such an act shall have effect until the date on which the decision of the competent competition authority or the court of appeal can no longer be the subject of an ordinary appeal'*.
[306] Muriel Chagny (n 162) 117-9.
[307] Section 9(5) DA.
[308] Section 33h (6) no. 2 GWB.
[309] David Ashton (n 111) 9.16.
[310] *Deutsche Bahn AG and others v Morgan Advanced Materials plc* [2014] UKSC 24; discussed in David Ashton (n 111) 9.18.

that were involved in the consensual dispute resolution process. This is in line with the reasoning of the Commission in *Deutsche Bahn and others* that the suspensive effect should only apply to the infringers involved in the legal cause for suspension, namely in the appeal or dispute resolution.

Finally, although common in many Member States, the Directive has not provided a rule on the absolute limitation period. Therefore, as long as Member States comply with the principle of equivalence and effectiveness (Article 4), they are not prohibited from introducing absolute limitation periods.[311] Member States that introduced absolute limitation periods opted for different durations. In Austria, Denmark, Finland, Latvia, Poland, Slovakia, Slovenia, and Sweden, the absolute limitation period is 10 years; in Croatia it is 15 years; and in the Czech Republic it is 10 years or 15 years if the infringement was committed intentionally. In Germany, the absolute limitation period is 10 years from the date the claim arose and the infringement ceased; in all other circumstances the absolute limitation period is 30 years from the date the infringement that caused the damage occurred.[312]

VII. Joint and several liability

Article 11
Joint and several liability
1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated. (…)

As a general rule, Article 11(1) introduces joint and several liability for joint infringers of EU competition law for the entire damage. Under joint and several liability, each infringer is bound to compensate the harm in full, including the harm caused by co-infringers, and may then recover contributions from co-infringers for their share of the damage. According to Article 11(5), the amount of contributions between the co-infringers is to be determined in light of their relative responsibility without, however, specifying the criteria to be applied for the assessment of individual responsibility.[313]

To ensure the effectiveness of the leniency programmes, exceptions from joint and several liability are made for immunity recipients. Article 11(4) provides that the share of contribution

[311] Directive, recital 36.
[312] Section 33h (3) and (4) GWB.
[313] Contribution claims are dealt with in more detail in Part TWO of this book.

due from immunity recipients shall not exceed the harm caused by the immunity recipient to its direct or indirect purchasers. After requests from the European Parliament, the same limitation to joint and several liability was also introduced for small and medium-sized enterprises (**SMEs**), if they have neither instigated the infringement nor previously been found in violation of competition law (Article 11 (3)) and two cumulative requirements are fulfilled: (i) the market share of the SME was below 5% at any time during the infringement, and (ii) the application of the normal rules would irretrievably jeopardise its economic viability and cause its assets to lose all their value (Article 11(2)).[314] Article 11(3) refers expressly only to SMEs as suppliers, which is likely to be an oversight of the legislator. Some Member States have therefore extended the wording of the exception to situations of SMEs as purchasers (e.g., the Czech Republic, Germany, Portugal, and Sweden). In the UK, the first of the two cumulative requirements (i.e., that the SMEs' market share is below 5% *at any time during the infringement*) was significantly broadened to the entire period of the infringement.[315] By contrast, in Sweden the legislator was unsure whether the Directive requires the market shares to stay below 5% at any time during the infringement, but at the end followed the wording of the Directive ('…vid någon tidpunkt…').[316]

In the interest of the Directive's objective to provide full compensation for victims, the limitation of the liability does not apply to immunity recipients if it would make it impossible for victims to obtain full compensation from co-infringers, particularly in cases of insolvency of a cartel member (Article 11(4)(b)). Some Member States (Belgium, the Czech Republic, Germany, Lithuania, and Slovenia) have also extended the subsidiary liability as an additional requirement for SMEs, which goes beyond the requirement of the Directive.

Article 11(6) only has a declinatory purpose through clarifying that the amount of any contribution from an immunity recipient to the other infringers for injured parties other than direct and indirect purchasers or providers is limited to the immunity recipient's relative responsibility.[317]

Many Member States already applied joint and several liability to competition damages actions under the previously existing law or case law (e.g., Estonia, Germany, Hungary, Ireland, Italy, Lithuania, Poland, and the UK),[318] while in other Member States the liability of co-infringers

[314] For a definition of SMEs, see Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small, and medium-sized enterprises [2003] OJ L124, 36.
[315] Barry Rodger (n 288) 398.
[316] Lars Henriksson (n 287) 365.
[317] To what extent these rules protect the leniency programme effectively is discussed in more detail in chapter VI.
[318] See Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 245) 444; Evelin Pärn-Lee (n 188) 113; Anna Piszcz and Dominik Wolski (n 286) 220.

existed under similar rules such as *in solidum* liability (Belgium, France, and Luxembourg).[319] The main effects of in solidum liability are the same as those under joint and several liability, namely that victims can receive compensation from any of the infringers in full. In Belgium, France, and Luxembourg, in solidum liability is a surrogate developed by courts where joint and several liability (solidarité / 'responsabilité solidaire') did not exist, and because it is a judge-made rule for particular circumstances, it has some limitations compared with solidarité liability (e.g., an action against one co-infringer does not interrupt the limitation periods of the claims against the other infringers, and a judgement against a co-infringer does not have a binding effect in contribution claims against the remaining infringers). Arguably, in solidum liability is therefore less favourable for victims.[320] France and Belgium have implemented additional rules to overcome the limitations of in solidum liability and to ensure compliance with the provisions under Article 11. Luxembourg, on the other hand, solely applies in solidum liability, which, except for its main effects, is likely to fall behind the provisions of the Directive.[321] In Spain, prior to the implementation of the Directive, as a general rule each co-infringer of a joint infringement was held only individually liable. The implementing legislation transcribed verbatim Article 11 of the Directive.[322]

A controversy that was revealed during the transposition of the Directive was whether parental liability also applies in damages actions. In essence, it was unclear whether the *undertaking* doctrine under EU competition law would also apply in damages actions at the national level and would therefore need to be implemented by Member States. It is settled case law that for an infringement of EU Competition law, the concept of undertaking refers to any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.[323] Under this concept, addressees to the EU competition rules are the economic unit even if under national law that economic unit consists of several natural or legal persons.[324] Thus, the economic unit doctrine allows for the attribution of liability for an infringement of competition law to the parent company.[325] Where a parent company exercises *decisive influence* over its subsid-

[319] Caroline Cauffman (n 198) 74.
[320] Muriel Chagny (n 162) 114.
[321] Caroline Cauffman (n 283) 262.
[322] Francisco Marcos (n 205) 114.
[323] Case C-280/06 *ETI and Others* [2007] EU:C:2007:775, para 38; Joined Cases C-189/02 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* [2005] ECLI:EU:C:2005:408, para 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECLI:EU:C:2006:8, para 107; and Case C-205/03 P *FENIN v Commission* [2006] ECLI:EU:C:2006:453, para 25. See also Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8 European Competition Journal 301-331, 2012.
[324] Case C-516/15 P *Akzo Nobel and Others v Commission* [2017] EU:C:2017:314, para 48.
[325] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019) 152.

iary to the extent that both form a single economic unit, the parent company may be liable for the competition infringement of its subsidiary, even if the parent company was not involved or even aware of the violation.[326] For the attribution of liability, the parent company must exercise decisive influence over the policy and direct the conduct of its subsidiary, such that the subsidiary does not enjoy real autonomy or independence in determining its course of action in the market.[327] The CJEU further established that decisive influence can be presumed (rebuttable presumption) where the parent holds 100% of the shares in the subsidiary.[328] Consequently, fines that are imposed against the entity or entities responsible for the infringement can also be imposed against the parent company. In fact, it has become common practice of the Commission to hold entities and their parent companies jointly and severally liable for the payment of fines. During the implementation period, it was not clear, however, whether in civil proceedings parent companies would also be jointly liable for the damages caused by their subsidiaries.[329] The Directive does not expressly address this issue. The term 'undertaking' is used throughout the Directive, particularly in relation to joint and several liability in Article 11; however, the Directive lacks a clear definition of the term. Despite the uncertainty following the wording of the Directive, some Member States have used language that inevitably refers back to the concept of undertaking under EU competition law: Belgium,[330] Luxembourg,[331] the Netherlands,[332] and Portugal[333] refer to 'undertaking'; Cyprus refers to 'agreement' while expressly excluding agreements within a 'single economic unit';[334] and France refers to '*the breach of antitrust law*', which refers to EU competition infringement, even though it is uncertain under French case law whether claimants can rely on the binding effect of a decision that is not addressed to the parent company.[335] In Germany the wording is not particularly clear and refers the liability of damages to the infringer of the competition provisions, which in turn covers the

[326] Case C-48/69 *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)* [1972] ECLI:EU:C:1972:70, paras 11, 131-140. See also Alison Jones, Brenda Sufrin and Niamh Dunne (n 325) 155.
[327] Alison Jones, Brenda Sufrin and Niamh Dunne (n 325) 155; Case C-48/69 *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)* [1972] ECLI:EU:C:1972:70, paras 125-146. The notion of decisive influence has in recent years even been extended to financial investors, see for example Case T-419/14 *The Goldman Sachs Group, Inc. v Commission* [2018] ECLI:EU:T:2018:445.
[328] Case C-516/15 P *Akzo Nobel and Others v Commission* [2017] EU:C:2017:314, para 60. In *Goldman Sachs* (n 327), the General Court extended the presumption of decisive influence to cases where a parent company exercises all voting rights in the subsidiary, even if the parent company – in this case a financial investor – does not own all of the subsidiary's voting shares.
[329] See Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 245) 441ff.
[330] Caroline Cauffman (n 198) 79.
[331] Caroline Cauffman (n 283) 267.
[332] Article 6: 193m DCC.
[333] Article 3(2) PT. Article 3(3) PT even introduces a presumption of decisive influence for parent companies holding 90% of the shares. See Miguel Sousa Ferro (n 191) 318-319.
[334] Maria Ioannidou (n 199) 94.
[335] See Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 245) 442.

concept of undertaking.[336] On the other hand, together with the implementation of the Directive, the German legislator introduced the single economic unit doctrine into national administrative law; therefore, it is not highly plausible that the legislator also intended to extend the doctrine to damages without expressly stating it in the amended law or the Explanatory Memorandum. In Hungary, both civil and administrative liability for competition law infringements rely on separate legal personalities. Liability for administrative fines as well as damages is attributed to the parent company holding 75% of the votes by law if the subsidiary fails to pay the fine.[337] Spain is the exception as it has expressly introduced an obligation for parent companies holding decisive influence to compensate victims for the conduct of subsidiaries.[338]

Indeed, Member States have taken diverging approaches with regard to the parental liability for damages caused by subsidiaries leaving an unsatisfactory situation for both claimants and undertakings.

However, shortly after the implementation period had expired in *Skanska*, the Supreme Court of Finland referred a question to the CJEU concerning the application of the concept of *undertaking* under EU competition law, and more specifically the doctrine of *economic continuity*, to damages claims. The case concerned a damages action following the asphalt cartel in Finland. Some of the entities involved in the cartel had been liquidated before and taken over by other companies. The administrative court fined the legal successors under the principle of *economic continuity*. The principle follows from the broad interpretation of the meaning of undertaking as an economic unit irrespective of the natural or legal persons it includes in EU competition law. Where an entity that has committed the infringement ceases to exist as a result of a restructuring, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when – from an economic point of view – the two are identical.[339] The claimant (the city of *Vantaa*) sought compensation for the overcharge it had to pay from the legal successors who were held liable for the administrative fine because of economic continuity. In March 2019, the CJEU handed down its judgement following the Opinion of Advocate General Wahl. The Court held that the person liable for damages under

[336] See Section 33a (1) GWB. Article 2 no. 2 Directive defines an infringer as '*an undertaking or association of undertakings which has committed an infringement of competition law*'. See also Christian Kersting and Rupprecht Podszun, *Die 9. GWB-Novelle* (Beck C H 2017) paras 10-11; Christian Kersting, 'Germany', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 131-136.
[337] Peter Miskolczi Bodnár (n 202) 136.
[338] Article 71 DCA. Francisco Marcos (n 205) 335-337.
[339] *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al.* (n 59) para 38; Case C-280/06 *ETI and Others* [2007] EU:C:2007:775, para 42; Case C-448/11 P *SNIA v Commission* [2013] ECLI:EU:C:2013:801, para 22; and Case C-434/13 P *Commission v Parker Hannifin Manufacturing and Parker-Hannifin* [2014] EU:C:2014:2456, para 40.

civil law actions follows directly from Article 101 TFEU and thus the undertakings, within the meaning of that provision, that have participated in the prohibited practice are liable for damages.[340] The Court further clarified that *'the concept "undertaking", within the meaning of Article 101 TFEU, (…) constitutes an autonomous concept of EU law'* and for that reason *'cannot have a different scope with regard to the imposition of fines (…) as compared with actions for damages for infringement of EU competition rules'*.[341] Thus, it is clear that irrespective of whether Member States have implemented a provision on parental liability in actions for damages, the legal or natural person liable for compensation follows directly from Article 101 TFEU. While it is reasonable to apply a consistent approach to the liability for fines and compensation, the application of the broad meaning of undertaking in civil proceedings also broadens the liability of corporations.

Moreover, the Court's ruling is likely to be of relevance for competition damages action beyond the issue of parental liability for damages. It was not self-evident that the person(s) liable in civil actions under national law follows directly from the prohibition under EU law in Article 101 TFEU. In *Manfredi,* the CJEU has previously held that in the absence of Community rules it is for the domestic legal system to lay down the detailed procedural rules, provided that Member States adhere to the principles of effectiveness and equivalence (see section A.I above). The Court was essentially confronted with the question of whether the person(s) liable for civil damages must be determined under national law with respect to the principle of effectiveness and equivalence or whether it stems directly from applicable EU law. The Commission – more precisely the Legal Service – preferred to leave the determination of civil responsibility from an infringement for the domestic laws. In the oral hearing, the Commission relied on Article 11(1) of the Directive for its reasoning. The Commission drew from the obligation for Member States to implement joint and several liability for undertakings committing an infringement that it is for the legal system of each Member State to determine the entity that must compensate for the damage.[342] The Court did not follow the Commission's reasoning because first, the Directive did not apply *ratione temporis* to the facts of the case, and second, Article 1(1) 1st sentence of the Directive expressly states that those responsible for damages caused by an infringement of EU competition law are specifically the 'undertakings' that committed that infringement.[343] Instead, the Court followed the Opinion of AG Wahl, who argued the determination

[340] *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al.* (n 59) para 32.
[341] Ibid, para 47.
[342] Ibid, para 33.
[343] Ibid, paras 34-35. Article 1(1) 1st sentence of the Directive reads as follows: *'This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an*

of the entity required to provide compensation for damages caused by an infringement is the *'other side of the same coin of the right to claim compensation'* and as such a *'constitutive condition of liability governed by EU law'*.[344] Therefore, the entity liable for compensation must be inferred from Article 101 TFEU, which addresses 'undertakings' within the meaning of that provision. Consequently, the Court has also clarified that the entities liable for fines and the entities liable for damages derive directly from Article 101 TFEU. This also impacts Member States' administrative provisions, since the entities liable for fines for an infringement are determined directly by Article 101 TFEU irrespective of the national administrative provisions. Hence, the rules, such as the separate legal personalities rule in Hungarian administrative and civil law, are not relevant for determining which entity is liable for an infringement of Article 101 TFEU. Similarly, the recently introduced provisions that implement the EU's meaning of 'undertaking' into German administrative law (including its limits on the temporal scope), which were introduced to close the so-called 'sausage gap',[345] have now – if any – only declaratory meaning. The same is likely to apply to Article 13(5) of the ECN+ Directive, which empowers Member States to apply the notion of undertakings for the purpose of imposing fines on parent companies and legal and economic successors of undertakings.[346]

The application of the notion of 'undertaking' may also have additional consequences in the field of private enforcement because, for example, it is settled case law that *anyone* who has suffered harm from an infringement of EU competition can claim damages.[347] From the Court's reasoning in *Skanska* that the notion of undertaking is an autonomous concept of EU law, it follows that *anyone* for the purpose of claiming compensation from an EU competition law infringement comprises an undertaking in the meaning of an economic unit. Thus, the notion of undertaking could equally broaden the group of potential claimants. This interpretation is

undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association'.

[344] *Vantaan kaupunki v Skanska Industrial Solutions Oy et al.* – Opinion of Advocate General Wahl (n 61) paras 60-61.

[345] The 'sausage gap' refers to a loophole in German competition law that existed until the transposition of the Directive with the 9th amendment to the GWB. In 2014, the Federal Cartel Office (*Bundeskartellamt*) imposed fines totalling approximately EUR 338 million against 21 sausage manufacturers. The fines were imposed against the legal entities involved in the cartel. Several of the companies involved undertook international restructuring, whereby the entities against which the fines had been imposed were dissolved and their assets transferred to sister companies or other group companies. As a result, approximately EUR 238 million of the imposed fines could not be collected. A press release of the *Bundeskartellamt* on the 'sausage gap' can be found here: Bundeskartellamt, '"Sausage Gap" - Further Fines Amounting to Approx. 110 Million Euros Cease to Apply because of Internal Restructuring Measures' (2017) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/26_06_2017_Bell_Wurstkartell.html> accessed 6 March 2021.

[346] Directive (EU) 2019/1 to empower the competition authorities of Member States to be more effective enforcers and to ensure the proper functioning on the internal market was signed into law on 11 December 2018 and published in the Official Journal of the European Union on 14 January 2019 [2019] OJ L11, 3–33).

[347] *Courage Ltd v Bernard Crehan* (n 54); *Kone and Others v ÖBB-Infrastrucktur AG* (n 75).

also confirmed by the Directive, which sets out in recital 13 that *'the right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking'*.[348] Therefore, for the right to claim compensation, it follows directly from the EU competition provisions that within an economic unit any entity that exercises decisive influence can claim compensation irrespective of which legal or natural entity has actually suffered the harm.

In relation to the 'undertaking' doctrine, a controversial issue that has not been settled in the public enforcement sphere at the EU level nor been addressed by the Court is the liability of entities within an economic unit that do not exercise decisive influence. For example, it is unclear to what extent sister companies or companies holding equal shares in a joint venture can be held liable for fines if they did not participate in the infringement.[349] The Barcelona Provincial Court has referred a request for a preliminary ruling to the CJEU which may bring further clarifications in relation to entities within an undertaking liable for competition damages. The preliminary reference concerns the reverse case of *Skanska*, namely whether the principle of economic unit (the 'undertaking' doctrine) allows for subsidiaries to be held liable for the parent company's conduct.[350]

VIII. Passing-on

Article 12

Passing-on of overcharges and the right to full compensation

1. To ensure the full effectiveness of the right to full compensation (…), Member States shall ensure that (…) compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided. (…)

Article 13

Passing-on defence

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. (…)

[348] Also, in relation to the rebuttable presumption of passing-on, recital 41 refers to the 'undertaking' as a potential claimant: *'While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm'*.

[349] See Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 245) 443 for a more detailed discussion.

[350] Case C-882/19 *Sumal, S.L. v Mercedes Benz Trucks España, S.L.*, request for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain) lodged on 3 December 2019.

> *Article 14*
> ***Indirect purchasers***
> *1.Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties. (…)*

Article 12 emphasises that in light of the right to full compensation, anyone who has suffered a loss may claim damages irrespective of their position in the supply chain. Article 12(1) thereby requires Member States to codify the principle that *'anyone'* can claim damages as set out by the CJEU in *Courage*. When a direct purchaser passes on the overcharge entirely or in part, the damage occurs at a different level of the supply chain. The damage resulting from the infringement will then shift to consumers or undertakings to whom the overcharge has been passed on.[351] Article 12(5) transfers the courts power to estimate the overcharge to the share of the overcharge that was passed on. Article 12(1), (4) and Article 14 (*'Indirect purchasers'*) allow standing for indirect purchasers and suppliers.[352] Where the damages action is based on whether or to what degree an overcharge was passed on to the claimant, the burden of proof for the existence of passing-on lies with the claimant.[353] Contrary to the Directive's provisions, Belgium has not explicitly included the requirement to take into account the *'commercial practice that price increases are passed on down the supply chain'* as set out by Article 14(1).[354]

Since it can be particularly difficult for consumers or undertakings who have not made any purchases from the infringer to prove that the loss has been passed on to their level of the supply chain, Article 14(2) introduces a rebuttable presumption of passing-on where the indirect purchaser has shown that (a) the defendant has committed an infringement of competition law; (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or which contain goods or services affected by the infringement. It is unclear, however, whether the presumption applies only to the question of *if any* overcharge has been passed on or whether Article 14(2) also presumes the amount of overcharge that was passed on. Arguably, Article 14(2) subparagraph 2 supports a broader interpretation, extending the presumption to the

[351] Directive, recital 41.
[352] Directive, Article 12(4) provides that Member States must ensure that the rules on passing-on also apply accordingly where their infringement relates to a supply to the infringer. For better readability, in relation to passing-on, purchaser is used as a reference for purchasers as well as suppliers.
[353] Directive, Article 14(1).
[354] Caroline Cauffman (n 303) 23.

amount, because it renders the presumption inapplicable *'where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser'*. Some commentators have interpreted the exception as an indication that the Directive also establishes the presumption in relation to the amount of the overcharge.[355] As far as the author is aware, no Member State has followed this interpretation and all have limited the presumption to the existence of a passing-on. The limited presumption of passing-on does not violate the Directive, as in practice it is not possible to establish a typical passing-on rate that could be applied as a general rule to all situations. Instead, a close assessment of the characteristics of the market in question is necessary.[356] Precisely because of the difficulty of establishing the share of the overcharge that was passed on, Article 12(5) enables Member States to estimate the share. All Member States have applied this possibility, albeit some with a slightly different wording (e.g., in Ireland: a court may *'decide'* the share[357]), or it already existed under the pre-existing national law (e.g., in Sweden[358]).

The Directive also emphasised that where the loss has been passed on entirely or in part to a different level of the supply chain, the loss no longer constitutes harm for which the direct purchaser must be compensated.[359] The defendant therefore has a right to invoke a passing-on defence (Article 13). Poland, for example, has not expressly transposed the passing-on as a defence, as it was seen that such a possibility already existed under the existing civil procedural rules.[360] Similarly, the rule that the burden of proof for the passing-on lies with the defendant invoking the defence under sentence 2 of Article 13 has not been explicitly implemented by all Member States, as the burden already lies with the defendant under the national procedural rules (e.g., the Czech Republic, Germany, Estonia, and Slovenia).

Notably, the 2013 Proposal excluded the passing-on defence if the harm was passed on to persons at the next level of the supply chain for whom it was legally impossible to claim compensation for their harm, as this would unduly free the infringer from liability for the harm caused.[361] However, this exception to the defence has not made it into the final Directive. In-

[355] For example, see Christian Kersting (n 336); Christian Kersting and Rupprecht Podszun (n 336) para 110.
[356] Practical guide for quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the functioning of the European Union 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 (C(2013) 3440), para 168. See also Anton Petrov (n 232) 17.
[357] Section 11(7) European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, S.I. No. 43 of 2017.
[358] Lars Henriksson (n 287) 369.
[359] Directive, recital 39.
[360] Maciej Bernatt and Maciej Gac (n 222) 298. Arguably, the lack of clarity might have the effect that in practice, defendants may not be able to raise the defence successfully.
[361] Proposal for the Directive on Certain Rules Governing Actions for Damages (n 105) Article 12(2).

terestingly, the German *BGH* in its *Schienenkartell V* judgment, did not accept the passing-on defence in a case in which end it was certain that end consumers to whom the overcharge was likely passed-on would not claim compensation.[362] According to the *BGH*, the aim of private enforcement is not only to compensate victims of the cartel, but it also plays an integral part of an effective enforcement regime. In cases with an extremely low probability that indirect purchasers will claim damages, accepting the passing-on defense would effectively result in an unjust enrichment of the injurer. Against this background, the *BGH* held that where there is no risk that the damage will be claimed by the indirect purchaser, the defendant cannot rely on the passing-on defense.

In the case that claimants from different levels of the supply chain bring actions for the same damages, Article 15 provides that when assessing whether the burden of proof for passing-on is satisfied, national courts must be able to take due account of other actions for damages or judgements resulting from such actions relating to the same infringement. The objective of the provision is to prevent over- or under-compensation of the harm caused by the infringement. Recital 44 also specifies that *'national courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level'*.[363] In Belgium, for example, transposition of such a rule was considered unnecessary, as under the existing rules, other court decisions involving the infringer and a different claimant are – upon request – to be taken into account.[364] For the same reasons, the Netherlands did not find it necessary to implement specific measures. However, the existing rules do not prevent a court arriving at a finding that contradicts another case, as the findings in one case do not have a *res judicata* effect in any other case.[365] A court may, however, summon a third party to appear in the proceeding if it deems it necessary for the resolution of the case.[366] Similarly, in Germany defendants can notify or a third party may with a legitimate interest join a pending proceeding.[367] However, these existing methods still bear the risk that courts can arrive at different findings or that a court would have to dismiss a claim as the damages were already awarded at a different level, thereby negating a victim's right to compensation. Thus, the lack of clear rules introduced

[362] BGH, judgment of 23 September 2020, KZR 4/19 – *Schienenkartell V*.
[363] Recital 44 also refers to the possibility *'for actions pending before the courts of different Member States to be considered as related within the meaning of Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (1). Under that Article, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction'*.
[364] Caroline Cauffman (n 303) 24.
[365] Jeroen Kortmann and Simon Mineur (n 160) 285.
[366] Article 118 Dutch Civil Code.
[367] Sections 68-74 German Civil Procedure Rules.

by Member States is likely to require difficult balancing exercises from courts between the victim's right to be compensated and the prohibition of over-compensation. The introduction of a single European register collecting all pending proceedings and the ability of courts to stay a proceeding until a parallel proceeding has been concluded could have overcome the risk of contradicting judgements.

IX. Quantification and presumption of harm

Article 17
Quantification of harm

1.(…) Member States shall ensure that the national courts are empowered, in accordance with national procedures, 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 evidence available.
2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

The Directive prescribes that neither the burden nor the standard of proof required for the quantification of harm should render the exercise of the right to damages practically impossible or excessively difficult.[368] For that purpose, Article 17(1) provides that in cases where it is practically impossible or excessively difficult to precisely quantify the harm, national courts should be able to estimate the amount of damages caused. Similarly, Article 12(5) provides that national courts must be empowered to estimate the share of the overcharge that was passed on to a different level of the supply chain. Article 12(5) is the necessary counterpart of Article 17(1) as it would be absurd if courts were to estimate the harm but still have to quantify the exact share of the damages passed on. In some Member States prior to the Directive, courts were already able to estimate the amount of damages; for example, this was the case in Germany,[369] the Czech Republic,[370] Estonia,[371] Italy,[372] and Sweden,[373] where a judge's ability to estimate the harm has only been clarified, partially by reference to existing rules.

Article 17(2) provides a shift of the burden of proof in favour of the claimant in actions for damages from cartel infringements. It introduces a rebuttable presumption that cartel infringements cause harm. It is crucial to note that the Directive's understanding of a 'cartel' only refers to horizontal cartels between competitors (Article 2(14)). The Directive's definition does not

[368] Directive, Article 17(1).
[369] Section 287 German Code of Civil Procedure (ZPO).
[370] Judgement of the Supreme Court of 26.05.2010, Ref. No. 23 Cdo 1299/2008; Michael Petr (n 194) 93.
[371] Section 127(6) Estonian Law of Obligations Act (Võlaõigusseadus <https://www.riigiteataja.ee/en/eli/524012017002/consolide> accessed on 8 March 2021.
[372] Article 1226 of the Italian Civil Code.
[373] Chapter 35, section 5 of the Swedish Code of Judicial Procedure.

include infringements of association of undertakings nor vertical cartels. Hence, Member States are only obliged to introduce the presumption of harm for cartels between competitors. Similarly, Article 2(14) limits the scope of the cartel's conduct to behaviour coordinated intentionally (*'aimed at'*). However, since the provision only requires minimum harmonisation, Member States can choose to extend the presumption to other types of cartel infringements. For example, Poland[374] has explicitly extended the presumption to vertical infringements and Belgium has introduced a much broader definition of 'cartels', including agreements and concerted practices with one or more non-competing undertakings or associations of undertakings.[375] All Member States have transposed the minimum requirement of the presumption. In Finland, it was questioned whether the presumption would engender a substantive change to the law as the burden of proof is already applied rather flexibly under national procedural law.[376] In some Member States, similar rules alleviating the burden of proof in damages actions following hardcore infringements already existed prior to the implementation of the Directive (e.g., Germany[377] and France[378]). Some Member States went beyond the minimum requirements of the Directive and also included a presumption of the amount of damages cartels have caused. In Hungary[379] and Latvia,[380] it is presumed that cartels cause an overcharge of 10%, but defendants can rebut the presumption by proving a lower amount; plaintiffs, on the other hand, may show a higher dam-

[374] Maciej Bernatt and Maciej Gac (n 222) 298.
[375] Article I.22, No 12 of the Code of Economic Law. See also Caroline Cauffman (n 303) 7.
[376] Sari Rasinkangas and Christian Wik (n 279) 309.
[377] In 2005, the German Federal Court of Justice (**BGH**) held that it follows from economic theory that cartels generally create an overcharge, and therefore, a high probability exists that cartels would lead to inflated prices for purchasers of cartelized products (BGH, judgment of 28 June 2005, KRB 2/05 – *Berliner Transportbeton I*). Following the BGH's ruling, courts in civil damages litigation applied *prima facie evidence* for hardcore infringements, such that plaintiffs only had to demonstrate facts from which, according to economic theory, higher prices 'typically' follow. In its *Schienenkartell I* judgment of 11 December 2018, the BGH raised the claimant's standard of proof in damages actions. The court held that *'in view of the diversity and complexity of agreements restricting competition'*, the assumption that cartels could be said to *'typically'* cause harm cannot be upheld. The court further clarified that, in its view, the typicality requirement for the prima facie evidence could only be satisfied where it is empirically established that events occur so frequently that there is a *'very high probability'* that they are present in every individual case. Instead, the BGH also accepted that in light of the national courts' obligation to comply with the *principle of effectiveness* under EU law, the plaintiff may be able to rely on a *factual presumption* (*tatsächliche Vermutung*), which has a *'strong indicative significance'* for the assessment of evidence. The BGH recently confirmed the higher standard of proof for the harm caused by a cartel in its *Schienenkartell II* judgment of 28 January 2020 (BGH, Judgment of 28 January 2020, KZR 24/17 – *Schienenkartell II*).
[378] In an abuse of dominance case, the Paris Commercial Court held that the existence of damages necessarily resulted from the abuse conduct. In *JCB* the Paris Court of Appeal applied a similar reasoning in favour of a victim of a cartel. See Muriel Chagny (n 162) 110.
[379] Section 88C HCA: *'In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article [101 TFEU], when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent'*. See Peter Miskolczi Bodnár (n 202) 144.
[380] Julija Jerneva and Inese Druyiete (n 220) 164. During the parliamentary debate, extending the 10% presumption to other infringements such as abuse of dominance was even considered.

age. Recently, on 16 October 2020 Romania published its new implementing legislation after the previous legislation was deemed unconstitutional.[381] Its Article 16 contains two provisions on the presumption on harm: Art. 16(2) contains a rebuttable presumption that cartels cause an overcharge of 20% which is currently the highest presumption for cartels in Europe. Art. 16(3) further introduces a (rebuttable) presumption of harm for abuses of a dominant position although without specifying a percentage of the overcharge and thereby extends Art. 17(2) of the Directive to violations of Article 102 TFEU. In other Member States, courts may take into account the defendant's profit gained from the infringement for the estimation of damages (e.g., in Slovenia[382] and Germany[383]).

Article 17(3) provides that national courts are able to request that national competition authorities assist with the quantification of the amount of damages. This leaves the issue open of whether national competition authorities can refuse to follow such a request. The wording that national competition authorities may assist *'where that national authority considers such assistance to be appropriate'* suggests that the authority should have some discretion as to whether it will assist in the civil proceeding. In France,[384] the effectiveness of such a rule was questioned as competition authorities are under no obligation to assist. By contrast, under Portuguese law[385] the authority must assist the court, upon request, for the quantification of damages. However, the authority can ask the court to be excused on the basis of adequate justification. Interestingly, Slovenia has also included the possibility for courts to ask the NCAs of other Member States, and in turn the Slovenian NCA can also be asked by courts of other Member States.[386] In Sweden and the UK, the existing rules were deemed sufficient since the NCAs are under no duty to assist the court, and national courts already have appropriate rules to request assistance from third parties where necessary.

[381] Romanian Emergency Ordinance 2020 (n 226).
[382] Article 62k NCA.
[383] Section 33a (3) sentence 2 GWB: *'In quantifying the harm, account may, in particular, be taken of the proportion of the profit which the infringer has derived from the infringement…'*.
[384] Art. R. 481-1 and Art. R 483-1 (1) C.Com. See Muriel Chagny (n 162) 113.
[385] Article 9(3) of the Proposal for the Transposing Act; Miguel Sousa Ferro (n 191) 320.
[386] Draft Article 62k(3)-(5) ZPOmK-1 Ana Vlahek and Klemen Podobnik (n 163) 282.

X. Consensual dispute resolution / settlements

Article 18
Suspensive and other effects of consensual dispute resolution
(…)

Article 19
Effect of consensual settlements on subsequent actions for damages
(…)

The Directive aims to facilitate the use of alternative dispute resolutions (**ADRs**) and increase their effectiveness.[387] The rules laid down by the Directive intend to encourage infringers and injured parties to use ADR mechanisms, which should cover as many injured parties and infringers as legally possible.[388] The Directive considers that *'[a]chieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties'*.[389] The terminology was considered particularly problematic for the transposition of the new rules in some Member States (e.g., Belgium, Ireland, Portugal, and the UK) because no single term would encompass all means of ADR addressed by the rules of the Directive.[390]

The measures to encourage the use of ADR are codified in Articles 18 and 19. According to Article 18 (1), limitation periods should be suspended for the duration of the ADR.[391] Under Article 18(2), proceedings before national courts should be suspended for the duration of the ADR process, but the suspension of proceedings should not exceed 2 years. Some Member States such as Bulgaria[392] and France have not implemented the rule because it was deemed unnecessary since the suspension already existed under the existing laws. However, it should be noted that under existing French law, the possibility of suspending the proceeding is not limited to 2 years.[393] Furthermore, other Member States failed to implement the 2-year rule of the Directive. Interestingly, the UK refused to implement the 2-year rule because it was seen that the 2-year limit was *'not in the spirit of the Directive in relation to the problem this provision is trying to address'*.[394] The vast majority of Member States have nevertheless transposed the 2-year limit for the staying of the proceedings. Another problem highlighted by Rodger, Sousa Ferro, and Marcos (2018) is that in some implementing legislations, the scope of application of the national provisions are unclear, particularly in relation to the means of consensual

[387] Directive, recital 48.
[388] Ibid.
[389] Ibid.
[390] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 245) 471.
[391] Directive, Article 18(1). See above under B.VI. for more details on the suspension of limitation periods.
[392] Anton Petrov (n 232) 29.
[393] Article 278 of the French Civil Procedure Code. In practice, however, it is unlikely that the negotiations would take longer than two years.
[394] Barry Rodger (n 288) 400.

dispute resolutions covered by the existing national rules on the staying of proceedings. Moreover, the authors note that the rule on the suspension of the proceeding may raise practical problems in claims against multiple infringers. For instance, it is unclear whether the suspension affects all co-defendants in a proceeding or only the defendant involved in the resolution process. In Spain, the latter was held to be the case.[395] However, in practice the proceeding against the remaining co-defendants cannot move forward without violating the right to be heard of the infringer participating in the resolution process.

Article 18(3) requires Member States to allow national authorities to consider compensation of damages paid as a result of ADR as a mitigating factor when setting fines. In some Member States it was not deemed necessary to expressly implement such a possibility as it already existed under the pre-existing laws (e.g., Austria, the Czech Republic, Germany, Hungary, Slovenia, and the UK). Other Member States included such a possibility for NCAs but did not oblige them to take the compensation into account for the setting of fines (e.g., Belgium, Estonia, France, Greece, and Malta). The provision is silent as to whether the same applies if the infringer has been ordered to pay compensation (i.e., following a court's judgement). Since this is not part of the subject matter of the Directive, Member States can choose to regulate the effects of compensation ordered by courts accordingly (Article 114 TFEU). As far as the author is aware, no Member State has expressly extended this possibility to court judgements.

The provisions in Article 19 are intended to ensure that infringers who pay damages through consensual dispute resolution should not be placed in a worse position vis-à-vis their co-infringers compared with what they otherwise would have faced in the absence of a consensual settlement. This can be the case if a settling infringer, even after a consensual settlement has been agreed, continues to be jointly and severally liable for the entire damage caused by the infringement.[396] Therefore, Article 19(1) reduces the claim of the settling injured party by the settling infringer's share of the harm caused to the injured party. The injured party may only claim the remaining damages from the non-settling co-infringers who are not permitted to recover contribution from the settling infringer (Article 19(2)). Thus, the settling injurer is excluded from the joint and several liability with the co-injurers. To ensure full compensation, Article 19(3) provides that, by way of exception, the settling co-infringer will still be liable for the damages if the non-settling co-infringer cannot pay the damages corresponding to the settling co-infringer's share of the harm. Under the second subparagraph of Article 19(3), this

[395] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 245) 471.
[396] Directive, recital 51.

possibility may be excluded under the terms of the settlement. The implementation of Article 19(3) was seen as particularly problematic. Where the parties to the settlement have not made use of the exception under the second subparagraph, the settling infringer will still have to either remain a party to the proceeding and be included in the judgement in such a way that she can still be held liable in case the co-infringers are unable to pay, or the claimant will be required to initiate a second proceeding against the settling infringer if she cannot obtain compensation from the remaining co-infringers.

Article 19(4) provides that when co-infringers claim contribution from a settling infringer, national courts should take due account of the compensation already paid under the settling agreement to ensure that the compensation paid by the settling infringer does not exceed her relative responsibility. The provision seems to intentionally limit the settling infringer's liability to her relative responsibility. However, the usefulness of the provision is questionable since Article 19(1) already provides that an infringer who has already reached a settlement with the claimant should not be ordered to pay damages.[397] Thus, it is unlikely that the provision will ever be of relevance in practice. Following the confusion surrounding the provision, some Member States have simply not transposed the provision (e.g., Estonia, Hungary, Germany, Greece, and Poland), whereas others have more or less copied out the rule (e.g., Lithuania, Luxembourg, the Netherlands, Portugal, Romania, and Slovenia).

XI. Temporal scope

Article 22
Temporal application

1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.
2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.

In Article 22, the Directive contains specific rules on the temporal application of the new provisions. Recital 56 of the Directive holds in a short sentence that it was *'appropriate to provide rules for the temporal application of the Directive'*; however, the Directive contains no word on why it was considered appropriate or why the provisions chosen by the legislator should be considered appropriate. The Directive's provision on the temporal application distinguish between substantive and procedural provisions. While it prohibits the retroactive application of

[397] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos 'Promotion and Harmonization of Antitrust Damages Claims by Directive 2014/104/EU?' in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 50.

the substantive provisions before the end of the implementation period on 26 December 2016, Member States are free to apply the new procedural provisions to proceedings that were initiated after 26 December 2014 (the day the Directive was passed). The restriction of the retroactive applicability of substantive provisions is intended to provide legal certainty and to respect the defendants' fundamental rights. However, the vague wording of the rules on the temporal application provides little guidance for Member States. This is especially problematic because Member States apply different approaches to the temporal applicability of new legal rules.[398] In particular, the classification of rules in either procedural or substantive provisions is problematic. The wording of the Directive (*'substantive provisions of this Directive'*) indicates that the temporal application of the new rules depends on whether the respective rule qualifies as either procedural or substantive under the Directive or more broadly under EU law. Given the Directive's goal of creating a level playing field in Europe by harmonising the rules for competition damages actions, the applicability of a particular provision should also follow a common European approach irrespective of whether the same rule is qualified as a procedural rule under national law. Diverging rules on temporal applications for the Directive's provisions would undermine this objective.

Consequently, for the purpose of the Directive, the classification into procedural and substantive provisions under EU law must prevail over national rules, even though the EU classification may contradict the national rules' intertemporal applicability. Member States that wish to apply a provision retroactively to proceedings initiated prior to the expiry of the implementation period on 26 December 2016 would therefore need to identify whether the respective rule is classified as a procedural rule under EU law. This undertaking is especially complex because EU case law is not clear on the nature of many of the rules. A detailed review of the classification of the Directive's rules would go beyond the scope of this chapter. The interested reader may refer to a more comprehensive analysis of the complexity of the interpretation of the Directive's rules under EU law and the consequences for the temporal application of the new rules, which the author has published elsewhere.[399] Given the complexity of identifying the nature of the provisions under EU law, it is no surprise that some Member States opted for the 'safe approach' and prohibited the retroactive application of all provisions of the Directive.[400]

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[398] Ibid 19.

[399] Philipp Kirst, 'The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe' (2019) 16 European Competition Journal 97-125.

[400] For instance, in Finland, Poland, and the UK, the new rules are only applicable to infringements that occurred after the entry into force of the implementing legislation. In *Cogenco*, the first preliminary reference in relation to the temporal scope of the Directive by the Portuguese Tribunal Judicial da Comarca de Lisboa, the CFEU held that the entire Directive was not applicable to the facts of the case because under Portuguese law the provisions of

The next part provides an overview of the provisions that are applied retroactively by some Member States and – where applicable – how Member States have classified the Directive's rules.[401] Table 1 found at the end of this part summarises the findings. The Member States' interpretations are discussed in alphabetical order as follows:

The implementing legislation of Austria lists, on the one hand, consensual dispute resolution, presumption of harm, passing-on, and joint and several liability as provisions of substantive law; on the other hand, limitation periods and disclosure of evidence are classified as procedural law provisions. To comply with the implementation deadline, the substantive provisions are (retroactively) applicable to claims that arose after 26 December 2016 (see Article 22(1) Directive), even though the implementing legislation only entered into force on 1 May 2017. Moreover, the new limitation periods apply to claims that were not time-barred at the end of the implementation period. The rules on disclosure of evidence have retroactive effect for actions brought after 26 December 2016, except for sanctions for failure to comply with the disclosure rules, which are only applicable to conduct that occurred after 30 April 2017.[402] Thus, the implementing legislation at least treats penalties as provisions of substantive law. Under Belgian civil procedural rules, new procedural rules are applicable immediately after they have entered into force.[403] In order to comply with the Directive, Belgium prohibited the retroactive application, and therefore, all new procedural rules are applicable to actions brought after 26 December 2014.[404] However, Belgian implementing legislation does not categorise the new provisions explicitly as part of substantive or procedural law. Bulgaria, on the other hand, has categorised the rules on the quantification of harm and those on joint and several liability as substantive law provisions. All new substantive rules (e.g., quantification of harm and joint and several liability) are immediately applicable at the time of entry into force on 7 January 2018, whereas procedural rules have retroactive effect in proceedings initiated after 26 December 2014.[405] In Croatia, the implementing legislation distinguishes between substantive law and procedural law provisions. Rules on subject matter and scope, the right to full compensation, the presumption that cartel infringements cause harm, joint and several liability, passing-on,

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the Directive are not retroactively applicable prior to the end of the implementation period (26 December 2016); Case C-367/17 *Cogeco Communications Inc. v Sport TV Portugal SA and others* [2019] ECLI:EU:C:2019:263.

[401] An earlier version of this overview was published by the author as part of the paper 'The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe' (n 399).

[402] See Section 86 (9) 2 KartG.

[403] Article 3 of the Belgian Civil Procedural Code.

[404] Article XVII.45 of the Code of Economic Law. See also Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 161) 436.

[405] Section 5 Act to amend and supplement the Competition Act, Decree No. 270 (Закон за изменение и допълнение на Закона за защита на конкуренцията, УКАЗ № 270); see also Anton Petrov (n 232) 18.

and effects of consensual settlements on subsequent actions for damages are considered provisions of substantive law.[406] Those rules are only applicable as of the entry into force of the implementing legislation on 22 July 2017.[407] On the other hand, the disclosure of evidence, the binding effect of national competition authorities' decisions, limitation periods, and the suspension of proceedings in settlement negotiations form part of Croatian procedural law.[408] The transposing legislation states that these rules, as well as those on passing-on, have retroactive effect and are applicable to proceedings initiated prior to entry into force, but after 26 December 2014.[409] It is questionable, though, whether the Directive's passing-on provisions form part of procedural law since the Directive establishes an individual substantive right for indirect purchasers to claim compensation.[410] Cyprus does not expressly address the issue of temporal application. It is therefore likely that courts will interpret the temporal scope of the rules in light of Article 22 of the Directive.[411] In the Czech Republic, substantive provisions (statute of limitations, scope of damages) are not applicable to damages that arose from infringements that occurred before the implementing act entered into force (18 August 2017). The procedural rules (e.g., disclosure of evidence), on the other hand, are applicable to actions brought after 25 December 2014.[412] Similarly, as a general rule in Denmark, the new rules do not apply to infringements that occurred prior to the implementing legislation entering into force.[413] The new implementing act entered into force on 27 December 2016 (the end of the implementation deadline). For some procedural rules, the act contains exceptions and applies them to damages actions filed on or after 25 December 2014. Furthermore, the new act applies in its entirety (all procedural and substantive provisions) to continuous infringements that had not ceased before 27 December 2016.[414] The implementing legislation in Estonia has amended, *inter alia*, the Competition Act[415] and added new 'procedural rules' in relation to the disclosure of evidence and the treatment of such information in proceedings, the suspension of proceedings during a

[406] Ana Poscic, 'EU Competition Law in the aftermath of Directive 2014/104 and its Implementation in the Republic of Croatia' in Silvia Marino, Łucja Biel, Martina Bajčić and Vilelmini Sosoni (eds) *Language and Law - The Role of Language and Translation in EU Competition Law* (Springer 2018) 116.
[407] Article 20 of the Croatian Implementing Act (ODLUKU o proglašenju zakona o postupcima naknade štete zbog povreda prava tržlšnog natjecanja).
[408] *Ibid*.
[409] Article 19 of the Croatian Implementing Act (ODLUKU o proglašenju zakona o postupcima naknade štete zbog povreda prava tržlšnog natjecanja).
[410] See Article 16(2) of the Croatian Implementing Act (Zakon, NN 69/2017-1607).
[411] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (n 161) 436.
[412] Section 36 of the Czech Damages Act (available in Czech here: <http://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=38277> accessed on 8 March 2021).
[413] Act No. 1541 of 13 December 2016 (Lov om behandling af erstatningssager vedrørende overtrædelser af konkurrenceretten).
[414] Henrik Peytz (n 167) 263.
[415] Competition Act ('konkurentsiseadus') of 5 June 2001 <https://www.riigiteataja.ee/en/eli/527122017001/consolide> accessed on 8 March 2021.

consensual dispute resolution process, and the binding effect of decisions of competition authorities.[416] The amended Competition Act states that these new procedural provisions are only applicable to damages claims initiated after the entry into force of the new provisions (5 June 2017).[417] Thus, neither the substantive nor procedural provisions have a retroactive effect.[418] In Finland, procedural provisions are also only applicable to damages claims brought after the entry into force of the implementing law on 26 December 2016. Moreover, the legislation lists the substantive provisions, namely the entitlement to full compensation, joint and several liability, contribution, limitation periods, and the effects of settlements.[419] The new substantive provisions only apply where the infringement occurred and the damages action was brought after the Act entered into force.[420] Hence, in Finland too, neither substantive nor procedural provisions have a retroactive effect. In France, by contrast, procedural provisions apply to proceedings initiated after 26 December 2014. The implementing legislation does not expressly state how to treat substantive provisions. However, under the general rules on the temporal application of new rules, substantive provisions that are not governed by a specific transitional rule only apply to infringements that occurred after the date of entry into force.[421] The new rules entered into force on 11 March 2017.[422] Germany has explicitly addressed the temporal application of the new rules.[423] Since Germany was one of the countries that failed to implement the Directive in time, it declared all substantive provisions – namely the right to compensation, binding effect of competition authorities' decisions, passing-on, joint and several liability, effects of consensual dispute resolution – to be applicable to claims arising after 26 December 2016 to comply with Article 21(1) Directive. However, the new limitation periods are only applicable to claims that were not yet time-barred at the time of the implementing legislation entering into force (9 June 2017). The provision on intertemporal application specifies that the new limitation periods are only applicable to claims that arose after 26 December 2016 under the new law and before 27 December 2016 under the old law if they were not yet time-barred on 9 June 2017.[424] For claims that arose before 27 December 2016, the beginning, suspension,

[416] Section 9 of the Act amending the Competition Act and the associated Acts ('Konkurentsiseaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus') of 10.05.2017 <https://www.riigiteataja.ee/en/eli/510122018001/consolide> accessed on 8 March 2021.
[417] Section 87(7) Competition Act as amended on 10.05.2017.
[418] I am very grateful to Evelin Pärn-Lee and Irene Kull for the clarifications they provided on the temporal scope of the new rules in Estonia.
[419] Section 13 of the amended Competition Act ('Suomen Säädöskokoelma'), 1077/2016 <http://ec.europa.eu/competition/antitrust/actionsdamages/act_competition_damages_fi%20.pdf> accessed 8 March 2021.
[420] Sari Rasinkangas and Christian Wik (n 279) 309.
[421] Muriel Chagny (n 162) 106.
[422] However, judge-made rules that existed prior to the entry into force may be interpreted by courts in light of the Directive; see Muriel Chagny (n 162) 106.
[423] Section 186(3)-(4) GWB (2017).
[424] Section 186(3)2 GWB (2017).

suspension of expiry, and recommencement of the limitation period will be determined under the law on the statute of limitations that remained in effect until 8 June 2017.[425] On the other hand, the procedural law provisions relating to the court's ability to estimate the passing-on rate as well as the disclosure rules are only applicable to actions brought after 26 December 2016, even though the Directive does not prohibit the retroactive application of procedural provisions (Article 22(1) Directive). The newly introduced Greek Competition Damages Act also distinguishes explicitly between procedural and substantive limitations.[426] The act specifies that substantive provisions apply only *pro futuro* after the entry into force of the act on 23 March 2018. The new procedural provisions, on the other hand, have retroactive effect and are applicable to claims filed on or after 26 December 2014. The Explanatory Memorandum to the new Greek Competition Damages Act explains that time-barring rules are not classified as procedural provisions.[427] In addition, Hungary has not introduced a specific provision dealing with the temporal scope of the new rules. Instead, their temporal application follows the general approach under Hungarian law. Accordingly, substantive provisions are only applicable to claims that arose after the entry into force of the provisions on 15 January 2017, whereas procedural provisions are immediately applicable. In order to comply with Article 22(2), procedural provisions are not applicable to claims filed prior to 26 December 2014. More interestingly, the newly amended Hungarian Competition Act classifies – with reference to specific provisions – the statute of limitations[428] and all presumptions[429] as provisions of substantive law.[430] Ireland is one of the countries that opted against the retroactive application of the new provisions (neither substantive nor procedural law) altogether. The implementing Regulation prohibits the application of the new rules to *'infringements of competition law that occurred before 27 December 2016'*.[431] In Italy, procedural provisions have retroactive effect and can be applied to proceedings initiated after the implementation deadline on 26 December 2016. The new law specifies the provisions of procedural law, namely the rules on the production of evidence and the suspension of limitation periods in the context of consensual dispute resolution.[432] Substantive provisions, on the other hand, have in principle no retroactive effect under Italian Civil Law.[433] In Latvia, the new rules entered into force on 1 November 2017. The rules on access to evidence

[425] Section 168(3)3 GWB (2017).
[426] Article 16 Law 4529/2018 of 23 March 2018.
[427] Maria Ioannidou (n 196) 164.
[428] Section 95/E(4) HCA together with section 88/T HCA.
[429] Section 95/E(4) HCA together with section 88/D(4) and 88/G HCA.
[430] Csongor István Nagy (n 163) 182.
[431] Statutory Instrument No 43 of 2017, reg. 3.
[432] Article 19 Legislative Decree No. 3/2017; see also Susanna Lopopolo (n 230) 212.
[433] Article 11 of the Preliminary Provisions of the Civil Code; see also Susanna Lopopolo (n 230) 212.

and the binding effect of competition authorities' decisions were incorporated into the Civil Procedural Law.[434] However, said law does not include a rule on the temporal application of the procedural provisions on access to evidence, nor of the rules governing the binding effect of decisions.[435] The Directive's remaining rules have been implemented in the Competition Act, which likewise does not include a specific rule on (inter-)temporal application.[436] The Lithuanian transposing legislation prohibits any retroactive effect of the new rules. The new rules only apply to infringements that occurred after the entry into force on 1 February 2017 or those still ongoing (continuous infringement) at that time. An exception was made for the new extended limitation periods, which apply to claims not yet time-barred at the time of entry into force.[437] In Luxembourg, the new rules do not apply to claims that arose before the entry into force of the Act on 10 December 2016.[438] In Malta, all new rules have retroactive effect as of 27 December 2014 with the exception of the new limitation periods.[439] The retroactive application of other substantive law provisions such as the Directive's presumptions in law is likely to violate Article 22(1) Directive. The Netherlands has included a provision copying Article 22(2) Directive in relation to the limited retroactive effect of procedural provisions until 26 December 2014. In relation to substantive law provisions, the Dutch legislator has not implemented a rule specifically addressing Article 22(1) Directive, because the general principles of Dutch transitional law were considered to be in compliance with the Directive.[440] Under Dutch transitional law, new laws only have 'immediate effect' (*'onmiddellijke werking'*) at the time of the entry into force (10 February 2017).[441] In Poland, all new rules are only applicable to infringements that occurred after the entry into force of the implementing act on 27 June 2017.[442] The act only makes an exception for two procedural provisions, namely the rules on the disclosure of evidence and the binding effect of the Polish competition authorities' decisions, which are applicable to proceedings initiated after the entry into force of the act irrespec-

[434] See Chapter 30 of Latvian Civil Procedural Law (Civilprocesa Iikums) amended on 19 October 2017.
[435] The Transitional Provisions of the Civil Procedural Law do not mention the temporal application of the rules on evidence and the binding effect of decisions. Para 130 of the Transitional Provision only specifies the referral of pending damages claims to the newly introduced specialised Competition Court after the entry into force of the new procedural rules.
[436] *Konkurences Iikums* as amended on 19 October 2017.
[437] Jurgita Malinauskaite (n 168) 240.
[438] Article 16 of the Transposition Act of Luxembourg.
[439] Article 2(1) of the Competition Law Infringements (Actions for Damages) Regulations (2017), L.N. 117 of 2017.
[440] Jeroen Kortmann and Simon Mineur (n 160) 274.
[441] Kortmann and Mineur stress that it remains unclear to what extent the 'immediate effect' under Dutch law would allow a retroactive application of substantive rules to claims that arose prior to the entry into force.
[442] Chapter 5, Article 36 (1) Act on actions for damages for infringements of the competition law provisions (USTAWA z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji).

tive of when the infringement occurred.[443] Thus, most of the new rules will not be applied for several years. A further question not addressed by the act is whether the rules apply to continuous infringements.[444] In Portugal, it was decided to leave the distinction between procedural and substantive provisions to the court.[445] However, as already mentioned, the transposing act makes an exception for rules relating to the burden of proof, which are part of the substantive law.[446] In the last minute of the legislative process, a provision was included which limits the application of procedural provision to claims brought after the entry into force of the Act on 6 June 2018.[447] The Romanian governmental emergency ordinance, which implements the Directive, contains a provision specifying that substantive law provisions (limitation periods, joint and several liability, quantification of damages, and passing-on of overcharges) have no retroactive effect and procedural law provisions (e.g., rules on the disclosure of evidence, binding effects of infringement decisions) do not apply to actions filed before 26 December 2014.[448] Interestingly, the article on the temporal scope of the new rules refers to the substantive and procedural provisions of *this ordinance* and not to the Directive. The categorisation of provisions into substantive or procedural law under Romanian national law could differ from their classification under EU Law. The Slovak Implementation Act has opted against a retroactive effect of the new provisions. In Slovakia, all new rules became applicable to infringements that occurred after the entry into force of the implementation legislation on 27 December 2016.[449] In Slovenia, only the rules on disclosure of evidence have retroactive effect for proceedings pending with the courts as of 26 December 2014.[450] However, the rules on disclosure also include the ability to impose fines for the failure to comply with the confidentiality obligations, which could equally have been classified as a provision of substantive law. Spain has clarified that none of the new rules have retroactive effect. The Decree transposing the Directive by

[443] *Ibid*, Article 36 (2).
[444] Maciej Bernatt and Maciej Gac (n 222) 294.
[445] Miguel Sousa Ferro (n 191) 308.
[446] *Ibid*.
[447] *Ibid*.
[448] Article 20 of the Emergency Ordinance no. 39 of 31 March 2017 (Ordonanţă de Urgenţă nr. 39 din 31 mai 2017 privind acţiunile în despăgubire în cazurile de încălcare a dispoziţiilor legislaţiei în materie de concurenţă, precum şi pentru modificarea şi completarea Legii concurenţei nr. 21/1996). The same provision was also adopted in the new implementing legislation published on 16. October 2020, available here: <http://www.monitoruloficial.ro/emonitornew/emonviewmof.php?fid=MS44MTQ2OTU0NjA0MjMxRSszMA=> accessed on 8 March 2021. For the classification of the provisions in substantive and procedural rules, see Valentin Mircea (n 226).
[449] Section 44f of the Slovak Implementation legislation (Z ÁKON z 29. novembra 2016 o niektorých pravidlách uplatňovania nárokov na náhradu škody spôsobenej porušením práva hospodárskej súťaže a ktorým sa mení a dopĺňa zákonč. 136/2001 Z.z.o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov v znení neskorších predpisov").
[450] Article 13 of the Implementing Law (Zakon o spremembah in dopolnitvah zakona o preprečevanju omejevanja konkurence (ZPOmK-1G)).

amending the Spanish Competition Act expressly states that substantive provisions are not to be applied retroactively and that the procedural law provisions on the disclosure of evidence are not to be applied to proceedings initiated prior to the entry into force of the new rules on 22 June 2017.[451] In Sweden, it was considered unnecessary to introduce a specific provision prohibiting the retroactive application of substantive rules into the Damages Act transposing the rules of the Directive, since the principle of non-retroactive application of substantive rules under national law was held to be in line with the requirements of the Directive.[452] The procedural provisions are applicable immediately after the entry into force on 27 December 2016 for proceedings initiated after 26 December 2014. The UK has prohibited the retroactive effect of substantive provisions to loss or damages suffered before the entry into force on 8 March 2017. The transposing Regulations define issues in relation to the statute of limitations as substantive provisions. Procedural provisions also apply only to claims that were brought on or after the entry into force of the Regulations. The rules on disclosure are deemed procedural under the Regulations. Thus, the new disclosure rules do not apply to claims brought before the date of the entry into force of the Regulations.[453]

[451] Transitory provision 1.1 of the Royal Decree Law 9/2017 of 26 May 2017, Official State Gazette 126, 27 May 2017. See Francisco Marcos (n 205) 331.
[452] Lars Henriksson (n 287) 363.
[453] Barry Rodger (n 288) 382-3.

Table 1 – *Overview of the temporal scope of the new provisions across Europe*

Member State	***Substantive Law***	***Procedural Law***
Austria	Rules on consensual dispute resolution, presumption of harm, passing-on, and joint and several liability are applicable to claims that *arose* after 26 December 2016.	Limitation periods apply to claims that were not time-barred at the end of the implementation period. New disclosure rules have retroactive effect for actions brought after 26 December 2016.
Belgium	The implementing legislation does not explicitly specify provisions of substantive law.	Procedural rules are applicable to actions brought after 26 December 2014.
Bulgaria	Rules on the quantification of harm and on joint and several liability were immediately applicable at the time of the entry into force on 7 January 2018.	Procedural rules have retroactive effect in proceedings initiated after 26 December 2014.
Croatia	The right to full compensation, the presumption that cartel infringements cause harm, rules on joint and several liability, rules on passing-on, and the effects of consensual settlements in actions for damages form part of substantive law and are only applicable as of 22 July 2017.	Rules on disclosure of evidence, the binding effect of national competition authorities' decisions, limitation periods and the suspension of proceedings in settlement negotiations. Those rules together with the rules on passing-on have retroactive effect and are applicable to proceedings initiated prior to the entry into force, but after 26 December 2014.
Cyprus	Not addressed in the implementing legislation.	
Czech Republic	Substantive law provisions such as the statute of limitations are only applicable to damages that arose from infringements that occurred after the entry into force of the implementing act (18 August 2017).	Retroactively applicable to actions brought after 25 December 2014.
Denmark	Those rules do not apply to infringements that occurred prior to the entry into force of the implementing legislation (27 December 2016).	For some procedural rules, the act contains exceptions and applies them to damages actions filed on or after 25 December 2014.
Estonia	Neither the substantive nor procedural provisions have retroactive effect.	Rules on the disclosure of evidence and the treatment of such information in proceedings, the suspension of proceedings during a consensual dispute resolution process, and the binding effect of decisions of competition authorities are only applicable to damages claims initiated after the entry into force of the new provisions (5 June 2017).
Finland	The right to full compensation, rules on joint and several liability, contribution, limitation periods, and the effects of settlements. Neither the substantive nor procedural provisions have retroactive effect.	Only applicable to damages claims brought after the entry into force of the implementing law on 26 December 2016.
France	Substantive provisions have no retroactive effect under the general rules.	Procedural provisions apply to proceedings initiated after 26 December 2014.

Member State	***Substantive Law***	***Procedural Law***
Germany	Substantive rules such as the right to compensation, binding effect of competition authorities' decisions, passing-on, joint and several liability, effects of consensual dispute resolution are applicable to claims arising after 26 December 2016. The new limitation periods are only applicable to claims that arose after 26 December 2016 under the new law and before 27 December 2016 under the old law if those claims were not yet time-barred on 9 June 2017. For claims that arose before 27 December 2016, the beginning, suspension, suspension of expiry, and recommencement of the limitation period will be determined under the law on the statute of limitations that remained in effect until 8 June 2017.	The court's ability to estimate the passing-on rate as well as the disclosure rules are only applicable to actions that were brought after 26 December 2016.
Greece	Substantive provisions, such as time-barring rules, apply only *pro futuro* after the entry into force on 23 March 2018.	Procedural rules have retroactive effect and are applicable to claims filed on or after 26 December 2014.
Hungary	The statute of limitations and all presumptions are considered substantive law and under the general rule substantive rules are only applicable to claims that arose after the entry into force (i.e., 15 January 2017).	Procedural provisions are immediately applicable but not to proceedings initiated prior to 26 December 2014.
Ireland	No retroactive application before 27 December 2016.	
Italy	No retroactive application prior to entry into force on 3 February 2017.	Rules on the production of evidence and the suspension of limitation periods in the context of consensual dispute resolution are retroactively applicable in proceedings initiated prior to the entry into force and after 26 December 2016.
Latvia	Not specified.	Rules on access to evidence and the binding effect of competition authorities' decisions. Temporal application not specified.
Lithuania	No retroactive effect of the new rules before the entry into force on 1 February 2017. The new limitation periods are only applicable to claims that were not yet time-barred at the time of entry into force.	
Luxembourg	The new rules do not apply to claims that arose before the entry into force of the Act on 10 December 2016.	
Malta	All new rules have retroactive effect as of 27 December 2014 with the exception of the new limitation periods.	
Netherlands	As a general rule, new laws only have 'immediate effect' ('onmiddellijke werking') at the time of the entry into force (10 February 2017).	

Member State	*Substantive Law*	*Procedural Law*
Poland	The new rules only apply to infringements that occurred after the entry into force of the implementing act on 27 June 2017.	Only rules on disclosure of evidence and the binding effect of the Polish competition authorities' decisions are already applicable to proceedings initiated after the entry into force.
Portugal	Not specified, with the exception of rules relating to the burden of proof, which form part of the substantive law.	Procedural provisions are applicable to claims brought after the entry into force of the Act on 6 June 2018.
Romania	Limitation periods, rules on joint and several liability, the quantification of damages, and the passing-on of overcharges are not retroactively applicable.	Procedural rules, such as rules on the disclosure of evidence and binding effects of infringement decisions, are retroactively applicable but do not apply to actions filed before 26 December 2014.
Slovakia	No retroactive application. All rules are applicable after the entry into force of the implementation legislation on 27 December 2016.	
Slovenia	No retroactive effect.	Only the rules on the disclosure of evidence have retroactive effect for proceedings pending with the courts as of 26 December 2014.
Spain	None of the new rules have retroactive effect. The rules on disclosure of evidence are not applicable to proceedings initiated prior to the entry into force on 22 June 2017.	
Sweden	No retroactive effect.	Procedural rules are applicable immediately after the entry into force on 27 December 2016 for proceedings initiated after 26 December 2014.
United Kingdom	No retroactive application before entry into force on 8 March 2017.	Procedural rules, such as rules on disclosure, are only applicable to claims brought on or after the entry into force.

All in all, Member States have taken different approaches in relation to the temporal application of the Directive's provisions. In particular, the nature of the Directive's provisions (as part of procedural or substantive law) has been interpreted differently. In light of the difficulty in classifying the Directive's provisions under EU law and the lack of guidance for the classification provided by the Directive, it is not surprising that Member States have treated the Directive's provisions differently. This is particularly understandable where the interpretation under national law contradicts the EU law interpretation. For example, as seen above, the Directive's provisions on the disclosure of evidence form part of procedural law, but Slovenia nevertheless interprets the same rules as provisions of substantive law under national law. Because of this uncertainty, some Member States have even refrained from classifying the new provisions altogether (e.g., Cyprus, Belgium, and Hungary), while others rely on the classification of proce-

dural and substantive law under national law (e.g., Romania). This bears the risk that national courts' interpretation differs from the classification under EU law, and thus also that courts might apply the rules in violation of Article 22.

Despite this uncertainty, all Member States – with the exception of Malta – apply the Directive's substantive provisions (e.g., limitation periods) only to claims that arose after the end of the implementation period, and some only to claims that arose after the entry into force of the transposing legislation (e.g., the Netherlands). In Member States where the Directive was transposed after 26 December 2016, the prohibition of a retroactive application of the substantive law provisions to the period after 26 December 2016 until the entry into force of the implementing legislation is problematic. At least for that period, those Member States have not sufficiently transposed the Directive.

From an enforcement perspective, it is to be welcomed that at least some Member States have exercised their discretion under Article 22 and apply at least some of the Directive's procedural law provisions to claims brought before 26 December 2016 (e.g., Belgium, the Czech Republic, Denmark, Greece, the Netherlands, Romania, and Sweden). Other Member States limit the retroactive application only to a minority of the Directive's procedural rules (e.g., Slovenia, where the retroactive effect is limited to rules on disclosure).

Some Member States have substantially limited the temporal scope of the Directive's rules by not applying any (substantive and procedural law) provision retroactively. Hence, in many countries, the new rules are only applicable to claims that arose or were brought after the entry into force of the national implementing legislation. For example, in Poland, Portugal, Finland, Estonia, Ireland, Lithuania, Luxembourg, Slovakia, Spain, and the UK, it will take years before the new rules become effective.

C. New Level Playing Field for Competition Damages Actions in Europe?

Most Member States have extended the scope of the new rules to national competition law and some even to other legal fields (e.g., France) or competition laws of other Member States (e.g., Hungary). In terms of the legal instruments set out by the Directive, some Member States lag behind the minimum requirements of the Directive in some areas, while others went beyond the minimum standard set out in the Directive. For instance, some Member States have also implemented pre-trial disclosure regimes, which the Directive had not foreseen (e.g., the Czech Republic, Estonia, Germany, Portugal, and Spain). Other Member States felt confident that the

existing rules on disclosure in the national laws were already in compliance with the provisions of the Directive (e.g., in the Netherlands and the UK, national laws already provided for the possibility to request disclosure). In some areas, however, the existing rules lag behind the requirements of the Directive (e.g., the rules in Croatia and Estonia in relation to the protection of legally privileged information) but remained untouched from the implementing acts. Other rules have purposely not been implemented by some Member States, as the drafting of the provision was deemed obviously flawed and confusing (e.g., the inclusion of withdrawn settlement submissions in the grey list) or even as contrary to the objectives of the Directive (e.g., the UK refused to implement the limit of 2 years for the suspension of the limitation periods during settlement negotiations). Similarly, the wording of the Directive only refers to SME as suppliers, which was seen as an oversight by many Member States that subsequently extended the reduction of SMEs' liability to direct and indirect customers as well as to SMEs as purchasers (e.g., the Czech Republic, Germany, Portugal, and Sweden). Moreover, the uncertainty as to whether SMEs must have a market share below 5% during the entire infringement or at any time during the infringement were implemented differently. The greatest divergence between the implementing legislations of the Member States, however, exists in relation to the temporal applicability of the new rules. In most Member States, the new rules are not applicable before the entry into force of the implementing legislation. Article 22 prohibits the application of substantive provisions of the Directive to claims before the expiry of the transposition period on 26 December 2016. Nevertheless, Member States enjoy discretion in relation to the retroactive application of the Directive's procedural provisions before 26 December 2016 (but not before 16 December 2014).[454]

D. Conclusion

The aim of this chapter was to trace the path of the signing into force of the Directive and the implementation of the new regime on private enforcement by Member States. The analysis of the implementation of the Directive has shown that while all Member States have by and large implemented the new provisions, some divergence between them exists. In particular, in Member States where similar rules already existed in their national laws, courts are likely to be inclined to follow the existing case law, which might diverge from the standard provided under the Directive. On the other hand, the Directive has also left Member States some discretion in how they achieve the objectives. This is the case, for example, with the measures to be taken

[454] Case C-637/17 *Cogeco Communications Inc. v Sport TV Portugal SA and others* (n 399) para 28.

for the protection of confidential information. Most Member States have left it to courts to take the appropriate protective measures, which might be problematic in those Member States where such obligations did not previously exist, and courts are therefore relatively inexperienced. It remains to be seen whether the recently published communication on measures to protect confidential information will be sufficient guidance or national courts. The greatest divergence was observed in relation to the temporal application of the new rules. The different treatment for procedural and substantive rules and the neglection to specify the nature of the provisions of the Directive led to uncertainty for national legislators. Therefore, some Member States chose not to introduce any rule on the temporal applicability, while others introduced rather thorough rules covering the time between the end of the implementation period and the entry into force of the implementing legislation. The recent judgment of the CJEU in *Cogeco*, however, might nevertheless drive national courts towards harmonised approaches where the court held that it follows directly from Articles 101 and 102 TFEU and the principle of effectiveness that national courts will have to interpret national law in a manner that does not hinder the right to full compensation.[455] Thus, in theory this could lead to the convergence of rules to a minimum standard that falls (slightly) behind the Directive.

The remainder of this book focuses on the impacts on the provisions on disclosure, quantification of harm, and the distribution of damages among joint infringers. As has been seen, even after the implementation of the Directive, divergence still exists between Member States. As concerns the distribution of liability among joint infringers, not all Member States have introduced joint and several liability. Furthermore, it remains to be seen if and how Member States will apply the *Skanska* jurisdiction of the CJEU and whether there will be harmonised parental liability in competition damages cases across Europe. Moreover, because disclosure regimes already existed in some Member States while they were alien to national civil procedures in other jurisdictions, divergence will likely remain in the application of the disclosure rules. Lastly, for the quantification of damage, some Member States have taken a more claimant-friendly approach compared with the rest of Europe as well as introduced a presumption for the amount of harm caused.

Despite these divergences between the Directive's rules and the implementing legislations of some Member States, this analysis focuses solely on the impact of said rules, assuming that they form a harmonised standard across all Member States. There are several reasons for this

[455] Philipp Kirst, 'Skanska, Cogeco And Otis: Harmonisation Through the Back Door' (2020) 41 European Competition Law Review 245.

assumption. First, as discussed in chapter I, the Directive strives to provide a level playing field for competition damages actions in Europe. The remainder of this book studies the effectiveness of the enforcement regime if a level playing field was accomplished based on the rules of the Directive. Second, in those Member States where the implementing legislations lag behind the requirements of minimum harmonisation under the Directive, national courts will likely interpret the national rules in conformity with the Directive where possible or ask the CJEU to set aside national rules by way of preliminary references. Third, some Member States went beyond the minimum standard to strengthen claimants' position in damages litigations (e.g., presumptions of the amount of damage). In those jurisdictions, it is less likely that the attractiveness of private enforcement will be undermined by rules to protect public enforcement (e.g., restrictions on the type of information to be disclosed). Consequently, the proposals in this study to further foster the effectiveness of private enforcement will *a fortiori* hold true for those jurisdictions.

PART TWO

Contribution Among Joint Infringers of Competition Law in Light of Directive 2014/104/EU

Chapter III
Lessons from the US: The No-Contribution Rule and Its Inapplicability in Europe

A. Introduction

This chapter introduces the subject of joint and several liability of cartel members. To this end, the discussion on the US no-contribution rule is first explained in more detail. A particular focus lies on the objections that have been raised against excluding the right to recover a contribution from co-infringers and the arguments raised in favour of the effects of no contribution. These considerations become relevant, *inter alia*, for the discussion on the allocation of civil liability among joint infringers in Europe in the following chapters. It is shown that the advantages put forward by the proponents of the no-contribution rule can also be achieved under the allocation rule proposed in chapter IV without the negative implications from prohibiting contribution altogether. To do so, this chapter provides an overview of the debate in the US on the pros and cons of no contribution that lasted decades.

B. No-Contribution Rule in the US

I. The current legal regime in the US

In the US – in parallel to the EU – the civil liability of infringers of competition rules is not regulated explicitly under national antitrust laws, neither under the Sherman Act nor the Clayton Act. Antitrust and competition infringements in the US, as in most jurisdictions, are torts for which joint tortfeasors are jointly and severally liable. Equally in the US, infringers of a concerted antitrust violation are jointly and severally liable because antitrust violations are torts and at common law joint tort feasors are jointly and severally liable.[456]

The civil liability of each individual tortfeasor depends, on the one hand, on the liability of the defendant in a damages action (*external liability*), which is determined by the joint and several

[456] Joseph Angland, 'Joint and Several Liability, Contribution, and Claim Reduction' in *Issues in Competition Law and Policy* (ABA Section of Antitrust Law 2008) 2369, 2371, fn 3; see also *In re Auto. Refinishing Paint Antitrust Litig.*, M.D.L. Docket No. 1426, 2003 U.S. Dist. LEXIS 4681 (E.D. Pa. 2003).

liability for the harm caused by the joint infringement, and on the other, it depends on the contribution the joint infringer can claim from co-infringers (*internal liability*). The actual liability may be illustrated with the following example:

> *The undertakings A, B, and C entered into a price-fixing agreement, which caused an overcharge of 20% during the period of the infringement. The customer of the infringers, the plaintiff P, purchased 60 widgets from A and 20 each from B and C for 100,000 €per widget during the cartelised period. All widgets of all three firms were subject to the overcharge.*
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> *In a system of joint and several liability, P may claim the full amount of damages (2m € excl. interest); that is, the overcharge, from any of the cartelists or from all three cartelists together (external liability). Therefore, P may for instance claim the full amount from B, although P only purchased 20% of the overall products from B.*
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> *The final amount of damages to be paid by the infringers depends on the distribution of the liability between the undertakings (internal liability). In a system without contribution between the jointly liable tortfeasors, B would be liable for the full amount of 2m €.*
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> *In a system with a contribution rule, on the other hand, the liability of each undertaking depends on the criteria for the distribution of liability between them. If the liability was distributed according to sales, B could claim contribution from A and C for the amount exceeding the overcharge of its own sales to P. B's and C's total liability would be 400,000 € (0.2 x 2m €), whereas A's liability would be 1.2m € (0.6 x 6m €). This liability, however, may shift depending on the criteria applied for the contribution. The amount of damages may not be the same when criteria such as market shares and initiation are applied.*

In its (in)famous *Texas Industries* decision,[457] the Supreme Court held that in Antitrust cases joint infringers have no right to claim contribution from co-infringers.[458] This means that in the absence of an agreement distributing the liability between joint infringers (*'sharing agreements'*), the allocation of liability lies entirely with the plaintiff.[459] The plaintiff may allocate the sole liability for the damages suffered from the cartel to one defendant, regardless of the value of products or services purchased from the different defendants. In the example above,

[457] *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981).
[458] See Edward D. Cavanagh, 'Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies.' (1987) 40 Vanderbilt Law Review 1277 (1280).
[459] Joseph Angland (n 456) 2371.

the plaintiff (*P*) may collect all the damages from undertaking *B*, even though *P* purchased the majority from undertaking *A*.[460]

The tortfeasors may, for that reason, enter into a *sharing agreement*, by which the defendants allocate the liability among themselves. Under these agreements any defendant party to such an agreement may recover any payment in excess of the share allocated under the agreement.[461]

Besides the no-contribution rule under US Tort Law, two special characteristics of the US tort regime exist in antitrust cases, which interplay with and impact on the share of a joint infringer's liability. First, a plaintiff – who has successfully proven her claim – will be awarded *'treble damages'*.[462] Under this rule, the person who suffered damages from an antitrust infringement can recover threefold of the actual damages suffered. In the example above, the plaintiff would be able to recover not only the overcharge of 200,000 €, but she would be awarded damages of 600,000 €. Secondly, besides entering into a sharing agreement with other infringers, a defendant may also settle the claim with the plaintiff and enter into a *settlement agreement* instead. Where a defendant has settled, the settled amount will be deducted – *pro tanto* – from the amount of damages that can be claimed from co-infringers.[463] According to the *Flintkote* rule,[464] the settlement amount is subtracted only from the trebled amount of damages found at trial rather than from the plaintiff's pre-trebled damages.[465]

The effects of these corresponding rules – joint and several liability, no contribution, trebled damages, and *pro tanto* reduction of settlements – can be illustrated by an adjustment of the example above: If *B* had settled with the plaintiff for an amount of 300,000 €, this would have

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[460] The additional burden can be best illustrated by *Olson Farms, Inc. v. Safeway Stores Inc.*, [1979-2] Trade Cas, 79,699, 79,707 10th Cir. [1979], in which *Olson Farms* was sued for treble damages of the cartelist, although it was the smallest of the price fixers by sales. It ended up paying an amount 24 times higher than the damages immediately caused by the plaintiff's purchases. See 'Contribution and Antitrust Policy' (1980) 78 Michigan Law Review 890, 898 (**Contribution and Antitrust Policy Note**) <https://repository.law.umich.edu/mlr/vol78/iss6/4> accessed 5 March 2021.

[461] For the validity of sharing agreements, see for example *In re Brand Name Pharm. Antitrust Litig.*, MDL 997 [1995] WL 234521 N.D. Ill. [1995]; *Cimarron Pipeline Constr. v. Nat'l Council on Comp. Ins.*, Civ.-89-822-T, [1992] U.S. Dist. LEXIS 18560 W.D. Okla. [1992]; Joseph Angland (n 456) 2371.

[462] Clayton Act 15 U.S. Code § 15 reads: *'(…) any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor (…) shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee'.*

[463] Under a *pro-rata* system, on the other hand, the settlement with one party will imply a reduction of claims enforceable against the co-infringers equal to the share of liability claimed against the settling party; see CEPS, EUR, and LUISS, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (2007) Final Report (**Impact Study**) 516, fn 782 <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 6 March 2021; Lewis Kornhauser and Richard L Revesz, 'Settlement Under Joint And Several Liability' (1993) 63 New York University Law Review 445.

[464] *Flintkote Co. v. Lysfjord* 246 F.2d 368, 397 f. 9th Cir. [1957] cert. denied U.S. Supreme Court 355 U.S. 835 [1957]; see also *Burlington Industries v. Milliken & Co* 690 F.2d 380, 391 4th *Cir.* [1982].

[465] For example, *Zenith Radio Corp. v. Hazeltine Research*, Inc., 401 U.S. 321, 348 (1971); Section of Antitrust Law to the Antitrust Modernization Commission, *Report on Contribution and Claim Reduction* (2005).

been deducted only after trebling the total damages of all infringers. Hence, the total damages that can be claimed by the plaintiff against *A* and *C* would amount to $5.7m$ € [$(2m$ € x 3) − 300,000 €]. If the plaintiff then decides to recoup the total losses only from *C* – despite *C* having made an illicit gain of only 200,000 €– *C* will become liable also for the additional losses of 5.5m € that in turn were profits gained by other firms and not *C*. The additional liability corresponds to 2850% of the gain *C* has received from the collusion.[466]

This example illustrates one of the main criticisms of the no-contribution rule in the US literature, namely that said rule magnifies the potential damage exposure of an individual defendant.[467] Moreover, the risk of liability rises with an increased number of defendants, which in turn further strengthens the plaintiff's position in settlement negotiations. Any defendant unwilling to settle is exposed to the risk that her liability could increase by the amount of damages caused by settling co-infringers. Thus, defendants are exposed to the (additional) risk that their liability increases through the settlement of co-infringers. This in turn provides the plaintiff with significant leverage in the settlement negotiations and increases the potential civil exposure of non-settling defendants litigating in court. Cavanagh (1987) describes the defendants' situations as a *'Hobson's choice: either pay some amount to settle, even though they believe in their innocence, or try the matter and risk uncapped liability'*.[468] The three rules amount to a considerable additional burden for the defendants, leading to a race between them to settle and evade the risk of *uncapped liability*.

Presumably, the interplay of these rules (joint and several liability, no contribution, trebled damages, and *pro tanto* reduction from settlements) is the primary reason why most antitrust disputes in the US are settled outside the courts. Connor and Helmers (2006) have found that *'[t]he great majority of private antitrust suits are resolved through settlements rather than final decisions from a trial, making them a small drain on federal judicial resources. In the case of international cartels which operated globally, out of 36 cartels convicted in the United States during 1990-2003, only 5 (14%) had corporate defendants go to trial'*.[469]

[466] See also the example used by Joseph Angland (n 456) 2371, which includes the undertakings market shares.
[467] For example, Edward D Cavanagh (n 458) 1284, who also refers to the additional burdens of *'class actions, prevailing plaintiffs' right to attorneys' fees, tolling of the statute of limitations, and lenient standards of proof'* strengthening the plaintiff's position. For an overview of the criticism on the no-contribution rule, see B.III below.
[468] Edward D Cavanagh (n 458) 1277 (1284).
[469] John M. Connor, 'Optimal Deterrence and Private International Cartels' (2006) SSRN Electronic Journal; John M. Connor and C. Gustav Helmers, 'Statistics on Modern Private International Cartels, 1990-2005' (2007) SSRN Electronic Journal.

II. Historical development of the no-contribution rule in the US

The US no-contribution rule developed from English case law. In *Merryweather v. Nixan,*[470] Lord Kenyon denied intentional tortfeasors the right to claim contribution from other joint tortfeasors. The doctrine was then *'either erroneously construed or broadened'*[471] to non-intentional torts by English Courts. In the UK, the no-contribution rule had been abolished by 1935.[472] American courts, however, in a series of cases between 1830 and 1905 had adopted the English doctrine. In that period, it became a general principle that a tortfeasor cannot recover contribution from another tortfeasor.[473] Later, US courts also started abolishing the no-contribution rule in many areas of the law, except US Antitrust Law. Most American scholars had criticised the no-contribution rule since its introduction, which eventually led to the permission of contribution claims by statute in several states as well as for many legal areas at the Federal level.[474]

In 1969, federal courts were confronted with contribution in an Antitrust case for the first time in *Sabre Shipping*.[475] The District Court of New York had previously confirmed the no-contribution rule for Antitrust matters, because Federal Common Law did not provide a right of contribution among joint tortfeasors and, in contrast to other areas of the law, no provision providing for contribution existed in the antitrust statutes. In the view of the Court, contribution among defendants could impede prompt recoveries by plaintiffs and undermine the deterrent effect of antitrust law altogether.[476] In *El Camino Glass,*[477] the California District Court confirmed that no contribution was available for joint tortfeasors after weighing considerations of equity and fairness against a congressional intent that antitrust liability be determined without regard to the defendant's state of mind, the detrimental effect that contribution could have on plaintiffs' attempts to control the size and scope of their lawsuits, and the possibility that denying contri-

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[470] *Merryweather v. Nixan* 101 Eng. Rep. 1337 K.B. [1799].
[471] Edward D Cavanagh (n 458) 1284; Jonathan Rose, 'Contribution in Antitrust: Some Policy Considerations' (1979) Antitrust Law Journal 1605, 1607.
[472] The Law Reform (Married Women and Tortfeasors) Act, 25 & 26 Geo. 5, ch. 30, § 6(1)(c) (1935). Today in Europe's Common Law jurisdictions, provisions on contribution have been introduced by statute; see the Irish Civil Liability Act of 1961 and the UK Civil Liability (Contribution) Act of 1978.
[473] Frank H. Easterbrook, William M. Landes and Richard A. Posner, 'Contribution Among Antitrust Defendants: A Legal and Economic Analysis' (1980) 23 The Journal of Law and Economics 331, 332, fn 4, who describe this period as the *'classical era of the no-contribution rule'*. In *Union Stock Yards Co. v. Chicago Burlington and Quincy Railroad Co.* 196 U.S. 217, 224 [1905], the Court was confident enough to summarise that *'the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done'*.
[474] See Edward D Cavanagh (n 458) 1286.
[475] *Sabre Shipping Corp. v. American President Lines*, 298 F. Supp. 1339 S.D.N.Y. [1969] in Edward D Cavanagh (n 458) 1286.
[476] James W. Dabney, 'Contribution in Private Antitrust Suits' (1978) 63 Cornell Law Review 682, 683.
[477] *El Camino Glass v. Sunglo Glass Co.* n. 1005 [1977-1] TRADE CAS. (CCH) 61, 533, at 72, 111 N.D. Cal. [1976].

bution would further deter antitrust violations.[478] The Court concluded that *'[o]n balance the ends of justice will be better served by holding that contribution is not available in an antitrust suit'*.[479] The decisions followed an extensive debate between legal scholars and attempted to address the criticism raised against the no-contribution rule, in particular the criticism that defendants face undue pressure to settle.[480]

Following this debate, the Eighth Circuit Court of Appeals in *Professional Beauty Supply*[481] accepted the possibility to claim contribution among joint tortfeasors in antitrust cases. Despite the absence of a provision on contribution at the federal level, the Court held that *'[u]nder certain circumstances an antitrust defendant may be entitled to pro rata contribution from other joint tort feasors'*.[482] Two other Courts of Appeals, however, refused to abandon the common law rule, concluding that contribution would neither enhance fairness nor deterrence of antitrust violations and that the introduction of such a rule should be left to the legislator not the courts.[483]

The Supreme Court in *Texas Industries* ended the controversy between the courts and rejected contribution at the federal level. The Court based its reasoning on the Court's lack of competence for the introduction of a contribution rule in the field of Antitrust Law. Chief Justice Burger expressly stated that as long as there is no-contribution rule in the Sherman or Clayton Act and as long as no such rule is referred to in the legislative history or a congressional concern about the existing remedial framework has been expressed, *'[t]he federal courts are not empowered to fashion a federal common-law rule of contribution among antitrust wrongdoers'*.[484] Thus, the Supreme Court in *Texas Industries* clarified that no right for contribution in joint Antitrust violations exists under the Sherman Act, the Clayton Act, or federal common law. However, the Supreme Court did not end the debate in its entirety. Instead, several initiatives were taken and proposals drawn up over the years, which still have not materialised today.[485]

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[478] James W Dabney (n 476) 686.
[479] *El Camino Glass v. Sunglo Glass Co.* n. 1005 [1977-1] TRADE CAS. (CCH) 61, 533, at [72], 112 N.D. Cal. [1976].
[480] For a detailed summary of the debate, see Daniel M. Wall (ed) *Contribution and Claim Reduction in Antitrust Litigation* (American Bar Association Section of Antitrust, Monograph No 11, 1986) (**ABA Monograph No 11**). For an overview of the contradictory findings of American courts on the legitimacy of the no-contribution rule, see Contribution and Antitrust Policy Note (n 460).
[481] *Professional Beauty Supply, Inc. v. National Beauty Supply*, Inc., 594 F.2d 1179 (8th Cir. 1979).
[482] *Professional Beauty Supply* (n 481) 1182.
[483] *Wilsen P. Abraham Construction Corp. v. Texas Industries, Inc.* 604 F.2d 897 (5th Ctr. 1979) and *Olson Farms, Inc. v. Safeway Stores Inc.*, [1979-2] Trade Cas, 79,699, 79,707 10th Cir. [1979]; discussed in Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 337.
[484] *Texas Industries* (n 457); Edward D Cavanagh (n 458) 1280.
[485] For a summary of the proposals during the debate, see the Antitrust Modernization Commission's final report to Congress (2007) 251. For the legislative initiatives following the contradictory decisions, see also Contribution and Antitrust Policy Note (n 460).

III. Criticism against the no-contribution rule in the US

The main criticism that commentators have raised against the no-contribution rule is that it is *unfair*. Despite a vast majority of commentators calling for changes to the no-contribution rule to address the fairness implications, some authors have rejected fairness considerations – more specifically potential conflicts with fundamental rights – as legitimate criteria for policy decisions. Before addressing the criticisms against the no-contribution rule, the next subsection addresses the general arguments of the proponents of the no-contribution rule against the fairness considerations in relation to contribution as well as criticism against fairness considerations for policy choices in general.

1. Fairness and the no-contribution rule

Kaplow and Shavell (1999)[486] argue that fairness theories and fundamental rights reduce aggregated welfare (welfarism) and thus violate the Pareto optimal (i.e., no one can be made better off without making someone else worse off).[487] Policy decisions should be based exclusively on its effects on the overall welfare of a society. In a conflict between welfare and fairness, human welfare and wellbeing will always outweigh the latter. However, Kaplow and Shavell do not reject fairness considerations altogether. In their view, fundamental rights may still prevail where society considers a right so fundamental that no welfare gain could justify its abolishment. This view is highly controversial and has been largely criticised. The main criticism is based on the legitimacy of the fairness principle. The approach suggests that fundamental rights have no independent value but only a derived one. The authors suggest that the legitimacy of the fairness criteria and the individuals' rights are subject to some empirical requirements, namely whether society deems the abolishment of that right problematic.[488] The prevailing opinion has rejected empirical pre-conditions for the legitimacy of fundamental rights. Furthermore, any theory of fairness requires a substantive justification for viewing certain acts (but not others) as unfair. Kaplow and Shavell disregard that fairness theories do not only consider potential conflicts and tensions which are immediately apparent (e.g., where no welfare gain could justify the abolishment), such as whether victims of torts should have a general right to recover their losses. However, once the immediate conflict has been resolved by fairness considerations,

[486] Louis Kaplow and Steven Shavell, 'The Conflict Between Notions of Fairness and the Pareto Principle' (1999) 1 American Law and Economics Review 63–77.
[487] Robert S Pindyck and Daniel L Rubinfeld, *Microeconomics* (8th edn, Pearson Education Inc 2013) 602.
[488] Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (Springer Publishing 2012) 32.

it is not clear why a fairness analysis would not be equally equipped to consider indirect, remote, or systemwide trade-offs like the welfare analysis proposed by Kaplow and Shavell.[489]

Easterbrook, Landes, and Posner (1980) disregard any fairness consideration specifically in relation to Antitrust violators, since the violator '*does not make a strong appeal to our moral sense'*, because he *'is himself an intentional wrongdoer'* and *'can avoid his "predicament" by conforming his conduct to the law's demands'*. This argument is misleading and unpersuasive for several reasons.

First, not all cartels are committed knowingly or willingly. Many cartels are entered into by employees of competing undertakings who regularly meet at fairs and other industry meetings where prices can be – among other things – part of discussions and informal gatherings. Moreover, collusive infringements are often committed at mid-management level with little or no understanding of the competition rules. The committed infringement finds its origin in a lack of supervision rather than in an intentional commitment by the decision makers of the undertaking concerned.[490] Neither US Antitrust Law nor EU Competition Law require an intentional violation.

Second, as Easterbrook, Landes, and Posner (1980) have pointed out themselves, the *'enormous vagueness and ever-changing contours of antitrust liability'*[491] results in uncertainty about the legality of certain behaviours. In particular, cases of infringement *by effect* (similar to the *'rule of reason'* in US Antitrust Law) require a complex analysis of negative economic effects for actual or potential competition.[492] The outcome of an analysis of the effects of the cooperative behaviour is highly case-specific and difficult for an undertaking to determine with external advisers, and even more so by its employees participating in the collusive activity.

Third, if it is difficult to assess the effects on competition of a particular behaviour, legal conduct may erroneously be deemed unlawful by a court. Easterbrook, Landes, and Posner (1980) argue that in such cases, any allocation of liability to the innocent defendant would be unfair. As this may be true, it does not strengthen the claims for the no-contribution rule nor weaken a

[489] Richard Craswell, 'Kaplow and Shavell on the Substance of Fairness' (2003) 32 The Journal of Legal Studies 269-273.
[490] For example, in recent years the Bundeskartellamt in Germany has uncovered information exchanges between employees that that were not aware that the type of information shared constituted a violation of competition rules, see for example Case B11-17/06 - *body care, cleaning agents and detergents*, where the meetings were intended to collect information on anticompetitive behaviour of retailers for the Bundeskartellamt even under the supervision of a lawyer specialised in competition law.
[491] Frank H Easterbrook, William M Landes and Richard A Posner (n 473) 342.
[492] See for example Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 2011/C 11/01, paras 24-27.

rule allocating liability between all defendants. Angland (2008) asserts that such an argument ignores the hierarchy of unfair scenarios.[493] The fairest outcome would be for all innocent defendants to bear no liability. However, if several firms enter into an activity wrongfully determined to be unlawful, under the second-best alternative, all firms involved would share the risk of a finding of illegality.

Lastly, the overriding problem of the assertion of Easterbrook, Landes, and Posner (1980) is that the argument surrounding a *'moral sense'* suggests that tortfeasors are not eligible to claim fair treatment under Tort Law. While civil liability may be harsh in some circumstances (one may think of the insolvency risks that joint infringers have to bear under EU Law[494] or the treble damages rule under US Antitrust Law[495]), it is not infinite.[496]

Fairness from a corrective justice perspective[497] includes two elements: first, corrective justice requires the compensation of victims who suffered a loss as a result of the wrongful conduct, and second, it requires the transfer of the wrongful losses to the wrongdoer who has caused the harm. Therefore, the principle of fairness also determines who should bear the cost of a given loss. Following these fairness considerations, it is difficult to argue that harm caused by multiple tortfeasors should not be compensated for by every tortfeasor according to her share of responsibility for the occurrence of the harm. Thus, the shift of the losses of a joint wrongful conduct to a (random) single actor creates an unfair allocation of costs, deviating from corrective justice requirements.

A further general argument raised against the fairness objection by Easterbrook, Landes, and Posner (1980) is based on equal treatment concerns, because – as they argue – all jointly and severally liable tortfeasors have been treated even-handedly *ex ante*; that is, before the plaintiff claims damages from a single or all tortfeasors. The authors compare the liability of joint infringers with the lottery, arguing that a person buying a losing lottery ticket may be unequally

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[493] Joseph Angland (n 456) 2374.
[494] Directive, Article 11(5).
[495] See chapter II, B.VII and chapter VI, F.II on the insolvency risk of jointly and severally liable infringers under the Directive.
[496] Section of Antitrust Law of the American Bar Association 'Report on Contribution and Claim Reduction for the Antitrust Modernization Commission' (**ABA Report on Contribution**) (2005) 6.
[497] For a summary of the different views on the corrective justice theory, see John CP Goldberg, 'Twentieth Century Tort Theory' (2003) 91 Georgetown Law Journal 513, 570. See also *Wright* who (re-)defines the concept of corrective justice under the Aristotelian theory to restore – in his words – *'the traditional substantive concept of corrective justice at a time when the idea of justice is the target of pervasive and sustained attacks by efficiency theorists, social welfarists, and antilegalists, whose skepticism regarding justice and rights already has escaped the confines of the academy and threatens to cause significant injury to individuals and the social order'*; Richard W Wright, 'Substantive Corrective Justice, in Symposium, Corrective Justice and Formalism' (1992) 77 Iowa Law Review 625.

treated *ex post* compared with the buyer of the winning ticket. However, there was no unequal treatment at the time both bought the lottery tickets (*ex ante*).[498]

This argument has rightfully been criticised by Angland (2008) as *'not sufficiently "ante"'*.[499] He argues that from a *Rawlsian* perspective the relevant time is the situation before the remedial scheme was adopted, namely the time no actors would know whether they would become anti-trust plaintiffs or defendants, much less whether they would become the unlucky defendant bearing a disproportionately high share of the loss. Under the Rawlsian postulate of justice, fairness is decisions accepted by members of a society in *'the original position'* when the actors do not know what their particular role in society will be at a later point in time. When applied to our situation, the relevant point in time for the Rawlsian postulate is before the actors are aware of whether they will become one of multiple tortfeasors or the victim of the tort.[500] According to Rawls, behind this *'veil of ignorance'*, people will employ a maximum principle that maximises their welfare in the event they become the most disadvantaged in society; in our setting, this is the defendant who has to bear the total amount of damages from the joint infringement. Following the Rawlsian fairness approach, justice will be best achieved through a proportionate distribution of liability among all joint tortfeasors.

In context with the debate on the legitimacy of the no-contribution rule, many authors have raised similar justice objections. It is worth discussing those justice objections – also put forward under the term 'fairness' – in more detail because the same objections are also relevant for a European-like contribution rule. The Directive's two main objectives are deterrence and corrective justice. For the latter objective, the discussion in the US provides insights on why contribution and under what circumstances a contribution rule scores better. Moreover, additional justice aspects are not mentioned explicitly by the Directive, which should be considered when allocating civil liability (e.g., distributive justice outcomes). The following subsections analyse those justice and fairness objections raised against the no-contribution rule in more detail. They can be summarised in the following categories: the inequitable allocation of loss among joint violators (2.), the unfairness in a plaintiff's choice of a defendant (3.), providing premia over expected trial outcomes (4.), and the coercion of defendants into settlements, in particular *Whipsawing Settlements* (5.). For better readability, other fairness arguments are addressed and summarised within those categories.

[498] Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 342.
[499] Joseph Angland (n 456) 2375.
[500] John Rawls, *A Theory of Justice* (Harvard University Press 1971); see also Amartya Sen, 'Personal Utilities and Public Judgements: or What's Wrong with Welfare Economics' (1979) 89 The Economic Journal 537, 546 for a summary on the Rawlsian in contrast to the utilitarian welfare approaches.

2. The allocation of losses and the distributive justice objection

As explained above, the *ex-ante* analysis of Easterbrook, Landes, and Posner (1980) does not undermine the general criticism, as the no-contribution rule nevertheless creates a situation of unevenly distributed losses among joint violators. Under the no contribution rule radically different consequences are imposed on defendants who were part of the same infringement.[501] The plaintiff can choose to impose the entire liability on one defendant regardless of the degree of his involvement in the infringement. From a corrective justice perspective, this already creates an unfair situation as some of the tortfeasors responsible for the harm suffered may escape civil liability altogether, whereas others with only minor involvement may have to bear the liability of all infringers; that is, the entire wrongful losses may be redistributed to a person not responsible alone for the losses. Most commentators have condemned the inequity resulting from a rule that permits the entire burden of a loss to be shouldered by only one of several violators.[502]

As Angland (2008) argues, the legal system aspires to *ex-post* fairness, and thus, the existence of fairness *ex ante* does not dispel the concern about unfairness *ex post*. Hence, the uncertainty of how the plaintiff chooses to distribute the liability among joint tortfeasors *ex ante* is a separate question from whether each tortfeasor must bear a fair share of the liability. As was explained in chapter I, tort remedies are an instrument to shift the loss of the victim to the person(s) who have caused the loss after the loss has been established and quantified. If the judicial system works well, tortfeasors can expect *ex ante* that a re-distribution of the loss will occur, which enhances deterrence. The no-contribution rule, on the other hand, allows for an outcome where the loss is shifted to a tortfeasor in excess of the tortfeasor's contribution to the loss, while other violators are exempted from any civil liability and their share is (wrongfully) redistributed. In the ABA report, the unfairness objection is illustrated by the following example:

> *'When three men are convicted of committing a crime punishable by a sentence of five years for each of them, the penal laws do not permit the court to take the aggregate fifteen years of sentences and assign it to a single defendant, while letting the other two defendants walk free, even if the unlucky defendant is chosen by lot and thus the system is fair ex ante'*.[503]

3. Plaintiff's choice of distribution

The doctrine of joint and several liability permits a plaintiff to claim the entire damages from any of the joint infringers. In the absence of a contribution rule, a single infringer who was

[501] ABA Report on Contribution (n 496) 4.
[502] Ibid.
[503] ABA Report on Contribution (n 496) 6.

chosen by the plaintiff may have to bear the entire burden of the liability. Whether an infringer has to bear the entire liability therefore depends on the plaintiff's criteria for choosing one violator over the other. The *'ex ante'* argument of Easterbrook, Landes, and Posner (1980) is no longer valid where the plaintiff has an interest to claim damages from a particular infringer, because the *'ex ante'* argument rests on the assumption that each defendant is equally likely to be the unfortunate defendant against which the entire liability is enforced.

Arguably, the plaintiff's choice of defendants is guided by two particularly troublesome motives: (1) anticompetitive motives of the plaintiff and (2) a special relationship between the plaintiff and a violator. Both of these motives were relevant in *Professional Beauty*.[504] The plaintiff had chosen the smaller violator (*National*) over the larger in order not to risk and to maintain a good business relation with the latter, as it relied on the supply of the larger violator. Furthermore, *National* was likely elected for compensation because it was a competitor of the plaintiff in Minnesota.

Easterbrook, Landes, and Posner (1980) reject such concerns based on deterrence considerations. If an undertaking – in particular smaller firms – is more likely to be chosen by the plaintiff for a suit, it will take this additional liability into account when deciding whether to join a conspiracy in the first place.[505] Thus, if an undertaking chooses to participate in a conspiracy, it has concluded that the gain from the participation exceeds its expected liability. On the other hand, if the undertaking knows it will be chosen by the plaintiff to compensate the entire damage, its expected liability from the conspiracy will exceed its gains. Thus, it will be unattractive for the undertaking to collude and it will refrain from participating in the collusion. The liability will then shift to the next (larger) undertaking and increase its liability so that it will also become unattractive for the firm to collude (the 'domino effect'). The liability would move upwards until the conspiracy as a whole becomes unattractive.

This argument, however, is flawed. It assumes that the plaintiff's hierarchy between the infringers is known to all undertakings before they enter into the conspiracy. However, where there is uncertainty about whether a potential plaintiff will choose one firm over the other – particularly where the firm has internal motives – the domino effect assumed by Easterbrook, Landes, and Posner (1980) no longer occurs. In other words, if the infringer cannot anticipate that it will be chosen by a potential plaintiff, then it will not take the additional civil liability into account

[504] Contribution and Antitrust Policy Note (n 460) 904ff; Joseph Angland also notes that other factors such as racial and ethnic factors may become relevant, (n 456) 2372 fn 12; see also Edward D Cavanagh (n 458) 1290.
[505] Frank H Easterbrook, William M Landes and Richard A Posner (n 473) 343.

when deciding whether to enter into the infringement. Thus, the *ex-ante* expected cost is lower than the actual cost *ex post*, rendering participation in the infringement more attractive than it actually is. Moreover, the assumption only holds for risk-averse or risk-neutral firms. Risk-neutral firms are indifferent between a certain prospect of income and an uncertain prospect of equal expected monetary value. Thus, a risk-neutral firm is indifferent between paying €200 and any other situation with the same expected loss (50% probability of paying €400).[506] Risk-averse firms consider not only the expected value of a risky situation but also the absolute magnitude of the risk. Such a firm, unlike a risk-neutral firm, would not be indifferent between a 25% chance of losing €800 and a 50% chance of losing €400 even though the expected loss is €200 in each situation. A risk-averse firm would be worse off in the first situation because the magnitude of the risk is larger.[507]

The decision maker within an undertaking who decides whether to participate in the conspiracy is often neither a risk-averse nor risk-neutral person but rather risk loving. In Europe, employees are generally not exposed to the consequences of competition sanctions, and the undertaking usually also covers the fine imposed against the employee. In the absence of criminal sanctions for cartel infringements in most Member States, employees are mostly not personally subject to sanctions for participation in a cartel. Whereas shareholders are likely to be risk averse, the decision maker within the company may not necessarily be risk-averse or risk-neutral. As shareholders tend to spread their risks by holding portfolios of different companies whose risks are independent,[508] they may also lose their voting rights and control over the decision makers (*the principal–agent problem*). Moreover, the decision maker is not exposed to the same liability as the firm. Sales representatives deciding to meet with representatives from competitors to fix prices are not exposed to the same liability (treble damages and no contribution) as the firm.[509] Thus, even a risk-averse employee may participate in the conspiracy as the liability of the firm is generally not or only indirectly distributed downwards to the employees.[510]

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[506] The example is a modification of the example provided by Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 351. See also A. Mitchell Polinsky and Steven Shavell, 'Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis' (1981) 33 Stanford Law Review 447, 450; Robert D. Cooter and Thomas Ulen, *Law and Economics* (6th edn, Pearson Education Inc 2011) 45.

[507] A Mitchell Polinsky and Steven Shavell (n 506) 452; Robert Cooter and Thomas Uhlen (n 506) 44.

[508] Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 351.

[509] This holds true at least in Europe, as most Member States have no criminal sanctions for the commitment of competition infringements.

[510] In practice, the fines imposed against employees committing the competition violations are generally covered by the undertakings if the employees agree to cooperate with the competition authorities, which in turn makes the undertaking eligible for reductions in fines under the leniency programmes. See also section IV.1.b).

4. Providing premia over expected trial outcomes (the 'Excess Recovery Theorem')

Another objection against the no-contribution rule is that it enables plaintiffs to recover settlements that exceed the expected value of their trial recovery. Easterbrook, Landes, and Posner (1980) find that *'defendants have an incentive to settle for an aggregate amount greater than their expected damages from a trial'*.[511] The ABA Report on Contribution summarises the effects in a two-defendant scenario as follows:

> *'If the plaintiff's probability of prevailing is 50% and single damages are $10 million, consider what happens if defendant A settles for its expected share of the judgment: .5 (probability of loss at trial) times $30 million (trebled damages) times 0.5 (probability that judgment will be levied against it), or $7.5 million. Defendant B then faces an expected liability of $11.25 million: a 0.5 chance of a loss of $22.5 million ($30 million trebled damages less the first defendant's $7.5 million settlement). Rather than accept this increase in its expected liability, B would bid against A for the privilege of settling first. The bidding process would end when one defendant settled for $10 million. That settlement amount is [a Nash] equilibrium because the expected liability of the other defendant would also be $10 million (0.5 probability of loss times $20 million exposure) and it would have no incentive to bid further. Assuming that the other defendant and the plaintiff then settle at the $10 million expected value, the plaintiff has recovered $20 million, $5 million more than the expected value of trying the case against both defendants. This recovery is equivalent to the plaintiff's expected recovery at trial if damages were quadrupled rather than trebled'*.[512]

Furthermore, Easterbrook, Landes, and Posner (1980) show that the difference between the aggregated settlement and expected damages increases as the number of defendants increases, regardless of the strength of the plaintiff's case. The reason is that as more and more defendants settle, the expected liability of the remaining defendants grows. Defendants ultimately have a strong incentive to settle with a plaintiff and will compete in order not to be left out of the settlement round. The plaintiff can exploit the race to settle between the defendants to obtain a larger recovery than she would otherwise receive before the court. Easterbrook, Landes, and Posner (1980) name this ability to exploit the defendants' race to settle the *'Excess Recovery Theorem'*. The result can be illustrated by extending the analysis of the ABA report to a three-and-more-defendant scenario:

[511] Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 354.
[512] ABA Report on Contribution (n 496) 8.

> *In this scenario, the probability that the judgment will be levied against one of the defendants is $\frac{1}{3}$, so the expected liability of each defendant is \$5 million. The Nash equilibrium is reached when each defendant settles for \$7.5 million (=0.5(\$30 million -2(\$7.5 million)). Assuming that the first defendant settles for \$7.5 million, C and D will face a \$22.5 million liability (\$30 million – \$7.5 million). Under the same logic as used in the two-defendant scenario, the Nash equilibrium solution to this game is \$7.5 million. The total settlement of \$22.5 million is \$7.5 million or 50% (\$22.5 million – (0.5x\$30million)) greater than the expected value of litigating the case against all the defendants.*[513]

The result has also been demonstrated by Easterbrook, Landes, and Posner (1980), who show that for n defendants, a probability p that the plaintiff will prevail, and treble damages of d, the Nash equilibrium is a settlement (s) given by

$$s = pd/(1 + p(n - 1)).$$

The total recovery through settlements (S) is given by

$$S = ns = npd/(1 + p(n - 1)).$$

The expected damages awarded at court (C), however, is only the probability of prevailing at court multiplied by damages (pd). The ratio (R) of recovery through Nash equilibrium settlements (S) to the expected recovery at trial (pd), an indicator of the plaintiff's gain after settlements compared with the expected gain when enforcing damages solely at court, is given by

$$R = \frac{S}{C} = n/(1 + p(n - 1)).$$

Where the plaintiffs' recovery in court is certain ($p = 1$), the ratio equals 1. In the three-defendant scenario the ratio equals 1.5. Thus, for n greater than 1, R exceeds 1, increases monotonically with n, and decreases monotonically with p.[514]

The analysis shows that, in theory, the no-contribution rule increases incentives for defendants to settle. Following the *Excess Recovery Theorem* shown above, a plaintiff can expect higher gains from settlements than from enforcing a claim before courts. The ratio between the gains

[513] Joseph Angland (n 456) 2377.
[514] Joseph Angland (n 456) 2377.

from settlements and the expected recovery in courts becomes largest in a very weak case against many defendants.[515] The ABA Report on Contribution has illustrated this by assuming that when the plaintiff has a 10% chance of prevailing and there are 40 defendants, the Nash equilibrium settlements would amount to 82% of the expected damages:

$$R = \frac{40}{1 + (0.1 \times 40) - 0.1} = \frac{40}{4.9} \approx 8.2.$$

This illustrates the observation of Easterbrook, Landes, and Posner (1980) that *'a plaintiff with a spurious claim against a large group of defendants may be able to extract an aggregate settlement comparable to what a plaintiff with a valid claim could obtain'*.[516]

Angland (2008) indicates that a plaintiff may gain even more from the bidding war underlying the Nash equilibrium if she can make a credible threat that the plaintiff will enforce the entire (trebled) damages against one defendant and not settle with any other co-infringer in case the defendant refuses to settle. The plaintiff could repeat the same threat for the remaining amount against the remaining co-infringers once the first defendant has settled. All defendants would settle for an amount reflecting their 50% probability of being held liable in the courts. The plaintiff would thereby achieve a recovery that exceeds even the recovery under the Nash equilibrium.[517]

In any case, the models illustrate the fundamental problem of the *Excess Recovery Theorem*. No defendant would settle for more than her expected liability in court. However, since the no-contribution rule creates a potentially excessive liability in court, the plaintiff can – if she strategically pressures the defendants – collect (substantially) more than her expected recovery in court.

5. Coercion of defendants into settlements ('whipsawing settlements')

As shown, the plaintiff can place extraordinary pressure on the defendants to settle since the no-contribution rule creates a potential exposure for defendants disproportionate to their gain from the conspiracy.[518] The extent to which plaintiffs can pressure defendants into settlements can be illustrated by the examples above. As shown in the examples, the amount at which the defendant was willing to settle stands in no relation to her gains from the conspiracy or expected liability in court.[519] In the three-defendants scenario, in which the probability that the judgment will be

[515] Joseph Angland (n 456) 2377; Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 359.
[516] Frank H Easterbrook, William M Landes and Richard A Posner (n 473) 360.
[517] Joseph Angland (n 456) 2378.
[518] See also the ABA Report on Contribution (n 496) 9.
[519] Joseph Angland (n 456) 2380.

levied against one of the defendants is $\frac{1}{3}$, assume that one defendant had caused an overcharge of $1 million out of the $10 million total overcharge, and that the two remaining defendants had settled at the Nash equilibrium ($7.5 million each). The defendant would face liability of $15 million (a multiple of 15 of the gain and 50% above the defendant's pro-rata share of damages).[520] Of course, if the other two defendants settled for an amount below the Nash equilibrium, the defendant's liability would increase further. The ability to coerce defendants into settlements becomes most problematic where the plaintiff has a weak case but there is a large number of defendants. In such cases, defendants can face potential liabilities substantially exceeding their gains and a pro-rata share of the damages.[521] The ABA Monograph describes this scenario as not purely hypothetical. The controversial debate about contribution claims in the US in the late 1970s and early 1980s stemmed from cases in which late settlers had faced exposure far exceeding three times their proportionate share of the alleged damages.[522]

IV. Potential justifications for the no-contribution rule

Authors in favour of the no-contribution rule have argued that the equity limitations should be accepted for superior results achieved in terms of deterrence, punishment, and compensation. The predominant arguments in favour of the no-contribution rule are based on three elements: (1) deterrence, (2) settlements, and (3) administrative costs.

1. Deterrence

Easterbrook, Landes, and Posner (1980) claim that the no-contribution rule achieves superior results in terms of deterrence than contribution and simultaneously incentives to settle the case.[523] Thus, the detriment of fairness for tortfeasors can be justified from a deterrence perspective. The argument follows from the possibility that each participant of the conspiracy may face the whole liability of all participants of the conspiracy. It does not matter that one infringer is released from her liability because said liability would only fall onto another infringer, ren-

[520] Ibid.
[521] ABA Report on Contribution (n 496) 9. The Report illustrates the problem through the following example: *'Assume that a firm allegedly was responsible for $1 million of the $100 million of overcharges caused by a 20-firm conspiracy, and that the probability that the plaintiff would prevail at trial is only 10%. If nineteen defendants settle for an average of $3 million, the remaining defendant would face potential liability of $243 million, a multiple of 243 of its alleged gain, and of more than 48 of its pro-rata share of single damages'*.
[522] ABA Monograph (n 480) 15-19; ABA Report on Contribution (n 496) 10. Since the extensive debate more than three decades ago, cases of excessive liability of late settlers have not received the same publicity. This may be explained by the ability of defendants to enter into sharing agreements, which ensure that each member of the conspiracy bears her proportionate share of liability. The content of sharing agreements is analysed in more detail below in chapter IV, C.II.
[523] Frank H Easterbrook, William M Landes and Richard A Posner (n 473) 331.

dering the conspiracy unprofitable for that infringer who would then withdraw from the conspiracy. The next infringer would then expect the liability to fall on her and withdraw from the conspiracy. This would continue until all but one of the participants withdraws and the conspiracy dissolves (see section III.3).[524]

However, it is not clear whether the no-contribution rule actually achieves superior deterrence compared with contribution in all situations. Angland (2008) argues that the no-contribution rule was not designed to increase deterrence: *'While one can posit scenarios in which the presence of contribution would decrease deterrence, there are equally plausible scenarios in which it would have the opposite effect'*.[525]

The legitimacy of the no-contribution rule may rather be tested by the ratio between the level of deterrence it achieves and its costs. Following *Becker* and *Landes*, the optimal sanctions should be designed in a way that the expected sanction equals the net social cost of the infringement and does not deter conduct that has a positive net social impact.[526] However, under the US remedial system there are strong indications that the costs of the no-contribution rule are disproportionally high compared with the level of deterrence it achieves.

a) Over-deterrence

Strong indications exist that the no-contribution rule creates over-deterrence. It has been shown above that the no-contribution rule is likely to coerce defendants into settlements exceeding the potential liability they would face in court. Easterbrook, Landes, and Posner (1980) have rightfully already highlighted the vagueness of antitrust liability, which follows the 'rule of reason' analysis of conduct in particular that falls outside *per se* violation.[527] The analysis of whether the conduct can be classified as anti-competitive creates uncertainty, which may deter not only unlawful conduct but also other conduct that may be pro-competitive and increase social welfare. This includes in particular joint-venture agreements between medium firms enhancing innovation or achieving other efficiencies.

Thus, some authors have argued that a distinction between hardcore infringements that constitute a *per se* violation and other conduct that requires a closer analysis under the 'rule of reason'

[524] Ibid 340.
[525] Joseph Angland (n 456) 2388 fn 65.
[526] Ibid; Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169; William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 656-57; see also chapter VII, E for a discussion on the two theories on optimal sanctions.
[527] Frank H Easterbrook, William M Landes and Richard A Posner (n 473) 342.

should be made.[528] Only in the latter case does a severe lack of legal certainty exist, rendering it difficult for firms to draw the line between lawful and unlawful conduct.[529] Thus, in such situations a substantial risk exists that lawful and procompetitive conduct might be deterred. On the other hand, where the conduct constitutes a *hardcore* infringement, it may be argued that because such agreements never achieve procompetitive effects, they cannot be over-deterred.[530] This argument is based on the US antitrust system, which does not allow for a justification of *per se* infringements like price-fixing agreements. Under the EU Competition regime, even an infringement by object (which arguably covers similar infringements to the US *per se* rule) may still be justified under Article 101(3) TFEU. Although in practice by object infringements have rarely been justified, the possibility of deterring social beneficial price-fixing agreements under the EU system exists. Overall, where uncertainty about the classification of conduct as pro- or anti-competitive exists, the no-contribution rule at least has the potential to deter socially desirable conduct, leading to an inefficient outcome.

b) Under-deterrence

There are also instances where contribution achieves better deterrence than the no-contribution rule, particularly when the decision maker and firms do not bear the same liability.

Polinsky and Shavell (1981) show that a risk neutral firm would be equally deterred under a system with contribution and under the no-contribution rule. Only for risk-averse firms does the deterrent effect of the no-contribution rule exceed that of contribution because it imposes a greater risk for the firm.[531] However, the authors also show that it is the consequences for the decision maker within the firm that primarily determine the likelihood of a violation. The decision makers may bear the liability through *'salary reduction, diminished promotion opportunities, or outright termination'* more leniently than the firm.[532] Because the effects for the decision maker between the firm having to pay a larger or smaller amount of damages may not

[528] Edward D Cavanagh (n 458) 1311; Carsten Krüger, *Kartellregress - Der Gesamtschuldnerausgleich als Instrument der privaten Kartellrechtsdurchsetzung* (Nomos 2010) 266.
[529] Ibid; Joseph Angland (n 456) 2389.
[530] Edward D Cavanagh (n 458) 1311.
[531] A Mitchell Polisky and Steven Shavall (n 506) 452-3; Edward D Cavanagh (n 458) 1306. This can be illustrated with the following example: Assume that two firms collude and each gain $10 million from the conspiracy. Both have a 25% chance of being successfully sued and the total overcharge trebled would be $60 million in damages. Without contribution, the probability that either would have to compensate the full amount is 50%, and the expected liability would be $7.5 million ($\frac{1}{2}$(0.25 x $ 60 million). If contribution was permitted, the expected liability would also be $ 7.5 million (0.25 x $ 30 million). Thus, a risk-neutral firm would not be deterred because the gain of $10 million is greater than the expected liability. For a risk-neutral firm, the deterrent effect of the no-contribution rule is even lower because the absolute liability the firm can face with a contribution of $30 million is substantially lower than $60 million, even though the expected liability might be the same under both rules.
[532] A Mitchell Polisky and Steven Shavall (n 506) 453-4.

differ much, the certainty of liability will be more of a deterrent to the decision maker. Since the probability that the firm must pay more under contribution than under the no-contribution rule and (although the amount under the no-contribution rule is higher) the decision maker bears a similar personal liability under both rules, the deterrence effect of contribution may be paradoxically higher.[533]

This argument has been challenged on two grounds: first, the no-contribution rule substantially increases the firm's liability, which should incentivise the firm to control and monitor its employees.[534] Second, some have questioned the assumption that hardcore infringements such as price-fixings agreements are even entered into without the involvement of upper management.[535]

However, the fundamental challenge of the assumption that the no-contribution rule achieves optimal deterrence is if one of the infringers liable for the damages releases the remaining joint infringers from any liability. This concern has also been addressed by the courts.[536] A liability regime refusing infringers from whom the total liability has been collected to claim contribution allows other joint infringers to free ride on the payment of one or some infringers. In *Professional Beauty Supply,* the court noted that contribution would ensure all joint infringers would be liable either with respect to the victims who suffered an overcharge or co-infringers claiming contribution. In other words, the debate concentrates on the question of whether deterrence can be achieved more effectively through a risk of a high liability or liability with certainty.[537]

Angland (2008) argues that even if the firm may be risk neutral, the decision maker may be a risk seeker and hope that the firm will escape any liability under the no-contribution rule. In this situation, *'contribution would increase deterrence by eliminating the aleatory nature of judgment enforcement and ensuring that each liable defendant paid its share'*.[538]

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[533] Impact Study (n 463) 517 fn 790.
[534] Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 349 fn 46.
[535] Carsten Krüger (n 528) 269.
[536] See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc*., 594 F.2d 1179, 1185 8th Cir. [1979] where the court stated that *'the question of deterrence actually cuts both ways'*.
[537] E Thomas Sullivan and Donald J. Polden, 'Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis' (1983) 20 Harvard Journal on Legislation 397, 409. For a general discussion on deterrence through certainty of detection and punishment as well as the severity of the penalty, see Gary S. Becker (n 526)
[538] Joseph Angland (n 456) 2387. The author illustrates the outcome with the following example: *'Faced with a choice between (1) the certainty of their firm's bearing one-half of a $100 million judgment and (2) a 50 percent chance of their firm's bearing the entire $100 million judgment and a 50 percent chance of bearing none of it, managers may prefer the second option. They may perceive the adverse effects on their career of being responsible for a $50 million loss to be sufficiently large that the incremental effect of being responsible for an additional $50 million may be relatively small'*.

Moreover, in terms of marginal deterrence, contribution achieves superior results. As Stigler observed, *'[i]f the thief has his hand cut off for taking five dollars, he had just as well take $5,000'*.[539] Because each joint infringer faces the risk of liability for the entire harm caused by the infringement under the no-contribution rule, an infringer may be incentivised to increase their involvement in the infringement. This occurs to the extent that the increased involvement also increases total damages. The amount for which the infringer would be jointly and severally liable would also increase, but the relative increase in its exposure would be much smaller than its relative increase in gain from the conspiracy.[540]

In Section III.3 above, it has been discussed that the assumption that all infringers are equally likely to be sued by a plaintiff is unlikely to correspond with reality. To the extent that an infringer is able to predict that another is more likely to be sued by a potential plaintiff, this would negatively impact deterrence.[541] In this situation, the certainty of exposure under a regime of joint and several liability with contribution would achieve greater deterrence. A similar outcome has also been concluded by Landes and Posner[542] when the sum of the probability predicted by each defendant that the whole liability will be enforced against her is below 1. With contribution, the magnitude of such errors would be relatively small if a well-defined allocation rule exists on which defendants could base their assessment.[543] Altogether, the deterrent effect of the no-contribution rule relies profoundly on each infringer's prediction of the probability that the plaintiff will enforce the whole liability against her.

2. Discouraging settlements

Commentators opposing contribution have argued that contribution would discourage settlements. Easterbrook, Landes, and Posner (1980) argue that if contribution claims were allowed against settlers alone, settlers would not be better off if the plaintiff prevailed at trial and even worse off if the defendants prevailed.[544] However, the effect would be compensated by allowing claim reduction.[545] Angland (2008) nevertheless argued that contribution with claim reduction would still not encourage settlements as well as the no-contribution rule, because settlements

[539] George J. Stigler, 'The Optimum Enforcement of Laws' (1970) 78 Journal of Political Economy 526, 527; see also Joseph Angland (n 456) 2385.
[540] Joseph Angland (n 456) 2385, fn 53: *'For example, assume that a firm that realized 1% of the gains from the conspiracy increased its participation and thereby increased the conspiracy's overcharges by 1%, all of which increase it captured. The firm would have increased its gain by 100% but its potential liability by only 1%'.*
[541] Joseph Angland (n 456) 2387.
[542] William M. Landes and Richard A. Posner, 'Joint and Multiple Tortfeasors: An Economic Analysis' (1980) 9 The Journal of Legal Studies 517, 530.
[543] Joseph Angland (n 456) 2387.
[544] Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 360-63; Joseph Angland (n 456) 2391.
[545] Joseph Angland (n 456) 2398.

would become more expensive for the plaintiff.[546] As noted previously, where claim reduction was allowed, not only would the settled amount be deducted from the total (trebled) damages but also the share attributable to the settling infringer would be excluded from collectable damages.[547] It has been argued that this also discourages plaintiffs from settling early, because any difference between the settled amount and the amount of damages caused by the defendant would be lost.[548] Consequently, plaintiffs are likely not to settle before they have the means to evaluate the impact of the settlement on their overall compensation, which will often only be at a later stage of litigation.[549]

Under the US regime without contribution and claim reduction, early settlements are compensated by non-settling defendants or late settlements. Without the compensation of cheaper settlements, plaintiffs would accept only larger payments, making settlements less likely. Moreover, plaintiffs may find it more difficult to finance litigation with early settlements as well as to access information about the defendants' involvement in the infringement and the scope of the infringement, which are regularly provided under settlement agreements. The ABA Monograph notes that contribution and claim reduction may also disincentivise defendants to settle, because a defendant settling last would no longer fear payment of the entire damages. This may even incentivise defendants to litigate because a defendant's liability (or 'relative responsibility') will still be relevant for contribution after the settling party has departed from the proceeding.[550]

Arguably, a reduction of settlements may be desirable. As shown above, under the current US regime, settlements are likely to exceed the defendants' expected liability at trial ('*whipsawing settlements')*. Angland (2008) claims that '*to the extent that claim reduction reduces the expected value of settlements (and thus actions) by eliminating the premium over the expected recovery at trial, it should discourage the commencement of suits at the margin… (i.e., have relatively low expected returns)'*.[551] Claim reduction should therefore be encouraged.

Commentators have argued that the features of the US regime, in particular the threat of treble damages, attorney fees, and the cost of litigation, are already sufficient to incentivise defendants

[546] Ibid.
[547] Frank H Easterbrook, William M Landes, and Richard Posner (n 473) 363-64; Joseph Angland (n 456) 2398.
[548] ABA Monograph (n 480) 38.
[549] ABA Monograph (n 480) 38. In US settlements, the settling parties must show that the settlement is 'fair' or in 'good faith' to be approved by the Courts. Judge Schwarzer argues that issues relating to the effects of the settlement and claim reduction will then become relevant in the settlement approval proceedings; see see statement of Hon. William W. Schwarzer, US District Judge for the Northern District California, 'Antitrust Damages Allocation: Hearing Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary' (97th Cong., 1st & 2nd Sess. 1982) 19.
[550] ABA Monograph (n 480) 39.
[551] Joseph Angland (n 456) 2399.

to settle. Contribution and claim reduction would only reduce the amount for which defendants settle.[552] Overall, economic theory suggests that the no-contribution rule achieves neither greater deterrence nor better compensation but is likely to result in over-compensation, which weakens the claim in favour of no-contribution significantly.

3. Administrative costs

Because of a potential discouragement of settlements and a potential increase in the complexity of litigation following contribution claims, some commentators fear the risk of increased administrative costs. They argue that litigation is complicated by the cross-claims for contribution between defendants and the need to determine each defendant's responsibility. By way of cross-claims for contribution, new parties would potentially be added to the proceeding by defendants (*Third Party notice*). Contribution claims may reduce or even eliminate incentives to engage in joint defence efforts because contribution rather creates an incentive to blame co-infringers for any damages.[553] Joint defence efforts can reduce costs by streamlining litigation in complex multidefendant cases. Defendants may voluntarily exchange documents and divide responsibilities, reducing the length of submissions and avoiding numerous submissions of the same position.

Any additional cost for the administrative system increases costs for society and thereby reduces the net gains from antitrust enforcement by an equal amount. The costs of the improvements gained from contribution would fall on society as a whole, whereas only the violators would gain from greater fairness.[554] The arguments do not prevail:

First, that the administrative cost of a regime without contribution is sufficiently lower than that of a regime with contribution and claim reduction is already questionable. The complexity of a regime allowing contribution depends greatly on the formula used to allocate the damages among the infringers. The different methods of allocating responsibility, particularly the relative responsibility introduced in the Damages Directive, are discussed in the next chapter. Despite the allocation of damages among the infringers, courts must already determine whether the evidence provided by the claimant is sufficient to prove that she has suffered harm caused by the infringement as well as to quantify the harm.[555] If a claimant seeks damages from a single defendant for the harm caused by other infringers by way of joint and several liability, she will

[552] ABA Monograph (n 480) 40.
[553] ABA Monograph (n 480) 34; Contribution and Antitrust Policy Note (n 480).
[554] Frank H Easterbrook, William M Landes, and Richard A Posner (n 473) 340.
[555] Under the EU Damages Directive courts may estimate damages, Art. 17(1).

have to prove that the remaining infringers have caused a harm, irrespective of any contribution claims that may follow between the infringers.

Secondly, the assumption that contribution claims would discourage a joint defence strategy among the defendants does not hold. In jurisdictions with contribution claims, particularly in Europe, defendants generally engage in a common defence strategy and share documents and other relevant insights. Because of the risk of contribution claims following a positive judgement for a plaintiff, all co-infringers have an interest in engaging in a unified defence strategy to repel any claims, even before claims for contribution can arise. Commentators assuming a lack of incentives for joint defence strategies in contribution regimes ignore that all joint infringers share the same interest after an infringement decision – namely defending themselves against potential civil liability. Moreover, in contribution regimes, all joint infringers anticipate contribution claims and thus have a strong interest to join the defence against the plaintiff instead of waiting for contribution claims following a positive judgement at a later stage. Above all, contribution proceedings after a binding damages judgement only relate to the distribution of the damages awarded among the remaining infringers. It would be unwise to leave the defence against a claim for damages caused by several infringers to only a single defendant, who would typically not have any knowledge about the sales, quantities delivered, prices, and other sales conditions of other co-infringers. In particular, for hardcore infringements such as price fixing, where an effect on the market is not required for the infringement decision under Article 101 TFEU, the conspiracy may not necessarily have been implemented against the plaintiff. To prove a lower amount of damages, price information of the co-infringers is necessary, which is not available to an individual defendant. Thus, all joint infringers are likely to contribute in a joint defence strategy to be able to fight the damages claim together instead of merely fighting the allocation of responsibility of a positive judgement.

Thirdly, following on from the previous point, once the responsibility for each infringer has been established, the complexity within cross-contribution claims is limited. Once the amount of damages has been established, the separate actions for contribution only address the allocation of the awarded damages. The facts for the damages award would have been largely developed in the original litigation. In the US system, the discovery of the facts is the largest cost in antitrust cases.[556] Under the principles of civil litigation, the burden of proof for the alleged damages lays with the plaintiff claiming the damages. Thus, the additional cost of including the remaining joint infringers in the proceeding is relatively modest in contribution cases.

[556] Joseph Angland (n 456) 2392.

Fourthly, for the abovementioned reasons, it is highly questionable that any difference in costs would be justified from an equity and fairness perspective. The Supreme Court in *United States v. Reliable Transfer Co.* adopted comparative negligence in admiralty cases, because an unjust rule could not be justified with the encouragement to resolve disputes outside the courts:

> *'For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations'.*[557]

C. No Contribution is not an option in Europe

Before the Damages Directive entered into force in 2014, the applicability of the no-contribution rule in Europe was regularly debated. Similar to the debate in the US, which lasted several decades, the incentives for defendants to settle as a result of a prohibition of contribution were seen as particularly appealing. Critics of the no-contribution rule raised fairness concerns, pointing in particular to decisions such as *Olson Farms, Inc.* where the smallest infringer had to pay an amount 24 times higher than the damages directly caused by the infringer's sales to illustrate that the shift of the civil liability burden to smaller firms results in unjust results.[558] Other commentators have pointed more generally to the prevailing understanding of the legal systems in Europe that the aim of private enforcement is to compensate victims and that damages are not intended to serve other policy goals.[559] Any incentive that may follow from a shift of civil liability was described as merely a side effect. In fact, the discussion in the US seems to confirm that the burden of civil liability is often shifted in accordance with the policy goals only by coincidence.

Moreover, as a result of the no-contribution rule, the amount of damages is likely to exceed the infringer's contribution, thereby implementing punishment mechanisms into the civil liability regime through the back door. The exclusion of contribution from co-infringers as an additional sanction for wrongful conduct accepts punitive damages, a concept alien to EU tort regimes. In most continental Member States, punishment and deterrence are considerations that are mainly relevant for criminal sanctions. For instance, opponents to the no-contribution rule in Germany have often referred to a judgement of the German Federal Court of Justice in which the court

[557] 421 U.S. 397(408) [1975] in Joseph Angland (n 456) 2393.
[558] *Olson Farms, Inc.*, (n 460).
[559] For a discussion on the opposing opinions in Germany, see Carsten Krüger (n 528) 223ff.

held that US judgements awarding punitive damages are in principle not enforceable because they are generally incompatible with the *ordre public*.[560] Others have emphasised the necessity of distinguishing between *punishment* and *deterrence*. Because the no-contribution rule is a method for the allocation of civil liability and not an official punishment by the sovereign, the rule's applicability does not fall under the same restrictions from the infringer's fundamental rights as other means for punishment (e.g., fines).[561] For instance, even though the infringer cannot anticipate *ex ante* if she might also become liable for the harm caused by co-infringers, a restriction to contribution does not violate the principle of *nullum crimen, nulla poena sine lege* (Article 7 European Convention on Human Rights).[562] Arguably, excluding contribution may therefore be justified solely based on its *deterrent* effect.

On the other hand, the levels of civil liability and fines are interlinked. A formalistic distinction between fines as a means of *punishment* on the one side and damages aiming at compensation and *deterrence* on the other ignores that any increase of either damages or fines increases an infringer's overall cost of the infringement (i.e., deterrence *and* punishment = total liability). The rise of civil liability ultimately increases the total liability of the infringer, which may in turn require an adjustment to the level of the fine for it to remain proportionate to the violation.[563] Therefore, it may be argued that the total liability must be equally restricted by the infringer's fundamental rights as the sanctions imposed by the sovereign state.

Irrespective of the limitations of the no-contribution rule and the potential fundamental rights implications, the Directive opted for the right to contribution and thus followed the position that already existed in Civil law jurisdictions in Europe.[564] In fact, the implementation of a no-contribution rule was never discussed as an option during the legislative process.[565] Article 11(5) of the Directive explicitly sets out the infringers' right to contribution from any other infringer.

[560] BGH, 04.06.1992 - IX ZR 149/91; see also Carsten Krüger (n 528) 225.
[561] Carsten Krüger (n 528) 225-231.
[562] For the same reason, the author argues that the principle of *ne bis in idem* and the right to a fair trial under Article 6 of the European Convention on Human Rights does not apply to the allocation of contribution.
[563] Because of the interaction between civil liability (private enforcement) and fines (public enforcement), the calculation of fines should include the potential civil liability; see chapter IV below.
[564] See for example Art. 1214 of the French Code Civil and Section 426 of the German Civil Code.
[565] The Impact Assessment accompanying the White Paper, however, discussed the no-contribution rule in the US in relation to the likely impact of joint liability; see Impact Study (n 463) 516-18.

D. Conclusion

This chapter has provided a brief overview of the debate on the implications of the no-contribution rule in the US. The proponents of no-contribution have mainly highlighted its effects on deterrence, settlements, and administrative efficiencies. It has been shown that these benefits come with severe negative implications. It has been predominantly reprimanded that no-contribution could lead to unfair results and raise corrective justice concerns. Moreover, it was questioned whether the potential justifications for no-contribution actually hold or whether the same results could also be achieved under contribution. The analysis suggests that the deterrent effects and settlement incentives are achieved more by coincidence rather than as a result of a policy goal. Overall, the review of the literature suggests that drawbacks outweigh the proclaimed benefits of no-contribution. The Directive's choice to follow Civil Law countries' approach of granting the right to contribution as opposed to the Common Law approach should therefore be welcomed.[566] The following chapter addresses the potential methods for the allocation of liability under a contribution rule. It shows that the EU contribution rule can achieve similar results as the no-contribution rule in terms of deterrence and settlements without the drawbacks (fairness and corrective justice) as experienced under a no-contribution rule.

[566] However, in Ireland and the UK, contribution was introduced by means of statutory acts; see for example the Irish Civil Liability Act [1961] and the UK Civil Liability Act [1978].

Chapter IV
Getting Contribution Right: The Allocation of Liability Among Joint Infringers of EU Competition Law Based on Relative Responsibility

A. Introduction

Directive 2014/104/EU (**Directive**) holds multiple infringers who jointly violated competition law (e.g., cartels) jointly and severally liable for the harm caused by that violation. Therefore, a victim can claim her entire damages for the harm suffered from any of the joint infringers (e.g., any members of the cartel). The infringer held liable for the harm in full can recover contribution from co-infringers, the amount of contribution will then be determined in light of each co-infringer's *relative responsibility* for the harm caused by the infringement. The Directive is, however, silent on how to determine *relative responsibility* and thus on how the total damages should be attributed between the joint infringers. Instead, the Directive has left the attribution of civil liability to national courts applying the applicable national law.

This chapter attempts to find an allocation rule based on *relative responsibility*. It reviews and compares alternative methods for the quantification of contribution and proposes an allocation of liability that balances predominantly corrective justice considerations with effective enforcement considerations. The approach proposed in this chapter strives to balance these considerations effectively by satisfying the following three requirements: First, the allocation of damages liability must respect the Directive's choice to distribute the civil liability according to each infringer's (relative) *responsibility* for the infringement. It is apparent that the wrongdoer's responsibility for the wrongful act alone is too vague to quantify the individual wrongdoer's share of liability. However, in order to respect the infringer's responsibility, the allocation rule must ensure that the infringer's civil liability at least corresponds to the infringer's contribution to the infringement and subsequently to the harm suffered by the victim. It is shown that for the purpose of allocating damages, the proximity of the infringer's contribution to the harm suffered by the victim best determines that infringer's responsibility for the occurrence of the damage. In other words, the infringer performing the last wrongful act in the chain of causation before the harm occurred should bear a higher responsibility than the act of a co-infringer further away from the harm. For this purpose, the different causation theories are discussed in more detail. Second, the liability must be allocated in a way to sufficiently deter the infringer.

To satisfy this deterrence requirement, the infringer's share of the overall damages must at least equal the infringer's individual gain. Third, the approach must be feasible in practice. Given the difficulty of determining the *responsibility for the infringement*, some allocation rules suggested in the literature are likely to overburden courts. Hence, the approach preferred in this chapter aims to adequately balance the following three objectives: deterrence, corrective justice, and administrative efficiency.

The remainder of the chapter is structured as follows: Section B introduces the new rules on joint and several liability as well as the suggested approach for the allocation of liability among joint infringers in the Directive. Section C introduces the different methods for the allocation of contribution and the potential criteria that could be applied for the determination of *relative responsibility*. This section also introduces the preferred allocation rule that is best equipped to meet the three requirements outlined above. Section D analyses and defines in more detail the requirements of *responsibility* for the infringement and its implications for the allocation of contribution. Section E then assesses the deterrent effect of each rule, and finally, Section F concludes the findings.

B. The Allocation of Liability According to Directive 2014/104/EU

The predominant objective of the Directive is to foster private enforcement in Europe by means of improving the position of the claimant to make it more attractive for victims to claim damages.[567] In line with this objective, joint infringers of EU competition rules are jointly and severally liable. Under joint liability, a victim of the infringing behaviour can claim the entirety of her losses from any cartel member; the defendant must then compensate the plaintiff for the losses caused by the entire cartel. This means, for instance, in a price-fixing cartel where all cartelists agree to charge an additional overcharge, *any* member of the cartel not only must compensate for the damage resulting from the overcharge of its own sales but also from the overcharge of all other members of the cartel. In fact, this obligation exists regardless of whether the plaintiff has made any purchases from the defendant.

Article 11(1) Directive introduces joint and several liability for infringements of EU competition law as a general rule:

[567] See for example Directive, recital 9.

> *'Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated'.*

Article 11(2)-(4) Directive limits the liability of small and medium-sized enterprises (**SME**s) as well as immunity recipients. Immunity recipients are only liable to their direct and indirect purchasers unless full compensation cannot be obtained from the co-infringers.[568] Similar, SMEs are only liable to their direct and indirect customers. However, the limitation of liability does not apply for SMEs that initiated the infringement (*'initiator'* or *'ring leader'*)[569] or which have repeatedly infringed the competition rules.

Under the Directive, the defendant compensating the plaintiff has the right to claim contribution from co-infringers for the amount exceeding her share of liability. The difficult question is how to determine each infringer's share of the liability.

The Directive opted for the allocation of liability based on the *relative responsibility* of each infringer for the infringement. Article 11(5) reads as follows:

> *'Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law'.*

Article 11(6) also extends the *relative responsibility* rule to injured parties other than direct or indirect purchasers.

The Directive is silent as to the criteria to apply for the determination of relative responsibility. In fact, the Directive expressly leaves the determination of relative responsibility to Member States and subsequently to the judge. Recital 37 contains a non-exhaustive list of criteria that judges may want to consider:

> *'The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence'.*

[568] See chapter VI, C.V for a discussion on the implications of the insolvency risk on leniency incentives.
[569] See chapter V below for a discussion of the Commission's practice towards *'ring leaders'* and *'initiators'* when adjusting fines.

The Directive leaves much room for the interpretation of what factors determine the relative responsibility. Consequently, Member States have interpreted relative responsibility differently and arrived at different determining factors for relative responsibility. The diversity of the interpretations is summarised in Table 2:

Table 2 - *Summary of the criteria used for relative responsibility across Europe*

Member State	***Criteria for Relative Responsibility***
Austria	Refers to Directive's criteria (turnover, market shares, relative role in the infringement)
Belgium	Refers to Directive's criteria (turnover, market shares, relative role in the infringement)
Bulgaria	No criteria codified
Croatia	Refers to Directive's criteria (turnover, market shares, relative role in the infringement)
Czech Republic	No criteria codified
Cyprus	No criteria codified
Denmark	No criteria codified
Estonia	All circumstances of the case, in particular gravity, unlawful character of the conduct, degree of risk born by each infringer[570]
Finland	*Inter alia* guilt of the infringer
France	Seriousness of the infringer's fault, causal causation, and other factors taken into account by the competition authority for the setting of fines[571]
Germany	No criteria codified, *pro rata* as a fall-back rule
Greece	No criteria codified
Hungary	No criteria codified, *pro rata* as a fall-back rule
Ireland	No criteria codified
Italy	No criteria codified
Latvia	No criteria codified
Lithuania	No criteria codified
Luxembourg	No criteria codified
Malta	No criteria codified
Netherlands	No criteria codified
Poland	No criteria codified
Portugal	Rebuttable presumption: market shares
Romania	No criteria codified
Slovakia	No criteria codified

[570] Evelin Pärn-Lee, 'Estonia', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 124.
[571] Muriel Chagny, 'France', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), The EU Antitrust Damages Directive (Oxford University Press 2019) 115.

Member State	***Criteria for Relative Responsibility***
Slovenia	Refers to the general criteria: gravity of the infringer's culpability and the gravity of the consequences; *pro rata* as a fall-back rule[572]
Spain	No criteria codified
Sweden	No criteria codified
United Kingdom	No criteria codified

Only a minority of Member States have attempted to codify the criteria for the determination of relative responsibility. Most have either refrained from specifying any criteria or simply referred to the non-exhaustive list in the Directive. As far as the author is aware, only Portugal has introduced a rebuttable presumption for the determination of relative responsibility.[573] It seems that market shares are the preferred criterion in most Member States, even though it has not been expressly codified in all of them. For example, in Sweden there is no general allocation rule that applies to competition cases. Under Swedish tort law, the general rule is that liability should be 'reasonably' allocated. Courts have indicated that market shares may serve as effective guidance for establishing liability under a 'reasonable' allocation requirement.[574] Estonia, France, and Slovenia, on the other hand, apply criteria relating to the infringer's conduct in the infringement (gravity of culpability, fault, or unlawful character). Estonia and France also consider the causational relations (causation, degree of risk born by each infringer) as potential criteria for relative responsibility.

The review of national implementing legislations has revealed that no uniform rule exists for the determination of relative responsibility across Europe. In light of the Directive's objective to create a level playing field for undertakings operating in the internal market, a uniform determination of relative responsibility would therefore be desirable.

Equally, it follows from the analysis of the implementing legislations in chapter II (B.XI) that it will still take years before all Member States even apply the new rules on joint and several liability. For example, some Member States (e.g., Bulgaria, Croatia, Finland, Germany, and

[572] Article 188 Obligacijski zakonik, Offizial Gazette RS, No. 83/01.
[573] Article 5 (5) PROPOSTA DE ANTEPROJETO DE TRANSPOSIÇÃO DA DIRETIVA *PRIVATE ENFORCEMENT*, 22 June 2016: *'O direito de regresso entre coinfratores existe na medida da sua responsabilidade relativa pelos danos causados pela infração, presumindo-se tal responsabilidade equivalente à média das suas quotas nos mercados afetados pela infração, durante a sua participação nesta, salvo prova em contrário'*. (in English: 'There shall be a right of contribution between co-infringers to the extent of their relative responsibility for the harm caused, which is presumed to be equivalent to the average of their market shares in the affected markets during their participation in the infringement, unless proven otherwise'.).
[574] Lars Henriksson, 'Sweden', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 371-372.

Romania) treat the new provisions on joint and several liability as part of their substantive laws, and thus, they prohibit the application prior to the entry into force of the national implementing laws. Thus, in most Member States the requirement to determine the share of civil liability according to the joint infringers' relative responsibility will not be applicable to damages claims that arose before the entry into force of the national legislation (in most Member States even after 26 December 2016). On the other hand, in Malta it seems that the rules on joint and several liability are also applicable to infringements that already occurred after 27 December 2014. However, despite the exception of Malta, it will likely take many more years before courts will have to address how to determine *relative responsibility* under the Directive.

The next section summarises the most common allocation rules for the distribution of civil liability and assesses whether they can be used specifically as a criterion for the determination of *relative responsibility*.

C. Relative Responsibility and the Criteria for Determining Contribution

The EU legislature made a policy choice in favour of equity and fairness over administrative efficiency when it opted for the requirement of *relative responsibility* instead of uniform abstract criteria, which are easily applicable across Member States (e.g., sales value or per capita). Recital 37 of the Directive lists only *turnover, market share, and the role in the cartel* as some of the relevant criteria that could be considered for determining responsibility. Since the list is not exhaustive, national courts may take different or additional factors into account. The wording (i.e., *'such as'*) does not even prohibit Member States from considering only a single criterion listed in recital 37, as long as they respect the overriding principles of effectiveness and equivalence. This section examines criteria for the determination of *relative responsibility*. The review of the different allocation criteria shows that none of the examined criteria are sufficient for determining *relative responsibility* and instead recommends the case-specific application of a combination of different allocation rules.

First, the criteria proposed under the Directive (*turnover, market share, and the role in the cartel*) are briefly summarised, and second, alternative criteria and approaches proposed in the literature are discussed.

I. Turnover / sales value

The allocation based on the firms' turnover is a rather straightforward approach. With regards to the temporal scope of the turnover, one might prefer an allocation based on the turnover over the entire period of the infringement or the previous business year. The latter might be appealing for administrative efficiency reasons. Under Article 23 Regulation No 1/2003,[575] fines imposed by the Commission cannot exceed 10% of the undertaking's worldwide turnover in the previous business year. The Commission therefore must already assess the undertaking's turnover in the previous business year. However, the simplicity of the approach has serious shortcomings in terms of corrective justice. First, the turnover in the previous business year has no correlation with the turnover of the undertaking during the affected period. Second, the undertaking's overall (worldwide) turnover stands in no correlation with the turnover in the affected market. Thus, the allocation based on the undertaking's overall turnover does not relate to the undertaking's responsibility on the affected market. This shortcoming could be overcome by an allocation based on turnover in the affected market in the affected period (i.e., sales value).

The advantage of allocating liability by sales value is most appealing in horizontal infringements because each defendant's share can be calculated relatively easily based on sales data.[576] The same applies to infringements on the buyer's side when responsibility is attributed based on purchases. The ABA Monograph (1986) views the method particularly desirable in light of fairness and administrative justice considerations as the allocation is based on an objective measurement, and furthermore, it is relatively straightforward to administer since the necessary evidence is generally already part of the plaintiff's case.[577] However, at the same time, the authors see a potential conflict with fairness concerns because allocation by sales value attributes the liability irrespective of the individual responsibility for the causation of the infringement. For instance, it does not take into account the *'leader'* or *'follower'* position of infringers.[578]

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[575] 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 [2003] OJ L1/1.

[576] Daniel M. Wall (ed) *Contribution and Claim Reduction in Antitrust Litigation* (American Bar Association Section of Antitrust, Monograph No 11, 1986) (**ABA Monograph**) 41.

[577] ABA Monograph (n 576) 41.

[578] Notably, the authors see a conflict with fairness concerns in the equal *'punishment'* for the *'leader'* and *'follower'*. The reference to punishment refers to punitive damages, which is common in the US Tort regime but alien to the European Tort Law systems and explicitly prohibited under the Damages Directive (Article 3(3)). However, notwithstanding the prohibition of punitive damages under the Directive, the attribution by sales ignores the individual responsibility of each infringer for the causation of harm.

Further criticism relates to the fact that allocation by sales is not appropriate in all types of infringements. For example, in bid-rigging cases, the liability could only be attributed to the winning party; in cases of umbrella pricing, there are no sales attributable to the infringers; and in vertical infringements, only the sales of infringers on the downstream market are affected.

Neither allocation based on turnover nor on sales value sufficiently factors in the individual conduct during the infringement. Other factors, such as the *'role of the infringer'*, are equally important when determining the relative responsibility. Arguably, a firm initiating the infringement or even exercising duress or any other form of constraint on its co-infringers to establish or stabilise the infringement contributes more to the harm than does an undertaking that happened to have a larger turnover or more attractive product (thereby affecting sales value). For this reason, the attribution of liability should not be determined solely by objective factors irrespective of the infringer's individual conduct in the infringement. While the infringer's turnover is a good approximation of the impact the infringement has on the market, it does not provide any indication of the infringer's contribution to creating or stabilising the cartel.

II. Market shares

Another objective criterion listed in the Directive is the infringers' market shares. Portugal and Sweden predominantly rely on market shares as the factor for allocating liability.[579] In price-fixing collusion, where firms increase prices uniformly, the harm (the overcharge) caused by each firm would generally be proportional to their market shares. In this situation, the determination of the responsibility relative to the other joint infringers would be fairly straightforward.[580] However, as Angland (2008) indicates, in other situations the infringer's gain (the overcharge) might not necessarily be proportionate to the infringer's market share. The infringer's proportion of gain could vary depending on the length of participation in the infringement, the difference in price increases, and the different product portfolios.[581] This equally applies to harm-based allocation based on relative responsibility, because factors influencing the gain (overcharge) also affect the harm caused to market participants. In a price-fixing conspiracy, the duration of the overcharge affects both the infringer's gain from the infringement as well as the harm caused to purchasers.

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[579] Lars Henriksson, (n 574) 371-372; Miguel Sousa Ferro, 'Portugal', in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019) 319.
[580] Joseph Angland, 'Joint and Several Liability, Contribution, and Claim Reduction' in *Issues in Competition Law and Policy* (ABA Section of Antitrust Law 2008) 2369, 2394.
[581] Joseph Angland (n 580) 2394, fn 96.

Despite the ambiguity, defendants in the US often use market shares in *judgement-sharing agreements* to determine each infringer's role in the cartel.[582] Defendants attempt to enter into sharing agreements to circumvent the effects of the no-contribution rule and avoid trebled liability.[583] The ABA Antitrust Section describes sharing agreements as, *'in essence, contractual contribution'*.[584] It is therefore even more surprising that in the absence of any statutory obligation, defendants voluntarily opt for a single objective criterion that may result in arbitrary allocation of liability. One may argue that if firms voluntarily decide on an allocation criterion, even if that allocation is not perfect, the law should follow what rational firms chose. However, the choice of a simple allocation criterion can likely be explained by the complexity of negotiating sharing agreements between asymmetric infringers.[585] If defendants face the risk that negotiations will fail altogether, they will likely prefer any agreement that spreads the liability among all defendants over a fair distribution of liability that takes account of all asymmetries between the firms and their involvement in the infringement. The choice of market shares as a criterion for the allocation might therefore not necessarily represent the defendants' will. Moreover, as the content of most sharing agreements is not public, neither the number nor methods actually chosen by the parties to allocate the liability is known.[586] It might very well be the case that because firms – and in particular their legal advisers – have become aware of the inaccurate distribution of liability in situations where the infringers' involvement in the conspiracy does not correspond with their market shares, firms agree on different criteria that are more tailored to the specific conspiracy and the involvement of each firm.

In any case, even though the allocation based on market shares allows for a greater scope of application compared with that based on turnover or sales value, market share allocation faces similar drawbacks: it does not necessarily correspond to the infringer's involvement in and gains from the conspiracy. On the positive side, the market share rule benefits from low administrative costs; however, market share as a criterion alone does not seem to accurately allocate the firm's liability according to its share of the responsibility for the victim's harm; that is, the premium the victim had to pay on the purchases from the specific firm.

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[582] Christopher R. Leslie, 'Judgment-Sharing Agreements' (2009) 58 Duke Law Journal 747, 754; Yosef J Riemer, 'Sharing Agreements among Defendants in Antitrust Cases' (1984) 52 Geo Wash L Rev 289, 295.
[583] See chapter IV, C.II.
[584] ABA Monograph (n 576) 19.
[585] *'In a great many cases, however, because of disparities in size, culpability, market share or other such factors, defendants are not able to negotiate sharing agreements'*; Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 97th Cong. 7 (1982) (statement of Robert P. Taylor, Esq., Pillsbury, Madison, and Sutro); see also Christopher R. Leslie, 'Judgment-Sharing Agreements' (2009) 58 Duke Law Journal 747, 755.
[586] Yosef J Riemer, 'Sharing Agreements among Defendants in Antitrust Cases' (1984) 52 George Washington Law Review 289.

III. The role in the infringement

The only criterion listed in recital 37 of the Directive that considers the undertakings' behaviour during the infringement is the infringer's *'role in the cartel'*.[587] By contrast, the objective criteria (turnover, sales, and market shares) are based on the undertakings' earnings or their position on the market that do not relate to how they have behaved in the infringement. As was shown above, an allocation rule based on those objective criteria alone distributes liability irrespective of the undertakings' involvement in the infringement. This can result in the adverse effect that undertakings with small market shares or low turnovers are incentivised to promote and stabilise the cartel because they know their behaviour will leave their civil liability unaffected. Of course, the undertakings' behaviour will still be considered a mitigating or aggravating factor for the fining decision, and thus, the additional incentive from the allocation rule might be low.

Yet, the Directive requires the distribution of civil liability based on *relative responsibility* and the undertaking's role in the cartel (e.g., instigator vs. follower) is certainly a factor relevant for the individual undertaking's responsibility for the infringement and ultimately the harm caused. On the other hand, an allocation based only on the role in the cartel is impractical for several reasons: First, it is difficult to distinguish between the roles of the infringers in the joint infringement. For instance, in a price-fixing cartel, one member might lead and organise the meetings but the remaining members still participate in those meetings and implement the agreement. It would be disproportionate to shift the burden of the damages entirely to the 'leader' of the meetings, and therefore, further categorisation between the participants would be required (e.g., the duration of participation, number of meetings attended, and quality of information shared). Hence, the allocation would become too complex and not administrable. Second, it is difficult to quantify the role in the infringement. What share of the total damages is justifiable for the 'leader' of the meetings? What share is justifiable for members who attend all meetings? What share is justifiable for members who only attend one meeting? Thus, the different roles in the infringement alone are not practicable factors for the calculation of the liability share.

Objective criteria such as turnover and market shares are more suitable bases for the calculation of liability, and it is thus more appropriate to adjust the liability share calculated from an objective criterion where necessary to take the infringer's behaviour sufficiently into account.

Given that the undertaking's role in the infringement is difficult to quantify, the Commission's practice of adjustments to the basic amount could provide a good reference point. Chapter V

[587] A different attribution rule that is also based on the infringer's behaviour during and after the end of the infringement has been proposed in chapter VI, namely a reduction from damages liability for leniency recipients in proportion to the reductions in fines granted in the administrative proceeding.

reviews the Commission's practice of adjusting the basic amount and demonstrates how the same adjustment for aggravating circumstances could be applied to the joint infringer's role in the infringement. The implications of the infringer's role in the infringement is discussed further in relation to the gravity of the contribution in Section D.V.2 below.

IV. Allocation per capita

The most straightforward approach not mentioned in the Directive, and which keeps the administrative costs at a minimum, is the allocation of liability *per capita*. For this method, courts simply divide the total damages by the number of defendants.[588] However, because of its simplicity, the *per capita* rule completely disregards the defendant's individual responsibility for the causation of harm. In particular, where companies are of different sizes with different market shares and sales volumes, the method creates unfair results that may be problematic for proportionate justice reasons. In fact, even prior to the implementation of the Directive, the *per capita* rule was only used as a fall-back rule in case individual responsibility could not be attributed otherwise.[589] The *per capita* allocation ignores the relative responsibility, and therefore it is not surprising that the Directive does not mention it as a suitable criterion.

V. Allocation based on gains from the infringement

Another alternative is to allocate each infringer's liability based on the proportion of illicit gain. Under this approach, liability is allocated in proportion to the additional gain a firm was able to generate because of the infringement. In a horizontal price-fixing cartel, where competitors agree to unilaterally increase prices, each firm's liability would be determined in accordance with the illegal gain received from the infringement. The illegal gain from a price-fixing infringement is the premium that could be charged because of the collusion, that is, the overcharge or mark-up price, which generally also corresponds with the harm suffered by purchasers of the cartel.[590] Moreover, by allocating liability in proportion to the infringer's illicit gain, the infringer cannot expect to gain a profit from the violation of the law.[591] In an optimal scenario, in which the overcharge is estimated correctly, this approach skims off any illicit gain from the infringer.

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[588] In many Member States this is the default rule for the allocation of contribution shares; for example, for Germany see Sec. 426 (1) German Civil Code, and for Spain see Article 1138 of Spanish Civil Code. See also Andrea Cataldo and Marie Nounchele, *Deux questions en matiére de solidarité: ses aménagements conventionnels et la portée du reours contributoire*, 26 <http://www.droit.fundp.ac.be/pdf/faculte/D1139.pdf> accessed on March 7, 2021.

[589] Ben Bornemann, 'Cartel Damages: Liability and Settlement' (2018) SSRN Electronic Journal para 125.

[590] See chapter VI, D.II for an analysis of the relationship between the overcharge and the harm caused by a price fixing infringement.

[591] Joseph Angland (n 580) 2394.

Section E.IV below analyses the deterrent effect of an allocation rule based on the overcharge in more detail.

On the other hand, the approach suffers from practical drawbacks. First, the overcharge is sometimes difficult to assess. For that reason, Art. 17(1) of the Directive enables courts *'to estimate the amount of harm'* (i.e., the overcharge) *'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 evidence available'*. A common detriment of all methods for the quantification of harm is that they (have to) accept some discrepancy between the estimation and actual overcharge gained by the infringers. As a result, the discrepancy influences the accuracy of the allocation of liability. Second, the complexity of the quantification of the overcharge complicates the allocation of liability among joint tortfeasors. For example, if firms fix prices over a wide range of products, the overcharge for each product must be estimated. Other more objective criteria, such as market shares, can be applied more easily. Third, the approach does not take into account the firm's role in the cartel. Assume that all competitors in a market collude and agree to increase prices. The representative of one firm only participates in a single meeting and does not communicate the agreed price increase internally. Even without the information gained at such a meeting, the firm would still adapt to the new market price resulting from the collusion of the remaining firms on the market, and therefore also increase its prices ('umbrella pricing'). Although the firm did not actively implement the agreement, under the overcharge approach it would still be liable relative to the price increase. Thus, this raises concerns as to whether the liability is distributed fairly (distributive justice). Instead, should the initiator of the infringement and the firm that implemented it not bear a higher share of the infringement?

However, for allocation based on relative responsibility, the illicit gain serves as a more effective proxy for the individual responsibility of the total damages because it corresponds to the harm caused by each infringer. In fact, objective criteria such as market shares or turnover do not correspond with the harm the infringer's conduct has caused to the claimant. For instance, market shares correspond with the individual infringer's size on the market but does not provide any indication of whether the infringer has implemented the agreement, and if so, whether the claimant had to pay a mark-up. For the same reason, the undertaking's overall turnover alone is not suitable for the attribution of liability, and neither are sales values good indicators of the harm caused by the individual infringer. Turnovers and sales values can change because of factors not related to the infringement, such as rising demand or effective marketing.

On the other hand, the illicit gain is not in every case a better proxy for relative responsibility. This is likely the case, for example, where sufficient data are not available for accurately estimating the illicit gain, or where not all victims claim damages. In both cases, the infringer's share of the total liability (based on the illicit gain) does not correspond to the infringer's contribution to the causation of harm in relation to the contribution of the remaining infringers. Like the turnover criterion, this shortcoming can be overcome if each infringer's liability is attributed based on the illicit gain generated from sales exclusively to the claimant. However, an attribution based solely on overcharge from sales to the claimant is not suitable for victims other than direct and indirect purchasers, who have not purchased from the cartel (e.g., umbrella pricing). Thus, while generally the illicit gain seems a suitable criterion to determine relative responsibility, it no longer provides reliable results if the claimant has not made any purchases from the defendants. Moreover, an approach based solely on the illicit gain – irrespective of whether it is based on the total overcharge or the overcharge paid by the claimant – ignores the infringer's conduct in the infringement (e.g., implementation of the agreement) and her contribution to establishing the infringement in the first place (e.g., role as a 'leader' or 'initiator'). As has been shown, illicit gain is not an effective proxy for the determination of relative responsibility in all circumstances.

VI. The economic approach: Shapley value

Some economists have proposed the use of allocation methods known from the theory of cooperative games, particularly allocation based on the Shapley value. Ferey and Dehez (2013, 2016) have proposed the use of the weighted Shapley value for the attribution of damages liability among joint and several tortfeasors.[592] Schwalbe (2013), Napel and Oldehaver (2015), as well as Napel and Welter (2017) have proposed the use of the Shapley value particularly for the distribution of damages among cartelists.[593] In the economic literature on cooperative games, the Shapley value has been established as a tool for allocating costs and profits between members of a group of players. While non-cooperative games concern the strategic interaction

[592] Samuel Ferey and Pierre Dehez, 'How to Share Sequential Liability: A Cooperative Game Theoretical Approach' (2012) SSRN Electronic Journal; Samuel Ferey and Pierre Dehez, 'Multiple Causation, Apportionment, and the Shapley Value' (2016) 45 The Journal of Legal Studies 143.

[593] Ulrich Schwalbe, 'Haftungsquotierung Bei Kartellschäden - Ein Ansatz aus der Theorie kooperativer Spiele' (2013) Diskussionspapier Universität Hohenheim <https://www.uni-hohenheim.de/organisation/publikation/haftungsquotierung-bei-kartellschaeden-ein-ansatz-aus-der-theorie-kooperativer-spiele> accessed on 5 March 2021; Stefan Napel and Gunnar Oldehaver, 'Kartellschadensersatz und Gesamtschuldnerausgleich – Ökonomisch Faire Schadensaufteilung mit dem Shapley-Wert' (2015) Neue Zeitschrift Für Kartellrecht 135–140. Stefan Napel and Dominik Welter, 'Responsibility-Based Allocation of Cartel Damages' (2017) Universität Bayreuth Working Paper <https://www.vwl4.uni-bayreuth.de/pool/Publikationen_Napel/2017_Responsibility-Based-Allocation-of-cartel-damages---Napel-Welter---September-2017.pdf> accessed on 5 March 2021.

between players, cooperative game theory deals with situations where players can enter into binding agreements regarding coordinated behaviour.[594] The crucial difference is the possibility for players to build *coalitions*. To each individual player of the coalition, the Shapley value attributes the average of her *incremental (economic) contribution* to the worth of all possible groups of other players. The advantage of the Shapley value over other concepts of attributing shares between the cooperative players (e.g., Core, Bargaining set, Stable set)[595] is that it attributes a specific share or payoff/liability, whereas other cooperative tools would provide only a set or a family of sets for attribution. This has made the Shapley value attractive for the attribution of contribution in many other areas.[596] The concept of the Shapley value, introduced by Lloyd Shapley (1953),[597] is also attractive for the allocation of contribution among joint cartelists because it bases the allocation on the marginal contribution of each cartelist; that is, the additional contribution each cartelist had on the overall harm (overcharge) of the infringement. Thus, Shapley allocation would attribute the damages liability according to the individual cartelist's ability to influence prices.[598]

The Shapley value is an axiomatic approach in that it finds the approach that best satisfies a set of specific requirements (axiomatisation).[599] The Shapley value satisfies the following properties:

(1) **Efficiency –** The first axiom requires the entire 'gain' – here the overcharge claimed as damages – to be distributed among the players. The requirement is therefore in line with the victim's right to full compensation set out in Article 3 of the Directive. It also excludes the possibility of overcompensation, as required under Article 3(3).

(2) **Symmetry** – If two players have contributed equally to the gain of the coalition, they are entitled to equal shares. This requirement can be translated in the case of relative responsibility as follows: if participation in the infringement has the same implications on the overall damages, the liability of the firms must be the same.

(3) **Null Player** – Where a player has not contributed to the coalition, the player does not receive any share of the 'gain'. Similar to the second requirement, where the participation of a particular firm makes no difference to the overall damages – that is, the overall overcharge remains the same with or without the firm being a part of the infringement – the

[594] Hans Keiding, *Game Theory – A Comprehensive Introduction* (World Scientific Publishing 2016) ch 10 (Introduction to Cooperative Games).
[595] For a discussion on other solutions, see for example Hans Keiding (n 594) ch 13, TU Games: Other Solutions.
[596] Ulrich Schwalbe (n 593) 6.
[597] Lloyed Shapley, 'A Value for n-Person Games', in Harold William Kuhn and Albert William Tucker (eds.), *Contributions to the Theory of Games II* (Princeton University Press 1953).
[598] Stefan Napel and Dominik Welter (n 593) 3.
[599] Ulrich Schwalbe (n 593) 7.

firm cannot be held responsible for any share of the liability. Hence, there is no obligation to contribute.[600] The combination of requirements (2) and (3) therefore guarantees that equal contribution is treated equally and unequal contributions differently.

(4) **Additivity/Linearity** – The fourth requirement refers to the linear distribution of liability. In game theoretical terms, the additivity requirement means that if the game can be split into two individual games (game A and game B), the pay-out (or in our case the liability) of each player in the coalition game is the sum of the pay-outs of the two individual games (game A + game B). In other words, if two coalition games described by 'gain' functions $v^1$and v^2 are combined, the sum of the Shapley value of both games should equal that of a single game with the 'gain' function $v^1 + v^2$. Napel and Welter (2017) describe the requirement in terms of relative responsibility as follows: *'[I]f the same cartel N caused damages to suing customers in two or more markets – reflected by a characteristic function v^1 for market 1, by v^2 for market 2, etc. – then the total damage contribution of firm $i \in N$ should not depend on whether the allocation rule is applied to damages v^1 in one market 1 at a time, or in one go to the total $v = v^1 + v^2 + \ldots$ (Different 'markets' could here refer to different plaintiffs or subsidiaries of the same plaintiff, to different products in the cartel's portfolio, or (…) distinct quantities of the same product)'*.[601]

In his work from 1953, Shapley was able to show that only one allocation rule exists that satisfies all the conditions simultaneously and it is based on the average marginal contribution of a player to all coalitions. It is calculated by considering all possible coalitions between the players and by assigning each player her marginal contribution to each coalition.

This can be illustrated with the following example: Imagine a detected cartel N generated an overcharge (i.e., damages) that needs to be divided among the three participating undertakings $N = \{1, 2, 3\}$. Other firms that are active on the same market but have not participated in the cartel ($j \notin N$) are not responsible for the overcharge and are, as such, not liable for contribution. For every possible coalition ($S \subseteq N$) of the three firms, $v(S)$ describes the total amount of overcharge obtained by the coalition. The overcharge would have differed if one or more firms would not have joined the cartel. There would not have been an infringement and *vice versa* no overcharge ($v(S) = 0$) if the coalition is comprised of no ($S = \emptyset$) or only one firm ($S = 1$). For all

[600] However, as noted in the literature, it is generally not the case in cartels that a member of the cartel has not contributed to the overall damages; see Ulrich Schwalbe (n 593) 8 and Samuel Ferey and Pierre Dehez (n 592) 9.
[601] Stefan Napel and Dominik Welter (n 595) 11. They also refer to the requirement of *scale invariance* (*'the factual distribution of damages should not depend on whether they are expressed in US dollars, euro, or any other unit of account'*). The combination of *scale invariance* and *additivity* satisfies the *linearity* requirement.

other coalitions between the three firms (1,2,3; 1,2; 1,3; …), the overcharge must be estimated in terms of what would have accrued through the coordinated behaviour of the coalition while firms that did not participate in the infringement ($j \notin N$) had competed on the market.

To allocate the shares of the overcharge to each of the three firms according to the requirements of the Shapley value, their marginal contribution to the overall overcharge must be calculated. The marginal contribution of firm i to a specific coalition is the difference between the overcharge of the coalition $v(S)$ before and after firm i joined the coalition. Next, the sum of the marginal contributions of firm i in all coalitions is taken and divided through the number of all potential coalitions to arrive at the average marginal contribution of firm i (i.e., the Shapley value).[602]

1. Numerical example of distribution with the Shapley value

We can apply this to the numerical example provided by Schwalbe (2013) to calculate the average marginal contribution of firm 3.[603] Table 3 shows the marginal contribution of firm 3 for each coalition, which we can use to determine firm 3's Shapley value:

Table 3 - *Marginal contribution of firm 3*

Order of Coalition ($\boldsymbol{S}$)	***Coalition without firm 3*** $\boldsymbol{v(S\backslash\{3\})}$	***Coalition with firm 3*** $\boldsymbol{v(S)}$	***Marginal contribution of firm 3*** $\boldsymbol{v(S) - v(S\backslash\{3\})}$
1, 2, 3	24	42	18
1, 3, 2	14	28	14
2, 1, 3	24	42	18
2, 3, 1	8	18	10
3, 1, 2	0	9	9
3, 2, 1	0	9	9

[602] The Shapley value can generally be calculated in games with N players using the formula $S_i(v) = 1/|N|! \sum_R |v(P_i^R \cup \{i\}) - v(P_i^R)|$, where $|N|$ represents the number of sequences of N players, R the sequence, $v(P_i^R)$ the value of a coalition of players in front of player i, and $v(P_i^R \cup \{i\}) - v(P_i^R)$ the marginal contribution of player i to that coalition; Ulrich Schwalbe (n 593) fn 28.

[603] Ulrich Schwalbe (n 593) 7: The example of Schwalbe is based on three players who can decide whether to research on their own or to enter into research cooperation. If we assume – for simplicity – that overcharges of each coalition are known, we can apply the same example in analogues to a cartel infringement. In his numerical example, Schwalbe assumes the following characteristics:
$v(\emptyset) = 0$ $v(\{1\}) = 14$ $v = (\{2\}) = 8$ $v(\{3\} = 9$
$v(\{1,2\}) = 24$ $v(\{1,3\}) = 28$ $v(\{2,3\}) = 18$ $v(\{1,2,3\}) = 42.$

The Shapley value, namely the average marginal contribution of firm 3, can be calculated as follows:

$$S_3 = \frac{18 + 14 + 18 + 10 + 9 + 9}{6} = 13.$$

With the same method we arrive at the average marginal contributions of firms 1 and 2 of 18.5 and 10.5, respectively. The allocation between all three firms would be as follows:

Firm 1	18.5
Firm 2	10.5
Firm 3	13
$\mathbf{v(1,2,3)}$	42

Several other characterisations exist in the literature beyond Shapley's original 'value'. Napel and Welter (2017)[604] and Ferey and Dehez (2016) use the Shapley value that satisfies different axiomatisations based on Young (1985): (1) Efficiency, (2) Symmetry, and (3) Marginality/Monotonicity. The latter means that the allocation of liability to a firm only depends on the firm's marginal contribution, independently of the other firms' contribution.[605] Young (1985) proved that the Shapley value was the only allocation rule that satisfied those properties.

2. High administrative burden

In our example, where the exact effects of all different coalitions and sequences are known, we can easily determine each undertaking's share of contribution. In practice, of course, the calculation of the Shapley value for cartel infringements is significantly more difficult. The underlying reasoning of the Shapley value is that the gain, or in our scenario the overcharge, would have changed if the firms' conduct would have differed in the sense that the firms would not have joined at all or joined in a different order. This requires the estimation of the effects of each potential coalition on the market, which directs us to a major practical disadvantage of the Shapley value for the allocation of damages liability: The estimation of the counterfactual overcharges for the different scenarios of coalitions requires a vast amount of data for demand and cost estimates. It will be time consuming and difficult to arrive at an overcharge level for so many different scenarios. At present, damages proceedings are already shadowed by lengthy disputes between claimants and defendants regarding which method to use for the quantifica-

[604] The authors also use scale invariance; see Stefan Napel and Dominik Welter (n 593) 11.
[605] Ferey and Dehez (n 592) 152.

tion of the harm. In its Practical Guide on the Quantification of Harm,[606] the Commission suggests that different methods and techniques are equally valid for the estimation of harm and does not prioritise a specific method over others. It has become common practice to refer to the Communication as a reference point for the general validity of the chosen method in parties' expert opinions, even when the applicability under the specific circumstances of the case remains subject to dispute between the parties. Because of the complexity of competition cases, in particular the analysis of data for the quantification of harm, the proceedings in Europe tend to take longer on average than those in other areas of the law. The Ashurst Report found that in most Member States, competition proceedings take an average of 2–5 years until final judgement, and in some Member States even longer (7 years in France and over 10 years in the Netherlands).[607] The use of the Shapley value would inevitably follow the same pattern in contribution proceedings with the significant difference that there is not only a single counterfactual (hypothetical competitive prices) that must be determined but countless more for every potential coalition between the members of the infringement $(1,\ldots,n)$. Hence, determining the counterfactual for every potential coalition would put an unreasonable burden on the administrative system and lengthen the proceedings even further.

Proponents of the Shapley value have themselves admitted that its calculation would lead to insurmountable difficulties in practice, since in most cases the necessary empirical data are not available or reliable for calculating the equilibria in different scenarios.[608] Schwalbe (2013) therefore suggests the use of market shares during the competitive phase as a proxy for the Shapley value. However, he cautions not to draw any general conclusions from his Cournot model. In a market with differentiated products, where firms compete on price, a different allocation rule might be closer to the Shapley value.[609] Napel and Welter (2016) test different rules (*per head, market shares based on competitive sales, market shares based on cartel sales, cartel revenues, and competitive revenues*)[610] on a Bertrand model and find that there is not one allocation rule that outperforms the others.[611] They find that allocation rules based on market shares tend to score higher compared with profit-based allocation, but a per-head division performs better when firms produce close substitutes.

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[606] Commission Staff Working Document: Practical Guide – Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] SWD(2013) 205.
[607] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (**Ashurst Report**) 90 <https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 4 March 2021.
[608] Ulrich Schwalbe (n 593) 14.
[609] Ulrich Schwalbe (n 593) 16.
[610] Stefan Napel and Dominik Welter (n 593) have also tested an approximation of the Shapley value by *dichotomous damage scenarios*, which score significantly better compared with 'traditional' allocation rules.
[611] Stefan Napel and Dominik Welter (n 593) 31-34.

Instead, to overcome the non-administrability of the Shapley value, they suggest the use of merger simulation analysis.[612] They argue that an estimate of the necessary price and overcharge estimates for the different coalitions of cartels can be obtained from equilibrium analysis in close analogy to merger simulations.[613] The authors apply common merger simulations to their Bertrand model to demonstrate that the data requirements are the same for the allocation of damages and for merger simulation analysis. Because merger simulation analysis has already established itself *'in the toolkit of competition policy'*, they argue that similar tools can be applied to find the counterfactual overcharges for the coalitions. They admit, however, that reaching an agreement in court on the counterfactual is bound to be difficult. However, the same difficulty already exists for the quantification of harm of the plaintiffs who purchased goods at the cartelised price.

While it might be true that merger simulation tools have become an integral part of the assessment of the effects on competition in merger cases,[614] for which competition authorities have gained a good practical understanding of its application, national courts are less familiar with such tools. In damages proceedings, the quantification of the damages already requires complex economic analyses, and therefore courts must generally rely on economic expert opinions. The replies in the Ashurst Report (2004) described the quantification of damages of claimants in damages proceedings as complex and costly, which the report found to be an obstacle to private enforcement. The main solution proposed to overcome the complexity and the different approaches applied by national courts was the publication of guidelines on the different methods of calculating damages, namely the Practical Guide on the Quantification of Harm.[615] Yet, no harmonised approach exists for the quantification of harm that is commonly applied by national courts, especially because each competition case is distinct with different facts and market characteristics. The Practical Guide clearly states that the methods proposed should not be seen as exhaustive and that methods and techniques may evolve over time.[616] Thus, while the methods for the quantification of harm will continue to evolve over time, national courts will be confronted with new and complex techniques they must understand and be able to apply. Moreover, the Directive now enables courts to estimate the amount of harm of the claimant, where it is practically impossible or excessively difficult to quantify the harm precisely (Article 17(1)). Since the allocation of relative responsibility is left to national law, Member States would have

[612] Stefan Napel and Dominik Welter (n 593) 31.
[613] Stefan Napel and Dominik Welter (n 593) 23.
[614] See for example O. Budzinski and I. Ruhmer, 'Merger Simulation in Competition Policy: A Survey' (2009) 6 Journal of Competition Law and Economics 277–319.
[615] Ashurst Report (n 607) 125; Commission Staff Working Document, Practical Guide (n 606).
[616] Commission Staff Working Document: Practical Guide (n 606) para 10.

to introduce a similar rule for the overcharges of each coalition. However, this raises the question of how national courts can estimate overcharges based on a technique judges are not familiar with and have no experience of its application.

An additional difficulty arises from the de-centralisation of competition proceedings in Member States. The Directive does not require Member States to centralise all competition proceedings with one Court 'specialised' in competition damages actions, as is the case with the Competition Appeal Tribunal in the UK.

Under these circumstances, it is unlikely that the analogous application of tools from another field of the law – that national courts are also unfamiliar with – will noticeably lessen the administrative burden of the allocation based on the Shapley value. National courts will have to rely even more on expert opinions and the counterfactual for each *coalition* will open a new battlefield for the parties, thereby extending the length of the proceedings and raising costs, including administrative costs. Hence, the use of merger simulation tools would complicate the allocation of contribution further and substantially lengthen the duration of proceedings.

3. The requirement of symmetry and the weighted Shapley value

Another disadvantage of applying the Shapley value as an allocation rule relates to the properties of said value, more precisely the Symmetry property. Under this requirement, firms that contributed the same to the overcharge are treated the same when dividing the damages liability. However, the symmetry requirement neglects the role the firms have played in the cartel. As outlined above, some members of a cartel may play a more significant role in the cartel, such as by leading or instigating the infringement. Therefore, even if the firms contributed the same economically, one may have played a more significant role in the creation and in stabilising the infringement. Furthermore, even if a firm has not implemented the infringement (i.e., the overcharge), its mere presence (behaviour of the firm) in the cartel meetings can have a stabilising effect on the infringement. The behaviour of a firm can therefore be more relevant for the firm's relative responsibility than its economic contribution to the overall mark-up price.

For that reason, Ferey and Dehez (2016) have suggested using the *Weighted Shapley Value*.[617] By removing the requirement of symmetry for firms with equal economic contribution, different *weights* can be assigned to players, who can thus be treated differently. The adjustment was first introduced by Shapley (1953b) himself.[618] Napel and Welter (2017) use the weighted Shap-

[617] Samuel Ferey and Pierre Dehez (n 592).
[618] Lloyd Shapley, *Additive and Non-Additive Set Functions* PhD thesis (Princeton University 1953).

ley value with the axiomatic characterisation of Kalai and Samet (1987) to relax the symmetry to require only the distribution in a *'consistent'* manner and form a *coalition* of specific sequence to a *'partnership'*. Members of the partnership only contribute to coalitions of other players when they are together. This allows for the treatment of the partnership as an individual,[619] whereas internally the 'gain' can be allocated asymmetrically between the members of the partnership. Napel and Walter (2017) propose the weighted Shapley value for the liability cap for leniency recipients under Article 11(4) of the Directive, which limits the liability to damages from their direct and indirect purchasers. However, they also suggest the same extension of the Shapley value to account for the additional liability of ringleaders. Nevertheless, they have not considered the appropriate value for the ringleader's additional liability but suggest – like the author (chapter V) – an adjustment of fines in infringement decisions as a reference point.

4. Comments on the use of the Shapley value for the allocation of civil liability

The discussion shows that the Shapley value allocates the firm's liability based on its economic contribution to the overcharge by analysing all possible collusions between the firms and the sequences of joining the infringement. The Shapley value scores best in terms of allocating liability according to each infringer's welfare impact. In theory, an extension of the model (*Weighted Shapley Value*) would also allow the firm's behaviour and its role in the cartel to be taken into account. However, before the Shapley value can be adjusted for subjective factors, such as the firm's role in the cartel, a method to quantify the appropriate value of the firm's role in the cartel is still necessary.[620]

A major obstacle of the Shapley value is its impracticability, since it requires data for the estimation of the counterfactual overcharge scenarios of each coalition. The allocation rule quickly reaches its limits when no sufficient data set is available. Moreover, the suggested application of merger simulation analysis is unknown in civil proceedings, raising administrative costs and lengthening the proceedings even further. Moreover, the Shapley value is a purely theoretical approach that has not been tested in practice. Therefore, it is likely that its introduction would overburden national courts, leading to severe administrative inefficiencies.

[619] Ehud Kalai and Dov Samet, 'On Weighted Shapley Values' (1987) 16 International Journal of Game Theory 205, 219.
[620] An analogy from the Commission's practice of fines adjustments – as proposed in chapter VI – would be conceivable.

D. Methods for the Quantification of the Infringer's *Responsibility for the Infringement*

This section analyses to what extent the different allocation rules distribute civil liability according to the infringers' responsibility for the infringement. Because *responsibility* for the infringement is difficult to grasp or quantify, the allocation rules are assessed primarily based on their corrective justice and secondarily on their distributive justice outcomes. Therefore, and in contrast to the general law and economics methodology, the analysis concentrates on a backward-looking approach (*ex post*), namely how it scores in terms of justice; that is, how closely the liability has been allocated according to the infringer's contribution to the harm and whether it is distributed according to the magnitude of the contribution. In other words, this section analyses how each rule allocates the harm among joint infringers once the harm has been caused.

I. Criticism against relative responsibility

In relation to the discussions of the no-contribution rule (see chapter III), some law and economics scholars, such as Easterbrook, Landes, and Posner (1980), have concentrated solely on economic efficiency. They particularly stress that the no-contribution rule enhances settlements that can avoid litigation costs.[621] In fact, the arguments raised by advocates of the US no-contribution rule are partly also relevant for the discussion on the legitimacy of relative responsibility for the attribution of liability in civil litigation.[622] During the debate, which continues today, the proponents of no-contribution have particularly criticised that contribution would increase the complexity of damages litigation, which in turn would place an unjustifiable burden on the administrative system.[623] It is certainly true that an allocation based on relative responsibility is more complex than refusing contribution altogether (no-contribution rule). Moreover, other (objective) criteria for the quantification of contribution such as turnover or market shares are significantly easier to apply compared with determining each joint infringer's individual responsibility. The more accurately that relative responsibility ought to be determined, the more complex it becomes to quantify contribution. For instance, the Directive lists as relevant criteria two objective criteria (*turnover* and *market shares*) and one subjective criterion (*the role in the cartel*). If a Member State decided to apply only one of the listed criteria for the

[621] See chapter III, B.IV above; Frank H. Easterbrook, William M. Landes and Richard A. Posner, 'Contribution Among Antitrust Defendants: A Legal and Economic Analysis' (1980) 23 The Journal of Law and Economics 331, 340.
[622] For details on the no-contribution rule, see chapter III above.
[623] Frank H Easterbrook, William M Landes and Richard A Posner (n 621) 340. See also chapter III, B.IV.3 above.

quantification of an infringer's responsibility, determining contribution would not necessarily be particularly complex, especially because the undertakings' turnovers and market shares are known to the courts from the infringement decision. Thus, the argument that relative responsibility would overburden the administrative system, as it is *per se* more complex to determine, does not hold. The administrability of *relative responsibility* depends predominantly on what methodology is applied by Member States.

Moreover, many legal scholars have criticised the disregard of fairness and equity implications of the no-contribution rule by law and economics scholars. The main fairness concern raised against the no-contribution rule is that it imposes radically different liabilities on defendants who were part of the same infringement. In other words, some infringers have to face a burden of civil liability that can exceed their contribution to the harm, while the burden of other infringers remains (significantly) below their contribution.[624] The discussion on the no-contribution rule in the previous chapter revealed that an 'all-or-nothing' approach for civil liability should be rejected for reasons of fairness. Thus, administrative efficiency is not sufficient to justify the random and 'unfair' distribution of civil liability. Moreover, the Directive has expressly advocated fairness when it chose *relative responsibility* for the allocation of liability, deliberately considering other efficiencies less important.

Another criticism relates to the ambiguity – in the view of the proponents of no-contribution – of relative responsibility. Easterbrook, Landes, and Posner (1980), for instance, criticise that relative responsibility, as a basis for the allocation of contribution, *'has no apparent meaning'*.[625] They argue that to the extent that *'responsibility'* relates to causation, *'relative responsibility'* may be meaningless in the context of collusions, as collusions are joint infringements and require by their very nature all tortfeasors to jointly commit the infringement. Moreover, even though Wright acknowledges that causation is necessary for the finding of responsibility, he rejects causation as the only determinant of *'relative responsibility'* in cases of joint infringements:

> *'Causation, unlike the level or foreseeability of the risk or most of the other factors relevant to responsibility, is not a matter of degree. Some condition either was or was not a cause (in the proper scientific sense) of a particular injury. There is no way, based purely on causation, to identify one cause of an injury as more important or significant*

[624] For a summary of the fairness objections raised against the no-contribution rule, see chapter III, B.III.1.
[625] *Hearings on S. 995 Before the Comm. on the Judiciary, United States Senate*, 97th Cong., 1st & 2nd Sess., at 201 (statement of Hon. Frank H. Easterbrook). See also Edward D. Cavanagh, 'Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies.' (1987) 40 Vanderbilt Law Review 1277, 1318.

> *than any other cause of the same injury. (…) True 'causal apportionment' is conceptually meaningless'.*[626]

Furthermore, Landes and Posner (1983) have on other occasions argued that causation should play no role in determining the liability of tortfeasors, and instead a tortfeasor should only be regarded as the cause of an injury when she is the lower cost avoider.[627]

The Directive has not clarified the term *responsibility*, but rather left it as an 'empty shell' which lacks meaningful guidance as to how liability should be distributed among infringers. Arguably, the uncertainty about the meaning of the term *responsibility* for the infringement is a considerable flaw of the new rules on contribution as it makes it difficult to establish a uniform approach to contribution across Member States. It thereby hinders the Directive's goal of a level playing field for competition damages actions. The criticism that *relative responsibility* has no apparent meaning would indeed be justifiable if the term *responsibility* were to be interpreted simply as another word for causation, as was suggested by Easterbrook, Landes, and Posner (1980). As Wright has rightfully asserted, the apportionment of civil liability based on causation is impossible if all joint infringers were found to have caused the infringement under the legal rules. Causation is only one of several requirements necessary for the finding of legal responsibility. It is unlikely that the Directive's understanding is that both terms, *responsibility* and *causation*, have the same meaning. For instance, in Article 3 in relation to the victim's right to full compensation and in Article 11 when it establishes joint and several liability, the Directive expressly refers to the causation of the harm (*'harm caused'*). On the other hand, only for the determination of the amount of contribution to the harm caused, the Directive refers in Article 11(5) and (6) to the responsibility of the individual infringer. Hence, the meaning of the term *responsibility* – as intended by the Directive – is likely to go beyond the mere legal rules for causation in national Tort laws. Responsibility refers to the question of when a person can be held responsible for her actions under legal, moral, or other standards. Thus, the term should not be understood as a synonym for rules that establish a causal link between two events. In contrast to responsibility, determining whether an event could have occurred *but for* a previous event does not entail fairness and equity considerations, which determine when a conduct also

[626] Richard W. Wright, 'Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure' (1988) 1 U.C. Davis Law Review 1141, 1152-53; see also Joseph Angland (n 580) 2395, fn 99.

[627] William M. Landes and Richard A. Posner, 'Causation in Tort Law: An Economic Approach' (1983) 12 The Journal of Legal Studies 109, 134. William M. Landes and Richard A. Posner, 'Tort Law as a Regulatory Regime for Catastrophic Personal Injuries' (1984) 13 The Journal of Legal Studies 417-434. For a more general overview of the views taken on Causation in the Law and Economics literature see Omri Ben-Shahar, 'Causation and Foreseeabilitiy' in Gerrit De Geest and others (eds) *Encyclopedia of Law and Economics* (2nd edn, Edward Elgar Publishing 2021) 644.

creates legal responsibility for the end-result. In other words, every actor in a chain of causation may have equally *caused* the harm; however, this does not mean that all actors were also equally *responsible* for its occurrence. Therefore, by relying on *responsibility* for the attribution of liability, the Directive deliberately chose to include justice and equity considerations for determining liability. Wright argues that the traditional requirements for tort liability are founded on *moral responsibility,* which consists of a *'theory of distributive justice based on equality of resources - the provision of an equal starting point for each person's pursuit of his life plan - and a theory of corrective justice based on protection of each person's rightful stock of resources, which are deployed in the pursuit of his life plan'*.[628] Under the requirements of *moral responsibility*, *'[e]ach defendant who has behaved tortiously (by creating a significant, objectively foreseeable, and unaccepted risk of injury to the person or property of another) is liable for injuries that were caused by the tortious aspect of her behavior, subject to some narrow proximate cause limitations. Conversely, each plaintiff who would not have suffered injury if not for the tortious behaviour of others is entitled to full but not excess compensation from those who tortiously caused the injury'*.[629]

II. *Responsibility* in terms of justice

This section discusses the *responsibility* of joint infringers as traditionally understood as a conception of equity, namely in terms of corrective and distributive justice. Corrective justice is measured on two grounds: (1) compensation of the victim's losses, and (2) the transfer of the wrongful losses to the infringer who was *responsible* for the harm caused. The first prerequisite is already guaranteed by the introduction of joint (and several) liability in Article 11(1) Directive (*'with the effect that each of those undertakings is bound to compensate for the harm in full'*). Therefore, this section only focuses on the second prerequisite, the *responsibility* for the losses suffered. Moreover, under corrective justice, causation between the infringer's contribution to the infringement and the harm suffered by the victim is the most relevant factor for determining responsibility. The principal function of causation is to explain the connections between events and to attribute responsibility to agents whose actions have provoked them.[630] It is important, however, to distinguish between *causation in fact*, which refers to the explanatory purpose of the connection between events, and *causation in law*, which refers to the attrib-

[628] Richard W Wright (n 626) 1180.
[629] Richard W Wright (n 626) 1181.
[630] Ioannis Lianos, Peter J Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press 2015) 4.15.

utive function by establishing responsibility for the outcome following their actions.[631] The latter – causation in law – already entails a normative policy choice that the infringer should be held liable. Causation in fact determines the factual link between the infringement and the harm by building a mechanical chain of events that link the action to the harm.[632] As will be explained below, even a very remote action can therefore still be considered to have caused the harm. The function of causation in law is to limit the responsibility of the tortfeasor for normative reasons. For that purpose, some jurisdictions require that the damage was reasonably foreseeable (e.g., England), adequately connected to the action or lies within the scope of the legal rule (e.g., Germany), or sufficiently direct (e.g., France).[633] However, given that causation in fact and causation in law rely on the same factual basis, it is often difficult to draw a clear line between both stages of the causation enquiry.

The rules on causation in law and the tests to limit the responsibility are less relevant at the stage of contribution, namely determining the share of contribution of each joint infringer. At this stage, it has already been established that all the joint infringers are responsible for the harm.[634] Moreover, as explained in chapter II, the CJEU in *Otis* stressed that national rules on legal causation limiting the causal relationship, such as the protective scope, cannot apply for the right to claim compensation, which is governed by EU law.[635] Thus, it would be absurd to consult those diverging normative policy choices at the national level for the attribution of civil liability among joint infringers, especially since those rules are inapplicable for the responsibility of infringers of EU competition law.

By contrast, the links that constitute a relevant cause in the sense of causation are in fact *'determined independently from any considerations of (legal policy) interests for the determination of causation in law/legal liability'*.[636] As noted above, it may sometimes be *'difficult to separate issues of fact from issues of legal policy in the determination of causation in fact'*.[637] The interest of the decision makers and the context in which causation should be identified influence the classification of causation in fact. The law may, for instance, apply different tests in different circumstances and the scope of the rule may become relevant for what constitutes a casually

[631] For the distinction between *causation in fact* and *causation in law,* see also chapter VII, D.VI.
[632] Claudio Lombardi, *Causation in Competition Law Damages Actions* (Cambridge University Press 2020) 1.6.
[633] Claudio Lombardi (n 632) chapter 2.
[634] The distribution of liability among multiple tortfeasors once liability has already been established must be distinguished from the apportionment of part of the assessment of causation, as is the case under the causal proportional liability rule; see for example Claudio Lombardi (n 632) 4.4.
[635] See chapter II, A.I.
[636] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.18.
[637] Ibid 4.19.

relevant event (e.g., reasonable foreseeability, duty of care). However, causation in fact remains *'distinct from issues of justice, efficiency, and more generally, policy, which enter the picture only when examining the attributive function of legal causation (responsibility), that is, choosing "the" responsible cause'*.[638] To determine what constitutes a fair allocation of liability in terms of corrective justice, it is necessary to first determine on what basis the theories on causation consider a particular act or event to be relevant for the occurrence of the harm. The outcome would be biased if policy considerations were to be taken into account (*causation in law*) that filter out relevant events in the chain of causation to achieve a particular policy goal.

Different theories for the determination of a *causal connection* in terms of causation in fact have emerged. The following part briefly introduces some of the theories to establish causation in fact that have been discussed in the literature and applies them to joint competition infringements, such as price-fixing cartels. Finally, this section discusses the considerations that underlie these theories on causation to better grasp the meaning of *responsibility* as a conception of equity and justice. The final part of this section analyses whether the allocation rules attribute liability according to the individual *responsibility*. The section concludes with a policy recommendation primarily based on corrective justice considerations, namely the relationship between infringers and victims *through economic relations*.

III. Theories of causation in fact

The basic rule for causation is the equivalence of conditions (*condicio sine qua non*), which is commonly applied in all Member States. The other rules outlined in this section are applied as correctives to the over-inclusive deficit of the equivalence of conditions.

1. Condicio sine qua non (the 'but-for' test)

According to the *condicio sine qua non* rule, any condition is necessary absent which the specific damage would not have occurred ('but-for' test). Wright describes the strong necessity requirement of the 'but-for' test as follows: *'a condition is a cause of some result if and only if, but for the occurrence of the condition, the result would not have occurred, considering the circumstances that existed on the particular occasion'*.[639] In other words, *'an activity or conduct is a cause of the victim's damage if, in the absence of the activity, the damage would not*

[638] Ibid 4.22.
[639] Richard W. Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (2021) 1 Iowa Law Review 1001, 1021; see also Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.27.

have occurred'.[640] The *condicio sine qua non* rule suffers deficiencies, however, which may lead to under- and over-inclusiveness. Over-inclusiveness may occur because of the equivalence property of the rule, which means that all conditions are equally indispensable for the result. A well-known example that illustrates the problem is the act of giving birth to a person who later in his life runs over a pedestrian has caused the death of the pedestrian equally as much as the negligent act of the driver has.[641] On the other hand, the rule is under-inclusive when a cause is redundant with regard to an effect (e.g., pre-emptive causation or duplicative cause). Lianos et al. (2015) illustrate the under-inclusiveness of the rule in the context of a competition infringement as follows:

> *'[S]uppose that the decision-maker considers whether the behaviour of an individual member of a cartel has caused damage to customers. In some instances, at least, it may be argued that the price in the industry would have remained far above the competitive level even if one individual firm had not participated in the cartel. Suppose for the purpose of illustration that a particular firm's decision to join the cartel had not affected the cartel price. A strict application of the 'but for' criterion for that individual firm might lead one to the conclusion that the firm's actions caused no damage, as the cartel price would have stayed the same, even if this firm would not have contributed to the cartel. However, in at least some cases cartels have been alleged to consist of a large number of small firms. If one considered whether any individual firm's behaviour caused the damage to customers, one might arrive at the conclusion that no firm should be held responsible'*.[642]

The introduction of joint and several liability – which eliminates the requirement of proof of individual causation – was a policy consideration for overcoming the under-inclusiveness and for helping victims of joint competition infringements to claim damages (*causation in law*).

Under the equivalence property of the *condicio sine qua non* rule, all contributions to the joint competition infringement are considered to have equally caused the harm. The mere participation (minor involvement) in the meetings would be equally as relevant for the causation as the instigation of the infringement or the implementation of the agreed overcharge towards the direct and indirect purchasers. Hence, the equivalence theory consequentially promotes the allocation of equal shares between all joint infringers (*per capita*) and disregards the relative responsibility of each infringer altogether. Because this contradicts the clear notion of the Di-

[640] As it is defined in Art 3:101 of the Principles of European Tort Law (PETL): European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Springer 2005).
[641] Hartmut Oetker, '§ 249', *Münchener Kommentar zum Bürgerlichen Gesetzbuch Bd. 2: Schuldrecht Allgemeiner Teil I* (7th edn, C H Beck 2016) para 103.
[642] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.29.

rective to attribute liability based on relative responsibility, the reasoning of the theories correcting the *condicio sine qua non* rule are assessed in more detail below.

2. The NESS test

One of the correctives of the 'but-for' test is the necessary element of a sufficient set of conditions (**NESS**) test. The NESS test does not require a direct link between the condition and the event, but instead a set of conditions is sufficient for causation. This means that even if *'each of the individual components of the set would not be sufficient for producing the specific damage, if it forms part of a set of conditions that would be sufficient for the occurrence of the damage, it would be deemed to have a causal character'*.[643] The NESS test is therefore better equipped to overcome the under-inclusiveness problem of the 'but-for' test illustrated in the competition example above. The test does not require a strong necessity as the 'but-for' test does but considers a firm to have caused the damage *'if it is a necessary element of (or condition contributing to) some set of antecedent actual conditions that was sufficient for the occurrence of the cartel'*. Hence, the necessary requirement under the NESS test is that the joint infringer has at least contributed to the cartel that led to the cartelised price.[644]

3. Causa proxima

The *causa proxima* theory considers each condition chronologically as well as (translated literally) the proximate and not the remote cause – namely the last condition before the realisation of the damage – as the cause for the event. It therefore focuses on the last opportunity to prevent the harm. [645] Today the theory is used only rarely and has been criticised due to excluding conditions that may be more remote but have contributed significantly more to the harm.

4. Efficient condition

The efficient condition theory originated in criminal law. The theory does not focus on the necessity of a condition but concentrates on the most efficient condition for the production of an event to find the cause.[646] Thus, the condition that made the greatest contribution to the result

[643] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.35.
[644] The NESS test may, on the other hand, lead to over-inclusiveness in situations of simultaneous sufficient causes. As this study focuses on joint infringements such as cartels, the author does not consider other joint competition infringements such as behavioural infringements of Art. 102 TFEU. Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) illustrate the over-inclusiveness problem with an Article 102 TFEU example (at 4.35).
[645] The causa proxima is commonly applied in marine insurance law; see for example Wan Izatul Asma Wan Talaat, 'Causa Proxima Non Remota Spectatur: The Doctrine of Causation in the Law of Marine Insurance' (2003) 34 Journal of Maritime Law & Commerce 479.
[646] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.36.

is considered to have caused the event. Lianos et al. (2015) argue that this theory – at least when contribution is measured quantitatively and not qualitatively – could integrate economic analysis and evidence. They suggest that the efficient condition could be measured by an assessment of the changes in the equilibrium. Other versions of the theory have linked the damages liability to the proportion of *'marginal contribution to the risk of damages'*. The proponents of this version tie the liability to the *general* risk of causing harm instead of actually causing the *specific* harm. For example, Schroeder (2015) argues that from a corrective justice perspective, a party that has increased the risk of harm through its conduct should be liable for that harm, regardless of whether the specific conduct has caused the claimant's harm.[647] This concept of causation can in fact be particularly useful for the determination of causation of joint infringements (cartels) where it is impossible to identify which of the firms has caused the harm. In practice, the concept of *'material contribution to the risk of damages'* was applied in relation to the risk of contracting a disease.[648] In these cases, the court held that each defendant was liable only for his contribution to the total risk of the claimant contracting the disease.

5. Causal proportional liability

Causal proportional liability is another rule developed to address situations of causal uncertainty, particularly in situations with multiple tortfeasors. Causal uncertainty may have different sources: *'broadly defined, it may be evidential, when there is uncertainty over the facts, or scientific, when there is uncertainty over the inferences that should be drawn out of the facts on the basis of the scientific method'*.[649] The source of causal uncertainty can therefore be of a wide range. In the context of contribution claims, it has already been established by a court that the joint infringers were a legal cause for the harm, and thus, causal uncertainty plays only a limited role. The causal proportional liability rule may nevertheless become relevant in situations when the injured plaintiff cannot identify, or does not need to prove, which of the joint infringers has caused the harm, as all joint infringers are legally treated as a cause of the harm (joint and several liability). This may be illustrated by the famous *Hunting case*, a problem discussed in many jurisdictions:[650]

[647] Christopher H Schroeder, 'Corrective Justice and Liability for Increasing Risks' (1990) UCLA Law Review 439–78; see also Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.39.
[648] *Barker v Corus UK Ltd, 2 WLR 1027, UKHL 20, 2 AC 572; Murray v British Shipbuilders (Hydrodynamics) Ltd and Others; Patterson v Smiths Dock Ltd and Another* [2006] UKHL 20.
[649] Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.52.
[650] For example in Germany: BGH, 02.02.1962 - VI ZR 156/61; in the US: *Summers v. Tice*, 33 Cal. 2d 80, 199 [1948]; in Canada: *Cook v Lewis* [1951] SCR 830.

> *Assume there are two hunters and both hunters each fire a shot at the plaintiff. Only one bullet injures the plaintiff and it remains unclear from which hunter's rifle the injuring bullet was shot.*

In the *Hunting case* and more generally in situations of causal uncertainty, the plaintiff is not able to prove that the hunters have caused the injury relying on the *condicio sine qua non* rule and with the procedural burden of proof resting on the plaintiff. Both hunters could evade any liability under the general causation rules, because the plaintiff cannot prove to the necessary standard which of the two bullets injured him. The result has been viewed as unjust and criticised on corrective justice grounds. Legal systems have addressed this problem differently, ranging from an *'all-or-nothing'* approach under general tort law to the introduction of evidentiary rules favourable to the plaintiff. Some of the approaches improved the position of the plaintiff by shifting the entire burden of proof to the defendants, the introduction of *prima facie* evidence, and the ability of courts to estimate damages. Other approaches recognise the existence of a causal link between the harm and multiple tortfeasors by law, ignoring the causal uncertainty altogether. For competition damages cases, the Directive has introduced a series of measures: rebuttable presumption that cartels cause harm (Art. 17(2)), the ability to estimate the harm caused by the cartel (Article 17(1)), and joint and several liability of cartelists (Article 11).

A different approach to solving the causal uncertainty of multiple tortfeasors is to address the problem at the stage of *causation in fact* by attributing responsibility according to the probability that the specific tortious activity was a factual cause (*causal proportional liability*).[651] In the Hunting case, the proportional liability doctrine would impose a liability of 50% on each shooter, as both simultaneously fired their rifles at the victim creating a probability of 50% that their shot injured the plaintiff. In the end, both are held liable according to the probability that their action has caused the harm.

The *causal proportional liability* doctrine may also take different forms, such as the form of a *'market share liability'*.[652] The market share liability is a different approach to solving the causal uncertainty problem in situations with multiple tortfeasors. The proportional liability based on the tortfeasors market shares arose in the *Diethylstilbestrol* (**DES**) case in the US. DES was a pharmaceutical drug taken by many women during pregnancy in the mistaken belief that it would reduce the risk of pregnancy complications and miscarriages. Only decades later,

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[651] Israel Gilead, Michael D. Green and Bernhard A. Koch, 'General Report Causal Uncertainty and Proportional Liability: Analytical and Comparative Report' in Israel Gilead, Michael D. Green and Bernhard A. Koch *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter, 2013) 1–73, at 2; Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 630) 4.55.

[652] Other forms are the doctrine of loss of chance (*'perte de chance'*) in French tort law.

the drug was found to have caused a rare type of cancer affecting their children as well as other medical complications.[653] At that time it was no longer possible for plaintiffs to prove which of the manufacturers of DES had produced the drug that was taken by the plaintiffs and caused the adverse effects. The problem was essentially similar to the hunting problem, to the extent that the plaintiff suffered a harm but could not identify which of the multiple tortfeasors had caused it. However, it was also more complicated since it was unclear which manufacturer produced the DES the victim had purchased. In the hunting example, at least the victim of the two hunters is known.

The Court in *Sindell* adopted the *proportional liability doctrine* based on each manufacturer's market share, but – because only a few of the manufacturers were defendants – granted only a portion of the liability.[654] The court held that because not all manufacturers were involved in the proceedings, there were risks that none of the defendants before the court caused the particular injury as well as that the offending manufacturer not party to the proceedings would escape the entire liability. Weinrib (2016) argues that from a *corrective justice perspective,* the reasoning is flawed because *'while the presence of all the possible defendants may make it easier to demonstrate the impossibility of identifying the perpetrator, this can hardly be a categorical precondition to liability'*.[655]

Thus, what justifies a liability proportionate to the tortfeasors market share? Weinrib distinguishes between the *Hunting case* and the DES case. While in both cases the plaintiffs were wrongfully injured and the defendants also acted wrongfully, in contrast to the hunters' case, not every manufacturer in the DES case is a perpetrator of the same injustice. In *Abel v Eli Lilly*, the Michigan Supreme Court, which granted full recovery, described the difference that in the hunters' case *'each defendant was negligent toward the plaintiff; [in the DES case], each defendant was negligent toward a plaintiff, but each defendant was not negligent toward each plaintiff'*.[656] According to Weinrib, the manufacturers would have acted wrongfully towards the plaintiff if the plaintiff's mother would have purchased the drug at a particular pharmacy that was supplied by several manufacturers, but it was impossible to determine the specific brand she bought. Then the case would be *'no different from that of the hunter'*. The distinctive characteristic between the hunters' and DES cases, as Weinrib puts it, is the foreseeability of the plaintiff's injury as a result of the wrongful act in the hunters' case. In this case, the *'signif-*

[653] See for example *Sindell v Abbott Laboratories* 26 Cal 3d 588 CA [1980].
[654] Ernest J Weinrib, 'Causal Uncertainty' (2015) 36 Oxford Journal of Legal Studies 135, 149.
[655] Ibid.
[656] *Abel v Eli Lilly* 343 NW2d 164 [1984] MI.

icant feature of liability' results from the *'**relationship** that arises when the defendant subjects the plaintiff'* to the wrongdoing. From a corrective justice perspective, this relationship between the wrongdoer and the person exposed to the risk that the wrongdoing materialises in a harm influences the factual causation.

On the other hand, when such a relationship between the infringer and the victim is missing, as was the case in DES, the liability is allocated according to the *'**risk of injury** that each created to the public at large, rather than to link any manufacturer's liability to any particular injury'*. In fact, the *market share liability* no longer links the defendant's liability to a particular relationship between the defendant and the victim but rather to the defendant's culpability to contribute to the wrongful conduct. As Weinrib argues, the move to liability for risk of injury (*market share liability*) is a move from the predominant goal of corrective justice to distributive justice. Indeed, *'what matters is the distributive justice of apportioning to manufacturers their respective shares of the total injuries caused by their culpability'*.

6. Adequate causation

In Germany, scholars have formulated the adequate causal theory (*Adäquanztheorie*) to limit the liability following the *condicio sine qua non* test. The adequate causation theory subdivides the conditions relevant to the occurrence of damage in the sense of the *condicio sine qua non* formula according to the probability of each of the conditions leading to the success that occurred. According to the adequate causal theory, the cause must be suitable in general and not only under particularly peculiar, improbable circumstances, which are not considered part of the regular course of events, to bring about a success of this kind.[657] In other words, the cause must be generally suitable to bring about a consequence like the one that occurred or at least considerably increase the probability that it occurs. Whether a cause is adequately causal is not determined *ex post* but rather from an *ex-ante* point of view, taking account of circumstances that would have been recognisable to an optimal observer in the position of the perpetrator. Thus, the test infers causation in the specific case from the general causation foreseeable by an optimal observer. It has therefore often been defined as the quintessential form of the generalising theory of causation.[658]

[657] BGHZ 7, 198 (204) = NJW 1953, 700; BGHZ 57, 137 (141) = NJW 1972, 36; BGH NJW 1995, 126 (127); BGHZ 137, 11 (19) = NJW 1998, 138; BGH NJW 2002, 2232 (2233); 2018, 541 Rn. 21; 2018, 944 Rn. 16; BVerwG NJW 2001, 1878 (1881). See also Hartmut Oetker (n 641) para 110.
[658] Claudio Lombardi (n 632) 1.5.1.

The theory of adequacy has, however, been criticised as not providing a meaningful criterion for limiting the liability following the but-for test. In fact, the theory of adequacy does not refer to causality but attempts to correct the limitations of the *condicio sine qua non* test through normative evaluations. Thus, the classification of the adequate causation rule as a rule of *causation in fact* or *causation in law* is not clear cut. In any case, it is questionable at least whether the correction should be made by relying on the general rather than specific causation, or more precisely whether it is convincing to establish causation solely on the basis of the probability of the occurrence of a damage. Rather, it is generally accepted that a tortfeasor is also liable for the occurrence of an extremely improbable damage if the violated legal rule aims to exclude the realisation of the (even if only slight) danger (protective scope of the rule, *Schutzzweck der Norm*). Thus, the probability of the occurrence of the damage may be only one of several criteria.

In other jurisdictions, similar tests to adequate causation are applied, which infer specific causation from general theories. England relies on the concept of *remoteness,* which means that responsibility is only established if the damage was for a reasonable man foreseeable as a consequence of the breach of duty irrespective of its extent.[659] The Italian causal regularity (*regolarità causale*) doctrine limits the compensable damage to the direct and immediate effects of an action.[660] Similarly, in France there must be a 'direct and certain' causal connection between the violation and the damage suffered.[661] All these different approaches have in common that they limit the 'but-for' test to those damages believed to commonly result from a specific act (generalisation theories).

IV. The underlying dogma of the causation theories

This brief analysis of the different theories on factual causation has shown that the corrective theories mainly attempt to limit the over-inclusiveness of the equivalence property of the *condicio sine qua non* rule (the 'but-for' test). These theories attempt to determine the causal relationship between the conduct and the harm-based *inter alia* on the gravity of the individual's conduct for the materialisation of the harm. We have seen above that the 'but-for' test, which is commonly used as a starting point for the determination of causation, suffers not only from over- but also under-inclusiveness. While the NESS test attempts to overcome the under-inclusiveness problem by considering a set of conditions sufficient for causation, it exacerbates the

[659] Anthony M Honoré, 'Causation and Remoteness', *International Encyclopedia of Comparative Law* (6th edn, Mohr Siebeck 1983); see also Claudio Lombardi (n 632) 2.5.2.
[660] Article 1223 Italian Civil Code; see also Claudio Lombardi (n 632) 2.4.
[661] Duncan Fairgrieve and Florence G'Sell-Macrez, 'Causation in French Law: Pragmatism and Policy', in Richard Goldberg (ed) *Perspectives on Causation* (Hart Publishing 2011) 113.

over-inclusiveness problem. Both tests thus risk attributing liability to defendants who have not (materially) contributed to the harm. From a corrective justice perspective, these theories should therefore be neglected for the attribution of liability.

Other corrective theories have attempted to weigh the contribution of a conduct to the harm against other conducts in the chain of causation. While the *causa proxima* theory determines the responsible act as the last act in the chain of causation before the harm materialised (i.e., the last opportunity to prevent the harm), the *efficient condition theory* identifies the act with the greatest contribution to the harm as the one responsible. Generalisation theories such as the adequate causation rule as well as equivalent rules, such as the foreseeability of harm and sufficiently direct causal connection between wrongdoing and harm, limit responsibility of the infringer to the harm that regularly follows from the wrongdoing, and thus rely on the remoteness between the wrongdoing and the harm. From a corrective justice standpoint, the gravity of the contribution and the remoteness between the act and the harm are equally relevant for the allocation of liability between multiple infringers.

In situations of causal uncertainty, in which it cannot be retraced which act has caused the specific harm, it has been argued that the act that materially contributed to the 'risk of damages' (*efficient condition theory*) should be considered the factual cause. When the causal uncertainty arose from the wrongdoing of multiple tortfeasors, it has been suggested that the liability should be apportioned according to the responsibility of the individual tortfeasor (*causal proportional liability*). From a corrective justice standpoint, the individual's responsibility (in cases of multiple tortfeasors) should be determined by the relationship between the wrongdoer and the person suffering from the wrongdoing (i.e., subjecting the victim to the risk of materialisation of the wrongdoing). In these situations, a strong case exists for the attribution of liability according to the probability that the individual conduct has caused the harm. In cases where there is no such relationship between the wrongdoer and the victim, distributive justice considerations prevail, and the liability should be allocated based on the wrongdoing's *general* risk of harm. Because the risk of the wrongdoing relates to and affects the general public, the allocation of liability should be determined on objective criteria (e.g., *'market share liability'*).

Hence, the underlying dogma of the corrective theories can be summarised as different attempts to find the causal responsibility for the harm based on the individual's contribution to its materialisation. The significant features for determining the liability based on corrective justice are two-fold: (1) the proximity of the wrongdoing to the harm, which may become apparent through the particular relationship between the wrongdoer and the victim (e.g., a supplier and its cus-

tomer), or the last position in the chain of events that can prevent the harm; and (2) the gravity of the contribution to the harm or the risk of the harm. Where the conduct and harm are remote, the general risk that the particular conduct causes harm and the distribution of such a risk among multiple tortfeasors become pertinent (distributive justice).

V. The conditions for allocation based on *responsibility* in competition cases

The theories on causation described above have shed some light onto the conditions for the allocation of liability of joint competition infringements based on corrective and distributive justice. We have seen that the determination of causation is primarily based on the goal of corrective justice in terms of the transfer of the wrongful losses to the infringer who was responsible for the loss. Causation is measured by the remoteness between the wrongful act and the harm suffered by the victim, and subsequently on the gravity of the contribution to the harm. Distributive justice becomes the dominant goal when no close relationship exists between the wrongdoer and victim or when both the act and the harm are rather remote.

In this section, the corrective and distributive justice requirements for allocation rules are discussed in more detail for cases of joint competition law infringements. First, the corrective justice requirements are discussed below.

1. Closeness between the conduct and the harm (relationship through economic relations)

The proximity requirement refers to the closeness between the wrongful act and the harm suffered. We have seen above that a wrongdoer can be sufficiently close to the harm if it was foreseeable or generally known that the victim would be exposed to the consequences of the wrongdoer's harmful conduct. From a corrective justice stand, a person who was able to foresee that the victim could be harmed by her conduct is sufficiently closely connected to the harm.

Thus, for joint competition infringements, the remoteness requirement would need to be tested by the closeness between the participants in the infringement and victims who suffered the harm. This can be illustrated with the following example: Assume that there are three producers of substitutable products – firms A, B, and C – which all supply different customers. Now assume that firms A and B enter into a price-fixing agreement. Both firms agree to increase their prices such that customer D who purchases only from firm A suffers an overcharge. This case, in which firm B did not supply customer D herself, raises the question of whether participation in the agreement together with firm A alone makes firm B sufficiently close to the harm suffered by customer D? What if firm B was not even aware of who purchases from firm A at

the time when both firms agreed to fix prices? In the latter case, no 'relationship' exists between firm B and customer D, as firm B could not foresee that *specifically* customer D would be harmed by their act of fixing prices. On the other hand, firm B did foresee that the agreement would generally lead to an increase of the price level on the market. Besides both firms' foreseeability of the harm, it was still up to firm A to implement the agreement by charging customer D the agreed mark-up. The act of firm A was therefore closely connected to harm suffered through the setting of a higher price *vis-à-vis* customer D. The agreement between the two firms to increase prices had no direct effect for customer D. Only at the point when firm A implemented the agreement did the agreement affect customer D. Thus, only firm A was sufficiently close to the harm suffered by customer D. This result is generally also confirmed by the gravity theories, such as the *causa proxima* theory, because despite the price-fixing agreement between firm A and firm B, it was firm A's decision to implement the overcharge, which was the last link in the chain of causation that could have prevented the harm. Moreover, the most material contribution to the harm of customer D was the implementation of the price increase by firm A (*efficient condition theory*).

Now, if we assume that customer D passed on his overcharge to customer E, would firm A still be sufficiently close to the harm suffered by customer E? At first sight the situation does not seem to differ from the relationship between firm B and customer D. However, firm A as well as customers D and E are active on different levels of the same supply chain, namely in purchasing goods to supply customers on the next level of the supply chain. Therefore, all three firms form a chain of direct and indirect economic relations. In competition cases where firms stand in economic relations with each other – such as by purchasing goods/services at one level to be used as input for new products or to be sold to the end consumer – it is foreseeable for firms within the same economic chain that their behaviour influences that of the remaining firms in the chain. Therefore, when a firm decides to implement a certain conduct on the market (to increase prices), it is also able to foresee that its behaviour will affect other firms it forms an economic relationship with. For the purpose of this analysis, the author refer to this as the *relationship through economic relations*.

From the allocation rules analysed above, an allocation of liability based on the overcharge is best equipped to satisfy this closeness requirement. Unlike other objective criteria, such as market shares and turnovers, the basis for the overcharge rule is the relationship between the cartelist and its purchasers. As shown above, the closeness requirement is satisfied when both form a relationship through economic relations. This excludes all purchasers who are not direct or indirect purchasers from the cartelist.

2. Gravity of contribution

As noted in the previous section, the gravity requirement generally arrives at the same conclusion as the closeness requirement. In the example above, the implementation of the agreed overcharge by firm A certainly has contributed most to the harm of customers D and E. However, if we assume that firm B has initiated the agreement, such that without firm B's behaviour the two firms would not have agreed to fix prices, firm A's implementation would no longer be the only material contribution to the harm of customer D and E. Arguably, firm B's contribution can be considered more material for the harm of customers D and E because the overcharge would not have been implemented if firm B had not instigated the agreement in the first place. Therefore, it is reasonable to take the responsibility of firm B for causing the harm into account and allocate (part of) the damages liability to firm B accordingly.

In chapter V below, an adjustment to the contribution for the role in the cartel is proposed, which is based on the Commission's fining practice. The objective allocation rules (per capita, sales value, market share, and overcharge) fail to take into account the firms' behavioural contribution to the creation of the infringement. However, to satisfy the corrective justice requirements, the role of the firms in the cartel must find some consideration in the allocation of damages while not neglecting the proximity between the cause and the harm.

3. Distributive Justice

Let us now consider the requirements from a distributive justice standpoint when no particular relationship exists between cartelists and the victims of the cartel. Assume that the price-fixing agreement has led to an overall increase of prices on the market, and thus allows firm C to also increase its prices to the new level. When firm C's customer G claims damages for the mark-up price charged by firm C as a result of the higher price level, neither firm A nor firm B had any contractual relationship with purchaser G – nor could both firms have foreseen that their agreement would specifically harm purchaser G. This is particularly true as it surely was not their objective that firm C also gains from their price-fixing agreement. Thus, how can we divide the damages of purchaser G between firms A and B? We have seen in the previous section that from a distributive justice standpoint, liability should be distributed according to the general risk of the behaviour for the general public. In the DES case, courts have attributed liability according to the manufacturers' market shares. In our example, and in all cases where the combined market shares of all firms participating in the infringement do not reach 100%, the market share liability rule violates the first limb of corrective justice: full compensation of victims.

Section C examined different allocation rules that could be used to take the relative responsibility of each infringer into account. With the exception of an allocation based on the subjective role in the infringement, all rules based on objective criteria can indicate each infringer's contribution to the global risk of the infringement. However, their accuracy of the contribution varies greatly. First, a rule based on overcharges is problematic because it only indicates the economic relations between the infringer and its customers. Customers might be able to negotiate certain discounts depending on their buyer power, which would dilute the risk created by the firm's contribution. Furthermore, every customer has not claimed damages, the court would need to estimate the overcharge without the necessary data. The estimation of the overcharge might in itself be inaccurate. Secondly, a rule based on turnover or sales value might be easier to administer. However, since there are no sales that can be attributed between firms A and B and purchaser G, the result is likely to be inaccurate. Thirdly, we have seen that the Shapley value scores best in terms of allocating the damages liability according to the cartelists' global impact on the market (welfare impact), because it assesses each firm's economic contribution to the price increase that followed the infringement irrespective of the customers who actually purchased from the firms. However, the rule creates a high administrative burden since the analysis is highly data-intensive. Lastly, and similar to the DES case, a market share analysis was suggested. Napel and Walter (2017) have shown that market shares allocation scores reasonably similar results to the Shapley value. In contrast to the Shapley value, however, market shares analysis is relatively easy to administer. Market shares are a reasonably good indication of each firm's influence on the market, particularly the ability to set prices. For instance, if we assume in our example that firm B and firm A have market shares of 60% and 10%, respectively, it is obvious that a price increase of firm A would not have the same impact on the overall price level. A criticism that was raised against the market share allocation is that the results can be falsified when infringers have agreed on a judgement-sharing agreement (see section C.II above) or the agreement itself concerned the conspiracy over market shares (e.g., bid rigging). However, when we are concerned with the global risk the infringement creates, the relevant point in time to consider is the status quo *ex ante*, namely before the unlawful conduct was implemented on the market and firms were active in a competitive environment. Any risk that an infringement can cause would need to be determined based on its pre-existing circumstances.

Overall, market shares at the time prior to the infringement indicate the risk created by the infringement sufficiently well without creating an unreasonable burden on the administrative system. Of course, unlike in the DES case, market shares would need to be used as a proportion in relation to total damages to guarantee full compensation of victims.

VI. Digression: Similar dogma based on the economic theories on uncertainty over causation

The dogma of the corrective theories discussed in the previous section is also reflected in the economic theory of causation. However, this section does not provide a complete description of all economic theories on causation. Instead, the parallel outcomes from an economic perspective will be illustrated for the sake of completeness only. Although in the literature on the economic analysis of law the guiding principle of causation is "efficiency",[662] resemblances with the principles of the corrective (legal) theories are notable. However, in the economic analysis of the law no distinction is made between causation in fact and causation in law (i.e., proximate cause), instead it illuminates both the cause in fact and the proximate cause doctrines.[663] As explained above,[664] the law establishes a causal connection by first determining causation in fact which defines when an act is part of a causal chain that ends with a certain event (i.e., the injury). Causation in law doctrines then further limit the responsibility of the tortfeasor by way of additional normative criteria. The economic analysis of law, on the other hand, takes a probabilistic view of causation which combines causation in fact and causation in law in order to achieve deterrence. As Ben-Shahar (2000) explains: *'Economic analysis applies positive tools from decision theory and statistics to clarify the definition of a cause-in-fact, and to resolve some of the confusion regarding the relative contribution of a given factor to the harmful consequence. Under the normative economic analysis, the proximate cause doctrine's designated role is to expand or shrink the scope of liability, in order to achieve efficient deterrence'*.[665]

Calabresi (1975) distinguishes between two types of tests: *causal link* and *but-for cause*.[666] As explained above, under the *but-for* test an act is a cause if, in the absence of it, the (harmful) event would not have taken place. In contrast, a *causal link* between an act and an event exists if it increases the probability of its occurrence.[667] Thus, as Shavell (1980) points out, causation can either be retrospective (*ex post*) or prospective (*ex ante*), of which the latter takes a probabilistic forward-looking approach to determine whether an action increased the probability of the occurrence of an event.[668]

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[662] Robert D Cooter, 'Torts as the Union of Liberty and Efficiency: An Essay on Causation' (1987) Chicago Kent Law Review 522-551.
[663] Omri Ben-Shahar (n 627) 645.
[664] See section D.II above.
[665] Omri Ben-Shahar (n 627) 645.
[666] Guido Calabresi, 'Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.' (1975) University of Chicago Law Review 69-100.
[667] Ibid, 71.
[668] Steven Shavell, 'An Analysis of Causation and the Scope of Liability in the Law of Torts' (1980) 9 The Journal of Legal Studies 463-516.

When uncertainty exists about which of multiple factors has caused the harm because the factors created similar risks – as in the case of a cartel with multiple cartelist[669] – economic analysis of law suggests two approaches: (i) the threshold (or 'all-or-nothing') approach under which a defendant is held fully liable if – and only if – the probability that she caused the harm exceeds a certain threshold level (e.g., 50% under the 'preponderance of the evidence' standard that exists in many common law jurisdictions); and (ii) the proportional liability criterion under which liability will be imposed but its magnitude will be reduced proportionally to account for the uncertainty.[670] The most common proportional rule is the market share approach which has already been discussed as part of the allocation rules in section C.II above.

The proponents of the threshold probability rule take an *ex post* perspective and argue that, in situations of uncertainty over causation, the primary aim should be to minimize the potential errors (false positive or false negative). Kaye (1982), for example, shows that the threshold probability rules is better equipped to minimize error costs than the proportional liability rule.[671] Thus, the threshold probability rules' *ex post* perspective is similar to the corrective justice considerations entailed in the corrective theories in the context of causation in fact. The threshold probability rule equally determines the proximity between an action and the injury but instead of relying on foreseeability or the general knowledge that a certain conduct exposes a victim to the risk of an injury, it relies on the probability for causation. Only if a certain degree of probability is reached, the action is considered to have caused the harm. Therefore, for establishing liability the 'all-or-nothing' approach replaces the proximity between an action and the harm with the probability that an action has caused the occurrence of the harm. Under the preponderance of the evidence standard, causation is only established if it is 'more likely than not' (i.e., above 50%) that the defendant's action has caused the harm.

In contrast, the proportional liability rule takes an *ex ante* perspective with the objective to create optimal deterrence by setting incentives for tortfeasors to take sufficient care. In situations where the probability is below the threshold (i.e., not 'more likely than not') the defendant will escape liability under the threshold probability rule. Under the proportional liability rule the defendant would still be liable (however, proportionate to the likelihood of causation) and apply a care level in accordance with the probability that the action will cause the harm or, in

[669] It should be noted that the economic analysis of law also considers methods for the apportionment of the causal shares among joint tortfeasors such as the Shapley value already discussed in section C.VI above.
[670] Omri Ben-Shahar (n 627) 653.
[671] David Kaye, 'The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation' (1982) 7 American Bar Foundation Research Journal 487-516.

the case of cartels, the probability that the implementation of the price fixing agreement will affect the market (e.g., the market share criterion).

Hence, in parallel with the corrective justice considerations of the legal corrective theories, the economic threshold probability rule excludes actions that are too remote in the sense that they do not reach the threshold level of probability for having caused the harm. Equally, when a close causal connection in terms of probability of cause cannot be established between the action and the harm, the *ex ante* perspective of the proportional liability standard leads to similar results like the distributive justice considerations of the legal corrective theories. The focus of the proportional liability standard on deterrence and thereby on the optimal level of care leads to tortfeasors ending up bearing liability that is equal to the risk it poses for the causation of the harm (e.g., market shares). At least in the context of price-fixing cartels, if the harm occurred in absent of a direct chain of causation between the cartelists and the victim, the impact of each firm on the market will be relevant from a distributive justice perspective which can be determined best based on market shares.

Despite these parallels between the corrective theories and the economic theories on uncertainty over causation, the economic theories on causation do not aim at compensating victims. The next section will introduce a proposal of an allocation rule based on the dogma of the legal corrective theories. It will then be shown that despite the *ex post* perspective of those corrective theories, the proposed allocation rule achieves deterrence while ensuring the victim's right of full compensation.

VII. Proposal for *relative responsibility* based on the overcharge, role in the cartel, and market shares

It follows from the above discussion that from a corrective and distributive justice perspective, allocation methods exist that are each best equipped to attribute liability according to *responsibility* in a specific scenario. First, allocation based on overcharges best satisfies the requirement of a close relationship between the wrongful act (anticompetitive price increase) and the harm suffered. This relationship through *economic relations*, however, only exists along the chain of supply between the supplier and its direct and indirect purchasers.

Secondly, the role of the cartel is best equipped to take into account the gravity of the wrongful behaviour.[672] Thirdly, when no close relationship exists between the cartelists and the victims, and the wrongful act and the harm are relatively remote, an allocation based on market shares during competition seems to embody the risk of harm reasonably well while not placing an excessive burden on the administrative system.

Consequently, for an attribution based on responsibility, an allocation rule will have to distinguish between direct and indirect purchasers as well as other claimants.

(1) For the liability in relation to **direct and indirect purchasers**, the basic rule would be that each infringer should bear the civil liability that follows from the illicit gain made, or in other words, the overcharge suffered by the infringer's direct and indirect purchasers.
(2) When damages are claimed by **claimants other than direct and indirect purchasers**, the joint competition infringers are liable according to their competitive market shares before the firm entered into the infringement.

The calculated contribution could then easily be adjusted for behavioural criteria such as the infringer's role in the cartel, which will be discussed in more detail in chapter V below.

E. Assessment of the Deterrent Effect of the Different Methods for the Allocation of Contribution

In contrast to the analysis of responsibility above, which examined the situation after the allocation of liability (*ex post*), deterrence requires an analysis of the effects from an *ex ante* perspective; that is, before the firm participates in the infringement. An *ex ante* analysis will show that the proposed combination of the two allocation rules also scores better from a deterrence perspective than any of the allocation rules alone. In this study the deterrent effects will be illustrated with a price-fixing cartel that consists of three firms in an oligopolistic market. All firms are active on the same product market with heterogenous products of different quality and price. Because of the product differentiation, their market shares and turnovers also differ. One firm has initiated the cartel while the two remaining firms only implement the price-fixing agreement. Depending on the method of allocating contribution, the firms may or may not collect a gain from the infringement, that is, after detection and payment of their contribution to

[672] The Commission's case law provides a useful reference point for an adjustment of contribution for the infringer's role in the infringement; see chapter V below.

total damages. Moreover, it will be shown that the allocation rule proposed in the previous section scores best in terms of deterrence.

I. The model scenario

For the analysis of the effects of the allocation of contribution among joint competition infringers, let us again refer back to the three firms: firms A, B, and C.

In contrast to the previous section, the firms' market shares are slightly adjusted to better illustrate the outcomes on firms of different sizes. All three firms are producers of widgets of different quality and at a different price. Firm A is the largest producer with a market share of 45%, followed by firm B with 35% and firm C with 15%; the remainder of the market is supplied by small local suppliers. Firm C offers widgets with the best quality and highest price, firm B offers midrange quality, and firm A offers the lowest quality and lowest prices. Assuming that demand is price elastic, firm A serves most demand and generates the highest turnover of EUR 25m p.a.; firm C serves the smallest portion of demand but generates the second highest turnover of EUR 15m; and Firm B supplies remain somewhere between firm A and firm C, assuming a turnover of EUR 10m.

Each firm decides whether to collude and jointly to increase prices by 20%. Firms A, B, and C would then gain an illicit overcharge of EUR 5m, EUR 2m, and EUR 3m, respectively. Let us assume that firm C is the initiator of the collusion, which gains more than firm B from the price increase but less than firm A, which supplies most of the market. All firms are risk neutral, which means that the magnitude of the loss is not a factor considered by firms when they decide to collude. As Polinsky and Shavell (1981) demonstrate, the firm's decision maker does not bear the same corporate liability for the infringement.[673] Rather, they argue, it is the *'consequences for the decision makers of the firm which primarily determines the likelihood of a violation'*, such as salary reduction and diminished promotion opportunities. For their analysis of the US enforcement regime, the authors disregard criminal sanctions for decision makers. In contrast to the US regime, most Member States in fact have no criminal sanctions for infringements of EU competition law, or only sanction specific types of infringements.[674] Therefore,

[673] A. Mitchell Polinsky and Steven Shavell, 'Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis' (1981) 33 Stanford Law Review 447, 454; see also chapter III, B.IV.1.b) above.
[674] For example, Austria, sec. 168b Criminal Code (StGB) ('bid rigging'); Cyprus, sec. 3 of Law 13(1)/2008 ('repeated offenders'); and Germany, sec. 298 Criminal Code (StGB) ('bid rigging'). Some Member States, however, have introduced criminal sanctions for cartel infringements, namely Bulgaria, Estonia, Ireland, Malta, Romania, Slovakia, and the UK.

the assumption of risk-neutral decision makers appears most suitable for the analysis of the EU regime. The assumptions are summarised in Table 4:

Table 4 - *Summary of the Assumptions for firms A, firm B, and firm C*

	Firm A	**Firm B**	**Firm C**
Market Share	45% (4.5m)	35% (3.5m)	15% (1.5m)
Turnover	EUR 25m	EUR 10m	EUR 15m
Overcharge (20%)	EUR 5m	EUR 2m	EUR 3m

The assumption is based on an optimal sanctions regime, which is designed in accordance with *Becker*, such that a violation is deterred if the expected gain from violating the law is lower than the expected costs of the violation. However, throughout this study it is assumed that the sanctions consist of administrative fines (F) and damages (D). For the purpose of this particular analysis, let us assume that damages are awarded only to direct and indirect purchasers and that they equal the overcharge exactly (20%). The harm caused to other purchasers, particularly as a result of umbrella pricing and other social welfare losses, are not compensated by the damages awarded.[675] Thus, the optimal sanctions can be expressed in the following function:

$$\Delta\pi \leq p(F + D),$$

where $\Delta\pi$ is the expected additional earning from colluding and infringing the competition rules and p is the probability of detection. Since it is assumed that courts estimate the overcharge correctly and there are no errors in the damages awarded, the awarded damages equal the additional gains from the infringement:

$$\Delta\pi = D.$$

Thus, we can re-write the optimal sanction's function as follows:

$$\Delta\pi \leq p(F + \Delta\pi).$$

[675] For simplification, this analysis therefore also ignores the deadweight loss that is created by the overcharge. For an explanation of the deadweight loss, see chapter VI, D.II.

The function for the optimal minimal amount of fines would then be as follows:

$$F = \frac{\Delta\pi}{p} - \Delta\pi.$$

In a numerical example in which we assume a probability of detection of 20%,[676] we can calculate the minimum levels of fines (F) for each firm as well as the overall optimal costs ($F + D$) for deterrence:

Table 5 - *The minimum level of fines and costs for deterrence*

	Firm A	***Firm B***	***Firm C***
Minimum Fines	EUR 20m	EUR 8m	EUR 12m
Minimum Total Costs	EUR 25m	EUR 10m	EUR 15m

Thus, based on a detection rate of 20%, the minimum level of the sum of the expected fines and the expected damages liability must at least equal EUR 25m, EUR 10m, and EUR 15m to deter firm A, firm B, and firm C, respectively. If the sum of fines and damages does not reach the minimum level, the firms' expected gains will outweigh the expected costs and the firms will collude. It is important to note that any shift of the damages liability between the firms influences the overall cost level of the firms and, in turn, deterrence.

The next section analyses the different allocation rules and how they influence the optimal deterrence outcome.

II. Allocation per capita

For the allocation of damages per capita, courts divide the total damages by the number of infringers. In our example, the total amount of damages is EUR 10m, and therefore each firm would have to bear $\frac{1}{3}$ of the total damages or EUR 3.33m each. This scenario only reaches the minimum optimal liability for firms B and C. Firm A, on the other hand, can still expect an illicit gain, which makes it attractive for it to collude. However, since it is unattractive for the

[676] A detection rate of 20% for a price-fixing cartel between only three firms is likely to be an over-estimation. Although not much data and literature exist on the enforcement rate in Europe, Byant and Eckart find a substantially lower annual average detection rate between 12.9% and 13.2%. For a discussion on the probability of detection in Europe, see chapter VII, E.III.

remaining firms to collude, collusion would not substantiate. The results in this scenario are the same as under the no-contribution rule.[677] Easterbrook, Landes, and Posner (1980) argue that despite the shift of the entire liability from one infringer to the other, no contribution achieves better deterrence because each infringer would expect the entire liability to fall on her and withdraw the conspiracy until only one participant is left.

Thus, in a scenario like the base model, in which a large firm colludes with smaller firms, the per-capita allocation will shift part of the liability of the large firm to the smaller firms, rendering collusion unattractive for the smaller firms. In our scenario, the per-capita allocation and no-contribution have the same deterrent effect, because the shift of liability from larger to smaller firms increases the expected costs of smaller firms until they withdraw from the collusion. Hence, small firms are driven out of the collusion until only the largest firms or those of equal size are left (the 'domino effect'). In our base model, the large firms would still not collude, because the optimal minimum level of sanctions is already reached when the expected gain equals the damages liability. However, the result is likely to differ from where the fine falls below the minimum optimal level.

III. Allocation by sales value

For the deterrence analysis, the analysis focuses only on the turnover the three firms generate on the affected product market. We know from the discussion in Section C.I that allocation based on turnover is not related to the affected market and the period of the infringement (e.g., worldwide turnover, turnover in the previous business year) is not representative for the individual's responsibility. For these reasons, the analysis focuses on the sales value instead.

In the base model, all three firms have agreed to increase prices by 20%. Based on the sales value, firm A would be liable for 50%, firm B for 20%, and firm C for 30% of the overall civil liability of EUR 10m. In this scenario, the collusion would be effectively deterred as the share of the affected sales value is proportionate to each firm's additional gain (i.e., each firm's overcharge of EUR 5m, EUR 2m, and EUR 3m). However, sales value for the attribution of liability does not necessarily relate to the individual firm's responsibility for the harm. This also impacts deterrence negatively. To illustrate this, let us assume that in the base model firm A has only attended the meetings with firms B and C but has not implemented the agreement. The overall damages would then reduce to the sum of the overcharges of firms B and C (EUR 5m). Based

[677] See chapter III, B.IV.1 for the discussion on deterrence and the no-contribution rule.

on the turnovers, firm A would have to bear EUR 2.5m of the liability of firms B and C. Their liability would reduce to EUR 1m and EUR 1.5m, respectively, and fall below the minimum level for optimal deterrence.

Arguably, similar to the situation under per-capita allocation, firm A would withdraw from the agreement leaving firms B and C to bear their entire damages liability, given that firm A's expected cost renders collusion unattractive. In this case, the infringement would be sufficiently deterred. However, if we assume that all firms negotiate their prices individually with their customers, and that firm A also intended to implement the price increase, but unlike firms B and C was unable to negotiate a price increase, firm A would still have to bear part of the liability of firms B and C. In this scenario, firm A intends to participate in the collusion *ex ante* but fails to implement the agreement. The outcome would still be the same: Because of the high turnovers of firm A, it would bear a substantial part of the liability of its co-infringers.

This example shows that allocation by turnover may have the counter-intuitive outcome of incentivising collusion when a firm assumes it will implement the agreement but fails to do so for whatever reason.

IV. Allocation based on gains from the infringement

Allocation based on gains can overcome the detriments of turnover allocation. Damages would be allocated according to each firm's gain from the infringement – in this case the overcharge – such that the minimum total cost for deterrence is satisfied (Table 5). Because the allocation is based on the illicit gain received by each joint infringer, the attribution based on gain achieves optimal deterrence.

However, gain-based allocation suffers a practical disadvantage: An inaccurate estimation of the illicit gain can negatively affect deterrence. For instance, if the overcharges in the model scenario are wrongly estimated such that part of the liability of firm A shifts to firms B and C, the overall costs of that firm fall below the optimum level. However, because *ex ante* none of the firms know with certainty whether it will benefit from an estimation error at the time of committing the infringement, all firms will refrain from colluding. Moreover, the Directive only accepts the estimation of the overcharge when it is *'practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available'*.[678] Thus,

[678] Article 17(1) Directive 2014/104/EU.

courts can now more easily and freely estimate the overcharge and thereby lower the standard of the estimation's accuracy for administrative efficiency.

V. Allocation rules based on market data (market shares / Shapley value)

For the allocation rules that use market data as a basis, namely market shares and the Shapley value, a combined analysis is sufficient because both suffer from a fundamental flaw in terms of deterrence; specifically, both rules are based on the risk that participation of an additional firm in the infringement poses for the market. The effects on deterrence of a potential deviation between the risk of harm and the harm caused can be illustrated with the market shares in the model scenario. Based on their market shares, firm A would only be liable for EUR 4.74m and firm C for EUR 1.58m of the total damages.[679] Therefore, their total costs would remain below the minimum level for deterrence. It remains attractive for both firms to collude. Only for firm B would it become unattractive to participate in the infringement, as its liability would increase to EUR 3.68m, well exceeding the EUR 2m overcharge.

While the Shapley value may more accurately determine the risk each firm poses, the approach is highly data-intensive, requires estimation of overcharges, and demands data for every potential coalition. As with gain-based allocation, any inaccurate estimation can create an arbitrary outcome.

VI. Relative responsibility based on a combination of illicit gain, market shares, and the role in the cartel

This section shows that the combined allocation rule proposed in this chapter also scores best from a deterrence perspective. The proposed allocation rule distinguishes between (1.) direct and indirect purchasers and (2.) other claimants.

1. Direct and indirect purchasers

As a general rule, every infringer will be liable for the illicit gain it has made – in this case, the overcharge it has caused to its direct and indirect purchasers. As shown above, the allocation of liability based on the gain has scored best in terms of deterrence because in principle it shifts an equal share of the liability to the beneficiary of the illicit gain. An adjustment to this rule accord-

[679] Damages are calculated in relation to the total damages of EUR 10m (100%). The combined shares of all three firms is 95% (45% + 35% + 15%).

ing to the role the infringer has played in the infringement will not adversely alter the result on deterrence. Indeed, in theory, a shift of liability to the initiator of the agreement should deter the infringement altogether. This can be illustrated with an adjustment of the findings of the model. Under the overcharge rule, all three firms have to compensate their direct and indirect purchasers' overcharge, which skims off their gains from the infringement. In theory, if we increase firm C's damages by only 1€for its instigator role in the infringement the liabilities of firms A and B would fall below the optimal amount for deterrence. However, the shift of liability towards the instigator (firm C) renders the infringement unattractive for the instigator; therefore, the infringement would also be deterred as a whole. Thus, a gain-based allocation rule scores best in terms of deterrence. A shift of liability towards the instigator or leader still attains deterrence.

2. Claimants other than direct and indirect purchasers

Damages claimed by claimants other than direct or indirect customers are less relevant from a deterrence perspective, as the colluding firms do not benefit from the losses of other purchasers. However, such claims increase a firm's total liability. To prevent over-deterrence, the additional liability needs to be allocated according to the joint-infringers' economic power.[680] Thus, the allocation based on market shares appears to be appropriate. In any case, distributive justice concerns should prevail.

VII. The need for harmonisation of the allocation of liability among joint competition infringers

The simple model scenario has shown that at least when fines are set at a level at which deterrence can only be achieved when the full gain (excl. interests) is recouped from each infringer, not every allocation rule deters the infringement equally sufficiently. Indeed, only gain-based allocation can deter the infringement in most scenarios. When the allocation of liability is based on a *per capita* rule, sales value, or market shares, the infringement is still profitable for some infringers. In addition, the findings on the effects in the model scenario demonstrate the adverse effects that different allocation rules across Europe can have on deterrence. This can be demonstrated with the following adjustment to the model scenario: Assume that all three firms are seated in three different Member States and all firms supply part of the demand in those three Member States. In this highly simplified scenario, also assume that the three host Member States apply three different allocation rules under which the firms are not deterred in their host Member State. In our case, host Member State 1 of firm A applies the per capita rule, host

[680] Chapter I, C discusses the risk of inefficiencies that can result from over-deterrence.

Member State 2 of firm B applies an allocation rule based on sales value, and Member State 3 of firm C allocates liability based on market shares. From the findings above, we know that the allocation rules are not sufficient to deter the respective firms. Thus, if each firm anticipates that purchasers seated in their Member State will be the first to sue,[681] or if they assume the same allocation rule exists in the other two Member States, all firms would still anticipate a gain from the infringement. Consequently, the infringement would not be deterred. The outcome is worse than if all Member States had commonly applied the same rule that deters only one firm but creates a 'domino effect'. In such a scenario, one would hope that once the first firm was deterred, the remaining firms would equally withdraw from the conspiracy because the risk of liability would then shift to them. The overview of the allocation rules across all Member States in Section B has shown, however, that mainly uncertainty exists as to how national courts will eventually distribute civil liability.

Overall, the analysis of the deterrence impact of the different allocation rules has revealed that each rule has some drawbacks and cannot achieve deterrence in every situation. The exemplary scenario has also shown that the overcharge rule has proven to score better results even when adjusted for the infringer's role in the infringement.

In any case, the results have provided a strong indication that a harmonised approach is necessary across all Member States. In cross-border price-fixing cartels, a variety of different rules may not deter but rather (wrongfully) incentivise undertakings to join an infringement.

F. Conclusion

This chapter has outlined approaches for the determination of contribution and the allocation of civil liability most commonly proposed in the literature. These were analysed to determine to what extent the existing allocation rules take the infringer's responsibility into account and which criteria should be considered for an allocation of liability based on *relative responsibility*.

The chapter has proposed determining each infringer's *relative responsibility* by applying a combination of two allocation rules: (1) gain-based allocation for *direct and indirect purchasers* and (2) allocation based on market shares for *other claimants*. It has been shown that the pro-

[681] Under Article 8(1) Regulation 1215/2012 (**Brussels I recast**), in cross-border actions with a number of defendants such as cartels, litigation against all defendants is centralised in one Member State when its conditions are met: '*A person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*'.

posed combination of the two allocation rules scores better than any individual rule under *corrective justice* as well as *deterrence* considerations. Responsibility, the fundamental criterion for the allocation of liability under the Directive, was defined as a matter of corrective and distributive justice and more particularly determined by three factors: the proximity between the contribution to the infringement and the harm suffered by the victim (*relationship through economic relations*), foreseeability, and the gravity of the contribution. The effects of the allocation rules on deterrence have been illustrated with a simple numerical example of a price-fixing cartel with three firms with different market shares and turnovers that apply the same overcharge rate. Finally, the additional burden on the administrative system for the assessment of an infringer's individual responsibility was assessed. The allocation rule proposed in this chapter optimally balances the goal of accurate determination of individual responsibility with administrative efficiency.

The analysis in this chapter has focused solely on price-fixing cartels. Further research would need to assess how the proposed combination of gain-based and market share allocation rules scores in terms of justice, deterrence, and operability with other types of infringements, such as the collective abuse of dominance. Moreover, the proposed combination of allocation rules does not take into account the infringer's role in the infringement. While it was shown that the role in the infringement alone is not a sufficient criterion for the allocation of liability, it is a necessary requirement for *relative responsibility*. The author proposes adjusting the share of contribution of the instigator and leader according to the adjustment of fines for aggravating circumstances. The impact of such an adjustment to the proposed allocation rule is discussed in chapter V below. Chapter V also addresses the general criticism against contribution raised in chapter III before, namely that it may disincentivise settlements. It shows that an adjustment of the proposed allocation rule for the role of the *instigator* or *leader* sufficiently incentivises settlements and simultaneously prevents 'whipsawing settlements'.[682]

[682] For more details and a discussion on the problems resulting from 'whipsawing settlements' see chapter III, B.III.5.

Chapter V
The Quantification of the Role *in the Cartel* for the Relative Responsibility of Joint Infringers of EU Competition Law

A. Introduction

This chapter follows up on the method for the allocation of civil liability proposed in the previous chapter, which attributes the civil liability of (a) direct and indirect purchasers according to illicit gain and that of (b) claimants other than direct and indirect purchasers according to the infringer's market shares prior to the agreement. In the previous chapter, it was shown that the criterion of *Role in the Cartel*, as proposed in recital 37 of Directive 2014/104/EU (**Directive**), was not a suitable criterion alone to determine the *relative responsibility* of joint and several infringers. The infringer's role in the cartel is nevertheless an important factor to be taken into account when determining the gravity of the infringer's contribution to the overall damage. For example, the instigator who led others to enter into the anticompetitive agreement in the first place has contributed more to the infringement than other cartel members because the infringement would not have occurred if it had not been for the instigator's conduct. The aim of this chapter is to find a method for quantifying the infringer's role in the cartel. It is argued that the adjustment of civil liability attributed according to the infringer's role in the cartel should be aligned with the Commission's practice of adjusting the basic amount under the Fines Guidelines.[683] For that purpose, the author reviewed the Commission's decisions between 2001 and 2019. The aim of the review was (1) to determine which factors related to the *role in the cartel* were accepted by the Commission as mitigating or aggravating circumstances for the adjustment to the basic amount, and (2) to examine whether a methodology for the quantification of the adjustments can be derived from the Commission's practice, which could be similarly applied for adjusting the distribution of civil liability between co-infringers. The review revealed that, in fact, the Commission applies similar ranges of adjustments for aggravating factors related to the role in the cartel.

There are several reasons for an alignment of the adjustment of civil liability with the Commission's fining practice. First, it reduces administrative costs as the Commission is already re-

[683] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, C 210/2 [2006] (**2006 Fines Guidelines**).

quired to enter into an in-depth analysis of each undertaking's conduct in the infringement. It would be an unnecessary burden for national courts to enter in their own analysis. Second, the national court is, in any event, bound by the Commission's findings on the undertakings' behaviour. It is therefore difficult to imagine a case where the national court could arrive at a different conclusion from that of the Commission. Third, it creates legal certainty. As will be shown, a pattern exists for the increase of fines for aggravating circumstances that can be derived from the Commission's practice. Fourth, it encourages settlements. Undertakings that have already received an increased fine for aggravating behaviour will know that they will face the same proportionate increase of civil liability. Thus, the only way to reduce the additional civil liability is to enter into a settlement agreement with their purchasers. As discussed in chapter III, the incentives to settle formed one of the main arguments in favour of the no-contribution rule. The contribution rule proposed in the previous chapter together with the adjustments for the individual's behaviour in the conspiracy proposed in this chapter are by no means inferior to the no-contribution rule in terms of encouraging settlements.

This chapter has the following structure. Section B introduces the criterion of *Role in the Cartel* in the Directive. Section C summarises the review of the Commission's practice and outlines the aggravating and mitigating factors that have been taken into account as well as the percentage adjustments made for that purpose. Section D describes how the same adjustments could be applied to the allocation methodology for civil liability. Section E shows that the increase of civil liability for aggravating conduct incentivises infringers to settle. Section F analyses the consequences of the proposed adjustments for the role in the cartel for the distribution of liability among the joint infringers, and finally, Section G concludes the findings.

B. The Role in the (Cartel) Infringement

The third criterion of the Directive referred to in recital 37 is a subjective criterion for allocating responsibility: the infringer's *'role in the cartel'*. The Directive explicitly only refers to the role in a *'cartel'*, which raises the question of whether the legislature intentionally limited the subjective criterion for the allocation to cartel infringements. Moreover, in Article 2(14) the Directive defines a cartel as *'an agreement or concerted practice between two or more competitors'*,[684] which excludes vertical infringement and limits the relevance of the role of the in-

[684] Article 2(14) Directive 2014/104/EU: '*"cartel" means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of*

fringer to horizontal collusive behaviour. The definition in Article 2(14) lists *inter alia* practices such as price fixing, the coordination of trading conditions, the allocation of production or sales quotas, and the sharing of markets and customers. These are typically horizontal hardcore restrictions that fall within the list of examples for *preventions, restrictions, and distortion* under Article 101(1) TFEU. It seems that the legislator has intentionally limited the subjective criterion of the role of the infringer to horizontal collusion and explicitly excluded vertical infringements. It is, however, not clear why the criterion (*role in the infringement*) should not apply to vertical infringements, as the role of joint infringers is equally relevant for the causation of harm as it is in horizontal infringements. In particular, in vertical relations in which firms in the downstream market depend on supplies from the upstream level, firms on the downstream market are generally more inclined to adhere to collusive intentions from their suppliers. It appears unjust to ignore the dependencies in supply chains and whether the infringement was initiated, organised, and/or maintained at the upstream or downstream level. For example, in cases of minimum retail price maintenance, the supplier who generally has an interest that a certain price level is maintained as long as possible to keep margins at a high level will also take steps to initiate a vertical agreement with retailers. The roles the firms play in joint vertical infringements, and particularly their roles in light of causation of harm, might even be more relevant than in horizontal infringements. In other words, there is no justification for a policy to discriminate between horizontal and vertical agreements by ignoring the role of the firms involved in vertical infringements altogether.

In consideration of the legislator's intention to permit contribution for jointly and severally liable infringers,[685] as well as to quantify each infringer's contribution based on the individual responsibility relative to the remaining infringers, strongly indicates that the exclusion of vertical collusive behaviour stems from an editorial error. Furthermore, Article 11(5) of the Directive provides that *'an infringer may recover a contribution from <u>any other infringer</u>'*, which includes joint infringers of vertical restrictions. Also, the list in recital 37 is not exhaustive – other criteria such as gain-based allocations (e.g., overcharge) are not mentioned in the list. Moreover, the wording does not specify which criteria are considered relevant for a specific type of infringement, but instead leaves the decision to national law. Therefore, the wording does not preclude Member States or courts applying the same or different criteria for different types of infringements.

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production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors'.

[685] Directive, Article 11(5).

Hence, despite the editorial error, the *role the infringer played in the infringement* may also be relevant for other joint infringements besides horizontal cartels.

C. The Adjustment of Fines Based on the Role in the Infringement

The Commission has considered – as one of several factors – the firm's role in the infringement when adjusting fines for aggravating and mitigating circumstances.[686] Furthermore, the Leniency Notice excludes firms that played a leading role in the cartel from immunity from fines; however, in contrast to the US, leading firms *'which took steps to coerce other undertakings to join the cartel or to remain in it'* may still benefit from a reduction of fines.[687] The Fines Guidelines contain a non-exhaustive list of factors that can qualify as aggravating or mitigating factors. Under the 2006 Fines Guidelines, the Commission may increase fines for firms with a leading role or firms that instigated the infringement.[688] By contrast, fines can be reduced for firms with only substantially limited involvement in the infringement.[689] The Commission is not always consistent in its fining practice in terms of fines reductions and/or increases based on the role of the firms in the infringement, as the circumstances for the adjustment of the fines are always case-specific.

This chapter summarises the circumstances for which the Commission has adjusted fines for the firm's role in the infringement. The analysis is based on the review of the Commission decisions against cartels during 2001–2019.[690] Appeal decisions of the European Courts were not included in the review as the aim of this chapter is to align the adjustment of fines for the role in the cartel with the adjustment of the share of civil liability. Most commonly damages are claimed once the Commission decision has become publicly known and at least one decision has become final. [691] Thus, the court's methodology for the adjustment of the civil liability should be aligned with that of the Commission.

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[686] See chapter VII for a detailed analysis of the current EU fining methodology. In *BASF* the General Court clarified that the role of 'ringleader' played by one or more undertakings in a cartel must be taken into account in setting the fine in so far as undertakings which have played such a role must bear a special responsibility compared with other undertakings (Case T-15/02 *BASF AG* v *Commission* [2006] ECLI:EU:T:2006:74, para 281; see also *Bitumen Spain* (COMP/38.710) C(2007)4441 [2009] OJ C321/15, para 528).

[687] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] C298/11, para 13. By contrast, according to the US Department of Justice Corporate Leniency Policy 1993, a firm may only be granted immunity or a reduction of fines if '*the corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of the activity'*.

[688] 2006 Fines Guidelines, para 28.

[689] 2006 Fines Guidelines, para 29.

[690] In 2020 the Commission has decided only three cases. At the time of writing the non-confidential version of the decisions were not yet published.

[691] While some members of the infringement may appeal the Commission's decision, plaintiffs will bring actions against the member(s) who have not appealed the decision (e.g., addresses of a Commitment decision) to prevent

The circumstances under which the role in the cartel has qualified for a reduction or led to an increase of fines are discussed below. The findings on mitigating circumstances are summarised in Annex 1 and those on aggravating circumstances are summarised in Annex 2.

I. Mitigating circumstances

The 2006 Fines Guidelines list the following as mitigating circumstances that qualify for a reduction of fines: the termination of the infringement as soon as the Commission intervened, the commitment of the infringement as a result of negligence, substantially limited involvement of the undertaking, cooperation of the undertaking outside of the Leniency Notice, and where the behaviour was authorised or encouraged by public authorities or by legislation.[692] From the listed circumstances, only *'substantially limited involvement'* in the infringement relates to the infringers' roles in the cartel. To prove that its involvement in the infringement was 'substantially limited', the undertaking needs to demonstrate that *'during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market'*.[693] The burden of proof thus lies with the undertaking relying on the mitigating circumstances, while the Guidelines set the standard of proving a *'substantially limited involvement'* rather high. In contrast to the 1998 Fines Guidelines,[694] the 2006 Fines Guidelines no longer accept only a minor or passive role in the cartel for a reduction of fines. Instead an undertaking claiming limited involvement must demonstrate that it did not implement the infringement and that it acted contrary to the agreement by adopting competitive conduct. The 2006 Fines Guidelines further clarify that *'the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount'*. Under the 1998 Fines Guidelines it was sufficient to show that the undertakings played an *'exclusively passive or "follow-my-leader" role'*, and *'non-implementation in practice'* was an additional factor that could justify a further reduction in fines.[695] The 2006 Fines Guidelines require that the limited role in the cartel is substantiated through non-implementation of the agreement.

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the claim becoming time-barred. For the new rules on limitation periods and the suspension of limitation periods, see chapter II, B.VI above.

[692] 2006 Fines Guidelines, para 29.

[693] Ibid.

[694] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty [1998] C9/03 (**1998 Fines Guidelines**).

[695] 1998 Fines Guidelines, 4.

In *Prestressing steel,* the Commission expressly stated that a passive or *'follow-my-leader'* role will no longer suffice, since the undertaking *'still participated in the cartel'*, which *'means that, on the one hand, it derives its own commercial benefits from its participation in the cartel and, on the other hand, it encourages the other participants in the cartel to participate and to implement the arrangements'*.[696]

However, as the list is not exhaustive, even after the introduction of the 2006 Fines Guidelines the Commission continues to accept a *'minor involvement'* as a mitigating circumstance but grants only a substantially lower reduction than under the 1998 Fines Guidelines. Moreover, the Commission's guidelines have no effect on prior case law on fines established by the European Courts. For instance, in *Airfright (2010)* the Commission observed that a *'passive or minor role'* does not entitle one to a reduction of fines under the 2006 Fines Guidelines, but it nevertheless examined whether the parties' roles would justify a reduction under the case law of the European Courts.[697]

The next part turns to the circumstances that the Commission has considered relevant for a reduction in fines in the decisions published between 2001 and 2019. For clarity, the circumstances relating to the role of the undertakings in the infringement are categorised by types of mitigating circumstance. The meaning of each category and the (potential) reasons why the Commission has considered those factors relevant for the setting of fines are summarised, before the relevance of each category for the determination of relative responsibility is discussed in more detail.

There are six categories of mitigating circumstances that relate to the undertaking's role in the cartel, each of which is described in the following subsections:

1. Passive role

It has already been mentioned that the mere *'passive role'* of an undertaking in the cartel is not sufficient to qualify for a reduction of fines under the current Fines Guidelines. Nevertheless, the case law of the European Courts on a passive role remains relevant. The General Court has defined a passive role when an undertaking keeps a *'low profile'*; that is, it does not actively participate *'in the creation of any anti-competitive agreements'*.[698] The case law considers factors likely to demonstrate a passive role to include significantly more sporadic participation in

[696] *Prestressing Steel* (Case COMP/38.344) C(2010)4387 [2010] OJ C339/7, para 983.
[697] *Airfreight* (Case COMP/39.258) C(2010)7694 [2010] OJ C371/11, para 1223.
[698] Case T 73/04 *Carbone-Lorraine v Commission* [2008] ECLI:EU:T:2008:416, para 163; citing Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECLI:EU:T:2003:193, paras 121, 167.

meetings compared with ordinary members,[699] or evidence in the form of statements from other representatives of undertakings that participated in the infringement.[700] Since 2001, the Commission has granted a reduction in fines for passive roles in eight cases under the 1998 Fines Guidelines. In four cases, the reduction granted was as high as 50%. In a case where a passive role was accompanied by partial non-implementation of the agreement, the fine was reduced by 40%. In the remaining cases, the reductions granted were 30%, 15%, and 10%.

The case law suggests that a reduction of 50% for a passive role will be granted where the undertaking did not attend any of the meetings or attended them only very sporadically and played no part in reaching the collusive agreement. The role of the beneficiaries of the 50% fines reductions was mainly limited to being informed about the agreement reached by others. In *Vitamins*,[701] Rhône-Poulenc (Aventis) received a 50% reduction because it only provided its historic volumes data upon request and was not involved in the market allocation agreement. In *Rubber Chemicals*,[702] General Quimica only accepted an agreement that had already been reached by others. Its participation was limited to a single meeting in its 8 months of participation in the infringement, which lasted overall from January 1996 to December 2001. The same reasoning can be found in the case *Methacrylates*,[703] in which Barlo received a 50% reduction because its participation was mainly limited to being informed about the anticompetitive agreements already reached by others, and it overall only attended the meetings sporadically. Furthermore, Caffaro in *Hydrogen peroxide*[704] participated in only two meetings, which was *'significantly more sporadic'* than any other cartel member, and Caffaro's anticompetitive contacts were only *'very small'*.

In *Graphite electrodes*, the Commission granted a combined reduction in fines of 40% for Carbide/Graphite Group's (C/G) passive role (*'price follower'*) in the infringement as well as the (partial) non-implementation during a period of nearly 4 years of its 5-year participation in the infringement. C/G increased its sales in Europe between 1993 and 1996, thereby deviating from

[699] Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECLI:EU:T:1998:93, para 343.
[700] Case T-317/94 *Weig* v *Commission* [1998] ECLI:EU:T:1998:94, para 264.
[701] *Vitamins* (Case OMP/37.512) C(2001)695 [2001] OJ L6/1.
[702] *Rubber chemicals* (COMP/38.443) C(2005)5592 [2005] OJ L353/50, upheld by the Court of First Instance (Judgment of 18 December 2008, Case T-85/06 *General Química v Commission* [2008] ECLI:EU:T:2008:598) and partially annulled by the CJEU in so far as the decision lacked proof of a decisive influence (C-90/09 P *General Química and Others v Commission* [2011] ECLI:EU:C:2011:21).
[703] *Methacrylates* (COMP/F/38.645) C(2006)2098 [2006] OJ C285/2, upheld by the CJEU (C-70/12 P *Quinn Barlo Ltd and others v Commission* [2013] ECLI:EU:C:2013:351).
[704] *Hydrogen Peroxide and Perborate* (COMP/F/38.620) C(2006)1766 [2006] OJ L353/54; upheld by the Court of First Instance (T-192/06 *Caffaro Srl v European Commission* [2011] ECLI:EU:T:2011:278) and the CJEU (C-447/11 P *Caffaro Srl. placed under special administration v European Commission* [2013] ECLI:EU:C:2013:797).

the agreed sales restrictions in 'non-home' markets.[705] In its decision, the Commission did not specify the proportion of the reduction attributable to C/G's passive role or non-implementation. The decision therefore does not indicate the reductions that were granted for the role as a 'price follower'.

A 30% reduction was granted in *French Beef* where the undertaking could demonstrate that it did not play *'any special part in the conclusion or the application of the agreement'*.[706] The Commission considered the role as passive, even though the undertaking was present at the meeting with the French Minister of Agriculture in which the initial agreement was reached, as well as in the meeting in which the agreement was renewed.[707] The Commission even found evidence that the undertaking had an interest in the renewal of the agreement.[708] Despite the undertaking's participation in the meetings establishing the agreement, the Commission still considered its participation sufficiently passive for a reduction in fines.

In *Industrial and medical gases,* BOC and Westfalen benefited from a 15% reduction because they did not participate in a meeting with the intention to fix prices. Both firms successfully claimed they did not know in advance that price-fixing topics would be raised in the meeting and they did not actively participate in the discussions.[709] The Court of First Instance (General Court) confirmed the decision.[710] Westfalen claimed that it was penalised disproportionally because *inter alia* of its brief duration of involvement and limited participation in the agreements. It claimed that considering everything, in relation to each firm's turnover, Westfalen was penalised more heavily than were the firms initiating and operating the cartel, and thus with the greatest ability to damage competition on the market.[711] First, the General Court reiterated that the Commission enjoys wide discretion when setting fines, before finding that the Commission's assessment of the duration of the infringement, the aggravating and mitigating circumstances, and the degree of the involvement were linked to the individual firm's conduct; furthermore, it found that the Commission took the minor role played by Westfalen in the infringement – compared with that of the other undertakings – sufficiently into account.[712]

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[705] *Graphite electrodes* (COMP/36.490) C(2001)1986 [2001] OJ L100/1, paras 234-236.
[706] *French beef* (COMP/C.38.279) C(2003)1065 [2003] OJ L209/12, para 178. The fines were later reduced by the Court of First Instance (T-217/03, *Fédération nationale de la coopération bétail et viande (FNCBV)* and T-245/03, *Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission* [2006] ECLI:EU:T:2006:391), which was confirmed by the CJEU (Judgment of 18 December 2008, Joined cases C-101/07 P and C-110/07 P, ECLI:EU:C:2008:741), because of a failure of the Commission to apply the Reduction under Section 5(b) of the 1998 Fines Guidelines.
[707] *French beef* (n 706), paras 32-36, 58.
[708] *French beef* (n 706), para 41.
[709] *Industrial and medical gases* (COMP/36.700) [2003] OJ L123/1, paras 439-442.
[710] T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECLI:EU:T:2006:374.
[711] Ibid, paras. 146-149.
[712] Ibid, paras 173-174, 176, 184.

In *Copper Fittings*, the Commission concluded that Flowflex's role was not comparable to that of the remaining cartel participants and granted a 10% reduction. Flowflex was a small player that followed the price lists agreed by the larger competitors.[713]

The case law shows that the Commission did not apply an 'all-or-nothing' approach in relation to reductions in fines for a passive role under the 1998 Fines Guidelines. Instead, the Commission has exercised wide discretion and tended to grant a gradual reduction depending on the actual participation and involvement in the infringement. However, it might be questionable whether a reduction of 15%, as was granted in *Industrial and medical gases*, is justified only because the parties did not anticipate fixing prices before they joined a price-fixing agreement and whether this still classifies as 'passive' in the meaning of the case law of the European Courts. In fact, it is doubtful that a firm's participation in the founding meeting of an infringement only played a passive role in the creation of the unlawful agreement. At least based on the Commission's fining practice under the old Fines Guidelines, an undertaking could still hope to benefit from a reduction if it demonstrated that it did not play *'any special part in the conclusion'* (*French Beef*). Table 6 below summarises the requirements for the different level of reductions in fines:

Table 6 - *Circumstances of different levels of 'passive roles'*

Fines Reduction	Circumstances
-10%	▪ Adherence to prices agreed by other cartel members
-15%	▪ Limited participation ▪ No intention to participate in the infringement
-30%	▪ Limited participation ▪ No specific involvement in the reaching of the infringement
-50%	▪ No attendance/very sporadic attendance of meetings ▪ No involvement in the reaching of the infringement and no implementation

The different levels of passivity make it difficult to apply the *'passive role'* as a factor to determine the infringer's relative responsibility. In its fining practice, the Commission has applied a range of reductions depending on the level of passivity. National courts would need to find an applicable percentage of reduction for each level of passivity while determining the passivity on a case-by-case basis. This raises the complexity of cases and the overall administrative costs.

[713] *Fittings* (COMP/38.121) C(2006)4180 [2006] OJ L283/63, para 135.

Moreover, the complexity of determining the level of reduction by national courts hinders the convergence of approaches, as national courts may quantify passivity differently and apply different reductions.

A major argument against the consideration of *'passive role'* altogether was already raised in *Prestressing steel*.[714] The Commission explained that it would no longer consider passive involvement to justify a reduction in fines, since even passive participation stabilises the infringement and encourages others to participate and implement the infringement. Moreover, the passive infringer still benefits from participation in the infringement. Then again, if set at an optimal level, administrative fines are better equipped to absorb the cartelists' gains from the infringement.

In Europe, the primary objective of damages is to compensate victims, and it is not the aim to correct any unjust enrichment resulting from the infringement. Therefore, the allocation of civil liability should be based on corrective justice goals, strive to achieve compensation of victims, and be guided by infringers' contribution to the harm caused by the infringement. Hence, an active role in a joint competition violation is likely to contribute more to the harm than merely passive participation. On the other hand, an infringer with solely passive involvement still stabilises the joint infringement by way of silently supporting the (active) collusive behaviour of other infringers. Unlike the role of the initiator, however, a merely passive participation is not essential for the creation of the collusion in the first place. In terms of responsibility of joint infringers in relation to each other, the importance of the role of the passive infringer must be determined in relation to the remaining infringers, particularly in relation to the 'ring leader' or instigator of the infringement. Thus, a passive role can be more decisive for stabilising the infringement where no party has taken the sole initiative to establish the collusion in contrast to the initiation of and/or the implementation of the collusion by one or more firms.

Overall, the case law exhibits some ambiguity when setting the reductions in fines for passive involvement in the infringement. It would be unwise to attempt to extract a methodology for the evaluation of passive role from the small number of cases and apply it for the determination of relative responsibility, particularly since the Commission no longer accepts merely passive involvement as a mitigating circumstance. Thus, whether passive participation can justify a shift in civil liability from a passive participant towards other infringers requires a case-by-case analysis and close scrutiny of the stabilising factors of the collusive infringement; that is,

[714] *Prestressing Steel* (n 696) para 983.

whether the passive involvement was ousted by the active involvement (e.g., the instigator) of another participant.

2. Minor involvement / substantially limited involvement

In contrast to the 'passive role', since the introduction of the 2006 Fines Guidelines the Commission has accepted 'minor involvement' as a mitigating circumstance, even though the Fines Guidelines do not expressly refer to 'minor involvements' but instead to 'substantially limited involvement'.[715] In the period between 2006–2019, the Commission only expressly referred to a *'substantially limited involvement'* in the infringement and granted a reduction of 10% in the *Power Cable* case. Overall, although the Commission has accepted 'minor involvement' as a mitigating factor, it has granted significantly lower reductions than for a 'passive role' under the old Fines Guidelines, ranging generally between 5% and 15%.[716] The Commission holds that *'the list of [mitigating] circumstances set out in point 29 of the 2006 Guidelines is not exhaustive and specific circumstances of the case, in particular whether the undertaking participated in all the aspects of the infringement, must be taken into account'*.[717] Following its case-by-case analysis, the Commission has taken into account the following considerations not listed in the Guidelines:

In *Shrimps*[718] the Commission granted Stührk a reduction in fines because its participation was limited to only one Member State (Germany), it never expressly agreed upon prices with competitors, and its involvement was limited to being informed by other cartelists and adapting its own pricing strategy in light of the information received. The specific amount of the reductions has not been disclosed in the non-confidential version.

A 15% reduction was granted to Schott and Asahi Glass in *CRT Glass Bulbs*[719] because both firms were only involved in the cartel to a limited extent. For a substantial part of their participation in the cartel (nearly two out of nearly 4 years) the firms only participated in some bilateral cartel meetings and their contacts were more sporadic than those of other cartel members. In *Automotive bearings,*[720] NFC was granted a 15% reduction because it participated in the discussions to a much lesser extent than the remaining participants and was absent from multi-

[715] 2006 Fines Guidelines, para 29.
[716] Under the 1998 Guidelines, the Commission even granted a 25% reduction in *Plasterboard* (*Plasterboard* (COMP/37.152) C(2002)4570 [2002] OJ C156/5, para 574) for limited involvement in two countries (Germany and the UK) that were affected by the cartel agreement.
[717] *Shrimps* (COMP/39.633) C(2013)8286 [2013] OJ C453/16, para 524.
[718] *Shrimps* (COMP/39.633) C(2013)8286 [2013] OJ C453/16.
[719] *CRT Glass Bulbs* (COMP/39.605) C(2011)7436 [2011] OJ C48/18, paras 28-29.
[720] *Automotive Bearings* (COMP/39.922) C(2014)1788 [2014] OJ C238/10, para 95.

lateral meetings. It was therefore not actively involved in the price coordination but was made aware of what was discussed and agreed during the meetings. In *Alternators and Starters*,[721] Hitachi received a reduction because it did not participate the infringement in relation to all customers. Its activity was limited to two customers, the GM Group and the Nissan/Renault Alliance. In addition, there was no evidence that Hitachi was involved or only aware of an additional collusion between two other members of the cartel.

A 10% reduction in fines was granted in *DRAMs*,[722] *Refrigeration Compressors*,[723] *Bitumen Spain*,[724] *Power Cables*,[725] *Steel Abrasives*,[726] *Euro Interest Rate Derivatives*,[727] *Air Freight*,[728] and *Paper envelopes*.[729] In all the listed cases, the undertakings benefitting from a reduction had to demonstrate a minor involvement (e.g., *'lesser involvement'*,[730] *'less active and regular'*,[731] or *'participated in the infringement to a limited degree'*[732]) compared with the remaining cartelists. Additional factors that came into consideration in *Air Freight* were that Qantas Airways, Air Canada, LATAM, and SAS only operated *'on the periphery of the cartel'* with limited contacts to other members of the cartel. LATAM only had regular contact with one cartelist (Lufthansa) to ensure the arrangements of the 'Capacity Sharing Agreement'. While the agreement was found to be pro-competitive in general, the cooperation between LATAM and Lufthansa went beyond the initially intended objective of the agreement. SAS successfully claimed a small market share compared with the remaining cartelists to demonstrate its minor role in the infringement.[733] In *Paper envelopes*, for the finding of a minor involvement of Mayer-Kuvert, the Commission referred to its significantly lower participation and the fact that Mayer-Kuvert was perceived as difficult to reach an agreement with.[734] In *Bitumen Spain* it was sufficient that Nynäs and Petrogal did not participate in all aspects of the agreement. While they showed active involvement in the market sharing and consumer allocation arrangements, they

[721] *Alternators and Starters* (COMP/40.028) C(2016)223 [2016] OJ C137/7, paras 28, 57.
[722] *DRAMs* (COMP/38.511) [2010] OJ C180, paras 109-110.
[723] *Refrigeration Compressors* (COMP/39.600) C(2011)8923 [2011] OJ C122/6.
[724] *Bitumen Spain* (n 686).
[725] *Power Cables* (COMP/39.610) C(2014)2139 [2014] OJ C319/10.
[726] *Steel Abrasives* (COMP/39.792) C(2014)2074 [2014] OJ C362/8; *Steel Abrasives* (COMP/39.792) C(2016)3121 [2016] OJ C366/6.
[727] *Euro Interest Rate Derivatives* (COMP/39.914) C(2016) 8530 [2016] OJ C130/11.
[728] *Airfreight* (n 697).
[729] *Envelopes* (COMP/39.780) C(2014)9295 [2014] OJ C39/10.
[730] Ibid, para 87.
[731] *Bitumen Spain* (n 686) para 567. Although the Commission also notes that '[i]t is not excluded that a less regular or active participation in these aspects of the infringement was just a consequence of their small market share on the Spanish bitumen market, which has already been taken into account by the Commission in establishing the starting amounts of the fine'.
[732] *Airfreight* (n 697) para 26.
[733] *Airfreight* (n 697) para 1228.
[734] *Envelopes* (n 729) para 87.

were less involved in the monitoring and compensation mechanisms as well as the price coordination activities.[735] Similarly, in *DRAMs* it was sufficient that the involvement of Toshiba and Mitsubishi was much lower than that of other suppliers and thus contributed less to maintaining the agreement.[736] The personnel of Mitsubishi and Toshiba were less involved in the anti-competitive contacts compared with other cartel participants. The Commission found that the operation of the cartel was based on regular and repeated contacts between cartel participants. Both firms therefore contributed to a lesser extent to the stabilisation of the infringement. In *Refrigeration Compressors*, Panasonic was granted a 10% reduction because out of several bilateral, trilateral, and multilateral meetings, it only attended on one occasion.[737] In *Power Cables*,[738] the reduction was granted for *'fringe players'* that were only included in the infringement on an *ad hoc* basis with *'substantially limited involvement'* in the infringement. Furthermore, in *Steel Abrasives*[739] the undertakings benefitting from a reduction in fines did not participate in the initial conclusion of the agreement[740] or were only occasionally involved in the infringement.[741] The Commission granted an additional 5% discount to an undertaking for which there was *'far less evidence'* of participation.[742] In *Euro Interest Rate Derivatives,* the recipients of the 10% reduction were found to play only a peripheral role in the infringement with a lower degree of intensity of collusive contacts compared with the main players in the cartel.

A 5% reduction in fines was granted in *Prestressing steel*,[743] *Power Cables*,[744] *Retail food packaging*,[745] as well as in *Car battery recycling*.[746] Again, the reduction was only granted to firms that demonstrated a significantly lower participation in relation to the remaining cartelists. In the decisions, minor factors were held to justify the deviation from the 10% reduction to a lower level of reduction in fines. In *Car battery recycling*, Campina – the only firm benefitting from a reduction for its limited role – was found to have not participated for a long period, but at the same time it took part in *'all multilateral meetings and did not oppose or disrupt the cartel'*. In *Prestressing steel*, however, there was evidence that the two firms found to play only

[735] *Bitumen Spain* (n 686) para 567.
[736] *DRAMs* (n 722) paras 109-110.
[737] *Refrigeration Compressors* (n 723) para 28.
[738] *Power Cables* (n 725) para 581.
[739] *Steel Abrasives* [2014] (n 726); *Steel Abrasives* [2016] (n 726).
[740] *Steel Abrasives* [2014] (n 726), para 36.
[741] *Steel Abrasives* [2016] (n 726) para 58.
[742] *Steel Abrasives* [2014] (n 726), para 36.
[743] *Prestressing Steel* (n 696) paras 1024-1026.
[744] *Power Cables* (n 725).
[745] *Retail Food Packaging* (COMP/39.563) C(2015)4336 [2015] OJ C402/8.
[746] *Car battery recycling* (COMP/40.018) C(2017)900 [2017] OJ C396/7, para 355.

a minor role in the cartel had also obstructed the cartel. Other cartelists complained that Proderac was not at all involved in the process of reaching the price-fixing agreement and that it *'never gave detailed, reliable figures of its sales and that it never gave its lists of clients'*. Trame was not only absent from several meetings but also found to go *'in all directions'*, and it eventually left the cartel. Similarly, in *Retail food packaging*, the firms benefitting from a 5% discount were perceived as a disturbing element in the cartel. Silver Plastics was only invited to join the cartel because it was seen as an aggressive competitor. It only remained in the cartel for 3 months and maintained a *'disruptive and fringe role'*.[747] On the other hand, in *Power Cables*, the Commission found that while ABB, EXSYM, Sagem, and Brugg had minor involvement in the cartel, it was not sufficient to qualify them as *'fringe players'*. It still granted them a discount of 5%.

From the Commission's practice, it is not clear which factors justify a 10% reduction over a 5% reduction in fines. Rather, it seems that the level of reduction is again highly case-specific, which needs to be assessed in relation to the role and involvement of the remaining members of the cartel. This was also illustrated in *Prestressing steel* where the Commission took into account that *'of all undertakings [Proderac] deviated most from the assigned quotas'*.[748]

Thus, equally to the 'passive role', the different level of reductions granted depend profoundly on the involvement of the remaining cartelists. If one was to apply the same circumstances seen as relevant for a 'minor involvement' in the administrative procedure for the determination of relative responsibility in the civil proceeding, this would inevitably create arbitrary results. Hence, the quantification of 'minor involvement' for the relative responsibility requires an assessment of all participants of the infringement, which again includes high administrative costs. This problem will be referred to again in relation to the role of the ring leader and instigator.

3. Non-implementation

Another factor that has been considered by the Commission is the (partial) non-implementation of the infringement. First of all, it should be noted that the 2006 Fines Guidelines no longer include the non-implementation in practice as a mitigating factor. Instead, the new Guidelines require that the firm *'avoided applying it by adopting competitive conduct in the market'*. The General Court considers it necessary to demonstrate that the firm, at the very least, clearly and substantially breached the obligations relating to the implementation of the cartel to the point

[747] *Retail Food Packaging* (n 745) paras 1045-1047.
[748] *Prestressing Steel* (n 696) para 1024.

of disrupting its very operation.[749] Thus, the mere non-implementation or difference in degree of implementation is no longer sufficient to justify a reduction.[750]

In relation to the allocation of civil liability, there are reasonable considerations to not accept the mere non-implementation and even the adoption of a conduct contrary to what was agreed in the collusion into account. Economic theory suggests that a firm that deviates from the collusively agreed conduct might simply do so to exploit the cartel for its own benefit.[751] In *Electrical and mechanical carbon and graphite products,* the Commission notes that *'occasional cheating is quite common in a cartel, if and when companies think that they can get away with it'*.[752] For the determination of relative responsibility, the mere non-implementation of the infringement will already be taken into account as the claimant will have to quantify the harm caused by the competition infringers. In theory, the claimants' damages are based on the overcharge or at least an estimation of it, and thus, if the defendant has not implemented the agreement – even to exploit the cartel for the defendant's own benefit – it would in theory reduce the amount of damages reflecting the defendant's pro-competitive behaviour. A further recognition of the defendant cheating on the cartel would therefore be unjust.

4. Lack of awareness

In *Bananas*, *Optical Disk Drive*, *Spark Plugs,* and *Maritime Car Carriers*, the Commission accepted as a mitigating circumstance the fact that a member of the cartel was not aware of the entirety of the cartel agreement. For example, in *Spark Plugs,* Denso and Bosch received a 10% reduction because there was lack of evidence that they were aware or could reasonably have foreseen the bilateral contacts between other members of the cartel. In *Maritime Car Carriers*, the reduction amounted to 20% because CSAV not only lacked awareness of the whole extent of the infringement but also played only a limited role in the infringement. The lack of awareness of parts of the infringement is less relevant for the distribution of civil liability than for the setting of fines. If a cartel member is not aware of the entire infringement, it is generally not able to implement the whole agreement. In other words, because of the lack of knowledge about a certain part of the infringement (e.g., the geographical scope), it will continue to behave competi-

[749] T-26/02 *Daichii v Commission* [2006] ECLI:EU:T:2006:75, para 113; and T-73/04 *Carbone-Lorraine v Commission* [2008] ECLI:EU:T:2008:416, para 196.
[750] T-220/00 *Cheil Jedang v Commission* [2003] ECLI:EU:T:2003:193, paras 194-199.
[751] Robert Marshall and Leslie Marx, *The Economics of Collusion – Cartels and Bidding Rings* (MIT Press 2012) 103-104; C-279/98 P *Cascades SA* v *Commission* [2000] ECLI:EU:C:2000:626, para 230; Joined Cases T-71/03 etc., *Tokai Carbon and others* v *Commission* [2001] ECLI:EU:T:2001:185, para 297; Case T-44/00 *Mannesmannröhren-Werke AG* v *Commission* [2004] ECLI:EU:T:2004:218, paras 277-278, and Case T-327/94 *SCA Holding* v *Commission* [1998] ECLI:EU:T:1998:96, para 142.
[752] *Electrical and mechanical carbon and graphite products* (COMP/38.359) C(2003)4457 [2003] OJ L125/45, para 308.

tively. Purchasers of that cartel member will not be affected by the infringement which should be mirrored by the overall amount of damages claimed by direct and indirect purchasers. Further adjustments for the lack of awareness would not be appropriate.

5. Absence of benefits derived from the infringement

The same reasoning also applies to a common claim by defendants that they have not benefited from the infringement despite participating in the collusion. It is settled case law that the absence of a benefit from the infringement does not prevent an undertaking from being fined,[753] and neither has the Commission accepted the claim that the cartelist has not benefited from the infringement as a mitigating circumstance justifying a reduction in fines. In *Air Freight,* the Commission notes that *'in assessing circumstances which may reduce the amount of the fine to be imposed, the actual effects of the conduct on the market are not relevant'*.[754] In relation to the defendant's responsibility, the effects of the infringement are precisely the calculated damages caused by each defendant. Thus, if no benefit was derived from the infringement, this should be reflected in the calculated damages.

6. Pressure by competitors

Members of cartels have also claimed that they had been pressured into the infringement by their competitors through sanctions and other forms of intimidation. The Commission has not accepted such pressure as a mitigating circumstance, as the firms could always have notified the competition authorities of such behaviour. In *Prestressing steel,* the Commission summarised the stand it takes in relation to external pressure as follows: *'[S]hould the companies have considered themselves as being put under pressure by competitors, they should have brought the issue immediately to the attention of the competition authorities, rather than starting or continuing their participation in anti-competitive meetings and agreements during several years'*.[755]

While the exercise of pressure to motivate others to join an infringement can be considered an aggravating circumstance triggering an increase in fines, it does not justify the reduction if a firm decides not to defend itself by informing the antitrust authorities. For the same reason, the defendant's omission to make use of existing antitrust enforcement tools should not justify a reduction of its civil liability. On the other hand, a defendant exercising duress or other forms

[753] Case C-219/95 P *Ferriere Nord v Commission* [1997] ECLI:EU:C:1997:375, paras 46-47; Case T-229/94 *Deutsche Bahn* [1997] ECLI:EU:T:1997:155, para 217 and Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECLI:EU:T:2005:296, para 146.
[754] *Airfreight* (n 697) para 1253.
[755] *Prestressing Steel* (n 696) para 1028.

of pressure to instigate or stabilise the cartel carries a higher responsibility for the harm than do other participants of the same infringement. The civil responsibility of undertakings stabilising the cartel and potential measurements of such responsibility are discussed in the next section.

The next section summarises the Commission's practice for increasing fines for aggravating circumstances.

II. Aggravating circumstances

In contrast to reductions granted for mitigating factors such as passive/minor roles, the Commission has applied a substantially more coherent approach to increases in fines for aggravating circumstances. The 1998 and 2006 Fines Guidelines list two aggravating circumstances that relate to the firm's role in the cartel, namely the *'role of leader in, or instigator of, the infringement'*.[756] Whereas the 1998 Fines Guidelines also referred separately to retaliatory measures, and retaliatory measures are additional factors in the 2006 Guidelines coercion that the Commission will take into account when assessing the role of leaders and/or instigators:

> *'— role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement'*.[757]

However, the wording of the Guidelines refers to leading and instigating as the same circumstance, suggesting the same criteria apply for the concept of leader and instigators. It is now settled case law that it is necessary to distinguish between both concepts.[758] The Commission summarises the two concepts as follows:

> *'Whereas instigation is concerned with the establishment or enlargement of a cartel, leadership is concerned with its operation. In order to be described as a leader, it is sufficient that the undertaking was a significant driving force for the cartel, which may be inferred in particular from the fact that it took upon itself responsibility for developing and suggesting the conduct to be adopted by the members of the cartel, even if it was not necessarily in a position to impose it upon them'*.[759]
> *'In order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other undertakings to establish the cartel or to join it'*.[760]

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[756] 2006 Fines Guidelines, para 28 and 1998 Fines Guidelines, part 2.
[757] 2006 Fines Guidelines, para 28.
[758] *BASF AG v Commission* (n 686) para 281.
[759] *Bitumen Spain* (n 686) para 529.
[760] *Bitumen – NL* (COMP/38.456) [2006] OJ L196/40, para 342; see also Case T-15/02 *BASF AG* v *Commission* [2006] ECLI:EU:T:2006:74, para 321.

Therefore, the primary distinction between leading and instigating the infringement is whether the infringer has persuaded others to establish the cartel or join the infringement, or whether the infringer has played a significant role in maintaining an existing infringement for which the undertaking should bear *'special responsibility'*.[761] The case law shows a clearer pattern for quantifying the additional responsibility for leading and/or instigating the infringement than for the reductions granted for a minor role in the infringement.

The Commission has generally imposed a 30% increase in fines against undertakings that solely instigated the infringement without playing a leading role. In *Belgian Beer Market*[762] and *French Beef,*[763] the undertakings that initiated the meetings and took the initiative for reaching the agreement received a 30% increase in fines. The same rate of increase has been imposed against infringers that have played a leading role in the infringement without also having initiated it. From 2001 to 2019, the Commission imposed a 30% increase of fines for a leadership role in three cases. First, in 2003 in *Sorbetes,*[764] both Hoffmann-La Roche and Daicel received increased fines. Hoffmann-La Roche suggested and introduced measures to monitor the volume quotas and implemented a penalty system. It also unilaterally imposed punishment measures to ensure adherence to the agreement. Daicel took an intermediary role between Hoechst and other suppliers and implemented a cartel penalty system to control the agreed volume quotas. The Commission described both as the *'important driving forces'* and most active members. The same description was used for Parker ITR in the 2009 decision *Marine Hoses,*[765] in which Parker ITR was described as *'the driving force behind the move to overcome the internal struggles among the cartelists'*. Parker ITR and Bridgestone were both found to have coordinated the infringement for different time periods. In *Bitumen Spain,*[766] the two leading firms were also found to have coordinated the infringement and bilaterally agreed the prices and their implementation.

In 2001, a marginally higher increase of 35% for a solely leading role was imposed in *Citric Acid*.[767] The involvement of the leading firms did not deviate visibly from the cases above. Both leading firms contributed to the infringement with ideas and chaired the meetings. In particular, Hoffmann-La Roche's efforts *'to sort out internal quarrels'* were held to demonstrate its leadership role. The evolution of the fining practice rather suggests that the Commission is more inclined today to impose a rounded increase of 30% for undertakings that play a key role

[761] *Bitumen – NL* (n 760) para 343.
[762] *PO/Interbrew and Alken-Maes* (COMP/37.614) [2001] OJ L200, paras 157, 347.
[763] *French beef* (n 706) para 175.
[764] *Sorbates* (COMP/37.370) C(2003)3426 [2003] OJ L173/5, para 366.
[765] *Marine Hoses* (COMP/39.406) [2009] OJ C168/6.
[766] *Bitumen Spain* (n 686).
[767] *Citric acid* (COMP/36.604) C(2001)3923 [2001] OJ L239/18.

in the monitoring and implementation of the infringement but have not initiated the infringement nor become the 'centre piece' without which the infringement would dissolve.

On the other hand, where the undertaking has also initiated the infringement or became the 'centre piece', the Commission tends to increase the fines by 50%. In five cases, the Commission has imposed a 50% increase in fines where the undertakings' roles have become indispensable for the infringement to continue. In *Sodium Gluconate*,[768] Jungbunzlauer chaired the meetings, took the initiative to resume the agreement, and collected the necessary data for the infringement. Furthermore, Sasol in *Candle Waxes* did not only convene and organise the meetings but also chaired them and initiated and organised the discussions on prices.[769] In *Carbonless Paper*,[770] in addition to the regular activities of a leader such as conducting the meetings and initiating price increases, AWA was also the 'first mover' and played a key role in monitoring and ensuring compliance with the infringement.[771] Similarly in the *Vitamins cartel*, the Commission distinguished between the roles of the two leaders Roche and BASF. Both were found to have formed a *'common front in convincing and implementing the collusive agreements'*, but only Roche played a particular role as *'prime mover and main beneficiary of these collusive agreements'*. Roche received a 50% increase in fines, whereas BASF received a 35% increase.[772] Nintendo as leader and instigator in *Video Games*[773] received a 50% increase in fines because it was not only the manufacturer but also the distributor of the product and the only one able to control parallel trade by putting in place measures to track traders.[774] In *Gas Insulated Switchgear,* the leading undertakings took over the role of the secretary of the cartel in Europe.[775]

In the *Vitamins cartel* and *Bitumen NL,*[776] the undertakings were found to have played a leading role in addition to instigating the infringement. Furthermore, in *Bitumen NL* the fines were increased by 50%. In the earlier case *Graphite electrodes*[777] in 2001, the Commission even increased the fines by 60% for two undertakings (SGL and UCAR) that took the main decisions and initiated the agreement. Slightly later in 2002, in *Speciality Graphite*, the Commission relied on its previous findings in *Graphite electrodes* that SGL initiated and steered the develop-

[768] *Sodium Gluconate* (COMP/36.756) C(2004)3598 [2004] C(2004)3598.
[769] *Candle Waxes* (COMP/39.181) C(2008)5476 [2008] OJ C295/17, paras 681-686.
[770] *Carbonless paper* (COMP/36.212) 2004/337/EC [2001] OJ L115/1.
[771] Ibid, paras 418-424.
[772] *Vitamins* (n 701).
[773] *Video Games* (COMP/35.587 PO), *Nintendo Distribution* (COMP/35.706 PO) and *Omega — Nintendo* (COMP/36.321) 2003/675/EC [2003] OJ L255/33.
[774] *Video Games* (COMP/35.587 PO), *Nintendo Distribution* (COMP/35.706 PO) and *Omega — Nintendo* (COMP/36.321) (n 773) paras 228-238, 406.
[775] *Gas Insulated Switchgear* (COMP/38.899) C(2006)6762 [2006] OJ C5/7, paras 511-514.
[776] *Bitumen – NL* (n 760).
[777] *Graphite electrodes* (COMP/36.490) 2002/271/EC [2001] OJ L100/1.

ment of the infringement but held that a 50% increase would be sufficient. Again, the Commission's practice seems to suggest that today the Commission would apply a uniform increase of 50% to the same facts.

Table 7 below summarises the circumstances for which the Commission has imposed the same level of increases in fines:

Table 7 - *Level of fine increases in Commission decisions between 2001 and 2019 for leading and instigating roles*

Role in the Cartel	Fine Increases
Leader **or** instigator	**30%**
Leader **and** instigator	**50%**
Leader **and** 'centre piece'	**50%**

III. Summary of the analysis

The analysis of the Commission's fining practice reveals that the Commission no longer tends to accept an exclusively passive role. Instead, it expects that the defendant has also avoided the implementation of the infringement ('substantially limited role'). A minor role may still be accepted for a reduction in fines, but the Commission has substantially limited the reduction that a member of the cartel can expect compared with the reductions for a 'passive role' granted under the former 1998 Fines Guidelines. However, the case law does not provide useful guidance for a reduction to be granted for the civil liability for defendants benefitting from mitigating factors. The analysis of the case law has shown that the assessment of whether a cartel member may benefit from mitigating factors inevitably also requires an analysis of the behaviour and roles of the remaining cartel members.

By contrast, the Commission applies a more consistent methodology when imposing an increase of fines for aggravating factors. For undertakings that took a leading role in the cartel or instigated it, the Commission consistently applies an increase of 30%. In cases in which both factors are present together or the undertaking qualifies as the centre piece of the infringement, the Commission imposes a 50% increase.

The next section discusses how the Commission's practice on adjusting fines can be translated into a methodology for adjusting the civil contribution of jointly and severally liable infringers of the cartel prohibition.

D. Adjusting the Allocation of Civil Liability for the Role in the Infringement

The previous section analysed the factors the Commission has considered as potential mitigating and aggravating circumstances, which relate to the role the undertaking has played in the infringement. This section proposes adjusting the allocation of civil liability for the undertaking's behaviour in the infringement. This raises the question of why the adjustment is deemed necessary in the first place, as well as the question of how the adjustment fits with the two main objectives of the Directives to guarantee the right of compensation without jeopardising deterrence. First, chapter IV showed that there are considerable justice implications if a firm that instigated the infringement and an undertaking that only followed and potentially did not even implement the agreement are treated the same. Without the instigating undertaking's action, the conspiracy would likely not even have occurred. Likewise, the harm created by a firm that has participated but not implemented the agreement is considerably lower. Second, from this it follows that based on the causation theories outlined in the previous chapter, the undertaking that has not implemented the agreement has also caused viewer losses and thus overall should carry a smaller burden. Third, the shift of civil liability to the 'instigator' of the conspiracy has a deterrent effect. Thus, if legal certainty exists that the 'instigator' will have to carry a larger share of the liability than that of the remaining firm in the conspiracy, a rational decision maker will likely refrain from instigating the infringement in the first place.

For aggravating circumstances that relate to the role of the undertaking in the infringement, the Commission has considered the *'role of a leader'* or *'instigator'* as relevant for an increase of fines. Depending on the degree and whether an undertaking has both instigated the infringement and played a leading role, the Commission increases the fines. In its case law the Commission has taken a coherent approach for the additional fines of 30% and 50% imposed (see Table 7 above). It would be reasonable to apply the same scale for the undertaking's civil liability.

For mitigating circumstances, the Commission has refused to accept the mere non-implementation, lack of awareness, absence of benefits derived from the infringement, or pressure by competitors as relevant factors justifying a reduction. However, the latter may qualify for an increase in fines against the firm executing the pressure. The arguments for rejecting those factors as mitigating factors are equally relevant for the allocation of relative responsibility. The Commission has rejected both the non-implementation and the absence of benefits because those factors are sufficiently factored in when setting the basic amount. The current methodol-

ogy for the basic amount is based on the undertaking's sales of the previous business year.[778] Arguably, the sales value of one year cannot consider a periodical non-implementation or absence of benefits in previous years. The civil liability of the infringer, on the other hand, is based on the overcharge gained from the infringement. Ideally, when an undertaking has not implemented the infringement it should not have gained a premium from it.[779] Even if it did, for instance, because following the infringement the price level on the market increased, its mere presence in the cartel already stabilised the infringement (*'passive role'*), which does not justify a shift of liability.

On the other hand, the Commission has accepted the 'passive role', 'minor involvement', and 'substantially limited role' as mitigating factors. The Commission's fining practice, however, does not seem to follow a coherent methodology for the reductions granted for those mitigating circumstances. The case-by-case analysis in the administrative procedure does not seem to follow a coherent approach that could be applied in analogue for the determination of relative responsibility. Moreover, a minor or even passive involvement in an infringement still contributes and stabilises the infringement, and thereby also creates a causal link for the harm.[780]

This is not true, however, for a *'substantially limited role'* as set out in the 2006 Fines Guidelines, which requires that the undertaking applied a behaviour that was contrary to the conduct agreed in the cartel. An undertaking must have avoided the application of the agreement and adopted a competitive conduct in the market. In contrast to mere passive or minor involvement, competitive conduct does not stabilise but weaken the joint infringement and as such does not contribute to the causation of the harm. In light of its pro-competitive effects, a *'substantially limited role'* as defined under the 2006 Fines Guidelines justifies a reduction in civil liability. The Commission has thus far always evaluated the reductions for mitigating circumstances relative to the conduct and involvement of the remaining undertakings, particularly that of *'ringleaders'* and *'instigators'*. For example, in *Power Cable*, the Commission held a reduction appropriate *'to ensure that the different degrees of involvement of the addressees is duly reflected in the fine beyond the differentiation that has already been made under the gravity section'*.[781] The Commission only considered a reduction of 10% appropriate for a substantially limited involvement that qualifies as a 'fringe player' and 5% where the involvement was substantially limited but did not qualify as a 'fringe player'.

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[778] See chapter VII, B above.
[779] Equally under the damages-based fines methodology proposed in chapter VII, the non-implementation and the absence of effects would already be reflected by the security for damages.
[780] For example, *Prestressing Steel* (n 696) para 983.
[781] *Power Cables* (n 725) para 1031.

Against this background, the Commission's practice sets a ceiling for a potential reduction for a *'substantially limited role'* at 10%. It therefore seems appropriate to grant – analogue to the adjustment in *Power Cable* – a reduction of 5% for a 'substantially limited role' as defined under the 2006 Guidelines and 10% if in addition the participation qualifies as that of a 'fringe player'. A mere 'passive role' or minor involvement, on the other hand, should not qualify for a reduction because of its stabilising effects on the collusion.

Table 8 below summarises the proposed adjustments for the role of the infringer in the infringement:

Table 8 - *Adjustment to the civil liability according to the role in the infringement*

Fines Adjustments	Circumstances
-5%	'*Substantially limited involvement*'
-10%	'*Substantially limited involvement*' **and** *'fringe player'*
+30%	'*Leader*' **or** *'instigator'*
+50%	'*Leader*' **and** *'instigator'*
+50%	'*Leader*' **and** '*centre piece'*

E. The Attractiveness of Settlements

chapter III illustrated the continuing debate about the legitimacy of the US no-contribution rule. Proponents of the no-contribution rule have argued *inter alia* that contribution would disincentivise defendants to settle because they would no longer have to fear liability for the entire damages. While it is acknowledged that the no-contribution rule may lead to 'whipsawing settlements', it is feared that contribution would substantially weaken the position of the plaintiff by rendering settlements unattractive for defendants. The underlying reasoning put forward is that under a contribution rule, defendants would not have to fear liability in excess of their contribution or gain. Thus, defendants would be more willing to litigate, which in turn would make it more difficult for plaintiffs to collect information necessary to bring damages actions. Although this view is controversial and has been heavily disputed in the more recent literature,[782] it cannot be denied that the fear of liability exceeding a defendant's contribution encourages infringers to settle. Defendants are inclined to avoid an excessive liability by way of

[782] Chapter III, B.III above summarises the criticism that has been raised against the no-contribution rule.

settlement. The risk of excessive liability under the no-contribution rule creates a race between defendants to settle, even in excess of their contribution, as otherwise the entire liability could shift to the non-settling defendant. In any case, the majority considers the outcome of the no-contribution rule unfair.

The adjustment of the allocation rule proposed in this chapter places particular emphasis on the role of the infringer in the cartel and shifts part of the liability to the instigator and ringleader. In line with the case law of the Commission, the liability of a defendant with an aggravating role in the infringement could rise up to 50%. Similar to the no-contribution rule, the defendant will have a strong incentive to reach a settlement with the plaintiff to avoid the additional liability. In follow-on actions, with the publication of the infringement decision/press release, the plaintiff is informed that part of the damages liability of all defendants will shift to the ringleader/instigator. Thus, the plaintiff is aware that the ringleader/initiator has the strongest incentive of all defendants to reach a settlement. However, once the plaintiff and the ringleader/initiator have reached a settlement, the overall claim is reduced by the ringleader's share, and courts will have to take the damages paid in the settlement into account when determining the amount of contribution (Article 19(1) Directive). Essentially, the settlement will also prevent the plaintiff claiming that the share of liability has shifted to the ringleader/instigator from the remaining defendants. The plaintiff only has an incentive to give up part of her liability if she intends to receive some compensation quickly or has difficulties gathering the information to substantiate the claim. In the latter case, the plaintiff may opt to 'purchase' the required evidence from the ringleader by settling for a lower amount.

The advantages of adjusting the allocation of civil liability according to the role in the cartel (as proposed in this chapter) over the no-contribution rule are as follows: (1) it creates incentives to settle with the plaintiff, but limits the 'race to settle' to the ringleaders who generally carry the largest responsibility for the harm; (2) it prevents the problem of 'whipsawing settlements'; and (3) it offers plaintiffs with evidential difficulties the opportunity to access information.

The advantages can be illustrated by adjusting the model scenario introduced in chapter IV, E. In addition, it is assumed that firm C instigated the infringement and had a leading role in the collusion. According to the adjustments to the share of civil liability proposed in this chapter, the civil liability of firm C would increase by 50%. Table 9 summarises the assumptions of the model scenario:

Table 9 - *Summary of the Assumptions for firm A, firm B, and firm C*

	Firm A	**Firm B**	**Firm C**
Market Share	45% (4.5m)	35% (3.5m)	15% (1.5m)
Turnover	EUR 25m	EUR 10m	EUR 15m
Overcharge (20%)	EUR 5m	EUR 2m	EUR 3m
Role			Instigator / Leader

Thus, if we assume that the amount of the overcharge is equal to each firm's civil liability, firm C's civil liability increases from EUR 3m to EUR 4.5m. In turn, the combined civil liability of firm A and B decreases by EUR 1.5m. However, more importantly, because the amount of liability that shifts to the instigator/leader is proportionate to the instigator's/leader's own liability for damages (in this example 50% of EUR 3m), the instigator/leader has a strong incentive to settle. In this scenario, firm C has a strong incentive to settle for any amount below its civil liability to reduce its contribution (EUR 1.5m) to the damages caused by firms A and B.

F. Application of Adjustment for the Role in the Cartel

The shift of civil liability away from cartel members with a substantially limited involvement and fringe players or the shift of liability to leaders and initiators of the infringement ultimately means that the civil liability of the remaining cartel participants will either decrease or increase. The question remains of how to determine the civil liability of the remaining co-infringers. In this scenario, the 50% increase of the civil liability of firm C means that firms A and B can claim a combined contribution to their civil liability of EUR 1.5m from firm C. The additional contribution of EUR 1.5m needs to be distributed between firms A and B. For the distribution, the same allocation criteria as discussed and reviewed in chapter IV, D.V can be applied, namely turnover, market shares, per capita, and gains-based allocation. For the reasons outlined above, the same criterion for distribution should be applied as for the civil liability of claimants other than direct and indirect purchasers. The adjustments for the role in the infringement are awarded or imposed for the conduct of that undertaking. Therefore, the reasons for which an increase of civil liability is imposed or a discount granted lie solely within the sphere of the undertaking that receives the increase or reduction of civil liability. By contrast, the adjustment of the civil liability of the remaining members of the cartel – that ultimately follows an increase for the leader/instigator or reduction for a substantially limited role – results from a policy

choice to allocate liability according to the role in the cartel. The policy choices are external factors that lay outside the sphere of the infringer. Similar to the situation of damages caused to claimants other than direct and indirect customers, distributive justice considerations prevail over corrective theories on causation. It follows from the analysis of the previous chapter that in such situations, market shares are the superior criterion for the distribution of liability.

In this scenario, firm C's contribution of EUR 1.5m to the civil liability of firms A and B would be distributed in proportion to their market shares (excluding the market shares of firm C). Thus, firm C's (additional) contribution to firm A's civil liability amounts to EUR 0.84m and that to firm B's liability to EUR 0.66m.

G. Conclusion

From the mitigating factors listed in the 1998 and 2006 Fines Guidelines, the passive role, minor or substantially limited involvement, non-implementation, lack of awareness, absence of benefit derived from the infringement, and pressure of competitors are factors that relate – some more directly than others – to the role of the infringer during the infringement. Simultaneously, the Guidelines consider as aggravating circumstances *inter alia* the role of the leader, instigator, or centre piece in the infringement. From the review of the Commission's decisions between 2001 and 2019, it is apparent that the Commission does not apply the same percentage adjustment for the same type of adjustment factor. In fact, the Commission's practice in relation to mitigating factors shows that reductions were highly case-specific and dependent on the conduct of other players in the infringement. No coherent methodology on the reduction for mitigating factors can be deduced from the reviewed period. In more recent decisions that applied the 2006 Guidelines, the Commission specified that it would hold a reduction of 10% appropriate for a *substantially limited involvement*, which qualifies as a 'fringe player', and 5% where the involvement was substantially limited but did not qualify as a 'fringe player'. To benefit from a reduction for a substantially limited involvement, the infringer must have avoided the application of the agreement and adopted a competitive conduct in the market. In light of the pro-competitive effects and ultimately the prevention of further damage, it is appropriate to apply the same reduction for the civil liability.

By contrast, for the aggravating factors of leading role and instigator, the Commission consistently applies an increase of 30% when one of those factors is present alone and 50% when both

are present at the same time or the conduct of the leader also qualifies her as centre piece of the infringement.

The increase of civil liability for the leader and instigator also has positive effects in settlements. As the increase for a leading or instigating role is proportionate to the leader's and instigator's civil liability, leaders and instigators have a high incentive to settle to reduce the additional liability. Thus, the adjustment of the leader's and instigator's civil liability achieves similar incentives to settle compared with the US no-contribution rule without its negative effects (e.g., 'whipsawing settlement', fairness limitations). If, in addition, the settlement is made dependent on the plaintiff's disclosure of further information, this would also significantly accelerate the claimant's litigation against other members of the cartel and further relieve the courts.

Lastly, in light of the findings on the allocation of liability in chapter IV, where an adjustment is applied to an infringer's share of liability, the additional share of liability or the amount of reduction that follows from the adjustment should be distributed among the remaining co-infringers according to their market shares.

PART THREE

The Impact of Directive 2014/104/EU on the EU Leniency Programme

Chapter VI
A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives

A. Introduction[783]

Chapter II outlined the steps that have been taken in recent years to encourage private enforcement. The right balance between private and public enforcement has also been discussed in an extensive academic literature.[784] The Directive 2014/104/EU (**Directive**) aims at a better compensation for victims of competition law infringements and simultaneously attempts at strengthening both public and private enforcement. In its proposal for the Directive the European Commission made it clear that *'[t]he overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement.'*[785] The proposal advanced two goals: (i) optimising the interaction between public and private enforcement of competition law; and (ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered. In other words, the Directive had to find the right balance between public and private enforcement without jeopardising the goal of compensatory justice. This has proven to be very difficult. In spite of the emphasis put on the need to facilitate private damages claims, the new Directive is also concerned with preserving the effectiveness of the leniency programme as a mechanism to uncover cartels. Under the leniency programme a cartel participant may apply for immunity from fines by confessing her participation in an illegal conspiracy. It is equally possible to apply for a reduction of fines by cooperating with the European Commission after it has initiated an investigation, in particular by providing additional useful information on the size and duration of the cartel agreement.[786] In recent years,

[783] This chapter is based on the paper written by Philipp Kirst and Roger Van den Bergh, 'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives' (2015) 12 Journal of Competition Law and Economics 1-30.

[784] See Gary S. Becker and George J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 The Journal of Legal Studies 1-18. Those authors argue that deterrence would be achieved more effectively if private individuals enforced the law. Conversely, Wils argued that private damages claims are not an effective enforcement mechanism. See: Wouter J P Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 World Competition 473-488.

[785] Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union [2013] COM (2013) 404 para 3.

[786] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006, C 298/11.

the Commission has increasingly relied on the leniency programme for the detection of cartels.[787]

Under the current state of the law, successful leniency applicants are not protected from follow-on damages claims that are brought afterwards by victims of the infringement. At this point, the goals to guarantee the right of compensation and to uncover illegal conspiracies may collide. In order to prove their harm and the causal link between the infringement and the harm, plaintiffs in damages actions may require access to leniency statements or at least the confidential version of the infringement decisions containing information from the leniency statements. In fact, the information on what was agreed on by the cartelists during their meetings facilitates the proof of causation by plaintiffs. The details on the content of such meetings are regularly provided as part of the statements of leniency applicants. By contrast, without detailed information on the content of the conspiracy, plaintiffs often have to rely solely on economic models to establish causation and harm which require extensive price data and are costly to produce. Defendants regularly object to plaintiffs' economic reports by pointing at methodological shortcomings and circumstantial facts of the case. Thus, allowing plaintiffs to access leniency statements may better enable all victims of cartels to claim follow-on damages but at the same time it could deter leniency applications. Potential leniency applicants might fear that plaintiffs will bring damages claims more frequently, if they have easy access to leniency submissions in the competition authority's file. For the same reason, leniency applicants have an interest to provide as little information as possible about the effects of the infringement (i.e., the overcharge imposed upon their purchasers), thus creating a burden for victims to prove their harm and thereby depriving them of their right to full compensation. The Directive tries to overcome the above problems in the following way: (i) private parties will have no access to leniency statements (Article 6); (ii) immunity recipients' obligation to compensate is limited to their direct and indirect purchasers (Article 11); (iii) a rebuttable presumption is introduced that cartels caused harm (Article 17(2)); and (iv) judges are empowered to estimate the harm suffered (Article 17(1)). However, as was discussed in chapter II, in many Member States the presumption of harm are only applicable to damages claims that arose after the implementation deadline and will take years before it will become relevant in practice.

By refusing access to leniency statements, the Directive aims at reducing the legal uncertainty, which arose as a consequence of a number of judgements of the European Court of Justice. In

[787] Tom Bainbridge, 'The EC Leniency Programme - Hamstrung by Private Litigation?' (2018) 17 Competition Law Insight.

the cases *Pfleiderer* [788] and *Donau Chemie*[789], the CJEU created scope for divergent national rules of procedural law on this issue. This led to different rules on access to evidence in the Member States, as can be learned from a comparison of German and English law. As to the size of the potential damages claims, the European Commission did not opt in favour of full immunity or a percentage reduction (as it is the case with fines under the leniency programme) but chose instead a different way of limiting liability claims. According to the Directive, an undertaking which has been granted immunity from fines under a leniency programme is liable only to its direct and indirect purchasers. However, this limitation of liability does not apply if injured parties are unable to obtain full compensation from the other undertakings (Article 11(3)). Hence, leniency applicants may be held liable in case of insolvency of the other cartel participants.

This chapter discusses the trade-off between the right to compensation for victims of antitrust infringements and an effective leniency programme from a Law and Economics perspective. Section B discusses the legal rules on leniency programmes, which existed prior to the entry into force of the Directive, and their interaction with private damages claims. The different rules of some EU Member States regarding access to evidence are highlighted. Section C summarises the main provisions of the Directive. Particular attention is given to the rules on access to evidence and the ceiling of civil liability payments. Section D discusses the impact of the Directive on the effectiveness of the leniency programme. Facilitating private damages actions may increase compensatory justice but at the same time it may negatively affect deterrence, particularly the goal of uncovering illegal cartels. The Directive's solution of this trade-off is critically analysed with the help of insights from game theory. Section E investigates whether a superior solution to the difficulties resulting from the above trade-off could have been chosen. It is argued that, under certain conditions, the goals of deterrence and justice can be better achieved by a rule which grants immunity or reduction of damages in the same proportion as fines are waived or reduced under the leniency programme. According to this solution, the duty to compensate is shifted from the leniency recipient(s) to the cartel participants who did not cooperate with the competition authorities. The proposed rule is contrasted with a rule granting only the immunity recipient immunity from fines and damages that has been proposed in the literature. In spite of the proposed rule's (theoretical) superiority to safeguard leniency incentives, immunity from damages actions or reduction of damages payments may create practical problems when all firms involved in a cartel have been granted fine reductions or some of them have

[788] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECLI:EU:C:2011:389.
[789] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECLI:EU:C:2013:366.

disappeared from the market. Section F analyses whether these concerns justify an exception to the general rule on damages reductions proposed in this chapter. Section G summarises the findings.

B. Previous EU Law and Member States' Laws on Access to Leniency Documents

In principle, private parties must collect their own evidence of the infringement, the harm and the causal relation between both. Since private parties suffer from serious information asymmetries to satisfy the burden of proof, it has become a common practice for them to notify the European Commission about a potential infringement of the EU competition rules. In this way, the European Commission will make use of its authoritative powers to collect the required evidence. Afterwards, the injured parties can use this evidence to their benefit, since the European Commission's decisions have a probative effect in subsequent actions for damages.[790] Also national courts cannot take a decision running counter to a decision of the European Commission.[791] In order to benefit from the leniency programme an immunity applicant must provide evidence that either leads to a targeted inspection or to the finding of an infringement; other leniency recipients must provide significant added value with respect to the evidence already in the Commission's possession.[792] This substantially eases the establishment of an infringement of Article 101 TFEU by competition authorities. Moreover, it is unlikely that leniency recipients appeal the infringement decision. The latter decision usually becomes final prior to decisions regarding other members of the same cartel. This makes leniency recipients the primary target of damages actions. If victims are granted access to corporate leniency statements, the right of compensation can be more effectively enforced but the number of leniency applications may be reduced out of fear for subsequent damages actions.[793] A brief overview of previous EU law and Member States' laws on access to leniency documents is useful for an accurate understanding of the trade-off between damages payments and optimal leniency incentives.

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[790] Article 16(1) Regulation No 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 16.12.2002.
[791] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECLI:EU:C:2000:689 para 52. This principle is given legislative expression in Article 16 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 (**Regulation No 1/2003**).
[792] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] C 298/11, para 8 lit. a) and b) and para 24.
[793] Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union [2013] 3.

I. The case law of the European Courts

The CJEU was confronted with the trade-off between compensation and discovery of cartels in the *Pfleiderer* and *Donau Chemie* cases. In *Pfleiderer*[794] the CJEU had to rule on whether the disclosure of leniency material may be prohibited in order to protect the leniency programme under EU competition law. The CJEU held that an absolute protection of leniency materials does not exist. In the absence of a rule under EU Law, it is for the national courts to decide on a case-by-case basis whether or not to allow the disclosure of leniency documents.[795] Unfortunately, the CJEU did neither offer clear guidance nor indicated the criteria that should be taken into account when assessing the desirability of access to leniency materials. In *Donau Chemie*[796] the CJEU extended the *Pfleiderer* ruling and held that, in the absence of EU law governing that matter, a systematic refusal by a Member State is contrary in particular to the principle of effectiveness guaranteed by EU Law. National laws must provide courts an opportunity to weigh the interest of victims of cartels against an effective enforcement regime. The application of the principles emanating from the CJEU's judgements led to divergent decisions in national case law. Below, the resulting legal uncertainty is illustrated by a brief comparison of German and English case law.

II. Member States' case law on access to leniency documents

The German Courts followed a hard-line approach and refused disclosure of leniency materials *per se*.[797] The District Court in Bonn held that the interest of an effective leniency programme generally outweighs the victim's interest of compensation and concluded that the leniency programme should not be jeopardised by disclosure leniency statements. According to German criminal procedural rules, access can be refused in cases of an overriding interest of the defendant or any other person, or if the purpose of the inquiry (including the goal of other investigations) appears to be put at risk. The Court noted that leniency applicants provide more information than other (non-cooperating) cartel members, which makes them an easy target for follow-on damages actions. The more likely it is that immunity applicants will also face substantial damages actions, the less likely it is that a cartelist will cheat on the cartel and apply for im-

[794] *Pfleiderer AG v Bundeskartellamt* (n 788).
[795] Proposal for a Directive on Certain Rules Governing Actions for Damages (n 793) 3; OECD, 'Leniency for Subsequent Applicants' DAF/COMP(2012)25; Caroline Cauffman, 'Access to Leniency Related Documents after Pfleiderer' [2012] 34 World Competition 597-615.
[796] *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* (n 789).
[797] AG Bonn, Decision of 18 January 2012 – 51 Gs 53/09.

munity. Thus, the purpose of a future inquiry would be put at risk.[798] In *Roasted Coffee*[799] the Higher Regional Court in Düsseldorf held that the EU 2006 Leniency Notice provides for a legitimate expectation of confidentiality. For that reason, the claimant's interest in preparing his own damages claim did not outweigh the leniency applicant's interest in maintaining confidentiality.[800]

The situation in the United Kingdom was different. In *National Grid* the High Court held that there is no legitimate expectation of leniency applicants that their leniency statements will not be disclosed.[801] The High Court referred to *Pfleiderer* where the CJEU expressly stated that the Leniency Notice cannot govern the application by national courts of its procedural rules in civil proceedings.[802] The Court accepted that leniency applicant's exposure to damages liability may be a relevant factor, but in contrast to the approach taken by the German courts, it did not hold civil liability alone to be sufficient to deter leniency applications. The immunity from fines was held to be sufficient to incentivise potential leniency applicants. This brief comparison has shown that, compared to Germany, there was a greater willingness to grant disclosure in the UK. This legal diversity created uncertainty for undertakings involved in international cartel agreements and it could reduce the number of leniency applications.

III. Further complications following from the Transparency Regulation

Judgements of the European Courts concerning the Regulation No 1049/2001 (the **Transparency Regulation**) have further contributed to the uncertainty concerning access to leniency documents. [803] The Fourth Chamber of the General Court in *CDC* rejected the European Commission's reasoning that the leniency programme would always be undermined if applicants had to fear that they would be prime targets for private damages actions. Such an interpretation would amount to permitting the Commission to avoid the application of the Transparency Reg-

[798] Section 406e subpara 2 German Criminal Procedure Rules. Section 406e subpara 1 German Criminal Procedural Code only grants access to documents of a procedure if a claimant can show a legitimate interest. The German Federal Constitutional Court has held that the preparation of damages claims is sufficient for establishing a legitimate interest (BVerfGE v. 04.12.2008, 2 BvR 1043/08).
[799] OLG Düsseldorf, 22.08.2012 - V-4 Kart 5/11 (OWi), V-4 Kart 6/11 (OWi), 4 Kart 5/11 (OWi), 4 Kart 6/11 (OWi) – *Roasted Coffee*.
[800] Michael Sanders and others, 'Disclosure of Leniency Materials in Follow-On Damages Actions: Striking the Right Balance Between the Interests of Leniency Applicants and Private Claimants' (2013) 34 European Competition Law Review.
[801] *National Grid v ABB* [2012] EWHC 869, para 34.
[802] *Pfleiderer AG v. Bundeskartellamt* (n 788) para 21.
[803] Regulation No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament [2001] OJ L145/43.

ulation.[804] In *EnBW*[805] the European Commission had refused access to leniency documents *'where disclosure would undermine the protection of commercial interests of a natural or legal person, (…) the purpose of inspections, investigations and audits'*[806] or where disclosure *'would seriously undermine the institution's decision-making process'*.[807] The General Court held that the Commission was not entitled to take the view that there is a general presumption that all such documents fall within the exceptions to the right of access, without a specific, individual analysis of each document in the relevant file. Later in *Bitumen*, the General Court held that disclosure of leniency documents could deter potential leniency applicants and that general access to these documents could jeopardise the public interest in an effective enforcement of competition law.[808] It reversed its view on the requirement of an individual assessment of the documents and held that there is a general presumption that disclosure affects the purpose of inspections, investigations and audits, as well as the commercial interests of the undertakings involved in such proceedings.[809] It is up to the European Commission to conduct an individual assessment of the documents showing why an exemption from disclosure should apply.

On appeal of *EnBW*,[810] the CJEU overruled the General Court's requirement that each document must be analysed individually. It stated that Regulation No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents to the institutions, but that the right is nevertheless subject to certain limits based on reasons of public or private interests.[811] Articles 27(2) and 28 of Regulation No 1/2003 and Articles 6, 8, 15 and 16 of Regulation No 773/2004[812] confine access to the file to the 'parties concerned' and to 'complainants'. Since those regulations do not expressly give one regulation primacy over the other, it is necessary to ensure that each of the regulations is applied in a manner which is compatible with the other.[813] The Court found that generalised access on the basis of the Transparency Regulation would jeopardise the balance between undertakings submitting sensitive commercial information and secrecy for the information provided.[814] The CJEU ultimately set aside the General Court's decision and held that the Commission was entitled to presume that all the documents concerned

[804] Case T-437/08 *CDC Hydrogene Peroxide v Commission* [2011] ECLI:EU:T:2011:752, para 70.
[805] Case T-344/08 *EnBW Energie Baden-Württemberg AG v European Commission* [2012] ECLI:EU:T:2012:242.
[806] First and third indents of Article 4 subpara 2 of Regulation No 1049/2001.
[807] Second subparagraph of Article 4 subpara 3 of Regulation No 1049/2001.
[808] Case T-380/08 *Netherlands v Commission* [2013] ECLI:EU:T:2013:480, para 56.
[809] Ibid, paras 40-42.
[810] Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg* [2014] ECLI:EU:C:2014:112.
[811] *Commission v EnBW Energie Baden-Württemberg* (n 810) para 61.
[812] Commission Regulation (EC) No 773/2004 relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty (2004).
[813] *Commission v EnBW Energie Baden-Württemberg* (n 810) paras 84-86.
[814] *Commission v EnBW Energie Baden-Württemberg* (n 810) para 90.

were covered by the exceptions. However, the general presumption can be rebutted by showing that either a specific document is not covered by this presumption or that there is an overriding public interest[815] of disclosure. The Court clarified that it is for the person seeking compensation to establish that it is necessary for him to be granted access to documents in order to enable the Commission to weigh, on a case-by-case basis, the respective interests in favour of disclosure and in favour of protection of these documents, taking into account all relevant factors.[816] It will, however, not be sufficient to merely refer to the intention to claim damages without showing that such disclosure would in fact enable the requestor to obtain the evidence needed to establish its claim for damages and that it had no other way of obtaining that evidence.[817] In *AXA Versicherung*, the General Court interpreted the *ENBW*'s reasoning and held that the general presumption of inaccessibility does not apply to the entire file but that the general presumption may only be applied to a set of documents in the file in order to deal with a global request appropriately.[818] In the case, the General Court held that global and speculative considerations according to which the disclosure of all references to leniency documents could jeopardise the effectiveness of the leniency programme and, in consequence, undermine the protection of the purpose of inspections and investigations connected to that proceeding do not prove a reasonably foreseeable risk of specific and actual harm to those interests and are therefore not sufficient to justify the refusal of such references to leniency documents.[819] The Court concluded that the Commission was wrong to refuse the disclosure of the table of content which contained references to leniency documents. It thereby also reiterated that the exceptions to the right of access to documents must be interpreted and applied strictly.[820]

C. The Directive's New Rules on Compensation of Victims, Access to Evidence and Immunity Recipients' limited Liability

I. Compensation of victims *versus* effectiveness of the leniency programme

The Directive attempts to find a delicate balance between the goals of compensation of victims and detection (deterrence) of cartel agreements. As outlined in more detail in chapter II, Article 3 introduces an obligation for Member States to grant all victims of competition law in-

[815] Article 4 (2) and (3) Regulation No 1049/2001.
[816] *Commission v EnBW Energie Baden-Württemberg* (n 810) para 107.
[817] *Commission v EnBW Energie Baden-Württemberg* (n 810) para 132.
[818] Case T-677/13, *Axa Versicherung AG v Commission* [2015] ECLI:EU:T:2015:473, para 97.
[819] *Axa Versicherung v Commission* (n 818) paras 125-6.
[820] *Axa Versicherung v Commission* (n 818) para 127.

fringements standing to claim full compensation. Standing may not be limited to direct victims (e.g., purchasers) but also includes indirect victims (e.g., end-consumers). Full compensation covers actual loss, loss of profit and payment of interest from the time the harm occurred until compensation is paid. Article 3(3) clarifies that full compensation may not lead to overcompensation, such as punitive or multiple damages, known from US antitrust law.[821] Article 4 summarises the principles of effectiveness and equivalence laid down in the CJEU's ruling in *Courage*.[822] Several provisions of the Directive seem to struggle with finding the right balance between compensation of victims and protecting leniency incentives. Given their relevance for this chapter, the rules on disclosure of evidence and the liability cap for immunity recipients are discussed again below (sections C.IV and V). In this section, the Directive's provisions that influence the balance between the Directive's goals to enhance compensation of victims while ensuring an effective enforcement regime are briefly summarised.[823]

II. Binding effect of national competition authority's decisions

The Directive attempts at improving the position of victims of antitrust infringements in several ways. Article 9(1) introduces a binding effect of decisions of national competition authorities (**NCA**) or a review court. Pursuant to Article 16(1) of Regulation No 1/2003 a national court cannot take a decision running counter to a European Commission's decision in an action for damages. The Directive brings the legal effect of NCA decisions in line with the European Commission's decisions, by extending their probative effect to judgements of national courts. Furthermore, Article 9(2) requires national courts to treat infringement decisions of a NCA or a review court of another Member State at least as *prima facie* evidence. In principles, it becomes easier for victims of cartels to claim compensation based on Article 101(1) TFEU decisions of NCA and national courts, even when they have been rendered in another Member State. Germany and Austria, for example, deviate from the minimum standard in Article 9(2) and apply the same evidential standard (irrebuttable presumption) to decisions of domestic competition authorities (and courts) and of other Member States. In twelve other Member States, infringement decisions of other foreign NCAs are treated as a rebuttable presumption of the com-

[821] In the political debate, strong concerns have been voiced with respect to a so-called American claim culture, which would be characterised by excessive litigation and profit-seeking by specialised lawyers. For a critical discussion of the EU policy options, see: Roger Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 Maastricht Journal of European and Comparative Law 12-34.

[822] Case C-453/99 *Courage Ltd v. Bernard Crehan* [2001] ECLI:EU:C:2001:465.

[823] See chapter II above for a more detailed discussion on the Directive's rules and an overview of the how those rules have been transposed into national laws.

petition violation. The remaining thirteen countries apply the minimum standard as required by Article 9(2) and treat foreign decisions as prima facie evidence. Thus, claiming damages following the infringement decision of a foreign competition authority will in fact become easier in some Member States than in others.

III. Presumption of harm

The Directive makes further attempts to reduce the burden for victims to receive compensation by introducing a presumption that cartel infringements cause harm (Article 17 (2)). The infringer may rebut the presumption. The Hungarian, Latvian, and Romanian implementation legislations went even so far as to presume the amount of overcharge that is typically caused by a cartel infringement. Hungary and Latvia presume an overcharge of 10% and Romania even an overcharge of 20%. The presumptions can be rebutted. The presumption of an amount of overcharge will likely bolster the attractiveness of those two national forums for claimants. On the other hand, the relaxation of the burden of proof for claimants increases the risk for potential leniency applicants which is likely to counteract the incentives of leniency programmes.

National courts may estimate the amount of harm, according to Article 17(1) *'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 evidence available'*. Similar relaxations of the standard of proof already existed prior to the transposition of the Directive in some Member States.[824] However, the claimant is still under an obligation to provide the evidence of a causal link between the infringement and the damage. Furthermore, claimants have to provide the judge with a concrete factual basis for the estimation of the harm suffered. Such data are not necessarily part of leniency statements. Hence, Article 17 provides no guarantee that victims of infringements of competition rules will always receive full compensation. In order to further facilitate the evidential position of claimants the national rules in Slovenia and Germany allow courts to take into account the profits that were gained from the infringement for the estimation of the overcharge.[825] While those rules go beyond the scope of the Directive to remove additional hurdles to compensation, they may further reduce the attractiveness of leniency programmes.

[824] For instance, in Germany the decisions of the Federal Cartel Office already had probative effect in follow-on damages claims under the previous competition act (Section 33 IV 1 Act against Restraints of Competition) and section 287 German Civil Procedural Code allowed the court to estimate the harm.
[825] See chapter II, B.IX.

IV. Disclosure of evidence

An important element of the Directive are the new rules on disclosure of evidence. According to Article 5(1), courts can order a party to the proceeding (claimant or defendant), or a third party to disclose relevant evidence which lies in their control where *'a claimant […] has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'*. Article 5 further states that the pieces of evidence or relevant categories of evidence to be disclosed must be specified as precisely and as narrowly as possible by the requestor and makes the disclosure subject to a proportionality test (Article 5(2) and (3)). Article 6 contains special rules on evidence in the file of a competition authority; in particular some categories of evidence, mentioned in Article 6(5) can be disclosed only after the investigation is closed ('grey list'). Most relevant for the purposes of this chapter is that the Directive limits the disclosure privileges as an attempt to prevent adverse effects on the leniency programme and settlement procedures. According to Article 6(6) leniency corporate statements and settlement submissions enjoy an absolute protection from disclosure ('black list'). Member States must ensure that national courts cannot at any time order a party or a third party to disclose leniency corporate statements.

Although leniency statements are protected from disclosure for damages actions, Article 5(8) allows Member States to introduce rules which allow wider disclosure rules for types of evidence that is not protected under the Directive (minimum harmonisation). Several countries have broadened the scope of their domestic disclosure regime (Czech Republic, Estonia, Germany, Ireland, Portugal, Spain and the UK) by allowing not only for *in-trial* disclosure but also for *pre-trial* disclosure of evidence, i.e., the disclosure of evidence in preparation of damages actions.[826]

The effectiveness of the disclosure regime depends on the scope of the evidence subject to the disclosure regime as well as on the penalties for the failure or refusal to comply with the disclosure orders. Article 8 requires Member States to impose effective, proportionate and dissuasive penalties. However, the level of penalties for failure or refusal to comply with the disclosure regime varies greatly between Member States. In some Member States the penalties are so low that they cannot ensure compliance with the disclosure regime (e.g., in Latvia, the maximum fine is as low as 40 EUR). In other countries, it was viewed that compliance might be better achieved through penalties against individuals or even by the means of imprisonment (e.g., Cyprus and Denmark). A less incisive approach was followed by Germany, which instead

[826] See chapter II, B.III.

introduced a right to compensation for any loss that was caused as a result of the obstruction to the disclosure of evidence.

Equally, the effectiveness of the treatment of confidential information in civil proceedings has an effect on the willingness of cartelists to apply for leniency. If courts are not able or willing to ensure that information containing business secrets is sufficiently kept confidential, the disclosure of such information can be more detrimental to the company than a judgment ordering the compensation of damage. This may particularly be the case where the plaintiff and the cartelists are competitors on other than the affected market. It is surprising that even though the fairly extensive disclosure rules introduced by the Directive are not common in most Member States, only some Member States have codified measures for the protection of confidential information (e.g., Austria, Belgium, France) while others left relatively unexperienced courts in this field without any guidance (e.g., Bulgaria, Germany).[827] Thus, in Member States where courts are more proactive in finding ways to protect confidential information, cartelists may be more willing to cooperate in the future.

Following the amendments of the European Parliament, Article 6 includes two subparagraphs whereby the absolute prohibition of 'black listed' evidence is without prejudice to the rules under Regulation 1049/2001 and Union or national rules on the protection of internal documents of competition authorities and correspondence between competition authorities.[828] In effect, the new Directive does not bring about any changes to the rules on access to documents under the Transparency Regulation, discussed above (see B.III). As the CJEU already clarified in *EnBW* in relation to regulations, as long as there is no explicit primacy of one over the other, they must be applied in a manner compatible with each other.[829] Thus, the prohibition of disclosure of leniency corporate statements in Article 6 does not restrict the disclosure of such statements under the conditions of the Transparency Regulation.

V. Joint and several liability and liability cap for immunity recipients

As outlined in the previous part of this book, Article 11(1) introduces a very significant change. Member States that previously did not have an equivalent rule were required to introduce joint and several liability (e.g., Spain), according to which each of the infringing undertakings is bound to compensate the harm in full. An infringing undertaking, which is liable for damages

[827] Ibid.
[828] See Article 6(2) and (3) Directive 2014/104 incorporating Amendments of the European Parliament, A7-0089/2014.
[829] *Commission v EnBW Energie Baden-Württemberg* (n 810) para 84.

through joint behaviour, may recover contribution from any other infringing undertaking. According to Article 11(5), the amount of contributions between the co-infringers is to be determined in light of their relative responsibility.[830] The joint and several liability may create a high burden for immunity recipients, given that they are likely to be the primary target of damages actions.[831] The Directive attempts to counteract by introducing a cap for the immunity recipient's damages liability. Accordingly, the amount of the contribution due by immunity recipients shall not exceed the harm they have caused to their direct or indirect purchasers (Article 11(4)). However, the exception does not apply to immunity recipients in cases where it would become impossible for victims to obtain full compensation from co-infringers; especially when a cartel member went bankrupt.[832] Joint and several liability puts a heavy burden on undertakings with minor market shares and small annual turnovers. Also, for this category of infringers, the Directive limits the liability to the harm caused to their direct and indirect purchasers.

Nearly all Member States have introduced the Directive's standard and exceptions for joint and several liability. Some deviations from the Directive were undertaken in some Member States to correct some uncertain and confusing wording.[833] In relation to the protection of immunity recipients, the Explanatory Memorandum of the German implementing legislation explains that in order for the claimant to satisfy the standard of proof that compensation cannot be obtained from co-infringers, the claimant is expected to have at least attempted to receive compensation once through execution procedures (*Zwangsvollstreckung*) against all remaining infringers before requesting compensation from the immunity recipient.[834] Although the Directive does not specify the standard necessary to prove that *'full compensation cannot be obtained from the other undertakings'*, it shows that some Member States are willing to raise the standard of proof in favour of immunity recipients. Thus, the extent to which claimants other than direct and indirect purchasers will realistically be able to receive compensation from immunity recipients will depend on the national courts' practices.

VI. The trade-off between compensation of victims and leniency incentives

When we assess the provisions of the Directive as a way to solve the trade-off between the right of victims to be compensated for infringements of competition law and the need to preserve the

[830] The allocation of liability among joint and severally liable infringers based on relative responsibility is discussed in more detail in chapters IV and V.
[831] Proposal for a Directive on Certain Rules Governing Actions for Damages (n 793) 16.
[832] Directive, Article 11(3).
[833] For details see above chapter II, B.VII.
[834] Deutscher Bundestag, Drucksache 18/10207, 60.

deterrent effect of the leniency programme, the outcome is ambiguous. On the one hand, rules regarding the right of compensation are improved. On the other hand, leniency incentives may be jeopardised.

The probative effect of the infringement decisions and the joint and several liability of cartel members are likely to reinforce the effect that leniency recipients become the primary targets of damages actions. With the introduction of an absolute prohibition to disclose leniency statements, the European Commission attempts to overcome the uncertainty following the *Pfleiderer* and subsequent cases on national and EU level. On the other hand, it attempts to outbalance the adverse effects of such a *per se* prohibition and to ensure compensatory justice – which is often undermined by the information asymmetry inherent to secret cartels – with the presumption of harm and joint and several liability. However, the presumption may itself come at the expense of reducing optimal leniency incentives.

Moreover, some Member States have deviated from the Directive's provisions and introduced rules that went beyond the scope of the Directive. The presumption of a 10% damage in Hungary and Latvia and 20% in Romania will likely incentivise victims of cartel infringements to file actions for damages but at the same time further reduce the incentive of firms to cooperate under the leniency programmes. Equally, the extension of the disclosure rules to *pre-trial* disclosure, under which potential victims can first access evidence to evaluate their chances of success before initiating damages actions, further increases the risk of disclosure of some potentially detrimental evidence of the infringer. Thus, the rules in some Member States further reduce leniency incentives.

On the other hand, in other Member States the penalties for a failure to comply with the disclosure order are so low and ineffective that undertakings are likely to be inclined to not comply with disclosure requests. Thus, where penalties are ineffective, the right to compensation is hampered. The same applies to additional procedural hurdles that need to be taken in some Member States before victims can claim compensation from immunity recipients if compensation cannot be obtained from their suppliers.

Against this background, Member States' rules that go beyond the scope of the Directive or, alternatively, lack behind the standard required under the Directive equally impact on the trade-off between the right of compensation and leniency incentives. Since the rules across Member States still remain diverse either because the Directive's provisions are not yet in force in some Member States (i.e., the rules are only effective to claims that arose after the end of the transposition period) or because Member States deviated from those provisions, the impact of the

national rules on the ability of victims to claim compensation and the incentives for infringers to cooperate may still be different in each Member State. An analysis of the effects in every Member State goes beyond the scope of the analysis in this chapter, especially since there are continuously new legislative initiatives on the national levels. This chapter therefore focuses solely on the impact of the Directive's provisions on the trade-off between compensation and leniency incentives. Where appropriate the analysis refers to the potential effects of some of the deviations to the Directive on the national level.

D. A Game Theoretical Analysis of the Directive

A full analysis of every single aspect of an efficient enforcement system for infringements of competition law is not intended in this chapter. In line with the purpose of this study on the implications of the Directive, the analysis focuses on European-wide cartels by assuming that all members of the cartel are only active within the EEA. Consequently, the effects on leniency incentives and deterrence from rules on follow-on damages actions in other jurisdictions diverging from the Directive in Europe are not subject of this analysis. The discussion below aims at providing answers to the following two questions. How will the Directive, assuming that all Member States transpose the Directive's provisions in the same manner,[835] affect the incentives of cartel members to confess their participation in an illegal conspiracy? If leniency incentives are negatively affected, which alternative solution for the trade-off between compensation of victims and optimal leniency incentives could have been chosen?

The above questions are answered with the help of basic insights from game theory. In order for deterrence to be achieved, the expected costs of colluding must at least be equal to the profits to be gained. In game theoretical terms, a leniency programme sets optimal incentives to blow the whistle if it creates a prisoner's dilemma. This dilemma arises where both players (cartel participants) would be better off if both stay silent, but the incentives of the game are such that both will confess. Players make strategic choices until they reach an end-state, called equilibrium. A Nash equilibrium is yielded when the strategy chosen maximises the payoff of a player, given the other player's choice. So, no player has an incentive to deviate as long as the other players also do not deviate. When the individuals' expected gain from cheating is higher than the expected gain from colluding, each player is better off when confessing, irrespective of the

[835] The analysis of the transposition of the Directive's rules in chapter II has shown that this assumption is not accurate as there exists (partial) divergence between the implementing legislations of Member States. The interested reader may therefore refer back to chapter II for an overview of where Member States went beyond or lagged behind the Directive's provisions.

other player's strategy. The result is a Nash equilibrium where both players confess, although their gain would be higher when staying silent. Profiting from the lessons of game theory, the leniency programme should create a situation where there is a dominant strategy for each player to confess, irrespective whether the other player confesses or denies. Does the Directive reach this goal?

The game theoretical analysis is based on the following assumptions. When the cartel is detected both firms will face a fine (F). The initial benefit of colluding for both firms is the profit (π) from an increased price minus the probability of detection (P_L) multiplied with the expected fine ($\pi - P_L F$). Under the leniency programme, whistle-blowers may be immune from fines or receive a fine reduction (RF) but they will stay subject to follow-on damages actions (D). Disclosure of leniency documents facilitates damages actions by victims. These damages have to be taken into account when analysing the incentives created by a leniency programme. There is no certainty that leniency materials will be disclosed. Hence, there is a probability between 0 and 1 [$0 \leq d \leq 1$] that the leniency applicant will face damages actions after cooperation. The final benefit of colluding thus amounts to ($\pi - P_L (F + dD)$). For the numerical example we assume that both firms estimate that, if the cartel is uncovered, they face a fine of 500m €. Follow-on damages actions are estimated to be equal to the fines (i.e., 500m €for each firm).[836]

I. The legal situation prior to the Directive

It is difficult to determine the exact level of d, given the lack of clear legal rules on disclosure prior to the Directive. Table 10 shows how this uncertainty (d) influences the outcome of the game.

***Table 10** - Impact of the uncertainty of disclosure on leniency incentives*

		Firm B			
Firm A		Deny		Confess	
	Deny	π - P_L (F + dD)	π - P_L (F + dD)	π - (F + dD)	π – dD
	Confess	π – dD	π - (F + dD)	π - (RF + dD)	π - (RF + dD)

[836] The assumption that the civil liability will be equal to the fines imposed by the competition authority is rather conservative. The recent studies on the development of follow-on damages actions and the quantification of damages since the introduction of the Directive suggests that, in fact, the civil liability in most cases exceeds the authority's fines. See for an overview of the recent development section F.I.

In numerical terms it is very difficult to estimate an *ex ante* probability of disclosure that leniency applicants are likely to face. As the legal analysis above has shown, there are simply too many factors involved and there is not enough data available. It is likely that the probability of disclosure is higher in one EU Member State than in another. Therefore, the size of likely damages actions mainly depends on the forum that was chosen for requesting disclosure. Some leniency applicants may have had more purchasers in a Member State more open to disclosure, like the United Kingdom, than others. Leniency applicants thus had to analyse the disclosure regime in all potential forums. Below are two numerical examples: the probability of detection is kept constant at 20% and the probability of disclosure varies from 20% to 30%. Of course, these figures have no probative value. The purpose of the examples is to illustrate how different probabilities of disclosure change the outcome of the game. Table 11 shows that an optimal outcome cannot be reached with a probability of disclosure of 30%.

Table 11 *- Impact of a 30 % probability of disclosure on leniency incentives*

		Firm B			
Firm A		Deny		Confess	
	Deny	[**370**][837]	[**370**][838]	[**- 150**][839]	[**350**][840]
	Confess	[**350**][841]	[**- 150**][842]	[**-50**][843]	[**-50**][844]

The game does not lead to full disclosure. There is no prisoner's dilemma, but there exist two Nash equilibria (Confess, Confess and Deny, Deny). The outcome Deny, Deny is Pareto dominant, since it creates a situation where neither of both players can become better off. There are thus strong incentives for both firms to deny their participation in the conspiracy and, consequently, the leniency programme will be ineffective.

However, the outcome changes when the probability of disclosure is as low as the probability of detection. In Table 12 the probability of disclosure and detection is set at 20%.

[837] 500 - 0.2 (500 + 0.3x500).
[838] 500 - 0.2 (500 + 0.3x500).
[839] 500 - (500 + 0.3x500).
[840] 500 - 0.3x500.
[841] 500 - 0.3x500.
[842] 500 - (500 + 0.3x500).
[843] 500 - (400 + 0.3x500).
[844] 500 - (400 + 0.3x500).

Table 12 *- Impact of a 20 % probability of disclosure on leniency incentives*

		Firm B			
		Deny		Confess	
Firm A	Deny	[**380**][845]	[**380**][846]	[**- 100**][847]	[**400**][848]
	Confess	[**400**][849]	[**- 100**][850]	[**0**][851]	[**0**][852]

In this situation there are optimal leniency incentives. The game changes to a prisoner's dilemma, in which both parties have a dominant strategy to confess.

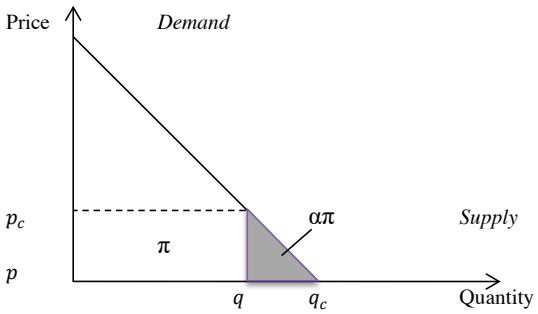
The numerical examples show that the attitude of the courts in Member States and the allocation of customers change the outcome of the game and influence the leniency incentives. Given that a cartel that violates Article 101 TFEU generally operates in more than one Member State and that a leniency applicant faces potential damages claims in all the Member States in which it operates, the probability of disclosure will likely exceed the probability of detection. The case law prior to the Directive implied that there was no uniform attitude towards disclosure of leniency documents across Member States. The analysis of different approaches taken in various Member States was likely too costly for leniency applicants. Consequently, it may be concluded that the possible effect of this uncertain situation was that hard-core cartels were strengthened.

II. The Impact of the Directive

The damages ceiling of Article 11(4)(a) limits the immunity recipient's liability to the compensation of the harm suffered by its direct and indirect purchasers. In this game theoretical model, damages (D) consist of the overcharge of the cartel (π) and the deadweight loss ($\alpha\pi$), which is proportionate to the increase in price.[853] The latter indicates the loss of consumer surplus due to the cartelised prices. Both are shown in Graph 1, where the area between q, p and p_c (c represents the cartel), illustrates the overcharge, i.e., the additional profit gained after cartelisation. The area between q and q_c shows the deadweight loss. The anticompetitive effects of the price

[845] 500 - 0.2 (500 + 0.2x500).
[846] 500 - 0.2 (500 + 0.2x500).
[847] 500 - (500 + 0.2x500).
[848] 500 - 0.2x500.
[849] 500 - 0.2x500.
[850] 500 - (500 + 0.2x500).
[851] 500 - (400 + 0.2x500).
[852] 500 - (400 + 0.2x500).
[853] So far, this study has focused solely on the overcharge (π) from the cartel. In terms of the impact of damages on leniency incentives, this analysis also includes the deadweight loss as the compensation of those losses equally contributes to the overall cost of the infringement.

conspiracy consist of the profit gained by the cartel members and the deadweight loss. The overall loss equals $\pi + \alpha\pi$.



Graph 1: *Overcharge and Deadweight Loss after Cartelisation*

The deadweight loss represents the loss of consumer surplus due to the cartelised prices. It is very difficult to prove that a purchaser, direct or indirect, would have purchased more units, if the price had remained at the competitive level.[854] This becomes almost prohibitively difficult for other potential claimants, like purchasers with a reservation price below the cartelised price. Due to the difficulties to prove the existence of the deadweight loss, it is regularly not claimed exclusively in damages actions. Claimants other than direct and indirect purchasers can base their damages actions only on the loss of consumer welfare. Thus, the limitation of liability to direct and indirect purchasers has little effect on the analysis. However, Article 11(4)(b) of the Directive provides that a leniency recipient becomes liable to injured parties other than its direct or indirect purchasers when such injured parties show that they are unable to obtain full compensation from the remaining cartel members. In other words, like any other cartel member, the immunity recipient must cover the insolvency risk of co-infringers. In the case of an insolvent cartel member, the immunity recipient will also have to compensate the purchasers of the co-infringer. This probability might be small, since the fine cannot exceed 10% of the undertakings' worldwide turnover.[855] Nevertheless, it increases the expected costs of the immunity recipient.

Conversely, if the injured party cannot provide sufficient evidence of the harm or the causation between the infringement and the harm and leniency corporate statements remain secret, the

[854] Simon Bishop and Mike Walker, *The Economics of EC Competition Law* (Sweet & Maxwell 2010) 17-029. Also, in US antitrust practice the loss in surplus from purchasers who cut back their purchases in case of a price increase is typically ignored; see Dennis W Carlton, 'Does Antitrust Need to Be Modernized?' (2007) 21 Journal of Economic Perspectives 155-176 (172).
[855] Article 23 (2) Regulation 1/2003.

leniency recipient will not face any liability from follow-on damages actions. Section C explained that the absolute prohibition of the disclosure of leniency corporate statements in the new Directive is without prejudice to the rules under the Transparency Regulation, which have been interpreted as incorporating a presumption that those documents fall within the exceptions of the right to access.[856] This presumption, however, may be rebutted by showing that there is an overriding public interest in disclosure, which may be the case where evidence necessary for a follow-on damages action cannot be obtained in any other way. Immunity recipients will face the uncertainty whether the court finds that a victim's interest in disclosure prevails or whether the presumption of harm (Article 17) suffices for the purpose of bringing a damages action. In fact, in Hungary, Latvia, and Romania where plaintiffs can rely on a presumption of a 10% or 20% overcharge in cartel cases, claimants face not the same evidential burden as in other Member States.

Following the courts' current interpretation of the Transparency Regulation, the probability of disclosure of relevant evidence (d) may well increase. Even more so, the new disclosure regime (Articles 5 and 6) allows claimants to access evidence to prove the damage that is not contained in leniency statements. Frequently, the information contained in leniency statements are not necessary to prove a causal link between the loss and the infringement but other documents in the hands of the cartelists are sufficient to provide the court (or a court appointed expert) to estimate the damage (e.g., pricing matrix, preparatory documents of negotiations, internal communication, etc.). Those documents may now be accessed (more easily) under the new rules even from immunity recipients. The risk that evidence for the loss and causation are disclosed depends on the national disclosure regimes. The comparative analysis in chapter II, B.III., showed that some Member States have applied a more restrictive approach in their implementing legislations than others. Estonia, Germany and Portugal have included specifically the proportionality test required by the Directive or codified additional requirements for the disclosure not listed in Article 5(3). The Czech Republic even limited the scope of disclosure to specific documents and has not expressly allowed for the disclosure of categories of documents as required by the Directive. On the other hand, other countries such as the Netherlands, Ireland and the UK already operate a broad disclosure regime and can rely on existing case law of national courts. Thus, the extent to which relevant evidence will be disclosed in national proceedings still depends on the experience of national courts and their interpretation of the national disclosure rules.

[856] *Commission v EnBW Energie Baden-Württemberg* (n 810).

At the same time, only some Member States have codified specific measures that courts can apply to protect confidential information. There is reason for concern that at least in countries that are relatively inexperienced with the new disclosure rules, courts will have difficulties to protect business secrets and other confidential information without clear guidance in the implementing legislations. For example, the Explanatory Memorandum to the Draft 10th amendments to the German Competition Act (**GWB**) notes that clarifications on the methods to protect confidential information have become necessary – after the previous amendment implementing the Directive did not specify any measures to protect such information – to overcome the difficulties in the application of the new disclosure rules.[857] Against this background, it is likely that in countries without specific measures to protect confidential information, the disclosure will be delayed by national courts and most likely the defendants who have an incentive to fight any method of protection proposed by the court. Hence, the new provisions seem to create an increased risk of disclosure of evidence necessary for claimants to prove their claim for compensation, but it is likely to remain more difficult to access such evidence in some Member States than was anticipated by the European legislators.

Overall, the new disclosure rules increase the risk of disclosure of evidence which are necessary to provide the judge with a sufficient basis to estimate the loss (or to appoint a court expert to do so). In turn, the higher probability that claimants can access the relevant evidence inevitably also increases the costs of follow-on damages ($\pi - dD$). Table 11 has already shown the adverse effects on leniency incentives where the probability of disclosure of relevant evidence is only 30%. With the new disclosure regime in place, the overall risk of disclosure of evidence and subsequently the cost of cooperation under the leniency programme increases significantly (although the likelihood of disclosure might still be higher in some Member States than in others).

E. A Suggested Alternative Solution: Immunity from Damages or Proportionate Damages

This section argues that there is an alternative solution to the trade-off between deterrence and compensation, which may achieve a better interaction between public and private enforcement of competition law. Contrary to the approach adopted by the Directive, it is not necessary to

[857] Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, *Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz)*, 153-4 <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.html> accessed 8 March 2021.

sacrifice either optimal leniency incentives or compensation. Instead, it is proposed to grant immunity and leniency recipients who have been granted immunity or who have received a reduction of fines the same protection from damages liability. According to the proposed solution, a leniency recipient who has been granted full immunity from fines also enjoys immunity from all damages claims brought by direct and indirect purchasers, or any other claimant. Other cartel members, who have cooperated or have applied too late for immunity but nevertheless qualify for a reduction of fines, are granted immunity from damages in the same proportion as the fines have been reduced. In order to ensure full compensation of victims, all other non-cooperating members of the cartel are jointly liable for the damages caused and not compensated by the leniency recipients. For instance, a whistle-blower may receive full immunity from fines and damages liability, whereas a co-infringer who has been granted a 50% reduction of fines will only be liable for 50% of the damage caused. The victim will have to be fully compensated by the remaining cartel members.

This solution is superior to the approach adopted by the Directive from both a legal and economic perspective. After a general policy discussion (see below, section E.I), the game theoretical analysis of section D will be complemented (see below, section E.II). Before elaborating on these issues, it may be stated at the outset that the proposed alternative solution finds support in antitrust practice. It is well-known that private enforcement is more common in the US than in the EU. Without US-style class actions in Europe, leniency recipients are less likely to face follow-on damages claims.[858] The main reason for this difference seems to be that in the US damages actions are used also as a method of deterrence, by allowing claimants to sue for treble damages. As a consequence, the potential negative impact of follow-on damages actions on the US leniency programme is more severe than in the EU. In the US, this problem is mitigated by de-trebling the common treble damages to single damages for leniency recipients.[859] The US experience thus shows that reducing the duty to compensate is a method already used in competition law. Since there are no treble (punitive) damages in the EU, it is not necessary to reduce the amount of punitive damages but a shift of the damages liability will have a similar effect.

[858] It must be added that the European Commission had published a recommendation on collective redress (European Commission Recommendation C (2013) 3539/3) together with the proposal for the Directive. To enable injured parties to obtain compensation in mass harm situations (such as overpricing by cartels) the European Commission suggests allowing opt-in collective actions (para .21) and damages claims brought by designated representative entities. See for an overview of the development chapter II, A.III.

[859] Section 213, Antitrust Criminal Penalty Enhancement and Reform Extension Act (2004).

I. The superiority of proportionate damages from the perspectives of deterrence and compensatory justice

Our proposal contains a clear and easy to follow rule: each leniency recipient is liable only for damages up to the same percentage as the fine to be paid (0 %, 70 %, 80 % and the like). The exceptions from the joint and several liabilities for leniency recipients, which do not provide optimal leniency incentives or deter leniency applications, thus become obsolete. This alternative solution not only improves legal certainty but also better optimises the interaction between public and private enforcement than the Directive is able to do. First, it creates optimal leniency incentives and further improves deterrence by avoiding that the filing of leniency applications becomes dependent on the market shares of the potential whistle-blowers. Second, it ensures the effective exercise of the victims' right to full compensation. This is further explained below.

First, proportionate damages are superior from a viewpoint of deterrence. The Directive is to be welcomed because it abolishes the uncertainty created by the *Pfleiderer* and *Donau Chemie* judgements of the CJEU. However, uncertainty remains regarding possible damages actions brought by direct and indirect purchasers, due to the presumptions introduced in the Directive. The rule of proportionate damages creates an additional liability for cartelists refusing to cooperate, which – depending on the number of cartel participants – may even double the expected costs of damages actions. An undertaking will take this additional cost into account when it considers the choice between colluding with its competitors and cheating. The additional liability will generally outweigh the benefit for a cartel member, since $\pi < 2(\pi + \alpha\pi)$; this creates an incentive to cheat.

The alternative solution further avoids that applications for leniency are dependent on the market shares held by the cartel members. The Directive creates more incentives to blow the whistle for undertakings with lower market shares than undertakings with larger market shares. Uncertainty about disclosure of leniency statements creates a Nash Equilibrium for denying. Indemnification from high fines will not incentivise firms to leave the cartel, if there remains a material risk of follow-on damages actions initiated by purchasers. The reduction of joint and several liability for the harm caused to direct and indirect purchasers of immunity recipients may stimulate only cartel members with a small customer base to apply for leniency. It is not clear why the protection of immunity recipients should depend on their market share and not on their contribution to the detection of the cartel. Equally, the cartel may not be as beneficial for undertakings with a small customer base as for undertakings with a large customer base. Creating

incentives mainly for smaller cartel members does not sufficiently destabilise hard-core cartels with members of equal size.

Second, the proposed alternative also scores better in terms of compensation. The Directive attempts to ensure leniency incentives by prohibiting the disclosure of leniency statements and restricting the civil liability of immunity recipients to direct and indirect purchasers. In this way, the Directive accepts that it may undermine the victims' right to full compensation. A systematic prohibition of disclosure of all leniency documents may prevent injured parties from obtaining full compensation. Also, incentives to apply for leniency are reduced by the introduction of presumptions of the harm caused (Article 17(2)). The proposal also overcomes these problems. Given that immunity recipients will not face damages, there is no need for a prohibition to disclose leniency documents. By eliminating the risk of follow-on damages claims, the proposal allows immunity recipients to provide the European Commission and victims all information at hand. Moreover, it incentivises at least the immunity recipient to disclose the necessary information: The higher the damages other cartel members face after the revelation of the cartel, the higher will be the competitive advantage for the immunity recipient. Besides the competitive advantage, the immunity recipient will have a strong interest to recover the lost reputation by assisting its purchasers to claim damages successfully. Hence, there will be a strong incentive for immunity recipients to provide victims with the best available information about the harm caused by the cartel (i.e., overcharge). Other cartel members are likely to face damages claims from their purchasers, which creates an incentive to cooperate in order to reduce their fines and damages liability. Ultimately the Directive may create a race between the cartelists to cooperate, which will unveil information aiding the damages claims of victims.

II. A game theoretical argument supporting proportionate damages

Again, a game theoretical analysis can be used to show that the proposed alternative solution may lead to optimal leniency incentives. The model used above has only two players. In such a case, liability for damages of each cartel member cannot be reduced by 50%, as this would undermine an effective exercise of the victims' right to full compensation. Hence an exception is needed to guarantee full compensation of victims; in Table 13 below the exception applies and each member has to cover the full damages caused.

Table 13 - *Leniency incentives of the alternative proposal and the exception to full indemnity from damages*

		Firm B			
Firm A		Deny		Confess	
	Deny	π - P_L (F + D)	π - P_L (F + D)	π - (F + 2D)	π
	Confess	π	π - (F + 2D)	π - (RF + D)	π - (RF + D)

An optimal outcome is achieved, since the denying player has to cover the damages caused by the other player, in addition to the damage caused by him.

If,

$$\pi - P_L (F + D) > \pi - (RF + D)$$

the game creates a prisoner's dilemma. The dominant strategy for both parties is to confess.

The numerical example below illustrates the optimal outcome (Table 14).

Table 14 - *Leniency incentives of the alternative proposal and the exception to full indemnity from damages (Numerical)*

		Firm B			
Firm A		Deny		Confess	
	Deny	[**300**][860]	[**300**][861]	[**- 500**][862]	[**500**]
	Confess	[**500**]	[**- 500**][863]	[**- 250**][864]	[**- 250**][865]

The benefit of the alternative proposal becomes evident when a third player is introduced. The limited liability must be equivalent to the reduction of fines granted by the European Commission or NCAs. Therefore, fines and damages must be reduced by the same factor, represented by β. In Table 15 below, firm A confesses and blows the whistle. All other firms can either

[860] 500 - 0.2 (500 + 500).
[861] 500 - 0.2 (500 + 500).
[862] 500 - (500 + 2x500).
[863] 500 - (500 + 2x500).
[864] 500 - (0.5x500 + 500).
[865] 500 - (0.5x500 + 0.5x500).

cooperate or deny. When they decide to confess, they will only receive a reduction of fines and an equivalent reduction of damages liability.

Table 15 *- Leniency incentives of the alternative proposal with three players where firm A Confesses*

Firm A Confesses							
		Firm C					
		Denies			Cooperates		
Firm B	Denies	π	π - (F + 1.5D)	π - (F + 1.5D)	π	π - (F + 2D + (1-β)D)	π - (βF + βD)
	Cooperates	π	π - (βF + βD)	π - (F + 2D + (1-β)D)	π	π - (βF + 1.5D)	π - (βF + 1.5D)

If firm A confesses, there is a dominant strategy for firm B and C to cooperate with the competition authorities. The situation creates a Nash equilibrium for both firms to cooperate. In practice, this means that, as soon as one firm confesses, there will be a strong incentive for all other members of the cartel to cooperate.

Table 16 illustrates the same outcome with the help of a numerical example. The numbers reflect a rather optimistic approach and assume that the second cooperating firm will benefit from the highest possible reduction of 30% from fines under the Fines Notice.[866] The second cooperating firm would then also benefit from 30% immunity from follow-on damages. It is assumed that in the case where all firms cooperate both cooperating firms still benefit from a 30% reduction from fines and subsequently follow-on damages.[867]

[866] See Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) (a) of Regulation No 1/2003 [2006] OJ C210/2, para 26.
[867] Under the Notice any subsequent firm cooperating after the first two will only qualify for a 20% reduction, para 26. However, it is assumed that at the time a firm has to decide whether to cooperate it anticipates being the second firm in line which will benefit from a 30% reduction.

Table 16 *- Leniency incentives of the alternative proposal with three players where firm A Confesses (Numerical)*

Firm A Confesses							
		Firm C					
		Denies			Cooperates		
Firm B	Denies	**[500]**	**[-750]**[868]	**[-750]**[869]	**[500]**	**[-1350]**[870]	**[200]**[871]
	Cooperates	**[500]**	**[200]**[872]	**[-1350]**[873]	**[500]**	**[-400]**[874]	**[-400]**[875]

More interesting is the case of a running cartel. Table 17 shows the different pay-offs when firm A denies, i.e., has not yet confessed. In contrast to the situation above, firm B and C will confess simultaneously if both decide to confess. Therefore, neither of the co-infringers will qualify for full indemnity but they will receive a reduction of fines and consequentially a reduction of their civil liability.

Table 17 *- Leniency incentives of the alternative proposal with three players where firm A denies*

Firm A Denies							
		Firm C					
		Denies			Confesses		
Firm B	Denies	π - P_L (F + D)	π - P_L (F + D)	π - P_L (F + D)	π - (F + 1.5D)	π - (F + 1.5D)	π
	Confesses	π - (F + 1.5D)	π	π - (F + 1.5D)	π - (F + D + (1-β)2D)	π - (βF + βD)	π - (βF + βD)

In Table 17 the dominant strategy for firm B and C is to confess; this is the result created by the transfer of damages from the confessing to the denying player. Furthermore, optimal leniency incentives are achieved by creating a prisoner's dilemma, if

$$\pi - P_L(F + D) > \pi - (\beta F + \beta D).$$

[868] 500 - (500 + (1.5x500)).
[869] 500 - (500 + (1.5x500)).
[870] 500 - (500 + (2x500) + (1-0.3)500).
[871] 500 - ((0.3x500) + (0.3x500)).
[872] 500 - ((0.3x500) + (0.3x500)).
[873] 500 - (500 + (2x500) + ((1-0.3)x500)).
[874] 500 - ((0.3x500) +(1.5x500)).
[875] 500 - ((0.3x500) + (1.5x500)).

Even in the case where two parties simultaneously confess the optimal outcome is reached.

The same outcome is illustrated by the numerical example in Table 18.

Table 18 *- Leniency incentives of the alternative proposal with three players where firm A denies (Numerical)*

Firm A Denies							
		Firm C					
		Denies			Confesses		
Firm B	Denies	[**300**][876]	[**300**][877]	[**300**][878]	[**-750**][879]	[**-750**][880]	[**500**]
	Confesses	[**-750**][881]	[**500**]	[**-750**][882]	[**-1200**][883]	[**200**][884]	[**200**][885]

The victim's losses will be compensated by the denying cartel member. The tables show a dominant strategy for all members of the cartel to confess while achieving full compensation at the same time. Colluding becomes too dangerous, even for well-organised hard-core cartels.

In the academic literature, it has equally been proposed to protect the leniency programme by granting only the immunity recipient immunity from damages.[886] In fact, granting only the immunity recipient immunity from civil liability achieves the same incentives to confess as illustrated in Table 15 and Table 16. But the proportionate damages rule proposed in this chapter which also reduces the civil liability of leniency recipients in the same proportion as their fines are reduced scores better especially once an immunity applicant has blown the whistle. The proposed rule incentivises not only undertakings to blow the whistle but also creates incentives for the remaining cartel members to cooperate. Generally, cartels are operated in the dark and because of the increased awareness of the high sanctions, cartel participants – at least in well-

[876] 500 - (0.2 (500 + 500)).
[877] 500 - (0.2 (500 + 500)).
[878] 500 - (0.2 (500 + 500)).
[879] 500 - (500 + (1.5x500)).
[880] 500 - (500 + (1.5x500)).
[881] 500 - (500 + (1.5x500)).
[882] 500 - (500 + 1.5x500).
[883] 500 - (500 + 500 + ((1-0.3)2x500))).
[884] 500 - ((0.3x500) + (0.3x500)).
[885] 500 - ((0.3x500) + (0.3x500)).
[886] Mike Smith and Christina P Grigoriadou, 'Leniency, Pfleiderer and the Impossibility of Balance' (2012) 16 Global Competition Review 21-23. Paolo Buccirossi, Catarina de Moura Pinto Marvao and Giancarlo Spagnolo, 'Leniency and Damages' (2015) SSRN Electronic Journal; Christian Kersting, 'Removing the Tension between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants' (2013) 5 Journal of European Competition Law & Practice 2.

organised cartels – attempt to prevent paper trails and regular meetings. For that reason, in many cases the Commission also needs to rely on evidence provided by other cartel members as the evidence provided by the immunity applicants alone is not sufficient to prove the infringement. Arguably, the Commission has attempted to take some (although not sufficient) steps to address the potential negative effects of civil liability on the incentives for immunity applicants by generally limiting the liability to direct and indirect purchasers. However, with the new exposure to civil liability and in particular with the additional shift of the immunity recipient's civil liability to the remaining cartel members – as has been proposed in the literature – other cartel members may be inclined not to cooperate and instead choose to fight the Commission's case. In fact, the shift of liability and the subsequent increase of civil liability can even have a stabilising effect for the remaining cartel members.

The attractiveness of the proportionate liability rule compared to the sole protection of immunity recipients can be illustrated by adjusting the three-firms scenario. In the modified scenario, it is assumed that firm A has already applied for immunity and receives immunity from fines as well as civil liability. All three firms operate the cartel with caution, so there is only a low probability that the evidence provided by firm A will be sufficient to prove the cartel (δ). It is assumed that the probability of successfully proving the cartel is as low as 30%. However, once another firm cooperates and provides significant added value, the probability of successfully proving the infringement with evidence from two firms (θ) increases to 80%. Table 19 illustrates the incentives in a scenario where only the immunity recipient receives immunity from civil liability.

Table 19 *- Incentives of the remaining cartel participants to cooperate in a scenario where only the immunity recipient receives immunity from damages*

Firm A receives immunity							
		Firm C					
		Denies			Cooperates		
Firm B	Denies	π	π - δ(F + 1.5D)	π - δ(F + 1.5D)	π	π - θ(F + 1.5D)	π - (RF + 1.5D)
	Cooperates	π	π - (RF + 1.5D)	π - θ(F + 1.5D)	π	π - (RF + 1.5D)	π - (RF + 1.5D)

As can be seen, there is dominant strategy for firm B and firm C to deny and to fight the Commission's case. There is a Nash Equilibrium for both firms to deny, if

$$\pi - \delta(\mathrm{F} + 1.5\mathrm{D}) > \pi - (RF + 1.5D).$$

The result can be better illustrated with the numerical example in Table 20.

Table 20 *- Incentives of the remaining cartel participants to cooperate in a scenario where only the immunity recipient receives immunity from damages (Numerical)*

Firm A receives immunity							
		Firm C					
		Denies			Cooperates		
Firm B	Denies	**[500]**	**[125]**[887]	**[125]**[888]	**[500]**	**[-500]**[889]	**[-400]**[890]
	Cooperates	**[500]**	**[-400]**[891]	**[-500]**[892]	**[500]**	**[-400]**[893]	**[-400]**[894]

Because the probability to prove the infringement solely with the evidence provided by the immunity applicant is low, both firms are better off if both deny the infringement.

In contrast, under the proportionate damages approach, the opportunity for the cooperating firm to receive a further reduction from civil liability makes it more attractive for both firms to cooperate as is illustrated by Table 21.

Table 21 *- Incentives of the remaining cartel participants to cooperate under the alternative proposal*

Firm A receives immunity							
		Firm C					
		Denies			Cooperates		
Firm B	Denies	π	π - δ(F + 1.5D)	π - δ(F + 1.5D)	π	π - θ (F + 2D + (1-β)D)	π - (βF + βD)
	Cooperates	π	π - (βF + βD)	π - θ (F + 2D + (1-β)D)	π	π - (βF + 1.5D)	π - (βF + 1.5D)

Under the proportionate damages approach, because the cooperating firm can also expect a significant reduction from the civil liability, the dominant strategy for firm B and C is to cooperate if

[887] 500 – (0.30x(500 + (1.5x500)).
[888] 500 – (0.30x(500 + (1.5x500)).
[889] 500 – (0.80x(500 + (1.5x500)).
[890] 500 - ((0.3x500) + (1.5x500)).
[891] 500 - ((0.3x500) + (1.5x500)).
[892] 500 - (0.8x(500 + (1.5x500)).
[893] 500 - ((0.3x500) +(1.5x500)).
[894] 500 - ((0.3x500) + (1.5x500)).

$$\pi - (\beta F + \beta D) > \pi - \delta(F + 1.5D).$$

It also creates a prisoner's dilemma if

$$\pi - (\beta F + \beta D) > \pi - (\beta F + 1.5D).$$

The attractiveness of proportionate damages is illustrated with the numerical example in Table 22.

Table 22 *- Incentives of the remaining cartel participants to cooperate under the alternative proposal (Numerical)*

Firm A receives immunity							
		Firm C					
		Denies			Cooperates		
Firm B	Denies	[**500**]	[**125**][895]	[**125**][896]	[**500**]	[**-980**][897]	[**200**][898]
	Cooperates	[**500**]	[**200**][899]	[**-980**][900]	[**500**]	[**-400**][901]	[**-400**][902]

As shown, the opportunity to receive not only a reduction from fines but also from civil liability when cooperating sets optimal incentives. Of course, this is even more true if the probability that evidence provided by firm A is sufficient to prove the infringement (δ) increases.

[895] 500 - (0.3x(500 + (1.5x500))).
[896] 500 - (0.3x(500 + (1.5x500))).
[897] 500 - (0.8x(500 + (2x500)) + ((1-0.3)x500)).
[898] 500 - ((0.3x500) + (0.3x500)).
[899] 500 - ((0.3x500) + (0.3x500)).
[900] 500 - (0.8x(500 + (2x500)) + ((1-0.3)x500)).
[901] 500 - ((0.3x500) + (1.5x500)).
[902] 500 - ((0.3x500) + (1.5x500)).

F. Potential Objections Against Proportionate Damages

The proportionate damages solution proposed in the previous section may provoke a number of criticisms. Wouter Wils has responded to the proportionate damages rule previously proposed in a published paper and raised some objections.[903] His objections can be summarised as follows:

First, Wils claims that granting the immunity recipient also immunity from damages would increase the civil liability for the remaining cartelists and make it unattractive for them to also apply for leniency. On the other hand, the evidentiary value of the immunity recipient's leniency statements would be reduced, because it may exaggerate the real scope of the infringement in order to harm its competitors. It has been shown in the previous section that the proposed proportionate damages rule also creates optimal incentives to cooperate for the remaining infringers. Also, the remaining infringers have an additional incentive to cooperate and to provide evidence of the actual scope of the infringement.

Second, a proportionate reduction from civil liability may not guarantee full compensation if all cartelists have cooperated with the competition authority for the remaining infringers undermines the right to full compensation. In section E.II this scenario was already discussed in a case of a cartel consisting of only two members (Table 13) and explained that the proposed rule of proportional reduction of damages should no longer apply.[904] The concern that full compensation may not be achieved may also be true if a non-cooperating firm has disappeared from the market. In such cases, an exception to the rule of proportionate damages equally applies in order to guarantee full compensation.

Third, granting immunity (or reductions) from not only fines but also from civil liability could be perceived as unjust and thereby negatively affect compliance with competition law. Essentially, Wils raises corrective justice objections that may result from an unequal treatment of infringers. A more detailed comment on this criticism is provided below (III.).

Fourth, the increased civil liability for non-cooperating infringers under the proportionate damages rule could lead to over-deterrence. This is – as Wils himself points out – a concern that was already raised under the current level of fines. As suggested in Part FOUR of this book, a

[903] Wouter P J Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 World Competition 42-45.
[904] This exception was already explained in the previously published paper in which the proportionate damages solution was introduced, see Philipp Kirst & Roger Van den Bergh (n 783).

more general adjustment to the methodology for the calculation of fines seems more appropriate. Therefore, only a brief comment on this concern is made below (V.).

In addition, this part also addresses other potential objections that could be raised against granting reductions from civil liability proportionate to the reductions of fines received. Before addressing the potential objections individually, some empirical evidence on the rise of damages actions and the impact on the EU leniency programme after the implementation of the Directive is provided to emphasise more generally the need for additional measures to protect leniency incentives.

I. The rise of damages actions since the implementation of the Directive and the impact on the EU leniency programme

In Europe, we are currently observing a decline of leniency applications. According to Global Competition Review's Rating Enforcement Reports, the number of leniency applications has materially dropped since 2014 (the Directive entered into force at the end of 2014) from 46 to 17 in 2019.[905] This is a reduction of leniency applications of more than 60%. As has been argued in theory in this chapter, the fall in leniency applications was likely caused by the additional civil liability that leniency applicants face. In fact, in the aftermath of the entry into force of the Directive a new wave of follow-on damages actions has hit courts all over Europe. Laborde (2019) identified in his study on cartel damages actions in Europe a rapid increase of the number of judgments that were handed down. In 30 European countries the number of cases increased from around 50 in 2013 to 239 in 2019.[906] This number does not even include settlements and other alternative dispute resolutions.[907] Moreover, a recent study on damages actions in Germany confirms this development. While in the years from 2003-2014, 21 judgments have been handed down, the number jumped to 70 in the years 2015-2018.[908] It should be noted that the Directive entered into force in December 2014. In the judgments handed down between 2014-

[905] Global Competition Review, Rating Enforcement Reports, 2016 – 2019 <https://globalcompetitionreview.com/series/rating-enforcement> accessed on 8 March 2021; 2015 <http://81.7.114.195/uploads/documents/files/administracine_informacija/naudos_vertinimas/nauda_gcr_2014.pdf> accessed on 8 March 2021 (in Johan Ysewyn and Siobhan Kahmann, 'The Decline and Fall of the Leniency Programme in Europe' (2018) 1 Concurrences Review 44-59).

[906] Jean-François Laborde, 'Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges' (2019) 4 Concurrences.

[907] In the UK, nearly all the cases are settled before the court. See Barry J Rodger, 'Private Enforcement of Competition Law, The Hidden Story Part II: Competition Litigation Settlements in the UK, 2008-2012' (2015) 8 Global Competition Litigation Review 89-108.

[908] Lukas Rengier, 'Cartel Damages Actions in German Courts: What the Statistics Tell Us' (2019) 11 Journal of European Competition Law & Practice.

2018, plaintiffs were successful in 78% of the cases.[909] The number has further increased. The author has counted 94 judgments and decisions that have been handed down between 2017 and 2020 concerning the truck cartel in Germany alone. Those judgments and decisions concerned an estimated amount of damages of more than EUR 3 billion. It should be noted that the total fine imposed against the cartel members was EUR 3.8 billion. The German Cartel Office estimates that in Germany alone over 400 damages actions are currently pending before the courts.[910] In light of these developments, it is likely that in the coming years, civil liability will exceed fines in the truck cartel but also in other follow-on damages actions.

Against this background, it is likely that the leniency programme will be adversely affected by the rise of civil liability. Although causation between the rise of civil liability and the drop of leniency applications cannot be proven for the obvious reason that the number of active cartels is unknown, a survey among practitioners from 2016 suggests that there is a correlation:[911] 83% of the participants in the survey indicated that clients showed less of an interest to apply for leniency in recent years; 36% of them mentioned that the decrease was due to the increased exposure of civil damages claims. With the new development and the increase in public awareness of the substantial civil liability, it is likely that the same survey would today result in much higher numbers. Furthermore, experimental evidence shows that a rise of civil liability has a stabilising effect on cartels. Bordnar, Fremerey, Normann, and Schad (2020) find in an experiment based on a symmetric three-firm homogeneous-goods Bertrand oligopoly that while fewer cartels are formed with additional civil liability, also the number of leniency applications decreases compared to a situation without private enforcement.[912] Also, the cartel stability increases over time because damages cumulate, so that deviations become more costly over time. The experiment also shows that in line with the proposal in this chapter (first introduced and published in 2015) if the immunity recipient is also protected from civil liability the number of leniency applications will increase. The authors observe a c. 26% increase in a setting with communication limited to structured price announcements.

[909] It should be noted that in the vast majority of those cases the courts have rendered declaratory judgments finding the defendants' liability and only in one case a court has also awarded and quantified the amount of damages.
[910] Bundeskartellamt, 'Jahresbericht 2019' (2020) 23, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Jahresbericht/Jahresbericht_2019.html?nn=5311338> accessed on 8 March 2021.
[911] Survey by Brussels Matters for the Meeting *The European antitrust leniency calculus: still worth it?*, Brussels, 16 June 2016 <http://www.brusselsmatters.eu/index.html?page=489&sz_event=Leniency16> accessed on 8 March 2021.
[912] Olivia Bodnar, Melinda Fremerey, Hans-Theo Normann, and Jannika Schad 'The Effect of Private Damage Claims on Cartel Stability: Experimental Evidence' DICE Discussion Paper, No. 315, Düsseldorf Institute for Competition Economics (DICE).

Despite some objections which are addressed below, the proposed proportionate damages rule can overcome the negative implication of an increasingly effective private enforcement regime on leniency incentives.

II. Proportionate damages if all firms have received fine reductions or a non-cooperating firm has disappeared from the market

As raised by Wils and addressed already in section E.II above, it is possible that all firms involved in a cartel cooperate with the competition authorities and are granted fine reductions. In such a case, the proposed rule of proportional reduction of damages should no longer apply to ensure victims are fully compensated. Table 15 illustrated a cartel with three firms, the first of which cooperates and receives immunity from fines and damages. In the latter case, the remaining firms will have a strong incentive to cooperate in order (i) to receive a reduction from fines and (ii) to reduce their damages liability. When the probability of follow-on damages equals 1 (or is sufficiently high), a race to cooperate will occur, so that all cartel participants become entitled to damages reduction. As explained, a proportionate reduction would undermine full compensation which may require an exception from the proposed alternative rule. Nevertheless, the payoff for both firms cooperating $[\pi - (\beta F + 1.5D)]$ is still better as long as it would otherwise face fines and follow-on damages from all cooperating cartel participants $[\pi - (F + 2D + (1-\beta)D)]$. The exorbitant costs for a firm denying will incentivise all remaining cartel participants to cooperate, as soon as one of the cartel participants decides to do so. Table 21 and Table 22 show that this even holds true when the probability that the immunity recipient's statements alone will be sufficient to reveal the cartel is low. When the non-cooperating firm becomes liable for the damages of the cooperating firms, in addition to the claims from its own purchasers, the game creates a race to cooperate without jeopardising full compensation.

The above insight invites to reconsider whether the conditions under the current Commission Notice on immunity from fines are optimal. Instead of relying on the timing of the leniency application, it may be advantageous to focus on the quality of the evidence provided. Following the proposed solution, the main incentive for the remaining firms to cooperate would be the partial immunity from follow-on damages claims of the cooperating firms. This is in particular true where the firms have no knowledge about the amount and success of potential follow-on damages claims against the other cartel participants. In this setting, a firm would risk more than twice of its civil liability $[2D + (1-\beta)D]$. If the incentives to cooperate are so strong, the

timing becomes less important. The Commission could change the race to cooperate to a race to provide the best evidence between the remaining cartelists. Arguably, the leniency corporate statements do not always provide the best evidence for follow-on damages, in particular the facts needed for the quantification of harm. The Commission could use this opportunity in order to provide a reduction from fines not only for evidence with a significant added value to prove the infringement, but also for evidence facilitating the proof of the overcharge.

A similar potential criticism is that the suggested alternative solution no longer leads to an optimal outcome when non-cooperating firms have disappeared from the market. To discuss this criticism, it is necessary to distinguish between two scenarios. In the first scenario, the non-cooperating firms disappear (because of unrelated factors such as insolvency) after the immunity recipient has applied and revealed the cartel. Then, the immunity applicant must take into account the risk of insolvency of a cartel participant from an *ex ante* perspective. The duty to pay follow-on damages (i) will only materialise if compensation cannot be obtained from the non-cooperating cartel participant(s). Following from the above analysis, there is a strong incentive for all cartel members to cooperate once the cartel has been revealed. In the case where all cartel members cooperate, the damages of the disappeared firm will be split between all the remaining cartel members (n). Hence, either when all firms deny or all firms cooperate, the damages (D) will be divided between all cartel members. From an ex ante perspective, the firms face a risk of additional damages liability ($\frac{i}{n}D$). However, the non-cooperating firm will always have to compensate the purchasers of the disappeared firm first. Table 23 shows that in the model with three firms, where firm C disappears, the dominant strategy to confess and the Nash Equilibrium to cooperate remain, even with the risk of additional liability.

Table 23 *- Leniency incentives when firm C disappears after the immunity application has been filed*

		Firm B			
		Deny		Confess	
Firm A	Deny	π - P_L (F + D + $\frac{i}{2}$D)	π - P_L (F + D + $\frac{i}{2}$D)	π - (F + 3D)	π
	Confess	π	π - (F + 3D)	π - (RF + D + $\frac{i}{2}$D)	π - (RF + D + $\frac{i}{2}$D)

In the second scenario, one of the firms disappears before the immunity applicant has filed an application. In this situation, the probability of follow-on damages to compensate the harm caused by the disappearing firm equals 1 if the cartel is revealed. As in the first scenario, the

damages will be divided only when all cartel members deny or cooperate. In all other circumstances, the non-cooperating firm becomes liable for the additional damages. Table 24 shows that the proposed solution still provides the optimal incentives, even when the immunity recipient will have to partially compensate the victims of the disappearing firm C.

***Table 24** - Leniency Incentives when firm C disappears before the immunity application has been filed*

		Firm B			
Firm A		Deny		Confess	
	Deny	π - P_L (F + 1.5D)	π - P_L (F + 1.5D)	π - (F + 3D)	π
	Confess	π	π - (F + 3D)	π - (RF + 1.5D)	π - (RF + 1.5D)

Table 24 shows that the dominant strategy to confess and the Nash Equilibrium to cooperate remains. The solution creates an even stronger incentive to cooperate than the solution of the Directive. Under the Directive the non-cooperating firm would face $\pi - (F + 2D)$ and the cooperating firm, when all firms cooperate, would face a liability of $\pi - (RF + 1.5D)$.

The strong incentive to cooperate created by the suggested rule of proportionate damages also leads to a better outcome when there is a risk of a judgment-proof cartel participant. The remaining cartel participants will cooperate not only to benefit from fines reductions but also to divide the leniency recipients' follow-on damages between all cartel participants, or to shift the compensation to the non-cooperating participant. These incentives remain even if a cartel participant neither faces fines nor damages but collects all its profits after revelation of the cartel. The immunity recipient will also collect all its profits and not become worse off.

III. Efficiency and a potential corrective justice objection

It is well-known that efficiency goals may conflict with other policy objectives, such as distributive and corrective justice. The latter goal aims at retribution: a sanction proportionate to the harm caused must be imposed to correct a wrongful act. Justice objectives do not take account of the effects of liability payments on future unlawful behaviour but are to be pursued as an independent goal. In contrast, mainstream Law and Economics scholars argue that tort rules are not necessarily the best instruments to achieve particular justice goals. Distributional justice

can be better achieved by tax law[913] and corrective (retributive) justice may be better accommodated as a goal of criminal law.[914] Hence, immunity of tort liability may be defended on efficiency grounds. Simple examples, such as liability of fire fighters or police officers, may illustrate that unlimited liability could lead to excessive care and deter socially desirable behaviour. In a theoretical paper, De Geest argues in favour of a rule of gross negligence or qualified or good-faith liability. [915] The notion of gross negligence is not alien to European law. An interesting parallel can be drawn with the concept of *Francovich* liability:[916] Member States are only liable for damages in case of a *'sufficiently serious breach'* of the EU rules on free movement of goods.[917] This rule avoids over-deterrence when standards of care are imprecise, as in the case of a violation of the principle of free movement of goods or a misinterpretation of EU law by a national court. Immunity of liability in cases where gross negligence cannot be shown avoids that socially desirable behaviour (taking legislative action to protect the interests of consumers or deciding lawsuits in a timely manner) is unduly restricted. The above reasons justifying (partial) immunity can be linked to the debate on the efficiency of leniency programmes. First, immunity from damages may help in avoiding over-deterrence of beneficial forms of cooperation between firms. Second, cartel members who blow the whistle put an end to their co-infringing conduct and reduce the severity of the violation of the competition rules. Their breach of law may be deemed no longer sufficiently serious to justify a duty to fully compensate the harm suffered.

Also, a comparison with (social) insurance law shows that immunity from damages liability does not necessarily conflict with tort systems in Europe. In several jurisdictions[918] an undertaking is immune to damages claims from the insured victim if it funds the insurance premium and has not caused the accident by intent or gross negligence.[919] For instance, in cases where an employee has been injured due to the undertaking's negligence, there is immunity to damages claims if the company has provided insurance protection for its employees.[920] The ra-

[913] See Louis Kaplow and Steven Shavell, 'Why the Legal System is Less Efficient than the Income Tax in Redistributing Income' (1994) 23 The Journal of Legal Studies 667-681.
[914] For an overview of the Law and Economics literature, see Isaac Ehrlich, 'Crime, Punishment, and The Market for Offenses' (1996) 10 Journal of Economic Perspectives 43-67.
[915] Gerrit De Geest, 'Who Should be Immune from Tort Liability?' (2012) 41 The Journal of Legal Studies 291.
[916] Joined Cases C-6/90 and 9/90 *Francovich v Italy* [1991] ECLI:EU:C:1991:428.
[917] Hans-Bernd Schäfer and Roger Van den Bergh, 'Member States Liability for Infringement of the Free Movement of Goods in the EC: An Economic Analysis' (2000) 156 Journal of Institutional and Theoretical Economics.
[918] As far as the author is aware, this is the case in Austria, Belgium, Canada, France, Germany, Italy, Luxembourg, Mexico, New Zealand, Norway and Portugal and some states of the US.
[919] See for instance Sec. 104 Volume VII of the German Social Insurance Code (SGB VII).
[920] The liability privilege also applies if the second injurer (without insurance) files recursive liability claims in cases of joint and several liability.

tionale behind this liability privilege is two-fold. On the one hand, it can be justified with the principle of liability substitution, whereby the damages liability is substituted for an insurance liability. By paying the insurance premium, the undertaking contributes to the compensation in advance. On the other hand, it ensures peace within the undertaking by preventing civil litigation between employees and the undertaking. Hence, the immunity from liability of the undertaking providing insurance is justified because it contributes to the proof of harm and ensures compensation of victims. Also, there are similarities with the rule of proportionate damages suggested in this chapter. Leniency recipients are granted full or partial immunity from fines and damages, because they have delivered evidence with (at least) significant added value for the finding of an infringement.[921] Moreover, an exception applies where full compensation is at stake. This leads to an outcome which is even superior to the example taken from (social) insurance law. Insurance liability does not exactly cover the concrete harm; it also applies even where the victim may be over- or under-compensated (no coverage of immaterial losses). The rule of proportionate damages in cartel cases protects leniency incentives and ensures full compensation.[922]

IV. Moral, Fairness and Retribution objections

Wils has mainly criticised that granting immunity from damages could create negative moral effects. His arguments can be summarised as follows. Wils questions that corporate managers are necessarily profit maximisers, instead they may be committed to obey the law which could determine their decision to cooperate. It could be perceived as unfair that an offender can evade punishment (incl. civil liability) and may be treated differently from co-infringers. Granting immunity should therefore be limited to what is *'strictly necessary to obtain the positive enforcement effects'*.[923]

This objection is based on several assumptions that describe a specific and arguably an exceptional situation that cannot be generalised. First, as illustrated by the theoretical model applied in this chapter but also by the empirical evidence of the increase of damages claims in recent years, we have already reached a situation where further adjustments to the liability of leniency applicants are necessary to ensure the effectiveness of the leniency programme. Second, the assumption that undertakings behave irrational, i.e., deviate from the objective to maximise

[921] Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, para 24.
[922] The exception from the liability privilege in insurance law for gross negligence and intent does not stand in the way of a parallel reasoning. Leniency recipients contributed to the cartel intentionally, but also dissolved the cartel by providing evidence to prove the infringement.
[923] Wouter Wils (n 903) 43-44.

profits, and that the decision-making is guided by factors such as moral is questionable. It is unlikely that moral standards of individuals manifest also in the decision-making processes of firms. The recent *'Diesel-Gate'* scandal – in which Volkswagen and other car manufacturers had intentionally programmed diesel engines to activate their emissions controls only during laboratory emissions testing but emit up to 40 times more nitrogen oxides in real-world driving[924] – is a good example that firms tend to rate the goal of profit maximisation over other moral standards. In 2017, Volkswagen pleaded guilty in the US and paid a USD 2.8 bn fine and agreed to a USD 15bn settlement which includes a USD 10bn buy-back programme.[925] In contrast, in Europe – where there was less pressure from enforcement agencies – Volkswagen is fighting off damages claims from customers concerning the same conduct in court despite previously having admitted to the illegal conduct in the US.[926] This behaviour is very difficult to align with the assumption that firms are predominantly driven by moral standards. Moreover, other factors that depart from the profit-maximising behaviour might counteract a moral based decision-making. For example, corporate managers might also be afraid of reputation losses and therefore not reveal the infringement. In such situations, the immunity from civil liability provides an additional incentive to cooperate because the customer will have to litigate against co-infringers instead. Third, even if corporate managers may feel a moral obligation to obey the law, the decision whether to cooperate are subject to collective decision-making processes which address individual biases that reduce firms' profits.[927] Firms generally also include external antitrust experts to objectivise the decision-making and to make better informed decisions about the (financial) consequences. Fourth, even if one would accept that firms may occasionally deviate from this cost–benefit analysis when deciding whether to cooperate, including these uncertainties in the analysis of leniency incentives would result in ambiguous outcomes. In fact, for the vast majority of firms, the neoclassical theory of rational profit maximising firms seems

[924] Gregory J. Thompson, Daniel K. Carder, Marc C. Besch, Arvind Thiruvengadam & Hemanth K. Kappanna, 'In-Use Emissions Testing of Light-Duty Diesel Vehicles in the United States' (West Virginia University 2014).
[925] D. Shepardson, 'VW Agrees to Buy Back Diesel Vehicles, Fund Clean Air Efforts' (2016) <https://www.reuters.com/article/us-volkswagen-emissions-settlement/vw-agrees-to-buy-back-diesel-vehicles-fund-clean-air-efforts-idUSKCN0ZD2S5> accessed 5 March 2021.
[926] In the US, Volkswagen was confronted with several class actions from its customers which eventually led to the buyback programme. Volkswagen's customers in Europe cannot rely on the same collective redress mechanism but have to file their claims individually (or need to assign them to a Third Party). For example, in Germany the Federal Court of Justice (*Bundesgerichtshof*) has not yet ruled against Volkswagen because Volkswagen seems to pursue the strategy to settle claims that could end with a negative ruling for Volkswagen to prevent a negative precedence while fighting the remaining claims at the lower courts (see for example Pia Lorenz, 'BGH sieht Abschalteinrichtung in Dieseln als Mangel an: Nur ein Hinweis oder schon ein Präjudiz?' Legal Tribune Online (2019) <https://www.lto.de/recht/hintergruende/h/bgh-hinweisbeschluss-vw-diesel-abschalteinrichtung-mangel-unmoeglichkeit-nacherfuellung/> accessed 8 March 2021).
[927] Roger Van den Bergh, 'Behavioral Antitrust: Not Ready for the Main Stage' (2013) 9 Journal of Competition Law and Economics 203, 211.

to be accurate. Bailey argues that the anecdotal evidence of firms deviating from profit-maximising that exists suggests that they are *'non-systematic mistakes or actions by a firm that is attempting to reach an interim goal that (…) may evolve over time to profit maximization'*.[928]

Fifth, the (partial) exemption from civil liability can be justified by the cooperation that leniency recipients have provided to the compensation of victims. As discussed above (chapter III) in relation to the fairness shortcomings of the no-contribution rule, fairness as a composition of corrective justice aspects requires, on the one hand, the compensation of victims who have suffered a loss and, on the other hand, the transfer of the wrongful losses to the wrongdoer who was responsible for the harm. In contrast to the no-contribution rule, which creates a situation where the plaintiff can choose how to distribute the civil liability irrespective of the responsibility for the infringement, the rule proposed in this chapter rewards as a policy choice the infringers who reveal the infringement in the first place and thereby contribute to the compensation of victims. Thus, the different consequences that are imposed on defendants under the proportionate damages rule can be justified also on fairness grounds. Moreover, the exception from the proportionate damage rules guarantees that equal contributions (all infringers choose to cooperate after the cartel was revealed) are treated equally in terms of civil liability.

V. A potential over-deterrence objection

There is a legitimate concern that the shift of civil liability under the proportionate damages rule may create over-deterrence for the non-cooperating undertaking.[929] It should be kept in mind, however, that under the proportionate damages rule, all firms have an incentive to cooperate in which case the exception to the proportionate damages rules applies (see above section E.II.) and no additional liability with the exception of to the immunity recipient's civil liability shifts to co-infringers. The current fining methodology already aims to set fines at a level to deter other infringements, therefore, there is reason for concern that – at least in theory – additional civil liability could lead to over-deterrence. This is, however, already a serious concern under the current fining methodology in absence of the proposed proportionate damages rule. The rise of damages actions that has been witnessed in the aftermath of the implementation of the Directive and the high likelihood that civil liability will rise further in the near future, requires a re-thinking of the current methodology. In order to overcome potential over-deterrence concerns, Part

[928] Elizabeth M. Bailey, 'Behavioral Economics and U.S. Antitrust Policy' (2015) 47 Review of Industrial Organization 19.
[929] See chapter I, C for a discussion on the meaning of over-deterrence and the potential inefficiencies that it may cause.

FOUR of this book proposes a new methodology to include an estimation of damages into the calculation of fines.

G. Conclusion

The legal situation prior to the implementation of the Directive required national courts in all Member States to weigh and balance the arguments in favour and against the disclosure of leniency documents, without clear guidance from EU courts. This resulted in different approaches that were taken by Member States, as the comparison of German and English law illustrated. Consequently, it was difficult for leniency applicants to determine a court's decision on disclosure *ex ante*. On top of this, the Transparency Regulation complicated the accessibility of leniency documents by introducing a public interest assessment.

The Directive has two main goals. It aims at optimising the interaction between public and private enforcement of competition law and at ensuring that victims of infringements can obtain full compensation for the harm they have suffered. Unfortunately, effective enforcement is a difficult balancing act between deterrence of infringements and compensatory justice as leading principles. Even though it may be defended from a compensatory justice perspective that victims of cartel infringements should be compensated for the entire harm caused, the number of leniency applications may be reduced if there is no immunity from damages actions. If leniency incentives are negatively affected, benefits achieved through better compensation may be outweighed by reduced discovery of cartels and the balance between compensation and deterrence will be suboptimal from a social welfare perspective.

This chapter has formalised the uncertainties of the Directive by using a game theoretical approach. In spite of the secrecy protection granted to leniency corporate statements, the possibility of disclosure remains if the Transparency Regulation applies. Moreover, evidence of the damage caused by the cartel infringement are often also contained in other documents at hand of the immunity recipient which claimants can still access under the new disclosure regime. This risk of disclosure of relevant documents increases the likelihood and the costs of follow-on damages claims and may cause adverse effects on leniency incentives. This is even more so, in Member States that went beyond the scope of the Directive and introduced broader disclosure regimes and additional presumptions to facilitate the position of plaintiffs. It is argued in this chapter that the European legislator may have missed the opportunity to introduce a less intrusive measure for safeguarding the leniency programme, which still ensures the effective exercise of the victims' right to full compensation. This result could have been obtained by trans-

ferring the damages liability from the leniency recipient to the cartel participants refusing to cooperate with the competition authorities. A rule of proportionate damages (i.e., immunity from fines or damages proportionate to the reduction of fines) is superior from a deterrence perspective, since it provides better leniency incentives. In contrast to a rule granting solely the immunity recipient immunity from fines and damages, the proportionate damages rule sets better incentives for the remaining cartel participants to cooperate once a cartel participant has applied for immunity and revealed the cartel. An exception to the proportionate damages rule would be necessary only when full compensation of victims cannot be achieved. However, even when such an exception applies, the shift of damages liability creates very strong incentives for all cartel participants to cooperate.

There remain several questions for further research. First, it has not been the goal of the chapter to analyse under what circumstances leniency programmes fully achieve the deterrence objective. Second, as outlined in chapter II, national rules on competition damages still deviate across Europe and in many Member States the Directive's provisions are still not effective. It was not the aim of this chapter to analyse the interplay of the proportionate damages rule with all domestic rules. Third, this chapter only briefly addressed problems of over-deterrence. A solution to this inefficiency could be the inclusion of follow-on damages into the calculation of fines. The theoretical elaboration of a methodology for the calculation of fines based on (an estimation) of the civil liability and its consequences in daily antitrust enforcement is developed in Part Four of this book.

PART FOUR

The Need to Reconcile Fines and Damages Following the Implementation of Directive 2014/104/EU

Chapter VII
A New Approach to the Calculation of Competition Fines to Reconcile Fines and Damages

A. Introduction

In *Courage*, the Court of Justice of the European Union (**CJEU**) clarified that private individuals have a right to claim damages caused by an infringement of EU Competition Law. It was, however, not until the entry into force of the Directive 2014/104/EU (the '**Directive**')[930] that the private enforcement of competition law saw a remarkable uplift (see the recent studies on the development of damages actions in chapter IV, F.I.).

Optimal methods for deterrence have mainly been analysed with a focus on public enforcement and fines as the only mean to deter cartels. Accordingly, the underlying objective of the 2006 Fines Guideline[931] is to set fines at a level to ensure deterrence. However, as was already argued in previous chapters, civil liability equally contributes to the cost of an infringement and ultimately also to the deterrence of future infringements. Thus, if the Directive accomplishes its objective to foster private enforcement in Europe, the current fining methodology will likely create a situation of over-deterrence, reducing welfare-enhancing transactions. In this chapter, an alternative approach to the calculation of fines is proposed, which is based on the infringer's gain, namely the overcharge. By contrast, the current fining system is based on the sales value of the previous business year. Many authors have already argued that the current methodology does not create the optimal level of deterrence,[932] and the method for arriving at the fines is not comprehensible. Thus, it seems necessary to rethink the current methodology for the calculation of fines.

Economic theory suggests that undertakings are likely not to pursue a certain conduct where its cost outweighs its gains. A competition law infringer is therefore likely to be deterred when any profit gained from the infringement will be skimmed off. Thus, a strong argument exists to base

[930] 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 [2014] OJ L349/1.
[931] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, C 210/2, 2006 (**2006 Fines Guidelines**).
[932] See section D.V below.

fines on the overcharge. Because the overcharge often correlates with the gains and harm suffered by purchasers, fines and damages should not be considered in isolation. In the literature, concerns have also been raised that the double burden of fines and civil liability can lead to problems with regard to the principle of proportionality and to over-come this problem by taking into account potential claims for damages when imposing the fine.[933] However, the implementation of a methodology based on follow-on damages into the current investigatory regime would encounter several hurdles. The estimation of harm is a resource-intensive process that requires a vast amount of data, which would also need to be undertaken at a stage when no damages actions have been filed and it is uncertain whether any or all victims will even exercise their right to compensation. Thus, a practical approach is necessary, which includes the civil liability into the calculation of fines without creating a disproportionate burden on competition authorities, as this would render public enforcement inefficient.

For that reason, the methodology proposed in this chapter includes an estimation of the harm caused by the infringement in the calculation of fines. The new methodology is balanced against administrative efficiency considerations, particularly the administrability of the fining regime. Rather than introducing a radical change from the current calculation, the aim is to find a practical approach that builds on the existing methodology and the experiences gained from its application in recent years. For illustrative reasons, the approach is tested and explained based on cartel infringements, which are the most common competition infringements in Europe. The following section outlines the current methodology for the calculation of fines in Europe as well as recent studies on the effectiveness of the regime (Section B). In Section C, the drawbacks of the current methods are briefly outlined and an alternative approach is introduced. Section D outlines the practical difficulties of including damages into the calculation of fines and provides possible ways to overcome them, and Section E discusses how the entry fee would need to be determined from a compensatory and a deterrence perspective. Section F sums up the advantages of the new approach, and Section G focuses on the proportionality of fines under the current system with increasing civil liability. Section H follows with an illustration of the differences between the proposed methodology and the calculation under the current fining policy with numerical examples from recent case law. Finally, Section I concludes the findings.

[933] See for example, Christopher Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34 World Competition 383; Jindrich Kloub, 'White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement' (2009) European Competition Journal 515–547.

B. Current Method of Calculating Fines

I. Background of the Fines Guidelines

The current methodology is based on the 2006 Fines Guidelines,[934] which followed the 1998 Fines Guidelines[935] and the Leniency Notice,[936] as well as the Settlement Notice.[937] Both Fines Guidelines were aimed at ensuring transparency and impartiality of the Commission's fining decisions.[938] The move towards more transparency departed from the former approach taken by the Commission under which the introduction of foreseeability (*'tariffs'*) was seen as jeopardising the deterrent effect of fines.[939] The Commission's approach prior to the introduction of the guidelines was criticised as lacking any coherent methodology, with some authors even describing it as a lottery with random figures magically appearing at the end of a decision.[940] The debate already centred around the question of whether uncertainty about the amount of the fine was better suited to deter infringements than an amount that infringers could anticipate.[941] Some commentators have argued that undertakings will always engage in a cost–benefit analysis before committing an infringement and only choose to infringe competition rules when the gain from the infringement outweighs its costs.[942] The General Court (Court of First Instance) in the *Welded Steel Mesh Cartel*[943] clarified that an undertaking should nevertheless be able to ascertain how the fines were calculated, but at the end upheld the Commission's fines decision.

In response to these criticisms the Commission published Guidelines on the method of setting fines in January 1998, in which it set out its methodology for the calculation of fines for the first time. However, under the 1998 Guidelines, the Commission still enjoyed wide discretion, particularly when assessing aggravating and mitigating factors. The Guidelines categorised the gravity of the infringement into 'minor', 'serious', and 'very serious', which were fined in the

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[934] 2006 Fines Guidelines (n 931).
[935] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, 98/C 9/03 [1998].
[936] Commission Notice on Immunity from fines and reduction of fines in cartel cases, C 298/17 [2006].
[937] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases, C 167/1, 2008; recently amended through Communication 2015/C 256/02 to align the Communication with the protection of settlement submissions under the Damages Directive.
[938] Preamble of the 1998 Fines Guidelines and para 3 of the 2006 Fines Guidelines.
[939] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2014) 1003.
[940] Ivo Van Bael, 'Fining À La Carte: The Lottery of EU Competition Law' (1995) European Competition Law Review 237.
[941] Ivo Van Bael (n 940).
[942] Luc Gyselen, 'The Commission's Fining Policy in Competition Cases – 'Questo È Il Catalogo', *Procedure and Enforcement in EU and US Competition Law* (Sweet and Maxwell 1993) 64.
[943] Case T-150/89 *G. B. Martinelli v. Commission of the European Communities* [1995] ECLI:EU:T:1995:70.

ranges of €1,000 to €1 million, €1 million to €20 million, and above €20 million, respectively. In cartel cases involving several undertakings, the basic amount of each undertaking varied according to the 'specific weight'[944] of the infringement. The amount was then increased according to the duration of the infringement. The factors were divided into three categories: short (less than a year) with no increase; medium (between 1 and 5 years) with an increase of up to 50%; and long (more than 5 years) with an increase of up to 100% per year. It was then left within the Commission's discretion whether to adjust the basic amount depending on aggravating and mitigating factors.[945] The 1998 Guidelines introduced a more systematic methodology, but it still remained difficult for undertakings to determine their liability precisely, particularly because the basic amount was subject to the Commission's discretion.[946]

The 1998 Guidelines were replaced by the current 2006 Guidelines. This replacement was necessary because the Commission tended to deviate from its guidelines, leaving the fining policy vague and incomprehensible. The current Guidelines replaced the categorisation of seriousness with a basic amount proportionate to the value of sales and the gravity of the infringement. It further aimed at improving deterrence by introducing new factors,[947] in particular a new entry fee (15% to 25% of the value of sales) *'in order to deter undertakings from even entering into horizontal price-fixing, market sharing and output limitation agreements. The Commission may also apply such an additional amount in the case of other infringements'*.[948] It also increased the fines for repeated offenders[949] and ensured that the duration plays a greater role for the setting of the basic amount compared with under the 1998 Guidelines by multiplying the value of sales by the number of years.

II. The methodology of the 2006 Fines Guidelines

The 2006 Guidelines apply the same two-step methodology as the 1998 Guidelines by first setting the basic amount and then increasing or decreasing the basic amount in accordance with aggravating and mitigating factors.

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[944] Section 1A of the 1998 Guidelines.
[945] See for example *Volkswagen* (COMP/35.733) [1998] OJ L124/60, where the Commission increased the fines by 20% for aggravating factors.
[946] Alison Jones and Brenda Sufrin (n 939) 1004.
[947] See European Commission, 'Competition Revises Guidelines for Setting Fines in Antitrust Cases' (2006): *'The three main changes – the new entry fee, the link between the fine and the duration of the infringement, and the increase for repeated offenders send three clear signals to companies. Don't break the anti-trust rules; if you do, stop it as quickly as possible, and once you've stopped, don't do it again. Of course, if the Commission's leniency policy applies, companies should also report the infringement without delay. If companies do not pay attention to these signals, they will pay a very high price'*.
[948] 2006 Fines Guidelines para 25.
[949] Ibid, para 28.

The basic amount (BA) is based on a proportion of the value of the undertaking's sales during the last full business year of its participation in the infringement, which is then – depending on the degree of gravity – multiplied by the number of years of participation in the infringement.[950] The Commission arrives at the BA using a percentage (α) of the value of sales in the relevant geographical area of the previous business year (v). The percentage applied to the value of sales depends on the gravity of the infringement.[951] The gravity in turn depends on the nature of the infringement, the combined market share of all undertakings concerned, the geographic scope of the infringement, and whether the infringement has been implemented.[952] The percentage applied on account of gravity can be up to 30%. The amount (αv) will then be multiplied by the number of years of participation in the infringement (t). An additional amount of 15–25% of the value of sales will be included in the BA for hardcore cartels (βv).

Thus, the basic amount can be expressed as

$$BA = \alpha tv + \beta v = v(\alpha t + \beta).^{953}$$

The basic amount is then adjusted according to 'aggravating circumstances' (AC) and/or 'mitigating circumstances' (MC).[954] Many of the aggravating circumstances of the old 1998 Guidelines were adopted in the 2006 Guidelines. They include 'recidivism' (repeated infringements), refusal to cooperate, and leader or instigator roles.[955] For a repeated infringement, the 2006 Guidelines provide an increase of up to 100% of the basic amount for each infringement uncovered. Mitigating factors, on the other hand, include termination of the infringement after the Commission's intervention; committing the infringement by negligence; limited involvement; cooperation with the Commission; and authorisation of the anti-competitive conduct by public authorities or legislation.[956]

The adjusted basic amount (ABA) can be formulated as

$$ABA = BA + AC - MC.$$

[950] Ibid, paras 13-26.
[951] Ibid, para 19.
[952] Ibid, paras 20-23.
[953] The notion has been taken from Cento Veljanovski, 'Deterrence, Recidivism, and European Cartel Fines' (2011) 7 Journal of Competition Law and Economics. 871-951.
[954] Ibid at fn 23, para 27.
[955] For a discussion on aggravating circumstances relating to the infringer's roles in the infringement, see chapter V, C.II.
[956] Ibid, para 29.

In its guidelines, the Commission states that it will *'pay particular attention to the need to ensure that fines have a sufficiently deterrent effect'* and may impose on undertakings with a *'particularly large turnover beyond the sales of goods to which the infringement relates'* [957] a specific increase of fines for deterrence. The specific deterrence increase (SDI) may also be imposed to exceed the amount of gains unlawfully made from the infringement.

The amount after the adjustment and deterrence increase ($ABA + SDI$) may not exceed 10% of the worldwide turnover in the preceding business year, as laid down in Article 23(2) of Regulation 1/2003.[958]

The Commission may then reduce the amount by applying the 2006 Leniency Notice.[959] Under the leniency programme, undertakings may qualify for total immunity from fines where it is the first to submit information and evidence, which enables the Commission to perform inspections or find an infringement of Article 101 TFEU.[960] Undertakings may be granted a reduction in fines when they provide evidence of the infringement with *'significant added value'*.[961] The first undertaking to provide significant added value qualifies for a reduction of 30–50%, the second a reduction of 20–30%, and subsequent undertakings may benefit from a reduction of up to 20%.[962] Thus, a leniency recipient may benefit from a reduction of $\alpha(ABA + SDI)$, depending on the time the evidence was provided and its value.

The Commission will take an undertaking's inability to pay (ITP) into account and may reduce the fine further where it *'would irretrievably jeopardise the economic viability of the undertaking concerned and case its assets to lose all their value'*.[963]

Thus, the calculation of fines under the 2006 Fines Guidelines may be formulated[964] as

$$F = ABA + SDI - \alpha(ABA + SDI) - ITP.$$

[957] Ibid, para 30.
[958] Ibid, para 32.
[959] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C298/17.
[960] Ibid, para 8.
[961] Ibid, para 24.
[962] Ibid, para 26.
[963] Ibid, para 35.
[964] For an example of the calculation of *Bayer's* fines in the *Synthetic Rubber cartel,* see Cento Veljanovski (n 953) 871-951.

III. Deterrence under the current Fining Regime

European Courts have repeatedly expressed that the objective of public sanctions is to deter new infringements. For example, the General Court in *Saint Gobain* already expressed that *'deterrence is an objective of the fine and a reference point for the Commission throughout the calculation of the fine'*.[965] In *Skanska*, the CJEU emphasised that the enforcement regime (including fines and damages) is *'intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct'*.[966] The Commission adheres to that interpretation in both Fines Guidelines. Other interpretations have focused on compensation, suggesting that the sanction should equal the total harm that was caused to the victims; that is, it should uphold the objective of proper indemnification of victims.[967] With the introduction of the Directive, the European legislator left the compensation of victims expressly to civil courts but still attempted to balance the right to compensation with the goal of deterrence.

It is difficult to assess whether the current fining method achieves optimal deterrence, since the actual number of existing cartels remains unknown. A reduction of the number of cartels and cartel investigations does not necessarily allow the conclusion that the enforcement system in Europe is working more effectively; a reduction may also be due to a prioritisation of competition authorities' enforcement efforts on certain industries or infringements. On the other hand, a steady or increasing number of cartel investigations also does not provide any indication of the overall number of cartels in Europe. For instance, an increase in the number of cartels investigated is meaningless if the number deterred increases at a similar rate. The number of cartel investigations alone does not necessarily correlate with the effectiveness of the enforcement systems.

Mainstream economic theory[968] suggests that if firms decide to collude solely for economic reasons, they will only do so if the gains outweigh the expected costs. Thus, for deterrence to be effective, the expected costs of colluding must exceed the expected gains (π). The colluding firm will, however, only face the costs when the cartel is uncovered. The costs of colluding

[965] Joined Cases T-56/09 and T-73/09 *Compagnie de Saint-Gobain v Commission* [2014] ECLI:EU:T:2014:160, para 380.
[966] Case C-724/17 Vantaan kaupunki v. Skanska Industrial Solutions Oy et al. [2019] ECLI:EU:C:2019:204 para 45.
[967] Marie-Laure Allain, Marcel Boyer, Rachidi Kotchoni and Jean-Pierre Ponssard, 'Are Cartel Fines Optimal? Theory and Evidence from the European Union' (2015) 42 International Review of Law and Economics 38–47; William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652-678.
[968] Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169-217.

consist of the fines (F) imposed by the Commission multiplied by the probability of detection (p). Thus, firms are deterred from colluding when

$$\pi < pF.$$

The gain (π) from colluding is the premium that members of a price fixing cartel can charge as a result of the infringement. Hence, current theories on the optimal level of fines suggest that an enforcement system achieves deterrence when the imposed fines exceed the overcharge from the infringement taking into account the probability of uncovering the infringement (pF).

Authors have used estimates of overcharges[969] to test the deterrent effect of the EU competition regime. They take different stands on whether the regime can deter cartels effectively with fines below the 10% ceiling. Wils (2001) argues that fines should exceed 150% of annual turnover.[970] Connor and Lande (2006) recommend even higher fines between 225% and 375% of the annual turnover, assuming a higher overcharge and longer duration.[971] Combe and Monnier (2007) calculate the optimal sanction to be 6.6 times higher than the loss of consumer surplus, which in a 5-year cartel would mean more than 300% of the turnover.[972] Smuda (2014)[973] takes the mean overcharge rate and average cartel duration of the most recent cartel overcharges that relate to the European market provided by Conner (2010).[974] He finds that even when applying the upper limits of fines and a high probability of detection, the maximum expected fine of 11.46% of affected sales per year does not achieve optimal deterrence at a mean overcharge rate of 21.9% of the selling price per year. After examining each individual cartel case, he finds that *'for more than two out of three cartels, price-fixing has been a lucrative business from an ex-post perspective although the underlying calculations are based on maximum values for probability of detection and fine levels'*.[975]

[969] See section IV.V below for different studies on the estimation of overcharges.
[970] Wils assumes a 10% price increase with a 5-year duration, a detection rate of 16%, and an increase in profits of 5%; Wouter P J Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require not only Fines on Undertakings but also Individual Penalties, in Particular Imprisonment?' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds) *European Competition Law Annual 2011: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2001).
[971] John M. Connor and Robert H. Lande, 'The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies' (2006) 51 The Antitrust Bulletin.
[972] Emmanuel Combe and Constance Monnier, 'Cartel Profiles in the European Union' (2007) Concurrences 181-189.
[973] Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2014) 10 Journal of Competition Law and Economics 63-86.
[974] John M. Connor, 'Price Fixing Overcharges: Revised 2nd Edition' (2010) Purdue University - Technical Report.
[975] Ibid, fn 43; 83.

Motta (2007), on the other hand, points out that the upper ceiling arises from an undertaking's worldwide turnover.[976] The turnover in a geographic market affected by the infringement within the EU is likely to be significantly lower than the overall turnover worldwide. Furthermore, the fine can be modified by taking into account aggravating circumstances. For instance, for recidivism, the fine *'will be increased by up to 100 percent for each such infringement established'*.[977] However, Veljanovski (2011) finds that only Akzo in *Calcium Carbide* was surcharged 100% for four previous offences, *'which could have attracted a maximum uplift of 400 percent'*.[978] Essentially, in cases where the gains exceed the 10% cap, it will be profitable for firms to collude. Allain et al. (2015) empirically study cartel cases between 2005 and 2012 and find that 30–80% of the fines (according to their scenarios) meet their deterrence benchmark. However, even though the authors only review a small time period, they find a significant dispersion of fines, some being much too high while others are much too low.[979]

The analysis of the recent literature on the deterrent effect of the EU regime suggests that the current level of fines is in many cases not sufficient to achieve deterrence while, at the same time, creating a level of fines significantly above the deterrent level. Thus, from a deterrence perspective there is a need to rethink the current fines regime which is solely based on fines.

C. A New Approach for the Calculation of Fines

I. The need for a new approach to the calculation of fines

As outlined above, the current fining system is based on the sales value (revenue) of the previous business year, which is then adjusted according to the infringer's willingness to cooperate. The approach departs from the 1998 Fines Guidelines, which derived the basic amount from a classification of gravity and the duration of the infringement.[980] With the 2006 Guidelines, the Commission aimed to address the commonly shared criticism that the vague wording of the 1998 Guidelines led to different starting amounts for the same anticompetitive infringement.[981] However, the 2006 Guidelines did not necessarily optimise deterrence. In fact, the discussion above has shown that the current methodology is ill-equipped to deter well-organised cartels.

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[976] Massimo Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) 29 European Competition Law Review 209, 215.
[977] 2006 Fines Guidelines, para 23.
[978] Cento Veljanovski (n 953) 871-951.
[979] Marie-Laure Allain and others (n 967) 38–47.
[980] Section 1 of the 1998 Guidelines.
[981] Damien Geradin and David Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments' (2005) GCLC Working paper 03/05, III.B.

Moreover, the current revenue-based methodology does not include the additional civil liability for infringers that may arise from follow-on damages claims.[982] The Directive claims that it aims to foster private enforcement and to optimise the interaction between private and public enforcement.[983] Those objectives are not yet mirrored in the Fines Guidelines, which still aim to deter infringements solely by means of public sanctions irrespective of the civil liability that infringers face following the infringement decision. The anticipated new competition litigation culture in Europe raises the question of whether it is still justifiable to calculate fines in isolation of damages.

The methodology for the calculation of fines proposed in this chapter incorporates the (anticipated) civil liability into the method for determination of the basic amount. Instead of deriving fines from revenues of the previous business year, the calculation is based on the overcharge of the cartel which is then adjusted by a deterrence increase as well as aggregating/mitigating factors. For the purpose of illustrating the alternative methodology, it is assumed that damages – if estimated correctly – equal the overcharge of direct and indirect purchasers.[984] Other costs that infringers might face following damages actions such as legal costs or interest, which equally contribute to deterrence, are not considered in this chapter and will need to be addressed in further research.

An overcharge-based methodology for the calculation of fines based on the gains from the infringement also finds support in the literature. Katsoulacos et al. (2015) compare and analyse four fine regimes, namely regimes based on revenue (current EU methodology), illegal gains (profit), fixed fines, and the cartel's overcharges. The authors test the impact of each regime on the prices charged before detection, the stability of the cartel, and the overall welfare impact. They find that *'[p]enalties based on overcharges are welfare superior to all the other penalty structures'*.[985] Despite their findings, in a recent paper the same authors propose an adjusted revenue-based regime (*'sophisticated revenue-based penalty regime'*), because arguably a re-

[982] The analysis in chapter VI above revealed that follow-on damages can have a detrimental effect on leniency incentives. See also Philipp Kirst and Roger Van den Bergh, 'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives' (2015) 12 Journal of Competition Law and Economics 1-30.
[983] Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union [2013] COM (2013) 404, 3.
[984] As will be discussed below, civil liability from claimants other than direct and indirect purchasers is difficult to estimate *ex ante* and should therefore not be included in the methodology for the basic amount; see section D.I below.
[985] Yannis Katsoulacos, Evgenia Motchenkova and David Ulph, 'Penalizing Cartels: The Case for Basing Penalties on Price Overcharge' (2015) 42 International Journal of Industrial Organization 70-80.

gime based on overcharges has been criticised on the grounds of legal certainty and high implementation costs (administrative inefficiency).[986]

This chapter does not intend to contribute to the literature comparing different hypothetical sanctioning regimes, but instead attempts to incorporate the Directive's goal of optimising the interaction between deterrence and compensation into the methodology for the calculation of fines. For that purpose, it is shown that the proposed overcharge-based (damages) methodology is better equipped to reconcile fines and damages than the current methodology. The criticism of high implementation costs is unfounded, and it is shown that the hurdles of implementing a revenue-based regime can be overcome.

The next section outlines how the current methodology can be adjusted to incorporate the infringers' civil liability. The section is followed by a more detailed analysis of some of the problems that could arise from the adjustment of the methodology and possible ways to overcome those hurdles. It is shown that the alternative approach is more advantageous from a deterrent and proportional justice perspective. The methodology is illustrated with a price-fixing cartel, but it may be applied to any competition law infringement.

II. Integrating damages into the calculation of fines

The CJEU in *Courage*[987] concluded that there cannot be an absolute bar to damages claims for the violation of competition rules. Art. 101 TFEU confers rights on individuals and any breach of these rights is sufficiently serious to trigger a right to damages. National procedural rules *'governing actions safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise the rights conferred by Community law (principle of effectiveness)'*.[988] In *Manfredi*[989] the Court clarified that the right to seek compensation must include compensation for actual loss and loss of profit plus interest.

In Europe, damages are only awarded for corrective justice purposes. A claimant will receive compensation for harm suffered if the claimant can prove that she suffered a loss that was

[986] Yannis Katsoulacos, Evgenia Motchenkova and David Ulph, 'Penalizing on the Basis of the Severity of the Offence: A Sophisticated Revenue-Based Cartel Penalty' (2020) 57 Review of Industrial Organization, 627–646.
[987] Case C-453/99 *Courage Ltd v. Bernard Crehan* [2001] ECLI:EU:C:2001:465, para 28.
[988] Ibid, para 29; Case C-261/95 *Palmisani* [1997] ECLI:EU:C:1997:351, para 27.
[989] Joined Cases C-295/04 and 298/04 *Manfredi and Others v Lloyd Adriatico* [2006] ECLI:EU:C:2006:461 para 60; C-397/11 *Jörös* [2013] ECLI:EU:C:2013:340, para 29.

caused by an act or an omission of the defendant. The claimant will not be granted damages exceeding the harm suffered (punitive damages). By contrast, damages in the US do not only serve the goal of compensation but are also used as a means of deterrence. For that purpose, treble damages (punitive damages) are awarded. Article 3(3) of the Directive prohibits courts in the EU awarding damages that exceed the loss incurred: *'Full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages'*.

Nonetheless, a judgement awarding damages increases the costs for the infringer and contributes to deterrence. Damages awarded following a price-fixing cartel ideally compensate the harm suffered by the claimant. In a simplified scenario of two symmetric firms, where both firms charge prices at a competitive level and increase their price after collusion, both gain an additional profit (π). This *overcharge*, namely the difference between the price on a competitive level and the price after collusion, is the harm suffered by direct and indirect purchasers. The latter will suffer harm if the direct purchaser passes on the overcharge (*passing-on*). In addition, the increase in price does not only lead to an overcharge for purchasers but may also increase the price to a level exceeding the reservation price of parts of the customer basis (*output effect*).[990] This is commonly referred to as the deadweight loss, which is proportionate to the overcharge ($\gamma\pi$).[991]

In addition, a cartel might even cause harm to customers of competitors who did not participate in the cartel. Because other firms can still find buyers when they set their prices below or at the collusive price level, the global price level in the market shifts upwards, harming not only purchasers from the cartel but also those from other firms (*umbrella pricing*). In *Kone*[992] the ECJ clarified that the ability to claim damages of *anyone* who suffered a loss also includes purchasers from competitors who did not participate in the cartel. In *Otis*, the CJEU further clarified that claimants do not even have to be active on the same market.[993]

Admittedly, the price effects for claimants other than direct or indirect purchasers, such as in the case of umbrella pricing, are difficult to estimate *ex ante* before a judgement was imposed against the infringer. This is because in the case of umbrella pricing, for example, the colluding parties do not necessarily have accurate information about the customer base of the remaining competitors on the market. Damages from umbrella pricing are most commonly claimed by

[990] The harm of the direct purchaser therefore equals the *overcharge* minus the overcharge *passed-on* plus the *volume effect*.
[991] See chapter V, D.II above for an explanation of deadweight loss.
[992] C-557/12 *Kone and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317.
[993] C-435/18 *Otis and Others v Land Oberösterreich and Others* [2019] ECLI:EU:C:2019:1069.

direct purchasers who have purchased from competitors not participating in the collusion. There still is a lack of awareness of this kind of claims by individuals initiating collusions. However, damages resulting from deadweight loss and umbrella pricing certainly contribute to the cost of collusion.

As far as costs are predictable *ex ante*, they contribute to deterrence.[994] Hence, the cost of collusion does not only include fines (F) imposed by the Commission but also damages (D) awarded by national Courts given the probability that the infringement is detected (p), where $\varepsilon\ [0, 1]$. Therefore, deterrence is achieved when

$$\pi < p(F + D).$$

Indeed, for infringements to be deterred (i.e., cartels to be destabilised), the sum of fines and damages must be set sufficiently high to compensate for the additional profit gained and a probability of detection below 1. In the best-case scenario in which civil courts award the correct amount of damages, the civil liability must be included in the calculation of optimal fines to prevent over-deterrence. On the other hand, for deterrence to be optimal, the potential infringer must expect costs to be at least equal to the gains from the collusion. For collective infringements, such as cartels, it may be sufficient to prevent only one firm from participating in the collusion.[995] However, only if the individual fines at least equal the gains of each infringer does a competition regime ensure optimal deterrence of the infringement.

D. Practical Implications of the New Approach

These findings may be quite intuitive, but in practice including damages into the calculation of fines has several hurdles: First, cartels can have different welfare impacts. Thus, depending on the effects of the cartel, different groups of victims may have suffered a loss. For the estimation of the (potential) civil liability, it is therefore necessary to determine the potential claimants that were affected by the cartel. As has been shown above, cartels may also cause harm which does not relate directly to the gains from the collusion (e.g., umbrella pricing, deadweight loss). This raises the question if and to what extent these other potential damages should be included. Second, it raises the question of how civil liability can be quantified if damages have not yet been claimed. Third, as the burden of proof of an infringement lies with the Commission, it raises

[994] Gary S Becker (n 968) 169-217.
[995] Wouter P.J Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition.

the question of which standard of proof should be applied for the harm caused – can the Commission apply presumptions for the amount of the harm that was caused? The Directive only applies a presumption that cartels cause harm. Fourth, following the previous question, as the quantification of harm is highly resource-intensive, it raises the question of whether the Commission must carry that burden alone or whether it can rely on external resources. Fifth, the question is raised of whether the Commission has to prove a causal link between the harm and the infringement, and if so, what the applicable standard of proof is. Sixth, the question is raised of how the calculation is influenced when victims do not claim damages – should the Commission collect the damages instead? Seventh, the fine – that is, the additional amount (F) – to be imposed on top of the estimated civil liability must be determined. The additional amount would need to be added to the civil liability and must increase the overall liability to an amount sufficient to deter infringements and to incentivise firms to cooperate (leniency, settlements).

I. The damages of entitled claimants to be included in the calculation of fines

For the estimation of the potential civil liability, it is necessary to have a closer look at the groups of victims that may be negatively affected by a cartel infringement. Bishop and Walker (2010) distinguish between 'direct purchasers' and 'other potential damages claimants'.[996] The direct purchaser has to pay a premium as a result of the cartel for purchases made directly from the cartel. The direct purchaser suffers from two elements of harm, namely the 'direct effect' and the 'output effect', also referred to as the 'volume effect', and may benefit from the 'passing-on effect'. The authors describe the 'direct effect' as the quantity of products purchased multiplied by the increase in price as a result of the cartel. This is, in essence, what has been referred to in this book as the overcharge or premium. Direct purchasers' customers (indirect purchasers) will refrain from making purchases where the new cartelised price exceeds their reservation price. The direct purchasers will then suffer a loss of demand, which the authors refer to as the 'output effect' and the Commission in its Guidelines on passing-on as the volume effect.[997] On the other hand, the 'passing-on effect' describes the effect where the direct purchaser also increases prices as a result of the increased input costs (i.e., the premium is passed on to indirect purchasers). 'Other potential damages claimants' are those claimants who have suffered harm from the cartel other than by purchasing directly from the cartel. Those claimants include indirect purchasers who purchase from a firm that was directly harmed by the cartel;

[996] Simon Bishop and Mike Walker, *The Economics of EC Competition Law* (Sweet & Maxwell 2010) 17-003 and 17-027.
[997] Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser [2019] OJ C267/4, para 15; see also chapter I, C.II above.

suppliers of the cartel, who sell less input products to the cartel because of lower demand following the increased prices; purchasers from other firms, who may have raised prices because of the reduction in the competitive constraint (umbrella pricing); and non-purchasers, who refrain from purchasing the product due to the cartelised price.

For the calculation of the optimal level of fines to deter infringements, it is irrelevant whether the damage was suffered by direct or indirect purchasers. Following the implementation of the Directive, whether defendants can benefit from the 'passing-on effect' and thus be able to rely on the passing-on defence (Article 13) is irrelevant for the calculation of fines if the damage occurred somewhere along the supply chain. As long as the indirect purchaser also claims the passed-on premium, it increases the overall cost of the infringement for the cartelists. However, whether victims on any level of the supply chain will claim damages is uncertain, in turn making it difficult to quantify *ex ante* the civil liability for the setting of the fines. Thus, if the passing-on defence was taken into account at this stage the overall cost of the infringement would likely remain below the deterrent level in the case the civil liability is over-estimated while an under-estimation can result in over-deterrence. Equally, estimating the output effect at the stage of imposing a fine when it is, first, unclear whether direct purchasers were in fact able to pass-on the entire or part of the overcharge, and second, unknown whether and to what extent the direct purchasers experienced any reductions in volume, it is almost prohibitively difficult to quantify the output effect *ex ante*.

Against this background, to mitigate the uncertainty of whether the overcharge was passed-on to indirect purchasers and whether they will in fact claim damages, quantification of the civil liability should include the potential damages of all direct purchasers and ignores the potential passing-on of the overcharge (passing-on defence).[998] The civil liability would therefore solely include an estimation of the price effect.

Similarly, given the various welfare impacts of cartels, it is uncertain whether 'other damages claimants' have suffered harm and whether they will claim their damages (e.g., shareholders or employees). As the harm caused to claimants other than direct purchasers is difficult – if not impossible – for authorities to estimate before any damages actions have been filed before courts, those uncertain damages claims should be ignored for the fines methodology to prevent an over-estimation of the civil liability. Furthermore, gathering the data necessary to estimate the harm caused to indirect purchasers, suppliers, and other potential damages claimants would

[998] Arguably, when the overcharge is passed on downwards on the supply chain and spread over a large customer base (e.g., consumer products), it is unlikely that 'indirect purchasers' will claim the harm.

tie significant resources, negatively impacting effective competition enforcement as a whole. A possible way to overcome the burden of estimating the harm suffered by other potential claimants would be to apply a presumption of the harm suffered by the remaining potential damages claimants. However, a presumption requires empirical data on the harm generally suffered by purchasers other than direct and indirect customers to prevent an overestimation of civil liability. Furthermore, the overcharge is also not a good indicator for the loss of other victims; for instance, the overcharge of a cartelised product does not provide an accurate indication of the harm potential customers suffered after switching to another product. The product may be of lower quality or less suitable for the potential customers' purpose. For that reason, estimating harm other than 'direct harm' is prone to either under-estimate (over-deterrence) or over-estimate (under-deterrence) the overall civil liability.

Overall, regarding the effects on potential claimants other than the price effects of direct purchasers (direct effect or overcharge), those effects are difficult to estimate which is likely to lead to ambiguous levels of fines. For that reason, it is more sensible to limit the estimation of civil liability to price effect of direct purchasers based on the calculation of the overcharge without allowing for a passing-on defence. Only if the competition authorities have knowledge and can quantify the harm suffered by victims other than direct and indirect customers can the additional amounts of damages be included in the calculation. This would need to be assessed on a case-by-case basis.

II. The relevant time period for the estimation of civil liability

As outlined previously in this book, in follow-on damages actions, damages are claimed after the competition authority has found an infringement and imposed sanctions against the members of the collusion. Thus, the total amount of damages awarded will be known only in the final judgement of a national court. Even if all victims filed damages claims immediately after an infringement decision, it often takes years before the judgement becomes final or the parties agree on a settlement. As a result of the duration of litigation, the amount of damages known to the Commission at the time of the infringement decision may often be very different to the final amounts awarded by courts. Thus, the amount of damages for the calculation of fines depends predominantly on the time the amount became known to the authorities.

The authority can estimate the calculation based on the amount of damages known at the time of the infringement decision, at any point after the infringement decision but before the limita-

tion periods have expired, or after the limitation periods have expired.[999] Since the final amount of damages is unknown at the time of the infringement decision, any known liability at that time is inappropriate for the calculation of fines. On the other hand, it would be impracticable to base the calculation of fines on the amount of damages claimed after the infringement decision (before or after the limitation periods have expired), because this would require either a separate fining decision or the adjustment of fines long after the decision finding the infringement has been imposed. Arguably, the later adjustment of a fine that has already been imposed against a violator for deterrence purposes is likely to conflict with the principle of legal certainty, forming part of the Rule of Law.[1000] When the penalty (fines) for a certain conduct may or may not be reduced at a later stage depending on whether victims claim their losses years later, the final amount of the penalty becomes unforeseeable for the infringer. On the other hand, imposing a separate decision on the fine would significantly increase administrative costs, as both the infringement decision and the fines decision could be appealed individually. For those reasons, the quantification of the civil liability should not be undertaken at a time when the limitation periods have lapsed, or the damages have been awarded by the courts. To overcome those limitations, competition authorities need to rely on an estimation of the harm instead, namely damages that can potentially be claimed by victims. Section VII below discusses the different methods authorities can rely on for the quantification of damages.

III. Burden and standard of proof for the harm caused by the infringement

The burden of proof defines which party must bear the primary responsibility of bringing forward the evidence for the alleged infringement. The standard of proof refers to the quality of evidence necessary to prove an infringement or defence under the law. Article 2 of Regulation 1/2003[1001] places *'the burden of proving an infringement of Article 81(1) [now 101(1)] or of Article 82 [now 102] of the Treaty [now TFEU] (…) on the party or the authority alleging the infringement'*. The Regulation does not deal explicitly with the standard of proof to be applied

[999] It is necessary to distinguish between relative limitation periods in Article 10 of Directive 2014/104/EU, which require knowledge of the claimant, and absolute limitation periods, which apply without knowledge. The Directive does not contain rules on absolute limitation periods, but some Member States have nevertheless included them in their implementing legislations (see Directive, recital 36, and chapter II, B.VI). The absolute limitation periods in Europe last from 10 years up to 30 years. Because the claimants' knowledge of the infringement is unknown to the Competition Authorities, from a temporal perspective limitation periods refer to absolute limitation periods.

[1000] Legal certainty (*nulla poena sine lege certa*) has been recognised as a fundamental principle of European Union Law (Case C-74/74 *Comptoir national technique agricole (CNTA) SA v Commission* [1975] ECLI:EU:C:1975:59, para 44; Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECLI:EU:C:1981:270, para 10; and Case 70/83 *Kloppenburg* [1984] ECLI:EU:C:1984:71, para 11), whereby the conduct and the punishment must be sufficiently defined to foresee when and how a certain conduct will be punished.

[1001] Regulation 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty [2003] OJ L1/1.

for proving an infringement. In *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission,*[1002] the CJEU has clarified that the Commission must produce *'sufficiently precise and coherent proof'* of the infringement. National competition authorities and courts, on the other hand, must apply national procedural rules on the standard of proof.

The difference between the standard of proof applicable in the administrative (or criminal) proceedings for the finding of a competition infringement *vis-à-vis* the procedural rules applicable in civil proceedings raises the following question: What standard of proof must be applied for the estimation of civil liability for the calculation of fines in an infringement proceeding? The purpose of fines is not to define the dimension of the infringement, but the finding of an infringement is the necessary prerequisite for the imposition of a fine.[1003] Fines are an instrument to prevent violations by deterring future infringements and to suppress illegal conduct.[1004] For the imposition of fines, the Commission does not need to prove the committed infringement, but rather how it arrived at and the appropriateness of the sanction.[1005] Consequently, the standard of proof applied for the evidence, on which the amount of fines is based, differs from the standard necessary to prove the underlying infringement. The assessment of harm caused by the infringement and how to retaliate for it lies within the Commission's discretion. The Commission enjoys a wide discretion in terms of calculating the fines up until 10% of the undertaking's worldwide turnover.[1006] Thus, for the calculation of fines the Commission is not required to calculate the exact amount of the harm as they would be under Tort Law, but can make substantial use of estimations for an indication of the damages.[1007] It must, however, comply with the principle of proportionality and equal treatment (see section G below).

IV. Blocking an amount for the estimated damages

Since the estimated damages do not form part of the fines and victims may not necessarily claim the estimated damages, there is a risk that the costs of an infringement fall behind the illicit gains. A lack of data may create an estimation that either over- or under-estimates the amount of damages. If the estimation exceeds the damages claimed, the infringer would, in fact, be granted a discount. On the other hand, in an optimal scenario the fines would merely exceed

[1002] Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities* [1984] ECLI:EU:C:1984:130, para 20.
[1003] Article 28(2) of Regulation No 1/2003.
[1004] Case C-41/69 *ACF Chemiefarma NV v Commission* [1970] ECLI:EU:C:1970:71, para 173.
[1005] For a discussion on the standard of proof for proportionate fines, see section G.
[1006] Art. 23(2) Regulation No 1/2003.
[1007] Under the current 2006 Fines Guidelines, an estimate of the harm, namely the *gravity*, is already taken into account for the calculation of the *BA*.

the level necessary for a deterrent effect if the estimation stayed below the amount of damages claimed. Thus, from an optimal fines perspective, the latter scenario would not necessarily require a policy adjustment.

To overcome the problem of unwillingly granting the injurer a discount, the Commission would need to impose *fines* and *damages* ($pF + D$) regardless of whether victims claim damages. The Commission could then block the amount imposed for the damages on a dedicated bank account. To prevent over-deterrence, the Commission should reimburse the infringer for the damages/settlement payments made to victims until the amount of D is exhausted. Therefore, whenever the infringer pays damages or agrees on a settlement, the Commission would reimburse the infringer from the dedicated bank account. In order to ensure the effectiveness of the allocation of civil liability (discussed in Part TWO), the Commission should not reimburse the infringer before the contribution of co-infringers has been established. Any amount of damages awarded by Courts that exceed D would remain within the infringer's risk sphere and not be reimbursed. At the same time, if the amount of all damages awarded remains below D, the difference would eventually form part of the fine. The remaining amount of D would only have to be reimbursed if it led to a disproportionately high sanction, which depends mainly on the accuracy of the estimated harm (see IV.5 below).

Besides overcoming the risk of granting an unwanted rebate, the infringer's obligation to provide the compensatory payment for (estimated) damages, together with the payment of fines, provides victims with security for their claims. The proposal is comparable to the enforcement of provisionally enforceable judgements (judgements that are still open to appeal), which can only be enforced if the claimant provides a security for the enforceable amount.[1008] Whereas the requirement under procedural law is intended to protect the defendant from an incorrect judgement, the depositing of an estimated amount of damages for the loss suffered would serve the goal of deterring future infringements and guaranteeing the compensation of victims.[1009]

V. Including a presumption of harm into the methodology

The imposition of both fines and damages in the form of a security overcomes the drawbacks that could follow from an inaccurate estimation of the harm. However, the burden of estimating

[1008] For example, Section 708ff Civil Procedural Rules in Germany or Section 584 Judicial Code in Belgium.
[1009] The proposal stated that the Directive on rules on damages actions advances two goals: (1) optimising the interaction between public and private enforcement of competition law, and (2) ensuring that victims of infringements of EU competition rules can obtain full compensation for the harm they suffered; Proposal for a Directive on Certain Rules Governing Actions for Damages (n 983).

the harm lies solely with the Commission. The fact finding for the estimation may tie authorities' resources, which would negatively impact the authorities' other enforcement activities. The victims and national authorities alike will face the problem of having to gather the information about the overcharge applied by the infringer (*information asymmetry*), similar to claimants in damages actions before the national courts. The necessity of gathering information about the overcharge to calculate damages would to some extent shift from the victims to the authority, as the authorities' findings on the effects of an infringement in the fining decision could become binding, allowing victims to rely on the authorities' findings before the national civil court.[1010] The authorities' resources would quickly be occupied if they were to estimates the damage caused to every direct and indirect purchaser, thereby hindering effective enforcement. In fact, in Germany fines in antitrust infringement proceedings used to include not only the sanctioning of the antitrust violation but also the absorption of the illicit gain obtained from the infringement (*'Mehrerlösbußgeld'*). Because of the complexity of quantifying the illicit gain, the legislator dropped the requirement to quantify and absorb the illicit gain from the infringers.[1011]

Besides the very lengthy and resource-intensive process of investigating the damage caused by infringers, the risk of being unable to find evidence for the estimation of the overcharge lies with the Commission. It should also be noted that not every infringement of the competition rules necessarily leads to a loss for purchasers of the products or services subject to the infringement. For instance, a price-fixing agreement constitutes an infringement by object regardless of whether the agreed overcharge was implemented on the market. Therefore, if there is no sufficient evidence of the implementation of the agreement on the market, the estimated civil liability would be close or equal to zero. Whether the overall cost of the infringement ($F + D$) is sufficiently high to deter the infringement or whether the costs are so excessive as to deter welfare-enhancing transactions would depend on whether damage can be proven by the claimants before the national courts. As seen above, the burden of proof remains with the authority claiming the infringement. Given that fines are based on civil liability, the burden of proving civil liability without an easing of the standard of proof for the authorities bears the risk that the fines will be set below the optimal level; that is, the costs will remain below the gains from the conspiracy.

On the other hand, the Commission and national authorities already benefit from more effective means to investigate the effects of an infringement than do individual claimants before the civil courts; in particular, they have the ability to access/seize relevant information for the estimation

[1010] Article 9 Directive.
[1011] Deutscher Bundestag, Drucksache 15/3640, 42.

of the harm during their investigations (e.g., down raids, leniency). The ability to rely on the findings gained from these means would strengthen victims' positions in civil damages claims to the extent that it could be in conflict with the principle of equality of arms.[1012]

To preserve the authorities' resources and prevent the overall cost of the infringement staying below the illicit gain, a minimum amount of harm should be presumed for the calculation of fines. Presumptions, which may or may not be rebuttable, are relied on in different areas of EU Competition Law.[1013] Presumptions are used to assist decision makers by presuming that a certain *'fact or conclusion may (provisionally) be presumed because experience shows it is self-evident, or for reason of public policy or procedural convenience'*.[1014] The presumption that a particular infringement creates harm for society $> x$ is of a substantive[1015] nature, which is *'invariably an expression of mainstream economic theory, administrative or judicial experience'*.[1016] In mainstream economics, there exists no theory that suggests a price-fixing cartel creates harm of at least x. In the recent past, various empirical studies have attempted to quantify the overcharge that cartels typically create. The most common study referred to in the literature, and often even before civil courts, is the study prepared for the European Commission by Oxera in 2009.[1017] It found that 93% of all cartels investigated resulted in an overcharge with an average of 20%. In a different report, the OECD (2002) found an average overcharge of 16% in 12 cartels.[1018] Conner and Lande (2008) found on average an overwhelming overcharge of 49% on partly the same data set as the Oxera study.[1019] All of those studies have identified the different types of infringements and victims harmed by the behaviour as well as the different methods available in the economic literature to quantify the harm. They have outlined the advantages and disadvantages, the data requirements to implement them, the assumptions made about the counterfactual, and the instances in which it would be more appropriate

[1012] Recital 15 Directive states that the new rules do not only strive to overcome information asymmetry by strengthening the victims' right to access information, but also to ensure the equality of arms.
[1013] See David Bailey, 'Presumptions in EU Competition Law' (2010) 31 European Competition Law Review 20.
[1014] Ibid.
[1015] Presumptions in competition law may be categorised as evidential, substantive, or procedural presumptions; Ibid. For a more detailed analysis of the legal nature of the presumptions in the Directive, see Philipp Kirst, 'The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe' (2019) 16 European Competition Journal 97-125.
[1016] Ibid.
[1017] Assimakis Komninos and Oxera, 'Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts' (DG Competition & European Commission 2009) <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 8 March 2021 (**Oxera study**).
[1018] OECD, 'Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws' (2002).
[1019] Robert H. Lande and John M. Connor, 'Cartel Overcharges and Optimal Cartel Fines' in *Issues in Competition Law and Policy* (ABA Section of Antitrust Law 1st ed. 2008) 3:2203–2218.

to use a certain technique over another.[1020] The overcharges are based on an estimation of the difference between the price charged and the hypothetical counterfactual price, which may explain the substantial differences between the results of these studies. However, it also shows that each cartel operates uniquely and that the markets on which they operate also have unique characteristics. Boyer und Kotchoni (2011, 2012)[1021] have analysed the different studies and found that the various overcharges are based on different methods of estimation and sources of publication. The authors also calculated the mean value by correcting the variations between the studies and arrived at a mean overcharge of 17.5%.

All the aforementioned empirical studies provide an average of the harm caused by an anticompetitive behaviour based on the experience of competition law enforcement in recent years. Studies do not yet exist for all anticompetitive conduct and the results may change over time, depending on the effectiveness of the enforcement regime. However, empirical studies on the quantification of harm serve as a sound basis for the presumption of the average harm of an infringement. For the presumptions to achieve a level high enough to outweigh the gains of the infringement, the empirical evidence should be updated over time when necessary.

Following the results of Oxera (2009), the presumption for cartel infringements could be based on an average 20% overcharge or the mean arrived at by Boyer and Kotchoni (2011, 2012). Whereas the Oxera (2009) study was prepared for the European Commission on a single methodology, Boyer and Kotchoni (2011, 2012) used correctives for different methods to arrive at a mean value. From a legal certainty perspective, the latter approach is less suitable for a legal presumption. It bares great uncertainty, because with new studies and methodologies published, the presumption could potentially be challenged. Consequently, the presumption should be based on the results of empirical studies conducted with a methodology universally applied depending of the type of infringement.

[1020] Giovanni Notaro, 'Methods for Quantifying Antitrust Damages: The Pasta Cartel in Italy' (2013) 10 Journal of Competition Law and Economics 87–106, in which the author examines the consequences of applying the different methods to a particular case instead.
[1021] Marcel Boyer and Rachidi Kotchoni, 'The Econometrics of Cartel Overcharges' [2011] SSRN Electronic Journal; Marcel Boyer and Rachidi Kotchoni, 'How Much Do Cartel Overcharge?' (2015) 47 Review of Industrial Organization.

Similar presumptions of harm already exist in some Member States. Hungary[1022] and Latvia[1023] have included a rebuttable presumption of 10% and Romania[1024] a presumption of 20% for the overcharge in cartels in damages actions. Although defendants can still rebut the presumption of harm, it strengthens the plaintiff's position by introducing a legal starting point for the judge to estimate the damages. On the other hand, the judge may be inclined to rely on the legal presumption and not necessarily deviate from the presumed amount to the benefit of the claimant. By contrast, the methodology proposed in this chapter does not bias courts to follow the presumptions on which the fines are based. The fines are an administrative sanction with no binding effect for the courts. The claimant still carries the burden of proof for the amount of damages caused by the infringement.[1025] Moreover, as every cartel is different with different effects on the market, the presumptions of harm applied during the administrative proceeding have no informative value on the effects in the individual case.[1026]

VI. Causation

In this section, the standard of proof for the causal relationship between the harm and the infringement that must be applied by the authority for the proposed methodology is analysed in more detail. In civil proceedings where damages are claimed, a sufficient connection (causation) between the damage suffered and the violation of the law by the defendant is a necessary prerequisite for the awarding of damages. In competition damages actions, proof of the causal link between the harm and the competition law infringement often requires a complex economic analysis based on a large amount of factual evidence and economic data.[1027] Generally, the legal notion of causation lies within the sovereignty of Member States, which have defined different

[1022] Article 88/C Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.
[1023] Julija Jerneva and Inese Druviete, 'Latvia' in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017) 164. During the parliamentary discussions extending the 10% presumption to other infringements such as abuse of dominance was even considered.
[1024] Art. 16 ORDONANȚĂ DE URGENȚĂ nr. 170 din 14 octombrie 2020 privind acțiunile în despăgubire în cazurile de încălcare a dispozițiilor legislației în materie de concurență, precum și pentru modificarea și completarea Legii concurenței nr. 21/1996.
[1025] It should be noted, however, that Art. 17(2) Directive 2014/104/EU introduces a presumption that cartels cause harm.
[1026] However, it would be worthwhile to include a clarification in the implementing legislation that the presumption of harm has no binding effect in damages proceedings. The first judgments in relation to the Truck cartel have shown that (some) courts tend to rely on studies (most commonly the Oxera study) when estimating the harm. For example, in Spain some courts have estimated damages based on the 2009 Oxera study (see for example cases 256/2018 and 257/2018 before the Juzgado de lo Mercantil Número 1 de Almería, case 309/2018 before the Juzgado de lo Mercantil No. 3 de Valencia, and cases 151/2019 and 118/2019 before the Juzgado de lo Mercantil Número 1 de Pontevedra).
[1027] Staff Working Paper, Annex to Green Paper Damages actions for breach of the EC antitrust rules (2005) SEC(2005)1732 para 274.

requirements for the causal connection. However, the Commission has found that in concrete cases, these concepts *'will not lead to widely diverging results and that the concepts derive from the legal culture of the jurisdictions in question more than to actual differences in appreciation'*.[1028] The Directive, on the other hand, does not contain one generic definition of causation and does not intend to harmonise national rules on causation. Instead, it limits the harmonisation of rules to provisions on the burden of proof for the causal link between the infringement and the harm. In particular, it introduces a presumption that cartels *cause* harm to *'remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages'*.[1029]

Chapter II, A.I. above illustrated the dividing line between the requisites of the right to claim compensation governed under Union law *vis-à-vis* those requisites which fall under domestic law. Here, the CJEU's case law is briefly discussed in relation to causation as a prerequisite for the claim for compensation. In recent years, the extent to which causation is governed solely by domestic law has been addressed in several judgements of the CJEU, most recently in *Otis*.[1030] In *Manfredi*, the CJEU outlined the relationship between the requirements for causation under domestic law and the requirements under EU law: *'In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of "causal relationship", provided that the principles of equivalence and effectiveness are observed'*.[1031] In *Kone* the CJEU confirmed *'that it is, in principle, for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of "causal link"'*, but Member States *'must ensure that European Union competition law is fully effective'*.[1032] Thus far, the Court has refrained from giving a positive definition, as a matter of EU law, of the concept of a 'causal link'. Consequently, the Directive reiterates the relationship set out by the Court and holds that irrespective of the harmonised rules of the Directive, the requirements for causation are still governed by national rules provided they comply with the principle of effectiveness and equivalence. [1033] In *Skanska*, Advocate General Wahl has interpreted the CJEU's case law in a way that the test of equivalence and effectiveness is applied only with regard to rules that (in one way or another) relate to the application of the right to claim compensation. On the other hand, Wahl suggested that *'where the constitutive*

[1028] Ibid, para 275.
[1029] Directive, recital 47.
[1030] *Otis and others vs Land Oberösterreich and others* (n 993).
[1031] *Manfredi and Others v Lloyd Adriatico* (n 989) para 64.
[1032] *Kone and others v. ÖBB-Infrastruktur AG* (n 992) para 32.
[1033] Directive, recital 11.

conditions of the right to claim compensation are at stake (such as causation), such conditions [should be] examined by reference to Article 101 TFEU'.[1034] As this interpretation is, at first sight, difficult to reconcile with the clear wording in *Manfredi*, the court's ruling was therefore eagerly awaited. The CJEU held in line with the Advocate General Wahl's opinion that the question of which entity is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law.[1035] The Court, however, did not address the question of how to determine the causal link between the harm and the infringement, as this was not part of the question brought before it. The case *Otis*, on the other hand, concerned in essence the limits to the scope of causation.[1036] The court was asked whether Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the market affected by a cartel are eligible to claim damages. In the case referred to the court, the Province of Upper Austria had provided promotional loans to builders of homes who purchased products from undertakings that participated in the elevator and escalator cartel. As a result of the cartel, the plaintiff claimed to have had to grant higher loans than in the counterfactual situation without the cartel. Similar to the situation in *Kone*, Austrian domestic law prevented claimants who were not active on the cartelised market to claim compensation because it required a specific connection with the 'protective scope of the norm' (*'Schutzzweck der Norm'*) pursued by Article 101 TFEU. Therefore, the case concerned the question of whether a restriction on causation under national law that categorially excludes the right to claim compensation for claimants not active on the affected market violates EU law. The court, with reference to the opinion of Advocate General Kokott, held that the claimant is not required to show that the loss is in a sufficient connection with the *'Schutzzweck der Norm'*.[1037] Instead, it follows from the previous case law of the court that a systematic exclusion of victims other than suppliers or customers active on the affected market to claim compensation would undermine the full effectiveness of Article 101 TFEU.[1038] Kokott, in her opinion, noted that the legal concept of causal relationship consists of more than one layer (*'mehrschichtiges Rechtsinstitut'*), namely *normative* causation and *factual* causation.[1039] The aspect of normative causation in *Otis* concerned whether the causal link between the damage and the infringement also requires

[1034] Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy et al*. [2019] ECLI:EU:C:2019:100, Opinion of Advocate General Wahl, paras 40-41.
[1035] Case C-724/17 *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al*. [2019] ECLI:EU:C:2019:204, para 28.
[1036] *Otis and others vs Land Oberösterreich and others* (n 993).
[1037] Ibid, para 31.
[1038] Ibid, para 27.
[1039] C-435/18 *Otis and Others v Land Oberösterreich and Others* [2019] ECLI:EU:C:2019:651, Opinion of Advocate General Kokott, para 50ff.

a specific connection with the *'Schutzzweck der Norm'*. This question relates to the material conditions of the claim, namely the protective scope of Article 101 TFEU, and not to the procedural rules governing the exercise of that claim. Without explicitly picking up on that differentiation between *normative* and *factual* aspects of causation, the CJEU held that while a normative restriction of the right to claim compensation to victims active on the affected market violates EU law, it nevertheless is for the national court to determine whether the claimant has *'actually suffered such loss'* and whether the victim *'adduces the evidence necessary of the existence of a causal connection between the loss and the cartel at issue'*.[1040] In light of the case law, the question of whether the person claiming damages is included in the protective scope of the competition rules is a matter of directly applicable EU law. By contrast, the evidential burden of factually proving that a loss was actually suffered as a result of the competition infringement is subject to domestic law.

Thus, with regard to the quantification of the potential civil liability that is necessary for the calculation of fines, diverging requirements for the proof of an actual causal connection between harm and the infringement between the different legal systems in Europe could become problematic. This is particularly the case where the rules on the causal connection result in different outcomes; that is, the case is dismissed in one country while damages are awarded in another country. For cartels operating across borders within the EEA, the Commission would have to consider the probability that victims can prove a causal harm in every jurisdiction the undertakings participating in the infringement are active in to arrive at the correct estimate. This task is extremely burdensome, and it would tie additional resources if the Commission had to undertake such a comprehensive investigation. The complexity and difficulty of such an undertaking can be illustrated by the Trucks cartel. In Germany, courts have thus far in many cases only ruled on the merits of a damages claim and postponed the quantification of the harm to a separate proceeding because of the difficulty in proving that the exchange of gross list prices had a causal effect on the customers' end prices.[1041] In Spain, on the other hand, some courts have discarded parties' expert reports for the quantification of damages, and instead the court

[1040] *Otis and others vs Land Oberösterreich and others* (n 993) para 33.
[1041] For example, Regional Court Stuttgart, Cases 2 U 101/18, 45 O 1/17, 30 O 33/17, 45 O 6/17, 30 O 53/17, 45 O 4/17, 45 O 13/17, 30 O 47/17, 30 O 310/17, 30 O 311/17, 30 O 7/18, 30 O 11/18, 30 O 124/18, 30 O 88/18, 30 O 44/17, 30 O 30/18, 30 O 43/17, 30 O 27/17, 30 O 116/18, 30 O 89/18, 30 O 132/18, 30 O 120/18; Regional Court Hannover, Cases 18 O 8/17, 18 O 18/17, 18 O 21/17, 18 O 23/17, 18 O 13/17, 18 O 19/17. The German Federal Court of Justice (**BGH**) has significantly limited the ability of courts to issues an interlocutory judgment on the existence or non-existence of a damages claim without quantifying the amount of damages in cartel damages cases with its judgment of 28 January 2020, KZR 24/17 – *Schienenkartell II*.

has estimated the overcharge relying on the average found in the Oxera study.[1042] Thus, in the absence of a harmonised concept of causation for EU Competition infringements, the fining methodology must at least be based on a common rule on causation, which takes reasonable account of the differences between the national legal systems.

The fundamental problem for the assessment of causation for this proposal is the *ex ante* view that is necessary for the estimation of damages for the administrative fine. By its nature, the legal concept of causation is based on an *ex post* perspective looking back on whether the harm has occurred because of the tort infringement. This explanatory function of causation is usually referred to as *causation in fact*.[1043] The second function of causation is usually referred to as *causation in law*, which limits the liability of an infringer to those effects of the violation that are legally relevant.[1044] Limiting the compensable damages to those that are legally relevant essentially determines responsibility. Chapter IV, D.II explained that the determination of responsibility in legal causation theories also entails policy choices (e.g., the protective scope of the legal rule). Legal causation takes a 'forward-looking' approach from the perspective of the individual tortfeasor. Depending on the jurisdiction, different tests of legal causation (e.g., reasonable foreseeability, adequate connection) connect the responsibility of the tortfeasor to the probability that the tortfeasor's act causes a certain damage. This two-stage approach on causation under national Tort law contradicts to some extent the purely *ex ante* estimation of civil liability as proposed in this chapter because the estimation is undertaken before any action has been filed and it is not clear what types of losses will be claimed. However, authorities cannot apply a concept of causation that makes it necessary to establish a causal link between the infringement and any individual who potentially may have suffered harm. Instead, authorities would need to limit the analysis to an estimation of the potential civil liability as a whole, which requires a causal generalisation containing abstract conditions.[1045] Such a generalisation of causation only provides a *'probability, rather than certainty, that the underlying causal law were completely instantiated and, thus, that the condition at issue actually was a cause of the relevant consequence'*.[1046] Similar to the application of the *presumption* of harm suggested in

[1042] For example, Case 309/2018 before the Juzgado de lo Mercantil No. 3 de Valencia; and Cases 151/2019 and 118/2019 before the Juzgado de lo Mercantil Número 1 de Pontevedra.
[1043] Ioannis Lianos, Peter J Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press 2015) 4.16. See the discussion on the different theories on causation in chapter IV, D.III.
[1044] Ibid.
[1045] Wright refers to this as the '*general causation*'; Richard W Wright, 'Proving Causation: Probability Versus Belief', in R. Goldberg, *Perspectives on Causation* (Hart Publishing 2011).
[1046] Ibid, 206.

Section D.V above, the competition authority would have to rely on a probability for the *estimation* of civil liability.

An academic generalisation of causation may not be appropriate for establishing a causal link under the law. The '*legal concept of causation would require instead a concrete instantiation of a causal law on the particular occasion, regarding the existence of a causal link between the specific event A and the specific event B*'.[1047] The generalisation of causation describes the probability based on the frequency an infringement of competition law has led to a particular harm in the totality of situations where an infringement has been found. Consequently, because the generalisation of causation does not consider the causal link in an individual case, the general causation is inconclusive for the causal link in an individual case, and therefore, it cannot have a binding effect in follow-on damages actions. The claimant will still have to prove that the infringement caused her individual loss.

Authorities will need to apply a principle of causation that anticipates to a sufficient degree the number of cases in which the *causation in fact* and *causation in law* can be proven without exhausting the authority's resources. However, since authorities do not have knowledge about who may have suffered a loss and whether those victims will successfully claim their losses, they are left with uncertainty as to whether individuals have suffered causal harm. In legal theory, approaches have developed in situations of causal uncertainty. *Gilead et al*.[1048] outline five doctrines that have been developed in legal theory to deal with the situation of causal uncertainty and which do not require an in-depth analysis of factual causation.[1049]

The most obvious method is to ignore causal uncertainty altogether. However, as Lianos has pointed out, ignoring causal uncertainty leads to either over- or under-compensation, depending on the standard of proof.[1050] It was shown above that the Commission enjoys wide discretion when calculating fines, so in theory the Commission could ignore the certainty of causation when estimating damages. The accuracy of the estimation would then depend solely on the method chosen to quantify the harm. On the other hand, when ignoring causational certainty altogether, the estimation could include all losses brought forward by potential victims. Causation as a legal instrument in Torts ensures corrective justice by limiting compensation to losses

[1047] Ibid, 205; Ioannis Lianos, 'Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe' (2015) 2 CLES Research Paper Series 9.
[1048] Israel Gilead, Michael D. Green and Bernhard A. Koch, 'General Report Causal Uncertainty and Proportional Liability: Analytical and Comparative Report' (2013) in Israel Gilead, Michael D. Green and Bernhard A. Koch *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter, 2013) 1-73, 5.
[1049] Ioannis Lianos (n 1047) 1-62.
[1050] Ibid, p. 19.

that were caused by the infringer. By ignoring the causal link between a loss and the infringement, the amount of the estimated damage is likely to exceed the losses that will be compensated under national tort law. An over-estimation of civil liability would have a negative effect on deterrence under the approach proposed in this chapter: an overestimation of the civil liability ultimately leads to the setting of fines (*F*) below the optimal level.

Another approach is to impose tort liability according to the causal probability that the tortious conduct caused the harm ('causal proportional liability').[1051] The approach requires knowledge of the harm before the responsibility for the specific harm can be attributed to the infringer. Because the estimation requires an *ex ante* approach of causation before the harm is known, the causal proportional liability approach therefore cannot be applied.

The last approach is similar to the first approach, but instead of ignoring the causal uncertainty altogether, it bypasses the uncertainty problem by allowing *'claims in which the claimants are not required to establish the individual harm caused … but rather the overall harm caused to the claimants as a group'*.[1052] The approach has been described as advancing an administrative governance solution that would substitute *'public law sanctions (taxes, fines or fund schemes) for tort liability'*, where the awarded money would be used *'to repair the harm, on a collective or individual basis, and to help prevent such harms in the future'*.[1053] This approach generalises the harm caused to a group without requiring an individual link between the infringement and the harm, but considers the overall harm following an infringement. Since neither the claimants nor their individual harm are known to the authorities at the time authorities have to estimate the civil liability to set the amount of fines, determining the overall civil liability by an infringement is the only suitable method for the purpose of setting fines.

Moreover, determining causation for the overall harm instead of proving causal harm of each (potential) victim is also preferable from public policy considerations. The objective of competition fines is to deter future infringements. Thus, for the deterrent effect of fines, the overall gain from the infringement (i.e., the premium that victims had to pay because of the infringement) is relevant rather than the specific harm that was caused to individual victims.

[1051] For more details on the causal proportional liability doctrine, see chapter IV, D.III.5 above.
[1052] Israel Gilead, Michael D. Green and Bernhard A. Koch (n 1048) at 29. For instance, this approach allows for actions or representative actions where the awarded amount would be distributed among the claimants.
[1053] Israel Gilead, Michael D. Green and Bernhard A. Koch (n 1048) 29, referred to in Ioannis Lianos, Peter J Davis and Paolisa Nebbia (n 1043) 4.57, 88.

VII. Methods to quantify the harm

Even more so, the accurate estimation of the infringer's civil liability depends on the method used to quantify the harm. Different methodologies exist for the quantification of damages from competition infringements.[1054] The amount of the cartel's overcharge can be estimated by comparing either the prices before and after the cartel or by comparing prices during the cartel period on a similar market in a different geographical area. The difference between the cartelised price and the price before and after the cartel period and/or the similar market constitutes the overcharge, which can be claimed by direct and indirect customers. These approaches require that (1) the cartel period can be clearly distinguished from the periods of competitive behaviour; and (2) the market is comparable to the market with the infringement, meaning prices on the comparative market were not affected by other factors. Furthermore, those methods assume that in the absence of the infringement, prices would have remained at the level prior to the collusion. Because of this weakness, the preferable approach would be an econometric analysis, whereby a statistical assessment of the determinants of observed pricing in the industry is conducted.[1055] Although the results may be more robust, the *econometric approach* requires intensive data, particularly on a significant number of periods during which the cartel was not operating. Another approach used is the *cost-based approach*, which estimates the competitive price based on the costs of the undertakings. This approach requires information about the pre-cartel price–cost margins, or otherwise it can only rely on assumptions about the nature of competition in the absence of the cartel. Overall, the approaches require a significant amount of data to estimate the overcharge accurately.

Arguably this highly complex analysis and the collection of data may require immense resources from the competition authorities, which raises administrative costs for enforcement. However, every claimant will have to conduct this exercise individually before or during litigation. While it is correct that the quantification of the harm remains highly resource-intensive, the exercise does not have to be shouldered solely by the authority for two reasons: First, in case the Commission has difficulties gathering relevant data to estimate the overcharge, it can rely on the presumed overcharges; and second, claimants will have a strong incentive to prepare the estimations of their individual harm for the authority. The harm estimated will also be collected together with the fines. Given that the infringer will have to pay a security for the estimated civil liability, victims of the infringement have an interest in ensuring that their damage

[1054] For an overview of the different methodologies for calculating antitrust damages for different types of competition infringements, see Simon Bishop and Mike Walker (n 996), ch 17.
[1055] Simon Bishop and Mike Walker (n 996) 17-010.

is included in the security. The Commission, on the other hand, would have a strong interest in cooperating with victims to accelerate the investigation and ensure an accurate estimation of harm.

VIII. Determining the amount of fines ($\boldsymbol{F}$)

As has been shown above, under the current regime Fines are based on a basic amount (BA) adjusted by 'aggravating circumstances' (AC) and /or 'mitigating circumstances' (MC), the 'specific deterrence increase' (SDI), as well as the undertaking's inability to pay (ITP).[1056]

With the new approach introduced in this chapter, it would only be necessary to impose a fine in addition to the calculated harm to achieve deterrence, assuming that the method chosen to quantify the harm is broad enough to include the entire overcharge (π) gained from the infringement. At the same time, it ensures compensation of the harm caused by the infringement. Thus, in contrast to previous findings in the literature, as long as a security for the civil liability is also imposed together with the fines, the fine can be substantially lower and still exceed the additional premium gained from the infringement. The potential infringer is then also assured that the overall costs of colluding exceeds their gains.

Thus, fines (F) would no longer need to include the basic amount (BA), which instead would be imposed separately as a security of the follow-on damages claims. However, fines would then need to be based on a deterrent factor to exceed the gains from the infringement. In other words, F must be based on an 'entry fee' on top of the damages, which would then be adjusted by other factors.

Under ideal conditions, the damages estimated by the Commission would equal the profits gained from the infringement. In that case, the fine could achieve deterrence with a small amount equalling the entry fee multiplied by the detection rate, because this would ensure that the overall costs of the infringement exceed the gains. Where the estimation of damages can only be based on presumptions or where the exact amount of damages cannot be determined accurately, the entry fee must be set at a level sufficiently high to deter future infringements while taking the detection rate into account. Given that the harm generally corresponds with the profits gained from the infringement, it is sensible to set the entry fee as a proportion of the damages calculated in advance. Consequently, the amount of the average loss (from the presumption) also becomes the relevant amount for calculating the entry fee. In cases where the

[1056] See section B above.

exact amount of damages is unknown, the entry fee can still be derived from the presumption that the cartel caused at least the average harm, ensuring that the level of fines will be set at a deterrent level. Hence, the entry fee should be calculated as a proportion of the calculated or presumed civil liability, which can be written as iD, where $i \, \varepsilon \, [0, 1]$. The proportion of damages iD may differ depending on the infringement and the different detection rates. The entry fee may therefore be higher for long-lasting *hardcore infringements* compared with that for other violations. That being said, the Commission should strive to increase the detection rate by strengthening other tools to incentivise cooperation and uncover infringements (i.e., leniency and settlements).

Next, the entry fee would be adjusted in parallel to the current Fines Guidelines, except for the specific deterrence increase (SDI), which becomes obsolete under the proposed methodology. Under the current 2006 Guidelines, *'irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales … in order to deter undertakings from even entering into horizontal price-fixing … agreements'*.[1057] In addition to the deterrence increase of up to 25% of the entry fee, the Commission may also add the SDI *'beyond the sales of goods or services to which the infringement relate'*. Whereas the SDI is an additional amount isolated from the sales generated during the period of the infringement, the entry fee may not exceed 25% of the relevant value of sales.

On the other hand, the entry fee under the proposed approach is a proportion of the overcharge, which will be added on top of the security for the harm. An additional increase would only become necessary where the total amount of the security and the fine do not exceed the expected gain from an *ex ante* perspective. This may be the case in well-organised cartels with low detection rates (p). Given that the entry fee no longer relates just to the sales but also to the overcharge gained from the infringement, it may be increased to compensate for a low detection rate. An additional deterrence increase in isolation from the overcharge will not be so accurate as to increase the proportion of the overcharge as part of the entry fee. To prevent over-deterrence, an additional SDI in isolation of the overcharge should be avoided.

Besides the deterrence aspects, the level of the entry fee must be high enough to include other aspects as well, particularly the authority's budgets. With the new approach, the fine will remain significantly below the level of the 2006 Guidelines if the Commission has to reimburse the

[1057] Commission Notice on Immunity from fines and reduction of fines in cartel cases 2006/C 298/11, para 24.

security. Thus, aspects such as the cost of the authority's investigation must also be taken into account when setting the entry fee. The previous 25% cap for the entry fee may therefore no longer be suitable.

The entry fee should only be adjusted by AC, MC, and ITP. The fines could therefore be expressed as follows:

$$F = iD + AC - MC - ITP\ .$$

Consequently, the 10% cap under Regulation No 1/2003 would only apply to the amount of F, because the additionally imposed damages (D) only serve as a security for follow-on damages claims. However, where the limitation periods have expired and the full amount of D has not been claimed by victims, the 10% cap must also apply to the remaining amount, which then effectively converts into a fine.

The Directive does not include an absolute limitation period, but Member States remain free to introduce such limitation periods as long as claimants can seek damages at least for 5 years after they have gained knowledge of the infringer and the infringement has ceased.[1058] Some Member States have introduced absolute limitation periods, albeit with different durations from 10 years (Austria, Denmark, Finland, Germany, Latvia, Poland, Slovakia, Slovenia, and Sweden) to 15 years (Croatia) and even 30 years (Luxembourg).[1059]

The Commission would have to introduce a harmonised absolute limitation period by which date the remaining amount of D would become part of the fines. Some Member States have already introduced absolute limitation periods after the infringement has ceased.[1060] However, it can safely be assumed that the imposition of the security of D alongside F will incentivise claimants to litigate their damages without any delay.

IX. Summary of the changes to the current method of calculating fines

This section has introduced and outlined a new approach for the calculation of fines to reconcile administrative liability and the civil liability from price-cartel infringements. The objective of the approach is two-fold: to overcome potential over-deterrence following an increase of damages claims after the implementation of the Directive without jeopardising compensation of

[1058] Article 10 (2) and (3) Directive 2014/104/EU. See also chapter II, B.VI.
[1059] Chapter II, B.VI.
[1060] For example, Section 33h (3) of the German GWB.

victims, while simultaneously ensuring that the costs from the infringement will always exceed the illicit gains.

To prevent over-deterrence, the logical consequence is to integrate the civil liability into the calculation of fines. However, this integration leads to several legal and economic implications. Since the infringement decision is generally taken before victims claim damages, authorities will need to estimate damages from an *ex ante* perspective. Consequently, the civil liability that can be taken into account for the calculation of fines is limited to damages claims that can be reasonably estimated. This includes the harm suffered from direct and indirect purchasers following an infringement. Additional types of damages may only be considered if victims can provide evidence before the infringement decision is taken. Because the Commission may not have sufficient resources to quantify the harm, it should cooperate with victims to collect information for the estimation. Unlike national Tort law, the Commission can apply a general theory of causation, which concentrates on the overall harm caused.

On the other hand, to ensure that the costs of the infringement exceed the illicit gains, even in cases where the harm cannot be quantified accurately, the Commission should make use of presumptions of harm based on empirical evidence from previous infringements. In addition, the Commission should impose a security of the estimated damages, which will only be reimbursed to the infringer after the infringer has compensated the claimant (as part of a settlement or a court judgement).

Fines are then based on an entrance fee on top of the infringer's civil liability to ensure deterrence. The amount of the entrance fee, in turn, consists of the estimated civil liability multiplied by a gravity factor. Consistent with the current methodology, the entrance fee will then be adjusted according to aggravating and mitigating circumstances. By contrast, the specific deterrence increase will only become necessary where the total amount of the security for the civil liability and the fine does not exceed the expected gain from an *ex ante* perspective. Lastly, the fine may be adjusted for the undertaking's inability to pay. The amount of the security not claimed becomes part of the fines to which the cap of 10% of an undertaking's worldwide turnover applies.

E. Optimal Level of Fines – Determining the 'Entry Fee'

Section C.I summarised the two main theories for the definition of optimal sanctions, namely the reparation of harm (compensation) and deterrence. This section illustrates that with the proposed methodology fines can be set at an optimal level. The proposed methodology is based on the overcharge caused by the infringing firms, namely the harm suffered by purchasers. In addition to the fine (F), a security (SEC) is imposed that (ideally) equals the overcharge illicitly gained from the infringement. Thus, the cost of infringement under the new approach is

$$SEC + F,$$

if an infringement is detected or certainty ($p = 1$) exists that the infringement will be detected. This section reviews the proposed methodology from the compensation perspective as well as deterrence.

I. Compensation theory and the new approach

To satisfy the compensatory condition, the minimum level of fine must equal the *'net harm to persons other than the offenders'*.[1061] Therefore, if we assume that the additional profit of the infringement and the overcharge suffered by purchasers are identical, the new approach satisfies the compensatory benchmark. This is true if (1) there is sufficient data to either calculate the actual overcharge or the presumption of the overcharge at least equals the illicit gain, and (2) the infringement has caused harm only to direct and indirect purchasers ('direct effect' and 'output effect') or the harm suffered by others is known and the SEC can be determined accurately. If one of the assumptions is untrue, the fine remains below the optimal compensatory benchmark. Thus, the calculations must account for these information asymmetries to satisfy the compensatory benchmark.

In the following extract, a simple mark-up model illustrates how the compensatory benchmark (minimum level of fine) can be calculated when both assumptions are met; that is, when the 'but-for' price can be determined.

[1061] William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652–678 (656).

Extract 1: A simple mark-up model to simulate the minimal compensatory fine

The simple mark-up model was developed by Buccirossi and Spagnolo (2007).[1062] It assumes perfectly symmetric firms where the competitive price ('but-for' price) is determined by a mark-up m over marginal costs. Marginal costs c are constant, so that the competitive price p_c is given by

$$p_c = c(1 + m)$$

When both firms collude, they are able to increase the market price above the competitive level by a factor of k. The collusive price will then be

$$p_m = p_c(1 + k) = c(1 + m)(1 + k).$$

A constant demand elasticity e is assumed, where q_m illustrates the quantity sold when colluding, and q_c the quantity sold under 'competitive' conditions:

$$e = -\frac{(q_m - q_c)p_c}{q_c(p_m - p_c)}.$$

After some algebra, q_m can be rewritten as

$$q_m = q_c(1 - ek).$$

The turnover of each firm when colluding is

$$p_m q_m = c(1 + m)(1 + k)q_c(1 - ek).$$

The profit of each firm when competing is

$$\pi_c = (p_c - c)q_c,$$

while the cartelised profit is

$$\pi_m = (p_m - c)q_m = c(1 - ek)(k + m + km)q_c.$$

From the calculations above, the additional profit from colluding is

$$\Delta\pi = c[(1 - ek)(k + m + km) - m]q_c.$$

To satisfy the compensatory benchmark the minimal level of fine must equal the illicit profit gained ($\Delta\pi$) as well as the loss in consumer welfare, the deadweight loss (π_{dwl}).[1063] When including the probability of detection (p), the minimal fine ($F^{\dagger}$) *ex ante* is

$$F^{\dagger} = p(\Delta\pi + \pi_{dwl}).$$

In relation to the firm's turnover, the minimal level of fine is

$$f^{\dagger} \equiv \frac{F^{\dagger}}{p_m q_m} = \frac{p(\Delta\pi + \pi_{dwl})}{(p_m q_m)}.$$

As shown above, the elasticity of demand is negative and determined by e. The supply curve is constant, since marginal costs and mark-up are assumed to be constant. Thus, the *deadweight loss* can be calculated as follows:

$$\pi_{dwl} = \frac{(p_m - p_c)(q_c - q_m)}{2} = (1+m)\frac{k^2 ceq_c}{2}.$$

We can now rewrite the minimal level of fines as a function of m, c, k, e, q, and w:

$$f^{\dagger} \equiv \frac{pk(\left(1 - \frac{ek}{2}\right)(m+1) - em)}{(1+m)(1+k)(1-ek)}$$

II. Deterrence theory and the new approach

Fines satisfy the deterrence theory when they are set at a sufficient level to deter other infringements. Deterrence theory suggests that fines are at an optimal level if the anticipated cost at least equal the gain from infringing the law, which is illustrated by

$$\Delta\pi \leq pF.$$

The formula can be rewritten as follows to find the optimal level of fines:

$$F = \frac{\Delta\pi}{p}.$$

[1062] Paolo Buccirossi and Giancarlo Spagnolo, 'Optimal Fines in the Era of Whistle Blowers: Should Price Fixers Still Go to Prison?', in Goshal, V., Stennek, J. (eds.) *The Political Economy of Antitrust* (Elsevier 2007), 81–122. The same model is also used by Massimo Motta (n 976) 209-220.

[1063] See chapter VI, E.II above for an explanation of the deadweight loss. For the purpose of illustrating the minimal level of compensatory fines, it is assumed that the deadweight loss covers the entire harm of society. It should be noted, however, that this is a simplification and that collusion may result in other inefficiencies such as a lack of innovation.

With the approach suggested in this chapter, a new infringement would be deterred if

$$\Delta\pi \leq p(SEC + F).$$

In a best-case scenario, SEC equals the illicitly gained profit from infringing the competition rules ($\Delta\pi$). Hence, the deterrence formula can be rewritten as

$$\Delta\pi \leq p(\Delta\pi + i\Delta\pi + AC - MC - IDP).^{1064}$$

The optimal deterrence level under the new approach can be simulated based on the simple mark-up model from above:

Extract 2: A simple mark-up model to simulate the minimal deterrent fine

The deterrence benchmark only considers the *ex ante* anticipated costs and gains. The benchmark is satisfied when the costs of the infringement outweigh the gains; therefore, the conditions for an infringement to be deterred are

$$\Delta\pi \leq pF + p(SEC).$$

The minimal fine under the new approach can be rewritten as follows:

$$F^{\dagger} = \frac{\Delta\pi}{p} - (\Delta\pi).$$

It also proves that the level of fines for deterrence under the new approach is substantially lower, since the Commission also collects an equivalent of the illicit gain as a security. In relation to the firm's turnover, the minimal level of fine is

$$f^{\dagger} \equiv \frac{F^{\dagger}}{p_m q_m} = \frac{(1-p)\Delta\pi}{(p_m q_m)}.$$

The minimal level of fines under the new approach as a function of m, c, k, e, q, and w is

$$f^{\dagger} \equiv \frac{k(1-p)(1+m-ek-em-ekm)}{(1+m)(1+k)(1-ek)}$$

[1064] For the calculation of the minimal optimal fine under the deterrence theory, aggravating and mitigating circumstances as well as the inability to pay are not considered. These factors only marginally adjust the 'Entry Fee' for non-deterrence considerations, which infringers are unlikely to take into consideration *ex ante*. For instance, the inability to pay is only considered for undertakings that would otherwise face bankruptcy.

The analysis above has shown that in the best-case scenario, in which the SEC can be determined correctly, the new approach satisfies both the compensatory and deterrence benchmarks. If the correct level of SEC is uncertain or there is only a low probability of detection, the level of fines may remain below both benchmarks. The main value to reflect both uncertainties is the 'entry fee' ($iSEC$), which is a factor of SEC.

III. Probability of detection

The probability of detection of cartels is very difficult to assess since the number of undetected cartels is unknown. Several studies have attempted to estimate the probability of detection of cartels. The first and most cited study to estimate the probability of detection was undertaken by Byant and Eckart (1991). The study estimated an annual probability of detection between 0.13 and 0.17 based on a sample of cartels detected during 1961–1988 in the US and before the introduction of leniency programmes in 1993. Based on Byant and Eckart's findings, most authors assume an average probability of detection of 15%. However, this detection probability only relates to the annual probability of detection for cartels that will eventually be detected.[1065] Because no data exist on the cartels that remained undetected, Byant and Eckart's estimations do not relate to the global probability of detection. Combe et al. (2008) use the same framework for calculation as Byant and Eckart and find a probability of detection between 12.9% and 13.2% in the EU between 1969 and 2007. However, the authors note that the difference in probabilities between both studies may be explained by the differences in methodology. Since both studies are based on a data set of detected cartels, their findings only represent the upper boundary of the global probability of detection.

The aim of this chapter is not to contribute to the discussion on the probability of detection. The brief analysis of some of the existing literature, however, illustrates the difficulty of assessing the probability of detection. The assessment of the probability of detection is highly case-specific, as some infringements are more likely to be discovered than others. Several factors influence the stability of cartels, such as the number of firms involved in the cartel, the interaction necessary to coordinate the behaviour (several or annual meetings), the characteristics of the affected markets (demand elasticity, buyer power, product differentiation, entry barriers, and cost asymmetries), and the monitoring and punishment mechanism (quick, effective, and cred-

[1065] Emmanuel Combe, Constance Monnier and Renaud Legal, 'Cartels: The Probability of Getting Caught in the European Union' (2007) SSRN Electronic Journal.

ible).[1066] For instance, it is much more difficult to detect a coordinated behaviour between firms in a duopolistic market structure where prices are available in the public domain than it is between many firms in a fragmented market where prices are discussed individually with customers. Thus, there is no global percentage that can be applied to all competition infringements; instead, the probability of detection must be assessed on a case-by-case basis. In the case of a well-structured price-fixing cartel, the probability of detection is very likely to be well below the upper bound of 12.9% found by Combe et al. (2008).

IV. Adjusting the 'entry fee'

Thus far, we have seen that the assessment of the optimal level of fines must include the probability that the kind of infringement is detected (p) and the potential rate of error of the calculation of the overcharge (SEC; lack of data or inaccurate data, inaccurate methodology for the quantification of harm, or presumption of overcharges). In addition, a compensatory fine must also include the harm caused to society (π_{dwl}). The new approach is dependent on an estimation of the overcharge, which is imposed as a security but is also the basis for the calculation of the fine. The 'entry fee' for the calculation of the fine is a factor of the secured overcharge ($iSEC$), which may then be adjusted for other (non-deterrence) factors. Thus, the probability of detection and the margin of error of the estimation of the overcharge can only be compensated for by setting the entry fee sufficiently high.[1067] A detailed analysis of the exact factor of the overcharge necessary for the entry fee to meet the optimal fine benchmarks requires at least substantive and reliable data on overcharges of previous infringements and experience of the likelihood of discovering and proving an infringement. Given that the Directive's provisions have only recently been transposed and not yet tested by courts on existing cartels, there is neither a robust data set on overcharges nor on the probability of detection. Any such analysis would be premature and go beyond the scope of this contribution. However, if sufficient data are available to calculate the overcharge and estimate the probability of detection, the level of the optimal fine can be tested by the formulas in Extracts 1 and 2.

Altogether, the proposed approach is better equipped to satisfy the compensatory and deterrence benchmarks. In a best-case scenario, the security (SEC) equals the actual overcharge of an infringement, such that any fine (F) exceeds the gain of the infringement. To deter an infringe-

[1066] For an overview of the requirements for successful collusion, see Roger J. Van den Bergh, *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017) 5.2.3, 191-198.
[1067] This section focuses on setting a level of fines that is sufficiently high to meet the compensatory and deterrence benchmarks. Section G below discusses the legal effects of excessive fines in more detail.

ment, the factor of F (here: $i\pi$) must countervail the probability of detection, and to compensate the harm (compensation theory), F also needs to include the harm of others than direct and indirect purchasers (π_{dwl}). For other scenarios, the 'entry fee' needs to be set at a sufficient level to overcome calculation errors of the overcharge and other uncertain factors.

F. Advantages of the New Approach

The methodology proposed in this chapter is advantageous over the current approach for different reasons.

First, the new methodology no longer treats damages and fines in isolation by including the (potential) civil liability in the calculation of fines. The civil liability is factored into the setting of the fine, ensuring that potential follow-on damages claims do not lead to the deterrence of welfare-enhancing transactions. As recent studies on the development of damages action in Europe since the entry into force of the Directive have shown,[1068] the number of follow-on damages actions in competition law cases has increased dramatically, also raising the liability of the infringing undertakings. Thus, in the mid or long term, authorities in Europe will have to reassess the current fining method to reconcile the liability from the public enforcement regimes with the strengthened and more attractive private enforcement regime.

Second, the proposed changes nevertheless achieve deterrence as they create certainty for the infringer that the gains from the infringement will be redistributed away from her. As shown in Section B.I above, a debate in the literature has emerged as to whether deterrence can be achieved more effectively if firms can predict the sanction with some degree of certainty or face uncertainty about how high the sanction will become. As Polinsky and Shavell (1981) rightfully highlight, decision makers, who primarily determine the likelihood of a violation, generally only pay a small fraction of the undertaking's fine.[1069] The decision makers are guided predominantly by the personal gains they can retrieve from an infringement (e.g., promotions, higher salaries, and bonuses). Those monetary benefits for employees are largely dependent on the undertaking's financial results. Thus, the certainty that the fines will eat up any premium gained from the infringement when the collusion is revealed has a greater deterrent effect than not knowing whether the fines will actually skim off the gains from the infringement. In the latter

[1068] See chapter IV, F.I above.
[1069] A. Mitchell Polinsky and Steven Shavell, 'Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis' (1981) 33 Stanford Law Review 447, 454.

case, the decision maker may still be inclined to believe that the amount of the fine will not reach the gain from the infringement when the infringement is uncovered.

Third, although the methodology requires intensive price data for the quantification of harm, the calculation of harm is still administrable for the Commission. The authorities' resources will be preserved by different methods that strengthen the interaction between public and private enforcement. The imposition of damages as a security for potential follow-on damages claims incentivises claimants to support the Commission's activity of quantifying the harm. Claimants will have an interest in actively making use of their own resources to support the investigation, ensuring that the harm suffered is included in the security for the civil liability. This new cooperation between the authority and victims may also encourage new forms of cooperation during the investigation of the infringement. It is likely to create a race between the victims to secure their own follow-on damages claim. Moreover, the Commission can always rely on the bottom presumptions of harm as a minimum amount to be imposed. Instead of only focusing on the harm caused by individual infringements, the authorities may also rely on empirical studies of the average amount of harm caused by an infringement. Even in cases where the authorities are experiencing difficulties when gathering data, the average amount of harm can be imposed as a security.

Fourth, even though damages are taken as a basis of the calculation of fines, the approach guarantees the separation of powers between the executive and the judiciary. The amount of the overall estimated damages has no probative effect (binding effect) for civil courts. Since the estimation is based on the overall harm caused by the infringement, the court cannot base its reasoning on the authorities finding of harm in an individual case. Only the Commission's findings that establish the finding of the violation can be relied upon by the plaintiffs, whereas the estimation of the civil liability is based on a variety of generalised approaches (e.g., presumption of harm, general causation), which do not establish the necessary causal connection between the infringement and a specific amount of harm claimed by the plaintiff. Thus, courts will still need to establish the damage in an individual case for which the evidence relied upon in the administrative proceeding can be taken into account as part of the judge's evaluation of the overall evidence presented.

G. The Principle of Proportionality and Equal Treatment

Any debate on the appropriate level of competition fines eventually results in a discussion on the proportionality of the fines. The principle of proportionality is a vague legal concept that leaves room for interpretation. Most literature on the appropriate level of fines has focused on the deterrent effect of competition fines presuming proportionality.[1070] This section focuses on the conditions and limits imposed by the principle of proportionality on the method of calculating fines.

The legal basis of the principle of proportionality under EU Law can be found in Article 5(4) TEU and Article 49(3) No. 3 Charter of Fundamental Rights of the European Union:

- Article 5(4) TEU:
  'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality'.
- Article 49(3) No. 3 Charter of Fundamental Rights of the European Union:
  'The severity of penalties must not be disproportionate to the criminal offence'.

It is settled case law that the meaning of 'criminal offence' in Article 49(3) No 3 of the Charter of Fundamental Rights also includes the infringement of EU Competition Law.[1071] Both Articles prohibit authorities from setting disproportionate fines for competition infringements. Furthermore, European Courts have confirmed that the Commission must respect the general principles of law, particularly the principle of proportionality, when setting fines.[1072] However, the Courts have not yet expressly addressed the requirements for competition fines to satisfy the principle of proportionality set out under both Articles. Needless to say, the general prohibition of disproportionate fines provides little to no indication of the appropriateness of the fines. With a likely increase of antitrust damages litigation and compensation through court judgements, the proportionality of fines is likely to become one of the preeminent considerations for authorities when exercising their discretion.

[1070] Hans Gilliams, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion' (2014) 37 World Competition 435.
[1071] *Menarini Diagnostics v. Italy* (Application No. 43509/08), paras 38-44.
[1072] Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECLI:EU:T:2006:272, para 315.

Thus far, courts have not accepted the argument of disproportionately high fines. Nonetheless, they have on numerous occasions stated that the Commission must set fines that are proportional to the factors considered for the assessment of the gravity of the infringement, and apply them in a way that is consistent and objectively justified.[1073] European courts have predominantly referred to the principle of proportionality with regard to whether the Commission attached (dis)proportionate importance to one or more factors taken into account for the assessment of gravity. Regarding the proportionality of the overall fine in relation to the infringement, the Court generally refers to a legal limit of 10% of an undertaking's worldwide turnover and considers that 'cap' for the amount of fines sufficient to guarantee the proportionality of the fine. In *Musique Diffusion,* the Court stated that the 10% turnover ceiling *'seeks to prevent fines from being disproportionate in relation to the size of the undertaking'*. Thus, it seems that for the Court a 10% turnover ceiling serves as the principal instrument to guarantee the proportionality of fines.

At the same time, courts have also obliged the Commission to take particular account of the deterrent effect of the fines.[1074] In *Degussa,* the General Court referred to the interplay between a sufficient deterrent effect and the principle of proportionality by requiring that *'the fine is not rendered negligible, or on the contrary excessive (…) in accordance with the requirements arising from, on the one hand, the need to ensure effectiveness of the fines and, on the other, compliance with the principle of proportionality'*.[1075] The Court ultimately held that the Commission was not entitled to apply the same rate of increase to fines for deterrence for two undertakings with dissimilar turnovers (one was approximately 25% lower). The Court based its reasoning on the principles of proportionality and equal treatment, but considered the reduced deterrence increase to be proportionate, having regard to the overall size and responsibility of the undertaking, without entering into an in-depth analysis of the legal principle of proportionality. The case law illustrates that the European courts seem to be rather reluctant to find competition fines to be disproportionate in light of the 10% turnover limit.

However, as has been indicated on several instances in this book, the undertaking's civil liability contributes equally to the overall liability for an infringement as the fines imposed by the

[1073] Case T-43/02 *Jungbunzlauer v Commission* [2006] ECLI:EU:T:2006:270, paras 226-228; Case T-202/98 *Tate & Lyle and Others v Commission* [2001] ECLI:EU:T:2001:185, para 106; Case T-279/02 *Degussa v Commission* [2006] ECLI:EU:T:2006:103, para 324; T-213/00 *CMA CGM and Others* v *Commission* [2003] ECLI:EU:T:2003:76, paras 416-418; Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECLI:EU:T:2003:245, para 1541.
[1074] Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECLI:EU:C:1983:158, para 106; see also Section B.III above.
[1075] *Degussa v Commission* (n 1073) paras 283, 323.

authority. Arguably, without an adjustment to the calculation of fines, the penalty for the same infringement increases without an increase in the gravity of the infringement. According to the case law above, when penalising undertakings differently for the same infringement, the Commission must comply with the principles of proportionality and equal treatment.[1076] Any difference in treatment between undertakings must be objectively justified by the nature and gravity of the infringement.[1077]

It is questionable whether an increase of the penalty for the same infringement can be objectively justified. As explained above (Section B.III), the current fines methodology focuses primarily on imposing a sufficient amount for deterrence, and may for that purpose also add a specific deterrent increase (*SDI*). Since the current methodology only considers fines as the only method to achieve deterrence, it is likely that if private enforcement develops as anticipated, infringers will have to carry a substantially higher burden for the same infringement in the future. Since the case law and Article 49(3) of the Charter require that the assessment for the level of fines be based on the gravity of the infringement, Gilliams argues that the level of fines may only be increased (i) if the fines did not reflect the gravity of the infringement appropriately in the past, or (ii) if the gravity of the infringement has increased over time.[1078] Provided that these two conditions are not met, it is unlikely that applying the same level of fines to an undertaking with a substantially higher civil liability, and thereby penalising the same infringement harder, can be objectively justified.

Of course, one may argue that fines and damages have different purposes – that is, civil liability is concerned with compensation, whereas fines are concerned with deterrence – and thus, the payments in civil damages actions are of no relevance.[1079] However, this argument does not withstand the fact that according to economic theory, both fines and damages constitute costs of violating the law and as such contribute to the level of sanctions as well as deterrence. The above case law illustrates that European Courts have established that, while the purpose of fines is to deter future infringements (the Commission corresponds with this in its 2006 Fines Guidelines), fines also need to comply with the principles of proportionality and equal treatment. Hence, fines must be set at a level that not only effectively achieves deterrence but that is also appropriate and necessary. The assessment of both – namely the effective deterrent level and appropriateness of the fine – depends on the gravity of the infringement, which in turn is meas-

[1076] *Degussa v Commission* (n 1073), para 324.
[1077] Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECLI:EU:C:1983:310, paras 50-53, and *CMA CGM and Others* v *Commission* (n 1073) para 411.
[1078] Hans Gilliams (n 1070) 446.
[1079] See for example *Graphite electrodes* (COMP/36.490) 2002/271/EC [2001] OJ L100/1, para 183.

ured by the harm the infringement has caused. This is also illustrated by the 2006 Guidelines, which explicitly refer to *'gains improperly made'* to be taken into account for an increase of fines (*SDI*).[1080] If and to the extent that another area of the law already requires the infringer to compensate for the harm, the gravity of the infringement decreases. From a proportional justice perspective, the severity of the punishment would need to decrease accordingly.

The methodology for the calculation of fines proposed in this chapter adequately respects the principles of proportionality and equal treatment. Because the level of fines depends on the estimated amount of civil liability, an increase in the infringer's civil liability does not lead to an inappropriate level of the overall sanction. At the same time, where the level of fines is dependent on the civil liability, the methodology ensures that infringers in the aftermath of the implementation of the Directive are not treated less favourably than participants in infringements in the phase prior to the Directive, who did not face the same civil liability. To ensure full equal treatment, an empirical study of the final overall sanctions (fines + civil liability) for infringements in the phase prior to the Directive could ensure that the overall sanctions in the phase after the Directive do not deviate significantly.

H. Examples: Synthetic Rubber and Bananas

In this section, the methodologies of the 2006 Fines Guidelines and the new approach are compared and illustrated with a numerical example. It should be noted that the examples cannot include all eventualities. The calculation of Bayer's fines in *Synthetic Rubber*[1081] contrast with the calculation of fines for Dole in *Bananas*.[1082] Whereas in Bayer both calculation methods exceeded the overcharge, the fine under the current methodology remained below the overcharge in the latter case due to a case-specific overall reduction of fines for the particular regulatory regime. The overcharge estimates are taken from the findings of Conner (2014).[1083]

Annex 3 compares the calculation of Bayer's fine in *Synthetic Rubber* under the current methodology with the alternative approach.[1084] It illustrates what has already been explained in Sec-

[1080] 2006 Fines Guidelines, para 31.
[1081] *Nitrile Butadiene Rubber* (COMP/38.628) C(2008)282 [2008] OJ C86/7.
[1082] *Bananas* (COMP/39.188) C(2008)5955 [2008] OJ C189/12.
[1083] John M. Connor, 'Price-Fixing Overcharges: Revised 3rd Edition' (2014) SSRN Electronic Journal 1–316. It must be noted that the empirical evidence on the overcharges is taken from different publications including court judgments, studies, and articles. The evidence of the overcharge is therefore not necessarily a robust estimation of the overcharge that was actually caused by the cartel infringement.
[1084] The table of the current calculation under the 2006 Guidelines can also be found at Cento Veljanovski, (n 953) 871-951.

tion B above. Under the current 2006 Fines Guidelines, the BA is calculated by a proportion of the sales of the previous business year (16%) multiplied by the duration (2 years) as well as a proportion of sales (16%) that is added on top. The BA has been adjusted by aggravating circumstances, increasing the BA by 50% for recidivism. This new ABA is then increased by 10% for deterrence purposes (SDI). At the end, a leniency reduction of 30% is applied to arrive at a final fine of €28.9m.

The alternative approach would not require a BA but a calculation of the security SEC instead, which under ideal circumstances (sufficient information available to exactly estimate the amount overcharged) would mirror the overcharge for the whole period of the infringement. Where the overcharge cannot be calculated, the presumption of 20% for price-fixing cartels would apply, indicated by the number in brackets. Next, the fine F needs to be calculated by first calculating the entry fee iD, which is based on the overcharge calculated for the SEC. In parallel to the current approach, the entry fee is adjusted by AC and MC to arrive at a fine of approximately €6.3m, which is significantly less than the ABA under the current method. The SDI would no longer be required because the estimated amount of SEC should equal the gain from colluding (π). The 10% cap under Regulation No 1/2003, the leniency notice, as well as a potential reduction for an ITP only apply to the fine F; thus, the final fine would amount to approximately €4.4m. However, including Bayer's security, the total amount to be paid would be approximately €30.5m, exceeding the fine under the current system by approximately €1.6m (see Table 25).

Table 25 *- Difference in Bayer's total amount (incl. security)*

2006 Fines Guidelines	€28,900,000
Alternative Approach	€30,478,950
Difference	€1,578,950

As shown above in Section D.VIII, the 25% cap on the entry fee may no longer be reasonable because the Commission may have to include other considerations besides deterrence. Table 26 shows a difference of approximately €4.32m between the amount imposed under the current system and the total amount under the alternative approach when the entry fee is increased to 26%. Although it may be necessary to increase the level of fines to cover the costs of the investigation, it should be taken into account that under the alternative approach the fines may increase by the amount of the security that has not been claimed after the limitation periods have

expired. Thus, the fines do not necessarily need to increase excessively to compensate for the costs of the investigation.

Table 26 *- Difference in Bayer's total amount with an 'entry fee' increased by 10%*

2006 Fines Guidelines	€28,900,000
Alternative Approach	
Fine (F)	€7,123,990
Total Amount	€33,219,190
Difference	€4,319,190

Annex 4 compares the two approaches for Dole's fines in *Bananas*. The calculation follows the same method as outlined above. Instead of a reduction under the leniency notice, in *Bananas* all cartelists received a reduction of fines under the 2006 Fines Guidelines for a mitigating circumstance (specific regulatory regime). The comparison between the two approaches illustrates the different impacts an application of mitigating factors has on either the BA or solely on F, irrespective of the SEC. Table 27 shows that the alternative approach would lead to an increase of the total amount to be paid by nearly 340%. However, as already outlined above, the total amount would include the expected damages to be paid in follow-on actions. When including the follow-on damages and assuming that the whole amount of overcharge is claimed, the current approach under the 2006 Fines Guidelines significantly exceeds the total amount under the alternative approach. Table 28 presents a comparison of the total amount to be imposed under both methodologies and finds that the current methodology exceeds the alternative approach by approximately €31m.

Table 27 *- Comparison of Dole's fine under 2006 Fines Guidelines and the alternative approach*

2006 Fines Guidelines	€45,600,000
Difference to	
Fine (F)	- €30,951,933
Total Amount	€108,553,468

Table 28 *- Comparison of Dole's total amount under 2006 Fines Guidelines and Alternative Approach*

2006 Fines Guidelines	€185,105,401
Alternative Approach	€154,153,468
Difference	**€30,951,933**

Admittedly, the assumption that the whole overcharge will be claimed may overstate the effectiveness of the private enforcement regime and not necessarily correspond with reality. This is particularly the case because in most Member States, the rules of the Directive will not apply retroactively to infringements preceding the implementation of the new rules (see chapter II, B.XI). In markets for consumer goods, where the overcharges may be passed on, and in the absence of effective rules on collective redress, it is highly unlikely that the total overcharge will be claimed by victims. In *Bananas,* three importers coordinated the setting of their quotation prices for bananas in eight EU Member States, and any overcharge for consumer products such as bananas are generally passed on to the end consumer. With ineffective rules for mass claimants and a widespread customer base with only small overcharges on individual products, it is unlikely that the entire or even any overcharge would be claimed by end-consumers. If we assume that in *Bananas* no damages had been claimed at all, both approaches would reach considerably different outcomes in terms of deterrence. Whereas the sanctions with the proposed alternative approach reach a deterrent level with a fine exceeding the overcharge by €14.6m, the current Guidelines fail to deprive Dole's overcharge, leaving Dole with an additional profit after fines of approximately €94m (Table 29). In *Synthetic Rubber*, on the other hand, the sanctions under both approaches exceed the overcharge.

Table 29 *- Comparison of the deterrent effect*

	***Bayer* (Synthetic Rubber)**	***Dole* (Bananas)**
2006 Fines Guidelines	€2,804,800	- €93,905,401
Alternative Approach		
Estimated civil liability	€4,383,750	€14,648,067
Presumption 20%	-€751,450	- €25,156,711

On the other hand, if the fines under the proposed alternative approach are calculated based on a presumption of overcharge (20%), neither in *Synthetic Rubber* nor in *Bananas* will the total sanction meet the level of the cartelists' gains from collusion. Nevertheless, the alternative ap-

proach is better equipped to achieve deterrence because the imposition of a security for the civil liability by the competition authority would incentivise victims to provide evidence during the administrative proceeding to determine the victims' damages as precisely as possible, thereby preventing that amount of the security imposed staying behind the damage that was suffered.

I. Conclusion

The alternative approach for the calculation of fines introduced in this chapter is based on the harm suffered by victims of the infringement. The Directive aims to strengthen the claimant's position in civil procedures. With the new provisions such as a presumption that cartels cause harm, the ability of judges to estimate the harm, and extensive rules on disclosure, it is expected that follow-on damages actions and ultimately the civil liability of competition law infringers will significantly increase in the coming years.

Even though damages do not constitute an administrative penalty as such and their purpose is limited to the compensation of victims, the civil liability following damages actions nevertheless contribute to deterrence by increasing the overall costs of violating the competition rules. Thus far, the current methodology for the calculation of fines in Europe has developed around fines as the only means of deterrence. From a deterrence perspective, reason for concern exists that an increase in civil liability in addition to the existing method of calculating fines under the 2006 Fines Guidelines will result in disproportionately high liability for infringers. This raises the question of whether fines should be reduced to compensate for the anticipated rise of civil liability. On the other hand, an isolated reduction of fines – in the anticipation of a rise in damages actions – may lead to under-deterrence if contrary to the general anticipation that damages liability will not increase.

Thus, adjustments to the current methodology under the 2006 Fines Guidelines are necessary to reconcile fines and civil liability following the implementation of the Directive. The proposed alternative approach bases the calculation of fines on the harm caused (i.e., the anticipated civil liability) and requires the infringer to pay a security for the estimated damages. By way of equally considering fines and damages as costs for the infringement, the approach finds a practical compromise between compensation on the one hand and a sufficient level of deterrence on the other.

Although the approach may be intuitive, it would create practical difficulties for the competition authorities in cases where the harm cannot easily be quantified. It has been shown that these difficulties can be overcome.

In this chapter, the approach was only tested on price-fixing cartels. Further research is necessary to study the effects of the proposed alternative approach on other infringements. Moreover, further research on the overcharge following competition infringements is necessary to apply more accurate presumptions in cases where competition authorities have difficulties determining the civil liability.

Concluding Remarks

The Directive's objectives are two-fold: On the one hand, it strives to optimise the interaction between private and public enforcement, and on the other hand, it aims to guarantee the right to full compensation of victims of infringement of EU competition law. This book has reviewed the Directive's provisions and their implications for leniency incentives as well as the fining methodology, which are the fundamental cornerstones of the public enforcement regime in Europe. Moreover, the work studied the different criteria for the distribution of civil liability among co-infringers, a field that the Directive has intentionally left to national courts. Those three areas of the competition enforcement regime play an integral part of the liability of competition law infringers. While the EU leniency programme together with the fining methodology determine the sanctions for competition law infringements, the allocation of damages liability determines the infringers' civil liability that follows the public sanction (*follow-on* damages actions). As highlighted in this book, both the risk of public sanctions as well as civil liability are factors that contribute to the ability of the enforcement regime to deter future infringements. In turn, the allocation of sanctions and civil liability are factors that impact the victim's right to full compensation. For example, in chapters II and VI it was shown that in Article 11(4)(b), the Directive makes an exception for the privilege of immunity recipients where full compensation could otherwise not be obtained. By contrast, the liability of SMEs remains limited to their direct and indirect purchasers even where this means that other victims may be deprived of their right to full compensation.

For the purpose of this book, the Directive's provisions affecting leniency, public sanctions, and the distribution of civil liability were tested against its objectives of full compensation of victims of competition infringements and deterrence of new infringements. Therefore, the optimal enforcement rule under study had to satisfy two requirements: deterrence as an efficiency requirement as well as ensuring the right of compensation of victims as a corrective justice requirement.

1. Contribution Claims

Part TWO of this book examined the implications of the determination of the share of contribution based on *relative responsibility*. The Directive has left the determination of *relative re-*

sponsibility to national courts and lists only three criteria that courts may take into account for the distribution of civil liability. Chapter IV discussed the meaning of *relative responsibility* and argued that the *responsibility* for the civil liability must be determined primarily based on corrective justice considerations. The responsibility for the occurrence of the harm should therefore be determined by three factors: the proximity between the contribution to the infringement and the harm suffered by the victim (relationship through *economic relations*), the gravity of the contribution, and lastly distributive justice. Following these three requirements for responsibility, it was shown that the civil liability should be distributed based on (1) a gain-based allocation for *direct and indirect purchasers* and (2) on market shares for *other claimants*. Moreover, the combination of the two criteria is better suited to deterring future infringements than any criterion alone.

In addition to infringers' turnovers and market shares, the Directive lists the infringers' role in the cartel as a potential criterion for the determination of the share of contribution. The Directive expressly only refers to the role in horizontal cartels, which is likely to be the result of an editorial error. In contrast to market shares or turnovers, the share of contribution cannot be deprived directly from the leading or a minor role in the cartel. Chapter V discussed the appropriateness of the role in the cartel for the determination of civil liability. The discussion revealed that an adjustment of the proposed allocation rule for the role in the cartel can be practical and reduce administrative costs by encouraging settlements. The review of the Commission's cartel decisions between 2001 and 2019 revealed that a coherent adjustment method can in fact be drawn from the Commission's fining practice at least in relation to aggravating circumstances. Moreover, it was argued that a minor role in the cartel should only justify a reduction of the share of contribution if the infringer has avoided the application of the infringement and adopted a competitive conduct. A merely passive or minor role in the cartel still has a stabilising effect on the cartel and ultimately contributes to the creation of the harm. In particular, it follows from the definition of responsibility for civil liability that since the infringer is in an economic relation with its purchasers, a reduction of the share of contribution is only justifiable if the infringer actually applied a competitive conduct. Arguably, in practice a reduction will often not be necessary because if the infringer has not applied the agreement it will likely not have gained any additional premium from the infringement. An adjustment is therefore much more likely to apply to leaders or instigators of the infringement.

Overall, the allocation rule proposed in Part TWO of the book scores equally well in terms of deterrence as the no-contribution rule in the US. The proposed allocation rule, however, does

not suffer from the same limitations as the no-contribution rule. As the discussion in chapter III showed, the proponents of the no-contribution rule argue that contribution does not deter future infringements as effective nor encourage settlements. In their view, these efficiency outcomes outweigh the fairness and justice limitations of the no-contribution rule. However, the proposed allocation rule achieves the same deterrent effect as the no-contribution rule. Arguably, the no-contribution rule even risks creating under- and over-deterrence, which is not the case with the gain-based contribution rule as was proposed in chapter IV. Furthermore, the proposed increase of liability for the leader and instigator of the cartel incentivises them to settle with the claimants. At the same time, because the increase for a leading or instigating role is proportionate to the leader's and instigator's civil liability (i.e., the overcharge), they can anticipate their overall civil liability sufficiently well, which prevents claimants from pressuring defendants into 'whipsawing settlements', as is the case under the no-contribution rule.

2. Leniency Incentives

Part THREE of the book focused on the Directive's implications for leniency incentives. Chapter VI compared the legal situation in relation to the disclosure of leniency documents prior to the implementation of the Directive with the situation under the Directive. The Directive's rules on disclosure are an improvement from the different approaches that were taken by Member States prior to the transposition of the Directive. However, despite the prohibition on disclosing leniency statements, the risk of civil liability has adverse effects on leniency incentives. The increased risk of additional costs from follow-on damages actions is likely to deter undertakings from applying for leniency. The decreasing number of leniency applications since the publication of the Draft Directive in 2013 seem to confirm this hypothesis. The game theoretical analysis in chapter VI confirmed this concern at least for well-organised cartels operating in secrecy. Moreover, it showed that the European legislature missed the opportunity to introduce a less intrusive measure for safeguarding the leniency programme, which still ensures the effective exercise of the victims' right to full compensation by transferring (part of) the civil liability from the leniency recipient to cartel participants who refuse to cooperate with the competition authorities. Under the proposed rule of proportionate damages, immunity and leniency recipients would benefit from immunity from or a reduction of the civil liability in the same proportion as the reduction of fines granted in the infringement decision. The proportionate damages rule also scores better compared with a rule that only shifts the civil liability of the immunity recipient to the remaining co-infringers. In many cases, the Commission must also rely on evidence provided by other cartel members to reveal the cartel because the evidence provided by

the immunity applicants alone is not sufficient to prove the infringement or its real scope. While a rule that only shifts the civil liability of the immunity recipient might even have a stabilising effect on the remaining co-infringers to fight the Commission's investigation, the additional reduction of civil liability under the proposed proportionate damages rule incentivises the remaining cartel members to cooperate. Thus, the proportionate damages rule is superior from a deterrence perspective. To ensure the victim's right to full compensation, an exception to this rule would be necessary only when full compensation of victims cannot be achieved. However, even when such an exception applies, the shift of damages liability creates very strong incentives for all cartel participants to cooperate.

3. Fines and Damages

Part FOUR analysed the implications of a more effective regime for damages actions on the current fining methodology. The Directive's new provisions for strengthening the claimant's position in civil procedures, such as the presumption that cartels cause harm, the ability of judges to estimate the harm, and extensive rules on disclosure, are expected to lead to a substantial rise of damages actions in Europe. The first studies on the developments of damages actions in Europe and in some Member States have shown that the entry into force of the Directive has marked a new era for competition damages in Europe. The fundamental hypothesis of this book is that civil liability equally increases the cost of an infringement as the administrative penalty, and therefore also contributes to deterrence. However, the current methodology for the calculation of fines was developed around the assumption that fines are the only means to achieve deterrence. Therefore, a legitimate concern exists that the interplay of the Directive, which fosters private enforcement and the current fining methodology, will lead to over-deterrence. A simple way to overcome this concern would be the reduction of fines. However, when it is uncertain whether the damage will be claimed either in its entirety or in part, a reduction of fines bears the risk that the overall cost of the infringement remains below the optimal level for deterrence. For that reason, chapter VII proposed an adjustment of the current fining methodology to reconcile fines with the infringer's civil liability. The interplay between fines and damages will work best if fines are calculated based on the (potential) damages liability. However, since the total amount of damages is unknown at the time of the infringement decision, the infringer would be liable to pay a security for the estimated damages.

When setting fines, the Commission would face the same obstacles as plaintiffs filing damages actions before the civil court, namely the difficulty of quantifying the amount of damages. In the past, the obligation for competition authorities to quantify the effect of an infringement on

the market proved to be overburdensome for authorities, resulting in administrative inefficiencies. The Directive has deliberately only introduced a rebuttable presumption of harm in Article 17(2) and not also presumed a specific percentage for the overcharge. In the infringement proceeding, on the other hand, the Commission is free to apply presumptions if it does so in a coherent manner, respecting the principle of equality. Hence, if the quantification of harm turns out to be overly complex, the Commission could rely on presumptions of harm that typically occur with particular types of infringements. The Commission could draw experience from the typical harm caused by different types of infringements from the damages awarded by civil courts throughout Europe. Over time, the fining methodology would likely align with the courts' practice on the estimation of harm (see Article 17(1)).

Moreover, a potential objection to the shifting of civil liability, proposed in Parts II and III, is that a shift of liability from one infringer to another could lead to over-deterrence, thereby deterring welfare-enhancing cooperation between firms. The inclusion of the civil liability into the methodology for the calculation of fines ensures that for the purpose of deterrence, the effects of both regimes are considered in combination and not in isolation.

4. Further Research

The proposals in this book thus far have focused exclusively on the provisions of the Directive. Part One followed up on the different ways Member States have transposed the Directive's provisions. For some rules, the Directive only required minimum harmonisation, allowing Member States to go beyond its required scope. Occasionally, Member States have made use of that possibility and extended the scope of individual rules. For other provisions, the implementing legislations of some Member States even lag behind the required standard of the Directive. In other Member States, the new rules will not be applicable for years to come. Therefore, despite the Directive's objective to create a level playing field for damages actions in Europe, a 'hotchpotch' of rules still exists for many rules concerning damages actions. The question of direct applicability of the Directive's provisions and a minimum standard for those rules guaranteed directly under primary EU law were not part of this study.[1085] This study has made reference to some of the national rules diverging from the Directive, by way of example, to show how the results of the analyses could change if those differences were to remain. Further research will be necessary on how the different standards (once applicable) between Member States influence the outcome

[1085] For a more detailed analysis, see Philipp Kirst, 'Skanska, Cogeco and Otis: Harmonisation through the Back Door?' (2020) 41 European Competition Law Review 245.

of the proposals of this study. Furthermore, this research question must be extended to the global scale to see how different regimes around the world influence the outcomes of this study.

The approaches presented in this study were solely based on price-fixing cartels, which are well organised and have only a low probability of detection. As these types of cartels have the most severe welfare impacts, and can therefore rightfully be perceived as the most severe infringements, it is sensible to initially focus on those types of infringements. Further research would need to be extended to other types of infringements.

Lastly, further research is required to better understand the interaction of the proposals in this book with different types of infringements and with different constellations of infringers. For that purpose, a dynamic model that takes full account of the different scenarios and effects of the three proposals in this book would be advantageous.

This book has analysed some of what the author considers the most relevant implications of the Directive and offered proposals to better align public and private enforcement. This contribution is not intended to provide a full analysis of all eventualities and the impact of the proposals on all types of potential infringements. Instead, this book aims to contribute to the discussion of how to further integrate private and public enforcement. The proposals in this book are intended to provoke a debate and dialogue between academics, practitioners, and enforcement agencies regarding how the existing obstacles to a more integrated enforcement regime could be overcome.

Annexes

Annex 1

Table of Commission decisions 2001-2019 granting a reduction in fines for minor/passive role

Case / Firms	Date	Fines Guidelines	Mitigating Circumstances	Fines Reduction	Reasoning
Maritime Car Carriers	21 February 2018	2006			
CSAV			limited role and lack of awareness	-20%	*'Taking into account CSAV's limited role and its lack of awareness of the whole extent of the infringement, the Commission grants it a reduction of 20% of its fine on the basis of mitigating circumstances.'*
Spark Plugs	21 February 2018	2006			
Denso *Bosch*			lack of awareness	-10%	The Commission considered that there was lack of evidence that: *'(i) Bosch was aware or could reasonably have foreseen the bilateral contacts between NGK and Denso; and (ii) Denso was aware or could reasonably have foreseen the bilateral contacts between NGK and Bosch'*.[1086]

[1086] *Spark Plugs* (COMP/40.113) [2018] OJ C111/26C(2018) 929, para 105.

Paper envelopes	16 June 2017	2006			
Mayer-Kuyert			minor involvement	-10%	The Commission considers that Mayer-Kuvert played a considerably different role than the other cartel participants. Mayer-Kuvert's lesser involvement was notably reflected in its significantly lower participation in the coordination related to tenders throughout the infringement period and the fact that it was perceived by the other cartel participants as a party with whom it was difficult to reach an agreement. Mayer-Kuvert is therefore granted a reduction of 10% for its limited involvement in the infringement.[1087]
Car battery recycling	8 February 2017[1088]	2006			
Campine			minor involvement	-5%	*'[T]he number of anti-competitive contacts in which Campine participated is significantly lower than for the other parties (six contacts for Campine, against 61 for JCI, 28 for Eco-Bat and 39 for Recylex). (…) [T]here are also long periods for which there is no evidence of Campine's participation in any anti-competitive contacts (…) Campine took*

[1087] *Envelopes* (COMP/39.780) [2014] OJ C39/10, para 87.
[1088] The previous decision of 8 February 2017 was amended on 6 April 2017.

					part in all multilateral meetings and did not oppose or disrupt the cartel.'[1089]
Air Fright	17 March 2017	2006			
Qantas Airways *Air Canada* *Latam* *SAS Cargo Group*			minor involvement	-10%	The undertakings *'participated in the infringement to a limited degree. This is due to the fact that these participants operated on the periphery of the cartel, entered into a limited number of contacts with other carriers and were involved in fewer aspects of the cartel. A reduction of 10 % was applied to these (…) undertakings.'*[1090]
Euro Interest Rate Derivatives	7 December 2016	2006			
HSBC *Crédit Agricole* *JP Morgn Chase*			minor involvement	-10%	HSBC, Crédit Agricole and JP Morgn Chase participated in the collusive arrangements in a different way than the main players, because they had a lower degree of intensity of collusive contacts than the main players. The Commission concluded that those undertakings had a more *peripheral/minor role* in the infringement.[1091]

[1089] *Car battery recycling* (COMP/40.018) [2017] OJ C396/7, para 355.
[1090] *Airfreight* (Case COMP/39.258) [2010] OJ C371/11, paras 1228, 1234; re-adopted on 17 March 2017 (*Airfreight* (COMP/39.258) [2017] OJ C188/14, para 26).
[1091] *Euro Interest Rate Derivatives* (COMP/39.914) [2016] OJ C130/11, paras 737ff.

Steel abrasives	25 May 2016	2006			
Pometon			minor involvement	-10%	The evidence shows that Pometon contributed to a lesser extent than some other parties in maintaining the arrangement on coordination on individual customers.[1092]
Alternators and Starters	27 January 2016	2006			
Hitachi			minor involvement	-15%	Hitachi was held responsible for the single and continuous infringement only in so far as it participated in contacts regarding the supply of alternators and starters to the GM group and to the Nissan/Renault Alliance.[1093]
Optical Disk Drives	21 October 2015	2006			
Philips *Sony* *Sony Optiarc*			lack of awareness	-3%	It could not be established that they were aware of HP-related contacts. *'The Commission grants a 3 % reduction for their lack of awareness of and liability for the part of the single and continuous infringement that relates to HP*

[1092] *Steel Abrasives* (COMP/39.792) [2016] OJ C366/6, para 225.
[1093] *Alternators and Starters* (COMP/40.028) [2016] OJ C137/7, para 110.

					(meaning the bilateral contacts between the other participants relating to HP).'[1094]
Retail food packaging	24 June 2015	2006			
Magic Pack Silver Plastics			minor involvement	-5%	The evidence showed that Magic Pack was perceived by the other cartel members as a disturbing element in the cartel in Italy. Magic Pack did not adhere to the cartel agreement in relation to the tenders. Silver Plastics was seen as an aggressive competitor in the French market and was, for that reason, invited to join the cartel. Silver Plastics only remained in the cartel for 3 months due to its strategy to expand in the French market. Its participation in the meetings were described as *'often opportunistic and self-serving'*. It maintained a *'disruptive and fringe role in the cartel by being often unable to commit to a particular collusive course'*.[1095]

[1094] *Optical Disc Drives* (COMP/39.639) [2015] OJ C484/27, para 561.
[1095] *Retail Food Packaging* (COMP/39.563) [2015] OJ C402/8, paras 1045-1047.

Smart card chips producers	3 September 2014	2006			
Infineon			minor involvement	-20%	'*The Commission found that Infineon is responsible for the single and continuous infringement only in so far as it participated in collusive arrangements with Samsung and Renesas because there is no clear evidence in the file showing that Infineon was aware of the exchanges between the other parties.*' Infineon's claims that it adopted competitive behaviour and a purely passive 'follow my leader approach' were subsequently rejected by the Commission.[1096]
Steel abrasives	2 April 2014	2006			
MTS			minor involvement	-10%	*'The evidence shows that MTS and Würth contributed to a lesser extent than other parties in some of the arrangements for maintaining the cartel (…). The Commission therefore considers that mitigating circumstances apply resulting in a reduction of 10% in the fine to be imposed on MTS and a reduction of 15% in the fine to be imposed on Würth.'*[1097]
Würth			minor involvement	-15%	

[1096] *Smart Card Chips* (COMP/39.574) [2014] OJ C27/17, paras 424-425.
[1097] *Steel Abrasives* (COMP/39.792) [2014] OJ C362/8, para 103.

Power Cables	2 April 2014	2006			
ABB *EXSYM* *Sagem/Safran/Silec* *Brugg*			minor involvement	-5%	ABB, EXSYM, Sagem/Safran/Silec and Brugg had a level of involvement that distinguishes them from the core group but is insufficient to qualify them as fringe players.
Mitsubishi *Showa* *LS Cable* *Taihan*			minor involvement / lack of awareness	-11%	They had a level of involvement that distinguishes them from the core group and is sufficient to qualify them as fringe players. It is therefore concluded that Mitsubishi and Showa, LS Cable, Taihan and nkt should be granted a reduction of 10% of the fine on account of their substantially limited involvement in the infringement. In addition, Mitsubishi and Showa, LS Cable and Taihan should be granted an additional 1% reduction for their lack of awareness of and liability for parts of the single and continuous infringement.[1098]
nkt			minor involvement	-10%	

[1098] *Power Cables* (COMP/39.610) [2014] OJ C319/109, para 1033.

Automotive bearings	19. March 2014	2006			
NFC			minor involvement	-15%	*'NFC participated in the bi-/and trilateral discussions to a much lesser extent than the other parties, and it was absent from the multilateral meetings but was aware of the content of some of them. It therefore had to rely on the information it received from the other parties about these meetings, could not itself take a position in these meetings and was not actively involved in the price coordination that was discussed and/or agreed during these meetings.'*[1099]
Shrimps	27. November 2013	2006			
Stührk			minor involvement	confidential	The participation of Stührk was limited to Germany and Stührk never expressly agreed upon prices with competitors but was only informed by other participants about the agreed price levels. Stührk adapted its own pricing strategy in function of the information received. [1100]

[1099] *Automotive Bearings* (COMP/39.922) [2014] OJ C238/10, para 95.
[1100] *Shrimps* (COMP/39.633) [2013] OJ C453/16, paras 521-529.

Kok Seafood			minor involvement	Confidential	*'Kok Seafood did not directly participate in the main aspects of the cartel, such as price fixing agreements. Its role was mainly limited to accepting a contract with Heiploeg under which it was remunerated for supplying shrimps to Heiploeg in function of the cartelised Heiploeg price and that came with the hidden clause that Kok Seafood should not come to the market as a viable competitor. (…) Kok Seafood may have tried to circumvent this clause by setting up a joint venture with another shrimps wholesaler.'*[1101]
Refrigeration Compressors	7 December 2011	2006			
Panasonic Cooperation			minor involvement	-10%	Panasonic contributed only to a lesser extent to maintaining the cartel and its involvement was limited, it only participated in the meetings on one occasion.[1102]

[1101] *Shrimps* (COMP/39.633) [2013] OJ C453/16, paras 530-537.
[1102] *Refrigeration Compressors* (COMP/39.600) [2011] OJ C122/6, para 84.

CRT Glass Bulbs	19 October 2011	2006			
Schott			minor involvement	-15%	Schott was only involved in the cartel to a limited extent in its later period (December 2002 – July 2004). It was mainly involved in price coordination in the initial period of the cartel and later did not take part in trilateral cartel meetings. Schott's contacts were much more sporadic compared to those of other cartel members.
Asahi Glass					Asahi Glass was involved only to a limited extent in the cartel in its early period (March 1999 – July 2001). It only participated in some bilateral meetings and did not take part in trilateral cartel meetings. Its contacts were more sporadic than those of other participants.[1103]
Prestressing steel	30 June 2010	2006			
Proderac *Trame*			minor involvement	-5%	Over a period of over 8 years Proderac participated in only around 12 meetings, it even complained that the agreement had already been fixed without its implication which – according to the Commission – showed the marginal role. The remaining members complained that Proderac did not pro-

[1103] *CRT Glass Bulbs* (COMP/39.605) [2011] OJ C48/18, paras 28-29, 89-90.

					vide data despite the agreement to do so and if it did the figures were not detailed and unreliable. Trame attended only 18 cartel meetings while its case was discussed in its absence on several other occasions. The Commission describes Trame as a 'marginal player' that ultimately decided not be part of the cartel. [1104]
DRAMs	9 May 2010	2006			
Hynix			partial deviation	-5%	Hynix avoided, during part of the infringement period, applying the agreement, at least partially, by adopting competitive conduct in the market.
Toshiba *Mitsubishi*			minor involvement	-10%	The involvement of Toshiba and Mitsubishi was much lower than that of other suppliers, in particular their contacts were of a lesser frequency compared to the overall network of contacts. As a result, they contributed less to maintaining the cartel and were not involved in all aspects of the infringement.[1105]

[1104] *Prestressing Steel* (Case COMP/38.344) [2010] OJ C339/7, paras 1024-1026.
[1105] *DRAMs* (COMP/38.511) [2010] OJ C180, paras 109-110.

Bananas	15 October 2007	2006			
Weichert			lack of awareness	-10%	There was no sufficient evidence to conclude that Weichert was aware of Dole's pre-pricing communications with Chiquita or that it could reasonably have foreseen them.[1106]
Bitumen Spain	3 October 2007	1998			
Nynäs *Petrogal*			minor involvement	-10%	The Commission could establish that Nynäs and Petrogal participated in the market sharing and customer allocation arrangements holding annual negotiations or at least discussions with the cartel leaders, but the evidence showed that their involvement in other aspects of the infringements, namely the monitoring and compensation mechanisms and the price coordination activities, was less regular or active than that of the other three participants.[1107]

[1106] *Bananas* (COMP/39.188) C(2008)5955 [2008] OJ C189/12, para 476.
[1107] *Bitumen Spain* (COMP/38.710) [2007] OJ C321/15, para 567.

Copper Fittings	21 February 2007	1998			
Flowflex			passive 'follow-my-leader' role	-10%	Flowflex's involvement was not comparable to that of the active members: *'There is no evidence that it actively participated in the creation of any anti-competitive agreements. Rather, the evidence shows that its involvement was limited to accepting and implementing the agreements reached by the others. As a small player, Flowflex did not take an upfront role in the agreements and/or concerted practices. Flowflex followed a passive, "follow-my-leader" role vis-à-vis other leading undertakings'*.[1108]
Methacrylates	31 May 2006	1998			
Barlo			passive and minor role	-50%	There appears not to be much evidence that Barlo actively participated in the creation of any anticompetitive agreements or practices. Rather, proven anticompetitive contacts comprised sporadic attendance of meetings which were mainly limited to Barlo being informed about the anticompetitive agreements or practices for PMMA-solid sheet. It also seems that Barlo did not participate in many of the sig-

[1108] *Fittings* (COMP/38.121) [2006] OJ L283/63, paras 797-798.

					nificant multilateral meetings in which key aspects of the price agreements and anticompetitive practices were agreed.[1109]
Hydrogen peroxide	3 May 2006	1998			
Caffaro			passive and minor role	-50%	The Commission concluded that Caffaro's involvement in the cartel was not comparable with that of the other active members. It is equally apparent that Caffaro's participation in the collusive contacts was significantly more sporadic by comparison with the other members of the cartel and limited to only two meetings relating to PBS. The number of Caffaro's proven anticompetitive contacts were seen as *'very small and shows a limited involvement in the overall arrangements'*.[1110]
Rubber Chemicals	21 December 2005	1998			
General Quimica / Repsol Quimica / Repsol YPF			passive and minor role	-50%	*'General Quimica's involvement in the cartel was not comparable to that of the active members Flexsys, Bayer and Crompton. There is no evidence that it actively participated*

[1109] *Methacrylates* (COMP/F/38.645) [2006] OJ C285/2, para 372.
[1110] *Hydrogen Peroxide and Perborate* (COMP/F/38.620) [2006] OJ L353/54, para 476.

					in the creation of any anti-competitive agreements. Rather, the evidence shows that its involvement was limited to being informed about and accepting the agreements or decisions reached by the others. (…) Indeed, it may well be that GQ was invited to join the cartel because it was regarded as a nuisance in the market. (…) Indeed, after 1996, the Commission is able to prove only a single occurrence in which General Quimica uncontestably participated in a collusive price increase with the other rubber chemicals producers, and the number of GQ's proven anticompetitive contacts is limited to two meetings.'[1111] (cartel duration January 1996 – December 2001; GQ participated 8 months between October 1999 and June 2000).
Industrial and medical gases	24 July 2002	1998			
BOC *Westfalen*			passive role	-15%	Both firms claimed that they had not known in advance that price fixing topics would be raised in a meeting with competitors.[1112]

[1111] *Rubber chemicals* (COMP/38.443) [2005] OJ L353/50, para 321.
[1112] *Industrial and medical gases* (COMP/36.700) [2003] OJ L123/1, paras 439-442.

French Beef	2 April 2003	1998			
FNPL			passive or 'follow-my-leader' role	-30%	*'The Commission has no evidence to show that the federation representing milk producers, the FNPL, played any special part in the conclusion or the application of the agreement at issue. It would appear that the FNPL played a passive or 'follow-my-leader' role in the agreement. The amount of the fine imposed on that federation should therefore be reduced by 30 %.'*[1113]
Plasterboard	27 November 2002	1998			
Gyproc			minor involvement	-25%	A lack of involvement was found on the UK market and only a limited involvement on the German market: Gyproc acted as a *'constant destabilising element, which helped limit the impact of the cartel on the German market and it was absent from the UK market, where the manifestations of the cartel were most frequent.'* For those reasons, Gyproc did not play the same part in the cartel as the other undertakings.[1114]

[1113] *French beef* (COMP/C.38.279) [2003] OJ L209/12, para 178.
[1114] *Plasterboard* (COMP/37.152) OJ C156/5, para 574.

Vitamins	21 November 2001	1998			
Rhône-Poulenc (Aventis)			passive role	-50%	*'With regard to the vitamin D3 market, Aventis submits that Rhône-Poulenc's role was limited to providing, at Solvay's request, its historic volumes data to Solvay and that it never attended any of the tripartite cartel meetings and played an exclusively passive role. Its small role in this market and its lack of active participation meant that Rhône-Poulenc was not even granted an independent market quota, but rather its allocation was always included under Solvay's.* *The Commission takes into account that Rhône-Poulenc played only a passive role in the vitamin D3 infringement. It did not attend any of the cartel meetings and was not allocated an individual market share.'*[1115]
Graphite electrodes	18 July 2001	1998			
Carbide/Graphite Group (C/G)			passive role / (partial) non-implementation	-40%	C/G was granted a reduction in fines because it took the position of a 'price follower'. A <u>further</u> reduction was granted because between 1993 and 1996 C/G did not adhere to the agreed sales restrictions in 'non-home' markets by

[1115] *Vitamins* (Case OMP/37.512) [2001] OJ L6/1, paras 719-725.

					increasing its sales.[1116] The Commission found that C/G participated in the infringement from January 1992 to November 1996.

[1116] *Graphite electrodes* (COMP/36.490) [2001] OJ L100/1, paras 234-236.

Annex 2

Table of Commission decisions 2001-2019 imposing an increase of fines for leading/instigating role

Case / Firms	Date	Fines Guidelines	Aggravating Circum-stances	Fines In-crease	Reasoning
Marine Hoses	26 January 2009	2006			
Bridgestone *Parker ITR*			leading role	30%	Bridgestone together with another firm jointly coordinated the infringement for a period of over 10 years. In 1999 Parker ITR was *'the driving force behind the move to overcome the internal struggles among the cartelists'* which re-established and strengthened the cartel. Until late 2001 Parker took over the role of coordinating and deciding on the allocation of tenders, as well as giving bidding instructions to all cartel members. [1117]

[1117] *Marine Hoses* (COMP/39.406) [2009] OJ C168/6, paras 457-463.

Candle Waxes	1 October 2008	2006			
Sasol			leading role	50%	Sasol convened almost all meetings by sending invitations and proposing agendas and organised many of them by reserving hotel rooms, renting meeting rooms and arranging for dinners. It chaired the meetings and initiated and organised the discussions on prices. On several occasions it also followed-up on the meetings by bilateral contacts.[1118]
Bitumen Spain	3 October 2007	1998			
Repsol *Proas*			leading role	30%	The Commission established their leading roles based *inter alia* on the following factors: - Both coordinated, convened and usually chaired the cartel meetings, - Repsol and Proas bilaterally decided on changes to bitumen prices and the moment at which they would be implemented and subsequently communicated the decisions made to the other market operators,

[1118] *Candle Waxes* (COMP/39.181) [2008] OJ C295/17, paras 681-686.

					- Repsol and Proas met with new members to negotiate their market shares in their area of sales, - During seven out of the twelve years duration issues concerning the market sharing agreement were agreed between Repsol and Proas.[1119]
Gas Insulated Switchgear	24 January 2007	2006			
Siemens *ALSTOM/AREVA*			leading role	50%	During the period of operation Siemens and ALSTOM have consecutively played the *'role of European secretary of the cartel'*, which had extensive tasks: *'It was the pivot for communication between the European undertakings, it handled the communication on behalf of the European undertakings with the Japanese secretariat, it convened and chaired meetings and it was responsible for accounting the quotas.'*[1120]
Bitumen NL	13 September 2006	2006			
Shell			instigator / leading role	50%	*Role of instigator*

[1119] *Bitumen – NL* (COMP/38.456) [2006] OJ L196/40, paras 527-536.
[1120] *Gas Insulated Switchgear* (COMP/38.899) [2006] OJ C5/7, paras 511-514.

KWS					The Commission found evidence that KWS approached Shell for suggestions for future cooperation between bitumen suppliers and the five major road builders. KWS passed on special rebates from Shell to other road builders. The Commission considers these initiatives at the origin of the cartel. As market leader of each group both firms were instrumental in instigating the infringement.[1121] *Role of leader* Both firms were found to be leader of the infringement during the entire period of its operation. Agreements were concluded between the group of road builders and the bitumen suppliers through contacts of the two market leaders in each group. KWS often organised the meetings for the road builders in which it would also inform other members of the price changes for bitumen. And Shell also participated in those meetings on behalf of the bitumen suppliers. The Commission considered their behaviour as *'driving forces in the operation of the cartel'*.

[1121] *Bitumen – NL* (COMP/38.456) [2006] OJ L196/40, paras 342-349.

Sorbates	1 October 2003	1998			
Hoechst *Daicel*			leading role	30%[1122]	Hoechst proposed the creation of a neutral Swiss organisation to collect the data from firms outside the EEA to effectively ensure monitoring of volume quota adherence. It also took punishment measures by unilaterally increasing its volume due to the existence of material that was not reported by Japanese producers. Because of its membership in a Japanese export cartel, it had access to Japanese export statistics and was in a position to check the individual sales figures, whereas Japanese producers had no access to Hoechst's sales figures. Hoechst was the world largest producer and as such benefitted most from the cartel. It was generally the first to announce new prices. Daicel acted as an intermediary between Japanese producers and Hoechst and thus had regular contact with Hoechst. It implemented a cartel penalty system to control the agreed volume quotas. It also tried to convince Nippon to stay in

[1122] Hoechst received a 30% increase for its leading role and a 50% increase due to recidivism.

					the cartel and to stick to the volume quotas and the target price. Together Hoechst and Daicel advocated for the continuation of the meetings and the agreement. They were found to be *'important driving forces'* and the most active members. Both were in charge of scheduling and chairing the meetings and in regular contacts to exchange information during the whole period of the infringement with the purpose of comparing the information with the documents distributed during the joint meetings.[1123]
French Beef	2 April 2003	1998			
FNB *FNSEA* *JA*			preponderant / instigator role	30%[1124]	FNB took the initiative to reach an agreement on a price scale for imports and was especially empathic in support of an oral agreement. It also took associated measures for the preparation and implementation of the agreement.[1125]

[1123] *Sorbates* (COMP/37.370) [2003] OJ L173/5, paras 92-95, 350-366.
[1124] An additional increase of fines was imposed against the three undertakings for the 'use of violence and physical force'. The Commission found that they also used physical force to set up mechanisms to verify that the agreement was being applied, such as illegal 'inspections'.
[1125] *French beef* (COMP/C.38.279) [2003] OJ L209/12, paras 173-175.

Speciality Graphite	17 December 2002	1998			
SGL Carbon AG (SGL)			leading role	50%	The Commission followed its findings in Graphite electrodes (see below) that SGL *'initiated and steered the development throughout the infringement period'*. SGL had not contested the Commission's findings.[1126]
Video Games	30 October 2002	1998			
Nintendo			leading role	50%	Nintendo coordinated and enforced the control of parallel trade to restrict parallel trade. As the manufacturer and distributor of the product Nintendo was able to monitor the existence of parallel trade by tracking the ratio of products purchased by retailers. Nintendo put in place administrative procedures to trace suspected parallel traders, it adjusted the hardware/software ratio of its products and used statistical methods to trace customer selling to other traders. It used similar methods to monitor distributors who parallel exported products. It also systematically collected data on parallel imports from all subsidiaries and distributors within the EEA. [1127]

[1126] *Specialty Graphite* (COMP/37.667) [2002] OJ L180/20, para 485.
[1127] *Video Games* (COMP/35.587 PO), *Nintendo Distribution* (COMP/35.706 PO) and *Omega — Nintendo* (COMP/36.321) 2003/675/EC [2003] OJ L255/33, paras 228-238, 406

Carbonless Paper	20 December 2001	1998			
AWA			leading role	50%	Several meetings were convened and conducted by representatives of AWA and AWA also instigated the restructuring of the cartel. AWA also initiated two price increases by demanding that others would follow AWA's price increases. Evidence showed that AWA often was the first to introduce price increases while others 'followed' the announcements. The Commission also found that AWA played a key role in monitoring and ensuring the compliance with the agreement.[1128]
Citric Acid	5 December 2001	1998			
ADM *Hoffmann-La Roche*			leading role	35%	The Commission considered that the meetings between ADM and Hoffmann-La Roche played a determining role in the establishment (and re-establishment) of the cartel, but it considered that the evidence was not sufficient to show that ADM was the instigator of the cartel. It did, however, find that ADM was a leader of the cartel. Evidence showed that the representative of ADM was seen as 'The Wise Old

[1128] *Carbonless paper* (COMP/36.212) 2004/337/EC [2001] OJ L115/1, paras 418-424

					Man' who contributed with ideas for the arrangements. Other members have declared that ADM chaired the meetings and tended to prepare matters and make the proposals for the price lists to be agreed. At least on one occasion Hoffmann-La Roche was found to have approached and introduced a new member to the cartel. In particular its efforts *'to sort out internal quarrels'* were held to show its leadership over the group.[1129]
Belgian Beer Market	5 December 2001	1998			
Interbrew *Alken-Maes*			instigator role	30%	Both firms had initiated the meetings between private-label breweries.[1130]
Vitamins	21 November 2001	1998			
Hoffmann-La Roche			leading roles and instigators	50%	Roche and BASF were joint leaders and instigators. The result of the anti-competitive agreements was to combine market power, but because Roche and BASF possessed a broad range of separate products on closely related markets,

[1129] *Citric acid* (COMP/36.604) [2001] OJ L239/18, paras 255-273.
[1130] *PO/Interbrew and Alken-Maes* (COMP/37.614) [2001] OJ L200, paras 157, 347.

					they formed a *'common front in convincing and implementing the collusive agreements'*. Roche played a particular role as *'prime mover and main beneficiary of these collusive agreements'*.[1131]
BASF				35%	
Sodium Gluconate	2 October 2001[1132]	1998			
Jungbunzlauer (Benckiser)			leading role	50%	Jungbunzlauer has chaired the meetings of the cartel in the period between 1981 and 1984. It took the initiative to resume the agreement in 1988 and chaired the cartel until 1991. After 1991 it also collected the data of the remaining firms. It has also negotiated with a cartel member that failed to fill its quotas.[1133]
Graphite electrodes	18 July 2001	1998			
SGL Carbon AG (SGL)			leading role and instigator	85%[1134]	SGL together with UCAR took the main decisions with regard to target prices and market allocation. They initiated the contacts with other firms and developed the whole plan to set up the cartel as well as organising the first meeting.

[1131] *Vitamins* (Case OMP/37.512) [2001] OJ L6/1, paras 712-718.
[1132] The decision was amended on 17 May 2000.
[1133] *Sodium Gluconate* (COMP/36.756) [2004] C(2004)3598, paras 398-403.
[1134] The Commission imposed a further increase, amounting overall to 85%, against SGL for its attempt to obstruct the Commission's proceeding.

UCAR International (UCAR)			leading role and instigator	60%	The Commission also notes that the fact that another firm has also played a leading role does not excuse or lessen the behaviour of a ringleader.[1135]

[1135] *Graphite electrodes* (COMP/36.490) [2001] OJ L100/1, paras 162-163, and paras 189-192.

Annex 3

Bayer's fine in Synthetic Rubber under the 2006 Fines Guidelines and under the Alternative Method based on the overcharge

Current Method under the 2006 Fines Guidelines			**Alternative Approach based on the overcharge**		
Component	**Calculation**	**€(millions)**	**Component**	**Calculation**	**€(millions)**[1136]
Basic Amount (BA)			**Security Amount (SEC)**		
Sales	€52,400,000		Sales	€52,400,000[1137]	
Relevant sales	16% x Sales	€8,400,000	Duration (Oct 00 – Sep 02)	x 2	€104,800,000
Duration (Oct 00 – Sep 02)	x 2	€16,800,000	Overcharge ($\boldsymbol{D}$)	24.9%	€26,095,200
'Entry Fee' (deterrence amount)	+ (16% x Sales)	€8,400,000	(Presumption of Overcharge)	(20%)	(€20,960,000)
	BA	**€25,000,000**		**SEC**	**€26,095,200**
Adjusted Basic Amount (ABA)			**Fine ($\boldsymbol{F}$)**		
			'Entry Fee' ($\boldsymbol{iD}$)	+ (16%[1138] x $\boldsymbol{D}$)	€4.175,000
Aggravating Circumstances (AC)			Aggravating Circumstances (AC)		
Recidivism	50% x BA	€12,500,000	Recidivism	50% x $\boldsymbol{iD}$	€2,087,500
Mitigating Circumstances (MC)	- none	€0	Mitigating Circumstances (MC)	- none	€0
	(BA + AC - MC) = **ABA**	**€37,500,000**		($\boldsymbol{iD}$ + AC - MC) =	**€6,262,500**

[1136] The numbers have been rounded up.
[1137] Due to a lack of information about the sales in the first year of the infringement, it is assumed that the sales are equal in both years of the cartel infringement.
[1138] In this example the 'Entry Fee' remains unchanged from the Commission decision. In order to cover the enforcement costs in case the whole amount of the overcharge has to be compensated, the Commission should increase the 'Entry Fee'.

Specific Deterrence Increase (SDI)	10% x ABA **ABA + SDI**	€3,800,000 **€41,300,000**	**-**	**-**	**-**
10% Cap	- none	€0	**10% Cap**	- none	€0
Leniency	- (30% x (ABA + SDI))	- €12,400,000	**Leniency**	- (30% x F)	- €1,878,750
Inability to Pay (ITP)		€0	**Inability to Pay (ITP)**		€0
	Final Fine	**€28,900,000**		**Final Fine**	**€4,383,750**
				Total Amount	**€30,478,950**

Annex 4

Dole's fine in Bananas under the 2006 Fines Guidelines and under the Alternative Method based on the overcharge

Current Method under the 2006 Fines Guidelines			**Alternative Approach based on the overcharge**		
Component	**Calculation**	**€(millions)**	**Component**	**Calculation**	**€(millions)**
Basic Amount (BA)			**Security Amount (SEC)**		
Sales	€190,581,150		Sales	€190,581,150	
Relevant sales	15% x Sales	€28,587,172.5	Duration (00 – 02)	x 3	€571,743,450
Duration (Oct 00 – Sep 02)	x 3	€85,761,517.5	Overcharge ($\boldsymbol{D}$)	24.4%	€139,505,401
'Entry Fee' (deterrence amount)	+ (15% x Sales)	€28,587,172.5	(Presumption of Overcharge)	(20%)	(€114,348,690)
	BA	**€114,348,690**		**SEC**	**€139,505,401**
Adjusted Basic Amount (ABA)			**Fine ($\boldsymbol{F}$)**		
			'Entry Fee' ($\boldsymbol{iD}$)	+ (15%[1139] x $\boldsymbol{D}$)	€20,925,810
Aggravating Circumstances (AC)	+ none		Aggravating Circumstances (AC)	+ none	€0
Mitigating Circumstances (MC)			Mitigating Circumstances (MC)		
Specific regulatory regime	- (60% x BA)	€68,609,214	Specific regulatory regime	- (60% x $\boldsymbol{iD}$)	€6,277,743
	(BA + AC - MC) = **ABA**	**€45,739,476**		($\boldsymbol{iD}$ + AC - MC) =	**€14,648,067**
Specific Deterrence Increase (SDI)	+ none	€0	-	-	-
10% Cap	- none	€0	**10% Cap**	- none	€0

[1139] In this example, the 'Entry Fee' has been taken from the Commission decision. In case the whole SEC will be reimbursed, an increase of iD will be necessary in order to cover enforcement costs

Leniency	- none	€0	**Leniency**	- none	€0
Inability to Pay (ITP)		€0	**Inability to Pay (ITP)**		€0
	Final Fine	**€45,600,000** [1140]		**Final Fine**	**€14,648,067**
				Total Amount	**€154,153,468**

[1140] In the decision publicly available, the final amount was rounded from €45,739,476.

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Akzo Nobel NV and Others v Commission, Case C-516/15 P, ECLI:EU:C:2017:314

Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others, Joined Cases C-212/80 to 217/80, ECLI:EU:C:1981:270

Andrea Francovich and Danila Bonifaci and others v Italian Republic, Joined Cases C-6/90 and 9/90, ECLI:EU:C:1991:428

Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani - ETI SpA and Others and Philip Morris Products SA and Others v Autorità Garante della Concorrenza e del Mercato and Others, Case C-280/06, ECLI:EU:C:2007:775

Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, Joined Cases C-46/93 and 48/93, ECLI:EU:C:1996:79

Bundeswettbewerbsbehörde v Donau Chemie AG and Others, Case C-536/11, E-CLI:EU:C:2013:366

Caffaro Srl in amministrazione straordinaria v Commission, Case C-447/11 P, ECLI:EU:C:2013:797

Cascades SA v Commission, Case C-279/98 P, ECLI:EU:C:2000:626

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Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities, Joined Cases C- 29/83 and 30/83, ECLI:EU:C:1984:130

Comptoir national technique agricole (CNTA) SA v Commission, Case C-74/74, ECLI:EU:C:1975:59

Coop de France bétail et viande (Case C-101/07 P) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (Case C-110/07 P) v Commission of the European Communities, ECLI:EU:C:2008:741

SA Musique Diffusion française and others v Commission of the European Communities, Joined Cases C-100/80 to 103/80, ECLI:EU:C:1983:158

SNIA Spa in amministrazione straordinaria v European Commission, Case C-448/11 P, ECLI:EU:C:2013:801

Sumal, S.L. v Mercedes Benz Trucks España, S.L., Case C-882/19, request for a preliminary ruling lodged on 3 December 2019

Vantaan kaupunki v. Skanska Industrial Solutions Oy et al., Case C-724/17, ECLI:EU:C:2019:204,

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BPB de Eendracht NV, formerly Kartonfabriek de Eendracht NV, v Commission, Case T-311/94, ECLI:EU:T:1998:93

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Degussa v Commission, Case T-279/02, ECLI:EU:T:2006:103

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Fédération nationale de la coopération bétail et viande (FNCBV) (Case T-217/03) *and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others* (Case T-245/03) *v Commission*, ECLI:EU:T:2006:391

G. B. Martinelli v. Commission, Case T-150/89, ECLI:EU:T:1995:70

General Química, SA, Repsol Química, SA and Repsol YPF, SA v Commission of the European Communities, Case T-85/06, ECLI:EU:T:2008:598

Jungbunzlauer v Commission, Case-T-43/02, ECLI:EU:T:2006:270

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Commission Decisions

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COMP/38.511 — *DRAMs*, 19 May 2010, OJ C 180

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COMP/40.113 — *Spark Plugs*, 21 February 2018, C(2018) 929

COMP/C.38.279 — *French beef*, 02 April 2003, OJ L 209

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COMP/F/38.645 — *Methacrylates*, 31 May 2006, C(2006) 2098

COMP/35.733 — *Volkswagen*, 28 January 1998, OJ L124/60

COMP/39.792 — *Steel Abrasives*, 25 May 2016, C(2016)

COMP/39.258 — *Airfreight*, Summary of Commission Decision, 2017/C 188/11, 07 March 2017, OJ C 188

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BVerfG, 4 December 2008 - 2 BvR 1043/08

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BGH, 4 June 1992 - IX ZR 149/91

BGH, 28 June 2005, KRB 2/05 – *Berliner Transportbeton I*

BGH, 11 December 2018, KZR 26/17 – *Schienenkartell I*

BGH, 28 January 2020, KZR 24/17 – *Schienenkartell II*

BGH, 23 September 2020, KZR 4/19 – *Schienenkartell V*

OLG Düsseldorf, 22 August 2012 - V-4 Kart 5/11 (OWi), V-4 Kart 6/11 (OWi), 4 Kart 5/11 (OWi), 4 Kart 6/11 (OWi) – *Roasted Coffee*

OLG Stuttgart, 4 April 2019 - 2 U 101/18

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AG Bonn, 18 January 2012 - 51 Gs 53/09

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Case 118/2019 before the Juzgado de lo Mercantil Número 1 de Pontevedra

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Barker v Corus UK Ltd and Murray v British Shipbuilders (Hydrodynamics) Ltd and Others, 2 WLR 1027, UKHL 20, 2 AC 572

Deutsche Bahn AG and others v Morgan Advanced Materials plc [2014] UKSC 24

Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799)

National Grid v ABB [2012] EWHC 869

Patterson v Smiths Dock Ltd and Another, [2006] UKHL 20

United States of America

Abel v Eli Lilly, 343 NW2d 164 (1984 MI)

List of Treaties and Charters

Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407

Treaty on European Union (TEU), OJ C 202, 7.6.2016, p. 13–388

Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26.10.2012, p. 47–390

List of Legislations

Regulations

Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003

Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012

Regulation No 1049/2001 regarding Public Access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001

Regulation No 773/2004 relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004

Directives

Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5.12.2014.

Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union, COM (2013) 404

Proposal for a Directive on the protection of persons reporting on breaches of Union law, COM/2018/218 final, 2018/0106 (COD).

Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final, SWD (2018) 96 final – SWD (2018) 98 final.

Directive 2019/1 to empower the competition authorities of Member States to be more effective enforcers and to ensure the proper functioning on the internal market was signed into law on 11 December 2018 and published in the Official Journal of the European Union on 14 January 2019, OJ L 11, 14.1.2019

Notices, Guidelines, etc.

Communication from the Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law. OJ C 242/01, 22.07.2020.

European Parliament, Resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)).

European Parliament, Resolution of 2 February 2012 on 'Towards a coherent European approach to collective redress', P7_TA(2012)21

Green Paper, Damages actions for breach of the EC antitrust rules, COM(2005) 672

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210/2, 1.9.2006

Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, [1998] OJ 98/C 9/03

Information Note of Vice-President Joaquín Almunia and Commissioner John Dalli, Towards a Coherent European Approach to Collective Redress: Next Steps Joint information note by Vice-President Viviane Reding, SEC (2010) 1192

Information Note of Vice-President Joaquín Almunia and Commissioner John Dalli, Towards a coherent European approach to collective redress, SEC (2011) 173

Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty [1993] OJ C39/6

Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11

Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, C 167/1, 2008; recently amended through Communication 2015/C 256/02 to align the Communication with the protection of settlement submissions under the Damages Directive

Practical guide for quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the functioning of the European Union 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 (C(2013) 3440)

Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003

Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3.

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM(2018) 40 final.

Staff Working Document, Impact Assessment Report Damages actions for breach of the EU antitrust rules accompanying the proposal for a directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD (2013) 203 final

Staff Working Document, Practical Guide – Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440

Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC(2007) 1376

Staff Working Paper, Annex to Green Paper Damages actions for breach of the EC antitrust rules, SEC(2005) 1732

White Paper on Modernisation of the rules implementing articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, [1999] OJ C 132/15

Bibliography

Allain M and others, 'Are Cartel Fines Optimal? Theory and Evidence from the European Union' (2015) 42 International Review of Law and Economics

Angland J, 'Joint and Several Liability, Contribution, and Claim Reduction' (2008) SSRN Electronic Journal

Ashton D, *Competition Damages Actions in the EU* (Edward Elgar Publishing 2018)

Bailey D, 'Presumptions in EU Competition Law' (2010) 31 European Competition Law Review

Bailey E, 'Behavioral Economics and U.S. Antitrust Policy' (2015) 47 Review of Industrial Organization

Bainbridge T, 'The EC Leniency Programme - Hamstrung by Private Litigation?' (2018) 17 Competition Law Insight

Becker G, and Stigler G, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 The Journal of Legal Studies

Becker G, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy

Ben-Shahar O, 'Causation and Foreseeabilitiy', in De Geest G and others (eds) *Encyclopedia of Law and Economics* (2nd edn, Edward Elgar Publishing 2000)

Bernatt M, and Gac M, 'Poland', in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Publishing 2019)

Bishop S, and Walker M, *The Economics of EC Competition Law* (Sweet & Maxwell 2010)

Blažo O, 'Slovakia', in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Bodnar O and others, 'The Effect of Private Damage Claims on Cartel Stability: Experimental Evidence' DICE Discussion Paper, No. 315, Düsseldorf Institute for Competition Economics (DICE).

Bodnár P, 'Hungary', in Piszcz A (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Bornemann B, 'Cartel Damages: Liability and Settlement' (2018) SSRN Electronic Journal

Boyer M, and Kotchoni R, 'The Econometrics of Cartel Overcharges' (2011) SSRN Electronic Journal

Boyer M, and Kotchoni R, 'How Much Do Cartel Overcharge?' (2015) 47 Review of Industrial Organization

Brussels Matters, 'Survey for the Meeting "The European Antitrust Leniency Calculus: Still Worth It?"' (2016) Brussels <http://www.brusselsmatters.eu/index.html?page=489&sz_event=Leniency16>

Buccirossi P, and Spagnolo G, 'Optimal Fines in the Era of Whistle Blowers: Should Price Fixers Still Go to Prison?', in Goshal, V. and Stennek, J. (eds.) *The Political Economy of Antitrust* (Elsvier 2007)

Buccirossi P, de Moura Pinto Marvo C, and Spagnolo G, 'Leniency and Damages' (2015) SSRN Electronic Journal

Budzinski O, and Ruhmer I, 'Merger Simulation in Competition Policy: A Survey' (2009) 6 Journal of Competition Law and Economics

Bundeskartellamt, 'Jahresbericht 2019' (2020) 23 <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Jahresbericht_2019.html?nn=5311338>

Bundeskartellamt, '"Sausage Gap" - Further Fines Amounting to Approx. 110 Million Euros Cease to Apply Because Of Internal Restructuring Measures' (2017) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/26_06_2017_Bell_Wurstkartell.html>

Calabresi G, 'Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.' (1975) University of Chicago Law Review

Calabresi G, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press 1970)

Carlton D, 'Does Antitrust Need to be Modernized?' (2007) 21 Journal of Economic Perspectives

Cataldo A, and Nounckele M, 'Deux questions en matiére de solidarité: ses aménagements conventionnels et la portée du reours contributoire', Théorie générale des obligations et contrats spéciaux: questions choisies (1st edn, Larcier 2016)

Cauffman C, 'Access to Leniency Related Documents after Pfleiderer' (2012) SSRN Electronic Journal

Cauffman C, 'Belgium', in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Cauffman C, 'Luxembourg', in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Cauffman C, 'The Implementation of the Antitrust Damages Directive in Luxembourg' (2017) SSRN Electronic Journal

Cauffman C, 'The Implementation of the Antitrust Damages Directive in Belgium' (2017) 4 Maastricht European Private Law Institute, Working Paper

Cavanagh E, 'Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies.' (1987) 40 Vanderbilt Law Review

CEPS, EUR, and LUISS, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (2007) Final Report <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf>

Chagny M, 'France', in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Combe E, and Monnier C, 'Cartel Profiles in the European Union' (2007) Concurrences

Combe E, Monnier C, and Legal R, 'Cartels: The Probability of Getting Caught in the European Union' (2007) SSRN Electronic Journal

Connor J, and Helmers C, 'Statistics on Modern Private International Cartels, 1990-2005' (2007) SSRN Electronic Journal

Connor J, and Lande R, 'The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies' (2006) 51 The Antitrust Bulletin

Connor J, and Lande R, 'Cartel Overcharges and Optimal Cartel Fines' in Issues in Competition Law and Policy (ABA Section of Antitrust Law 1st ed. 2008)

Connor J, 'Optimal Deterrence and Private International Cartels' (2006) SSRN Electronic Journal

Connor J, 'Price Fixing Overcharges: Revised 2nd Edition' (2010) SSRN Electronic Journal

Connor J, 'Price-Fixing Overcharges: Revised 3rd Edition' (2014) SSRN Electronic Journal

'Contribution and Antitrust Policy' (1980) 78 Michigan Law Review

Cooter R, and Ulen T, *Law and Economics* (6th edn, Pearson Education Inc 2011)

Cooter R, 'Torts as the Union of Liberty and Efficiency: An Essay on Causation' (1987) Chicago Kent Law Review

Craswell R, 'Kaplow and Shavell on the Substance of Fairness' (2003) 32 The Journal of Legal Studies

D. Shepardson, 'VW Agrees to Buy Back Diesel Vehicles, Fund Clean Air Efforts' (2016) <https://www.reuters.com/article/us-volkswagen-emissions-settlement/vw-agrees-to-buy-back-diesel-vehicles-fund-clean-air-efforts-idUSKCN0ZD2S5>

Dabney J, 'Contribution in Private Antitrust Suits' (1978) 63 Cornell Law Review

Dari-Mattiacci G, 'Tort Law and Economics' (2003) SSRN Electronic Journal

de Cecco F, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 Common Market Law Review

De Geest G, 'Who Should Be Immune from Tort Liability?' (2012) 41 The Journal of Legal Studies

De Smijter E, and O'Sullivan D, 'The Manfredi Judgment of the ECJ and How It Relates to the Commission's Initiative on EC Antitrust Damages Actions' (2006) 3 Competition Policy Newsletter

Deringer A, and Tessin C, ‚Das erste Kartellgesetz des Gemeinsamen Marktes' (1962) 15 Neue Juristische Wochenschrift

Deringer A, 'Rapport Sur La Consultation Relative À Un Premier Règlement 'Application Des Articles 85 Et 86 Du Traité De La C.E.E.' (1961) Assemblée parlementaire européenne

Easterbrook F, *Antitrust Damages Allocation: Hearing Before the Subcommittee on Monopolies and Commercial Law* (House of Representatives, 97th Congr, 1st & 2nd Sess 1982)

Easterbrook F, Landes W, and Posner R, 'Contribution among Antitrust Defendants: A Legal and Economic Analysis' (1980) 23 The Journal of Law and Economics

Ehrlich I, 'Crime, Punishment, and the Market for Offenses' (1996) 10 Journal of Economic Perspectives

European Commission, 'Competition: Commission Revises Guidelines for Setting Fines in Antitrust Cases' (2006) <https://ec.europa.eu/commission/presscorner/detail/en/IP_06_857>

European Commission, 'A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement Brussels, IP/18/3041' (2018) <http://europa.eu/rapid/press-release_IP-18-3041_en.htm>

European Commission, 'Competition Revises Guidelines for Setting Fines in Antitrust Cases' (2006)

European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Springer 2005)

Fairgrieve D, and G'Sell-Macrez F, 'Causation in French Law: Pragmatism and Policy', in Goldberg R, *Perspectives on Causation* (Hart Publishing 2011)

Ferey S, and Dehez P, 'How to Share Sequential Liability: A Cooperative Game Theoretical Approach' (2012) SSRN Electronic Journal

Ferey S, and Dehez P, 'Multiple Causation, Apportionment, and the Shapley Value' (2016) 45 The Journal of Legal Studies

Ferro M, 'Portugal' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Geradin D, and Henry D, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments' (2005) SSRN Electronic Journal

Gilead I, Green M D, and Koch B A, 'General Report Causal Uncertainty and Proportional Liability: Analytical and Comparative Report' in Gilead I, Green M D, and Koch B A, *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter 2013)

Gilliams H, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion' (2014) 37 World Competition

John CP Goldberg, 'Twentieth Century Tort Theory' (2003) 91 Georgetown Law Journal

Gray A, 'Criminal Sanctions for Cartel Behaviour' (2008) 8 QUT Law Review

Gyselen L, 'The Commission's Fining Policy in Competition Cases – Questo È Il Catalogo' in Slot P and McDonnell A, *Procedure and Enforcement in EU and US Competition Law* (Sweet and Maxwell 1993)

Harding C, 'Cartel Deterrence: The Search for Evidence and Argument' (2011) 56 The Antitrust Bulletin

Henriksson L, 'Sweden' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Hess P, Pfeiffer P, and Mertens M, 'Evaluation of Contributions to the Public Consultation and Hearing: Towards a Coherent European Approach to Collective Redress' (University of Heidelberg 2011)

Honoré A, 'Causation and Remoteness', *International Encyclopedia of Comparative Law* (6th edn, Mohr Siebeck 1983)

Houba H, Motchenkova E, and Wen Q, 'Legal Principles in Antitrust Enforcement' (2018) 120 The Scandinavian Journal of Economics

Inderst R, Maier-Rigaud F, and Schwalbe U, 'Umbrella Effects' (2014) 10 Journal of Competition Law and Economics

Ioannidou M, 'Cyprus' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Ioannidou M, 'Greece' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Jerneva J, and Druyiete I, 'Latvia' in Piszcz A (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Jones A and Sufrin B, *EU Competition Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2014)

Jones A, Sufrin B, and Dunne N, *EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019)

Jones A, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8 European Competition Journal

Kalai E, and Samet D, 'On Weighted Shapley Values' (1987) 16 International Journal of Game Theory

Kaplow L, and Shavell S, 'Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income' (1994) 23 The Journal of Legal Studies

Kaplow L, and Shavell S, 'The Conflict Between Notions of Fairness and the Pareto Principle' (1999) 1 American Law and Economics Review

Katsoulacos Y, Motchenkova E, and Ulph D, 'Penalizing on the Basis of the Severity of the Offence: A Sophisticated Revenue-Based Cartel Penalty' (2020) 57 Review of Industrial Organization

Katsoulacos Y, Motchenkova E, and Ulph D, 'Penalizing Cartels: The Case for Basing Penalties on Price Overcharge' (2015) 42 International Journal of Industrial Organization

Kaye D, 'The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation' (1982) 7 American Bar Foundation Research Journal

Hans Keiding, *Game Theory – A Comprehensive Introduction* (World Scientific Publishing 2016)

Kersting C, and Podszun R, *Die 9. GWB-Novelle* (C. H. Beck 2017)

Kersting C, 'Germany' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Kersting C, 'Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants' (2013) 5 Journal of European Competition Law & Practice

Kirst P, and Van den Bergh R, 'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives' (2015) 12 Journal of Competition Law and Economics

Kirst P, 'Skanska, Cogeco and Otis: Harmonisation Through the Back Door' (2020) 41 European Competition Law Review

Kirst P, 'The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe' (2019) 16 European Competition Journal

Kloub J, 'White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement' (2009) 5 European Competition Journal

Komninos D, and Oxera, 'Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts' (DG Competition & European Commission 2009) <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf>

Kornhauser L, and Revesz R, 'Settlement Under Joint and Several Liability' (1993) 63 New York University Law Review

Kortmann J, and Mineur S, 'The Netherlands' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Krüger C, *Kartellregress - Der Gesamtschuldnerausgleich als Instrument der privaten Kartellrechtsdurchsetzung* (Nomos 2010)

Laborde J, 'Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges' (2019) 4 Concurrences

Lahme R, and Ruster A, 'Das ungeschriebene Merkmal der Kartellbefangenheit' (2019) 4 Neue Zeitschrift des Kartellrechts

Landes W, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review

Landes W, and Posner R, 'The Private Enforcement of Law' (1975) 4 The Journal of Legal Studies

Landes W, and Posner R, 'Joint and Multiple Tortfeasors: An Economic Analysis' (1980) 9 The Journal of Legal Studies

Landes W, and Posner R, 'Causation in Tort Law: An Economic Approach' (1983) 12 The Journal of Legal Studies

Landes W, and Posner R, 'Tort Law as a Regulatory Regime for Catastrophic Personal Injuries' (1984) 13 The Journal of Legal Studies

Leslie C, 'Judgment-Sharing Agreements' (2009) 58 Duke Law Journal

Lianos I, Davis P, and Nebbia P, *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press 2015)

Ioannis Lianos, 'Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe' (2015) CLES Research Paper Series 2/20159

Lombardi C, *Causation in Competition Law Damages Action* (Cambridge University Press 2020)

Lopopolo S, 'Italy' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Lorenz P, 'BGH sieht Abschalteinrichtung in Dieseln als Mangel an: Nur ein Hinweis oder Schon ein Präjudiz?' Legal Tribune Online (2019) <https://www.lto.de/recht/hintergruende/h/bgh-hinweisbeschluss-vw-diesel-abschalteinrichtung-mangel-unmoeglichkeit-nacherfuellung/>

Lucey M, 'Ireland' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Malinauskaite J, 'Lithuania' in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Malnar V, 'Croatia', in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Amsterdam University Press 2017)

Marcos F, 'Spain' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2017)

Marcos F, 'Transposition of the Antitrust Damages Directive into Spanish Law' (2018) Working Paper IE Law School <https://cee.ie.edu/sites/default/files/AJ8-241-I.pdf>

Marshall R, and Marx L, *The Economics of Collusion – Cartels and Bidding Rings* (MIT Press 2012)

McAfee R, Mialon H, and Mialon S, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) 92 Journal of Public Economics

Mikelėnas V, and Zaščiurinskaitė R, 'Lithuania' in Piszcz A (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Mircea V, 'Romania' in Piszcz A (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Motta M, 'On Cartel Deterrence and Fines in the European Union' (2008) 29 European Competition Law Review

Nagy C, 'Hungary' in Rodger B, Ferro M, and Marcos F (eds), *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Napel S, and Oldehaver G, 'Kartellschadensersatz und Gesamtschuldnerausgleich – Ökonomisch faire Schadensaufteilung mit dem Shapley-Wert' (2015) 3 Neue Zeitschrift für Kartellrecht

Napel S, and Welter D, 'Responsibility-Based Allocation of Cartel Damages' (2017) Universität Bayreuth Working Paper <https://www.vwl4.uni-bayreuth.de/pool/Publikationen_Napel/2017_Responsibility-Based-Allocation-of-cartel-damages---Napel-Welter---September-2017.pdf>

Notaro G, 'Methods for Quantifying Antitrust Damages: The Pasta Cartel in Italy' (2013) 10 Journal of Competition Law and Economics

OECD, 'Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws' (2002)

OECD, 'Leniency for Subsequent Applicants' (2012) DAF/COMP(2012)25

Oetker H and others, *Münchener Kommentar zum Bürgerlichen Gesetzbuch Bd. 2: Schuldrecht Allgemeiner Teil I* (8th edn, Beck C H 2018)

Parisi F and others, 'Deterrence of Wrongdoing in Ancient Law' (2020) Roman Law and Economics

Pärn-Lee E, 'Estonia' in Piszcz A (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Petr M, 'Czech Republic' in Piszcz A (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Petrov A, 'Bulgaria' in Piszcz A (ed*), Implementation of the EU Damages Directive in Central and Eastern Countries* (Amsterdam University Press 2017)

Petrov A, 'Implementation of the EU Damages Directive in Bulgaria' (2018) SSRN Electronic Journal

Peytz H, 'Denmark Implementation of Directive 2014/104' (2018) 5 Wirtschaft und Wettbewerb

Pindyck R, and Rubinfeld D, *Microeconomics* (8th edn, Pearson Education Inc 2013)

Piszcz A, and Wolski D, 'Poland' in Piszcz A (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Piszcz A, *Implementation of the EU Damages Directive in Central and Eastern European Countries* (University of Warsaw Faculty of Management Press 2017)

Polinsky A, and Shavell S, 'Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis' (1981) 33 Stanford Law Review

Polinsky A, 'Private versus Public Enforcement of Fines' (1980) 9 The Journal of Legal Studies

Pošćić, A. 'EU Competition Law in the Aftermath of Directive 2014/14 and Its Implementation in the Republic of Croatia' in V. Sosoni, M. Bajčić, Ł. Biel, & S. Marino (eds.), *Language and Law - The Role of Language and Translation in EU Competition Law* (Springer 2018)

Rasinkangas S, and Wik C, 'The Implementation and Impact of the EU Antitrust Damages Directive in Finland' (2018) 1 Wirtschaft und Wettbewerb

Rawls J, *A Theory of Justice* (Harvard University Press 1971)

Rengier L, 'Cartel Damages Actions in German Courts: What the Statistics Tell Us' (2019) 11 Journal of European Competition Law & Practice

Riemer Y, 'Sharing Agreements Among Defendants in Antitrust Cases' (1983) 1 George Washington Law Review

Rodger B, 'Private Enforcement Of Competition Law, The Hidden Story Part II : Competition Litigation Settlements in The UK, 2008-2012' (2015) 8 Global Competition Litigation Review

Rodger B, 'United Kingdom' in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Rodger B, Ferro M, and Marcos F, *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Rodger B, Ferro M, and Marcos F, 'Promotion and Harmonization of Antitrust Damages Claims by Directive 2014/104/EU', in Rodger B, Ferro M, and Marcos F (eds) The EU Antitrust Damages Directive (Oxford University Press 2019)

Rodger B, Ferro M, and Marcos F, 'Transposition: Key Issues and Controversies', in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2019)

Rodger B, Ferro M, and Marcos F, 'Transposition Context, Process, Measures and Scope', in Rodger B, Ferro M, and Marcos F (eds) *The EU Antitrust Damages Directive* (Oxford University Press 2018)

Rose J, 'Contribution in Antitrust: Some Policy Considerations' (1979) Antitrust Law Journal

Rutgers J, 'European Competence and A European Civil Code, A Common Frame of Reference or an Optional Instrument' (2010) SSRN Electronic Journal

Rutgers J, 'European Competence and a European Civil Code' in Hartkamp A S, Hesselink M W, Hondius W, Mak C, Du Perron E (eds.), *Towards a European Civil Code* (4th edn, Kluwer 2004)

Sanders M and others, 'Disclosure of Leniency Materials in Follow-On Damages Actions: Striking the Right Balance Between the Interests of Leniency Applicants and Private Claimants' (2013) 34 European Competition Law Review

Saenger I, *Zivilprozessordnung* (8th edn, Nomos 2019)

Schäfer H, and Ott C, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (Springer Publishing 2012)

Schäfer H, and Van den Bergh R, 'Member States Liability for Infringement of the Free Movement of Goods in the EC: An Economic Analysis' (2000) 156 Journal of Institutional and Theoretical Economics

Schroeder C, 'Corrective Justice and Liability for Increasing Risks' (1990) UCLA Law Review

Schwalbe U, 'Haftungsquotierung bei Kartellschäden - Ein Ansatz aus der Theorie Kooperativer Spiele' (2013) Diskussionspapier Universität Hohenheim <https://www.uni-hohenheim.de/organisation/publikation/haftungsquotierung-bei-kartellschaeden-ein-ansatz-aus-der-theorie-kooperativer-spiele>

Section of Antitrust Law of the American Bar Association, 'Report on Contribution and Claim Reduction for the Antitrust Modernization Commission' (2005)

Schwarzer, W. W. 'Antitrust Damages Allocation: Hearing Before the Subcommittee on Monopolies and Commercial Law' (1982) House of Representatives, 97th Cong., 1st & 2nd Sess.

Sen A, 'Personal Utilities and Public Judgements: or What's Wrong with Welfare Economics' (1979) 89 The Economic Journal

Shapley L, 'A Value for n-Person Games', in Kuhn H W, and Tucker A W (eds), *Contributions to the Theory of Games II* (Princeton University Press 1953)

Shapley L, *Additive and Non-Additive Set Functions* (Princeton University 1953)

Shavell S, 'An Analysis of Causation and the Scope of Liability in the Law of Torts' (1980) 9 The Journal of Legal Studies

Shavell S, *Economic Analysis of Accident Law* (Harvard University Press 2009)

Shepardson D, and Schectman J, 'VW Agrees to Buy Back Diesel Vehicles, Fund Clean Air Efforts' (2016) Reuters <https://www.reuters.com/article/us-volkswagen-emissions-settlement/vw-agrees-to-buy-back-diesel-vehicles-fund-clean-air-efforts-idUSKCN0ZD2S5>

Smith M, and Grigoriadou C, 'Leniency, Pfleiderer and the Impossibility of Balance' (2012) Global Competition Review

Smuda F, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2012) SSRN Electronic Journal

Spellenberg U, 'Rom I-VO Art. 18' in Säcker, Rixecker, Oetker and Limperg (eds) *Münchener Kommentar zum BGB* (8th edn, 2021)

Stigler G, 'The Optimum Enforcement of Laws' (1970) 78 Journal of Political Economy

Sullivan E, and Polden D, 'Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis' (1983) 20 Harvard Journal on Legislation

Talaat W, 'Causa Proxima Non Remota Spectatur: The Doctrine of Causation in the Law of Marine Insurance' (2003) 34 Journal of Maritime Law & Commerce

Thompson G and others, 'In-Use Emissions Testing of Light-Duty Diesel Vehicles in the United States' (West Virginia University 2014) < https://theicct.org/publications/use-emissions-testing-light-duty-diesel-vehicles-us>

Van Bael I, 'Fining à la Carte: The Lottery of EU Competition Law' (1995) European Competition Law Review

Van den Bergh R, 'Behavioral Antitrust: Not Ready for the Main Stage' (2013) 9 Journal of Competition Law and Economics

Van den Bergh R, *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017)

Van den Bergh R, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 Maastricht Journal of European and Comparative Law

Veljanovski C, 'Deterrence, Recidivism, and European Cartel Fines' (2011) 7 Journal of Competition Law and Economics

Visscher L, 'Tort Damages' in De Geest G and others (eds) *Encyclopedia of Law and Economics* (2nd edn, Edward Elgar 2009)

Vlahek A, and Podobnik K, 'Slovenia' in Piszcz A (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press 2017)

Wall D M, 'Contribution and Claim Reduction in Antitrust Litigation. A Legislative Analysis' Monograph 11 (American Bar Association Section of Antitrust 1986)

Waelbroeck D, Slater D, and Even-Shoshan G, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (Ashurst 2004) <https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf>

Weber F, 'Tackling Pass-On in Cartel Cases: A Comparative Analysis of the Interplay Between Damages Law and Economic Insights' (2020) 16 European Competition Journal

Weinrib E, 'Causal Uncertainty' (2015) 36 Oxford Journal of Legal Studies

Wils W, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, In Particular Imprisonment?' in Ehlermann C-D, and Atanasiu I, European Competition Law Annual: Effective Private Enforcement of EC Antitrust Law (Hart Publishing 2001)

Wils W, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition

Wils W, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 World Competition

Wils W, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 World Competition

Wright R, 'Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure' (1988) 1 U.C. Davis Law Review

Wright R, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (2021) 1 Iowa Law Review

Wright R, 'Proving Causation: Probability Versus Belief' in Richard Goldberg (ed) *Perspectives on Causation* (Hart Publishing 2011)

Wright R, 'Substantive Corrective Justice, In Symposium, Corrective Justice and Formalism' (1992) 1 Iowa Law Review

Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli 'Joint information note: Towards a Coherent European Approach to Collective Redress: Next Steps Joint information note by Vice-President Viviane Reding' (2010) SEC(2010)1192

Ysewyn J, and Kahmann S, 'The Decline and Fall of the Leniency Programme in Europe' (2018) 1 Concurrences Review

Summary

The thesis contributes to the discussion on the shaping of an optimal enforcement regime of the competition rules in the EU and more specifically on the adjustments to the enforcement system that have become necessary following the implementation of Directive 2014/104/EU. The objectives of this Directive 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 appear to be two-fold: it aims (1) to foster the effectiveness of the competition enforcement regime by optimising the interaction between public and private enforcement, and (2) to ensure full compensation to victims of competition infringements. In other words, the Directive strives to guarantee the right to full compensation to victims of competition law infringements and to integrate the rules on damages actions into the enforcement regime in a way to ensure deterrence. Ensuring the right of compensation is not the single goal of the Directive, rather – as the CJEU has recognised in *Courage* and more recently in *Skanska* – the compensation of victims contributes to the effective enforcement of the competition rules by discouraging agreements or practices which distort competition.

The thesis studies the effects of an anticipated rise of civil damages actions and the solutions opted for by the Directive to overcome potential negative effects for an effective enforcement system. As there still exists a hotchpot of different rules across Europe even after the transposition of the Directive in Europe, the thesis studies the provisions of the Directive and refers only exemplarily to specific deviating national rules. The study focuses on three aspects for which an optimisation is crucial to achieve the Directive's two main objectives. Both goals of effective enforcement and full compensation may be jeopardized by specific features of the EU leniency programme, the methodology for setting fines for competition infringements, and the allocation of civil liability among joint infringers. The study finds that an increased attractiveness of damages claims and the corresponding increase of civil liability for competition infringers will likely lead to negative effects on the deterrence effect of the EU enforcement regime and the victim's right to compensation. Moreover, the thesis provides concrete policy recommendations to overcome these negative effects. These recommendations address each of the three main aspects to achieve optimal enforcement of the competition rules and the goal of full compensation. Below they are discussed in turn:

The allocation of civil liability among joint infringers

The Directive requires that civil liability will be distributed based on an infringer's relative responsibility but has failed to provide national judges with any guidance for how to determine relative responsibility. The thesis proposes a methodology to determine relative responsibility that applies a combination of allocation criteria and distinguishes between direct and indirect purchasers on the one hand and other victims on the other hand. The proposal shows that the determination of contribution can be aligned with the Commission's existing fining practice and is better suited to ensure deterrence and incentives to settle than the US no contribution rule or any other allocation criterion on its own.

Leniency incentives

The study finds that an increase of civil liability has negative effects on the attractiveness of the leniency programme. The decreasing numbers of leniency applications since the publication of the proposal of the Directive in 2014 appear to confirm the findings of the analysis (which were published for the first time in 2015). Following up on the previous findings, the study shows that allowing leniency applicants immunity from or a reduction of its civil liability in the same proportion that the leniency applicant receives immunity or a reduction from fines can overcome the negative impact on the enforcement regime without jeopardising the right to full compensation.

Integrating civil liability in the calculation of fines

A rise of civil liability in addition to the existing level of fines will likely lead to a disproportionate level of fines and in turn likely to result in over-deterrence. In light of those welfare losses, the study argues for a new methodology to reconcile fines and damages. By including the harm that was caused to victims of an infringement in the methodology for the calculation of fines, the proposal scores better in terms of deterrence than the current methodology without jeopardising the right to full compensation. This is true even if the level of follow-on actions remains unchanged.

Samenvatting

Deze dissertatie levert een bijdrage aan de discussie over de vormgeving van een optimaal handhavingsregime van de mededingingsregels in de EU en meer specifiek over de aanpassingen van het handhavingssysteem die noodzakelijk zijn geworden na de invoering van Richtlijn 2014/104/EU. De doelstellingen van deze Richtlijn betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuken op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie lijken tweeledig te zijn: gericht op (1) bevorderen van de effectiviteit van de handhaving van het mededingingsregime door optimalisering van de interactie tussen publieke en private handhaving, en (2) garanderen van volledige schadevergoeding van slachtoffers van mededingingsinbreuken. Met andere woorden: de schadevergoedingsrichtlijn streeft naar garantie van het recht op volledige schadevergoeding van slachtoffers van inbreuken op het mededingingsrecht en het integreren van de regels voor schadevergoedingsacties in het handhavingsregime op een manier die afschrikkend werkt. Garanderen van het recht op schadevergoeding is niet de enige doelstelling van de Richtlijn, want – zoals het HJEU heeft erkend in Courage en meer recentelijk in Skanska –de vergoeding van slachtoffers draagt bij aan de effectieve handhaving van de mededingingsregels door ontmoediging van overeenkomsten of praktijken die de mededinging verstoren.

De dissertatie bestudeert de effecten van een verwachte stijging van civielrechtelijke schadevergoedingsacties en de in de Richtlijn gekozen opties voor het ondervangen van mogelijke negatieve effecten voor een effectief handhavingssysteem. Nu er in Europa, na de gedeeltelijke omzetting van de schadevergoedingsrichtlijn, nog steeds grote verschillen bestaan tussen de Lid-Staten bestudeert de dissertatie de bepalingen van de Richtlijn en wordt alleen als voorbeeld gerefereerd aan specifieke afwijkende nationale regels. Het onderzoek focust op drie aspecten waarvoor een optimalisering cruciaal is voor het realiseren van de twee belangrijkste doelstellingen van de Richtlijn. Beide doelstellingen, effectieve handhaving en volledige schadevergoeding, kunnen in gevaar komen door specifieke kenmerken van de EU-clementieregeling, de methodologie voor het bepalen van boetes voor mededingingsinbreuken en de verdeling van civielrechtelijke aansprakelijkheid tussen gezamenlijke inbreukplegers. Het onderzoek oordeelt dat een grotere aantrekkelijkheid van schadevergoedingsclaims en de

corresponderende toename van civielrechtelijke aansprakelijkheid voor inbreukmakers op het mededingingsrecht waarschijnlijk zal leiden tot negatieve effecten op het afschrikkingseffect van het EU-handhavingsregime en het recht van slachtoffers op schadevergoeding. Bovendien biedt de dissertatie concrete beleidsaanbevelingen voor het ondervangen van deze negatieve effecten. Deze aanbevelingen gaan in op elk van de drie belangrijkste aspecten voor het realiseren van optimale handhaving van de mededingingsregels en de doelstelling van volledige schadevergoeding. Hierna worden ze beurtelings besproken:

De verdeling van civielrechtelijke aansprakelijkheid tussen gezamenlijke inbreukplegers

De Richtlijn verlangt dat civielrechtelijke aansprakelijkheid wordt verdeeld, gebaseerd op de relatieve verantwoordelijkheid van een inbreukpleger, maar heeft nagelaten om nationale rechters te voorzien van richtlijnen voor het bepalen van die relatieve verantwoordelijkheid. De dissertatie stelt een methodologie voor ter vaststelling van de relatieve verantwoordelijkheid, die een combinatie van verdelingscriteria toepast en onderscheidt tussen directe en indirecte kopers, enerzijds, en andere slachtoffers, anderzijds. Het voorstel toont dat de vaststelling van de schadevergoedingsbijdrage afgestemd kan worden op de bestaande boetepraktijk van de Europese Commissie. Deze benadering is beter geschikt voor het garanderen van afschrikking en prikkels om te schikken dan de bijdrageregeling van de VS of een ander verdelingscriterium.

Clementieprikkels

Het onderzoek oordeelt dat een stijging van civielrechtelijke aansprakelijkheid negatieve gevolgen heeft op de aantrekkelijkheid van de clementieregeling. Het dalende aantal clementieaanvragen sinds de publicatie van het voorstel van de Richtlijn in 2014 lijkt de bevindingen van de analyse te bevestigen. Als vervolg op eerdere bevindingen (gepubliceerd in 2015) toont het onderzoek dat de negatieve effecten op het handhavingsregime kunnen worden ondervangen zonder afbreuk te doen aan het recht op volledige schadevergoeding. Dit resultaat wordt bereikt indien aan de clementieaanvrager immuniteit of vermindering van zijn civielrechtelijke aansprakelijkheid wordt verleend in dezelfde mate als de clementieaanvrager immuniteit of een vermindering van boetes ontvangt.

Integreren van civielrechtelijke aansprakelijkheid in de berekening van boetes

Een stijging van civielrechtelijke aansprakelijkheid naast het bestaande niveau van boetes zal waarschijnlijk leiden tot een onevenredig niveau van boetes en over-afschrikking. In het licht

van deze welvaartsverliezen pleit het onderzoek voor een nieuwe methodologie om boetes en schadevergoedingen op elkaar af te stemmen. Door de schade die is toegebracht aan slachtoffers van een inbreuk op te nemen in de methodologie voor het berekenen van de boetes presteert het voorstel beter op het gebied van afschrikking dan de huidige methodologie, zonder afbreuk te doen aan het recht op volledige schadevergoeding. Dit is eveneens het geval als het niveau van opvolgende schadevergoedingsacties ongewijzigd blijft.

Curriculum vitae

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Short bio	
Philipp Kirst is a lawyer (Rechtsanwalt) at Cleary Gottlieb Steen & Hamilton LLP in Cologne, Germany. Philipp's practice focuses on European and German competition law, including cartels, abuse of dominance, merger control, and private damages actions. He represents clients before the European Commission, the German Federal Cartel Office as well as before European and German courts. Philipp in particular advices on all aspects of competition damages litigation, including cartel follow-on damages actions, and represents both plaintiffs and defendants before German courts. Since 2017, Philipp is an external PhD researcher at the Rotterdam Institute of Law and Economics at the Erasmus Universteit Rotterdam. His research focuses on the links between public and private enforcement and the impact of the Damages Directive on the enforcement of EU competition law.	
Education	
PhD Candidate (Rotterdam Institute of Law and Economics)	2017 - 2021
Second State Examination in Law (Berlin, Germany)	2014 - 2016
LL.M. in Competition Law (University of London)	2016 - 2018
Postgraduate Diploma in Competition Law (University of London)	2013 - 2014
European Master in Law and Economics (Rotterdam, Bologna, Aix-Marseille)	2012 - 2013
First State Examination in Law (Berlin, Germany)	2009 - 2012
LL.B. English Law and German Law (King's College London)	2007 - 2010
Work experience	
Associate at Cleary Gottlieb Steen & Hamilton LLP (Cologne, Germany)	Since 2017
Associate at Linklaters LLP (Brussels, Belgium)	2016 - 2017
Legal Clerk at Higher Regional Court Berlin (Berlin, Germany)	2014 - 2016
Trainee at Unit A4 - Private Enforcement and ECN, European Commission, DG Competition (Brussels, Belgium)	Oct-Dec 2015
Trainee at Freshfields Bruckhaus Deringer LLP (Berlin, Germany)	Jan-Sep 2015
Trainee at the Federal Ministry of Economic Affairs and Energy (Berlin)	Sep-Dez 2014
Research Assistant at Freshfields Bruckhaus Deringer (Berlin, Germany)	Nov 2013 - Jan 2014
Prizes and awards	
Shortlisted for the Concurrence Academic Writing Awards	2020
Others	
Anglo-German Law Society e.V. (Founding Member)	
Studienvereinigung Kartellrecht (Member)	
Competition Litigation Forum (Member)	

PhD Portfolio

Name PhD candidate	Philipp Kirst
PhD-period	2017-2021
Promoter	Prof. dr. Roger Van den Bergh
Co-promoter	Prof. dr. Louis Visscher

PhD training

Presentations	***year***
Getting Contribution Right: The Allocation of Liability Among Joint Infringers of EU Competition Law Based on Relative Responsibility	2019
A New Approach to the Calculation of Competition Fines to Reconcile Fines and Damages	2017
European Draft Directive on Damages Actions - How to Protect Leniency Incentives without Jeopardising the Victim's Right of Compensation	2014
Attendance (international) conferences	***year***
36th Annual Conference of the European Association of Law and Economics	2019
34th Annual Conference of the European Association of Law and Economics	2017
31st Annual Conference of the European Association of Law and Economics	2014
Publications	***year***
'Skanska, Cogeco and Otis: Harmonisation through the Back Door?' 41 European Competition Law Review 245	2020
'The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe' 16 European Competition Journal 97-125	2019
'Kartellrecht: Der kartellrechtliche Unternehmensbegriff – Anmerkungen zu EuGH – C-724/17, Vantaan kaupunki/Skanska Industrial Solutions Oy u.a.' 9 EuZW 374 (co-author Rüdiger Harms)	2019
'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives' 12 Journal of Competition Law and Economics 1-30	2015
'Neue Vorgaben für Umweltschutz- und Energiebeihilfen' 2 Zeitschrift für Umweltrecht 73 (co-author Anna Sophie Bigot)	2015