

PART XII

SPECIAL SUBJECT MATTERS

CHAPTER 7

PRIVATE COMPETITION LAW PROCEEDINGS

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1 INTRODUCTION

- 1 The following chapter deals with the issue of competition proceedings. Not all competition *proceedings* are covered but only the private actions for competition law infringements in (civil and commercial) courts. In many systems around the world, competition law is enforced primarily publicly; civil actions – at least outside the US – being a relatively new phenomenon. Public enforcement of competition law is usually carried out by competition authorities, national or supranational, whose decisions can be appealed before the courts with jurisdiction over administrative matters.¹ For the purpose of this chapter, competition authorities and their actions are discussed only insofar they relate or even clash with private actions.
- 2 In this chapter, proceedings for *competition law infringements* are covered. This chapter focuses on those proceedings dealing with violation of anti-competitive agreement and abuse of dominance/monopolisation provisions. Other aspects often included under the umbrella-term 'competition law', such as merger control or unfair competition, are not discussed or only at the periphery where they become relevant. Furthermore, even though competition law can also be referred to as 'antitrust law', especially from the perspective of scholars coming from the United States of America, for consistency reasons, this chapter will prefer using the expression 'competition law'.
- 3 The chapter raises the question, if and to what extent, competition proceedings can be described as a special subject matter different from usual civil and commercial proceedings. Contrary to longer established special subject matters, such as family or labour law, competition proceedings are a relatively new phenomenon. Systems around the world often do not view it as a special subject matter, do not foresee special rules, or special courts or chambers. Yet, the chapter establishes, that competition proceedings at least slowly develop into a special subject matter and, at least, maintain several procedural peculiarities that categorize it as a special subject matter.
- 4 First, competition proceedings and the procedural difficulties are heavily influenced by the substantive competition rules. Who was involved in a cartel or harmed by a cartel determines, for example, the active and passive standing. Here, different stages of the supply chains warrant that there may also be indirectly injured parties or umbrella claimants, for whom special procedural rules may apply. The particularly challenging calculation of damages in competition law and the general asymmetry of information also require special procedural instruments, such as disclosure rules, special rules or usage of evidence (eg, an overly broad reliance on economic experts), presumptions, and

¹ For a comprehensive study focusing on Europe O Brook and B Rodger, 'Comparative report: National judicial review of competition law enforcement in the EU and the UK' in O Brook and others (editors), *Judicial Review of Competition Law Enforcement in the EU Member States and the UK (Empirical Mapping)*, Kluwer 2024); However, there are also systems in which competition authorities play a subordinate role and cartel courts determine the public competition law penalties, for example in Austria, Sections 26 et seq *Kartellgesetz (Austrian Competition Act) 2005 (Austria)*.

estimation of harm, which might not be available in general civil and commercial matters. Therefore, where necessary, this chapter also explains the substantive law contexts of competition proceedings.

- 5 Second, contrary to other fields of civil and commercial procedures, competition proceedings are also special because there is the mentioned duality of enforcing competition provisions across the globe: public and private enforcement. Often competition authorities investigate and fine anti-competitive behaviour. Afterwards or in parallel, harmed companies or individuals claim damages or injunctions (so-called follow-on actions). The interrelation between public and private actions raises several important procedural questions, for example, the role of competition authorities in private actions (eg, as *amicus curiae* or intervener), the evidentiary value of a public enforcement decision for private actions, or access to the competition authority file. In that sense, competition proceedings are also discussed representatively for other fields of private law having a large interaction with regulatory law, such as data protection and financial law.
- 6 Generally, this chapter does not try to comprehensively explain how competition proceedings are handled around the globe in depth but alludes to common features and specific procedural mechanism particularly prone in competition proceedings or introduced specifically for competition proceedings in contrast to general civil and commercial matters. In that context, the overall use of procedural instruments in competition proceedings for general civil procedural law is discussed. Furthermore, this chapter wants to demonstrate differences and similarities between the different systems around the globe and how they handle the (economic and factual) complexity of competition procedures as well as the procedural interests of the parties.
- 7 The chapter tries to grasp the pressing issues raised in competition proceedings around the globe and give an overview in the different systems. In the following order, it discusses (2) the different legislative frameworks, (3) involved courts and tribunals, (4) standing of claimants and defendants and the related peculiarities, (5) different types of actions between so-called stand-alone actions without a prior or parallel public enforcement action and follow-on action (in particular the procedural particularities of follow-on actions, such as the publication of public enforcement decisions, the evidentiary value of public enforcement decisions, the influence of special forms of public enforcement on private actions, such as leniency, settlements and commitments, the role of competition authorities in private claims, staying of proceedings), (6) the available remedies and connected procedural tools, such as damages (including calculation and quantification methods of different forms of damages, guidelines provided for quantification, involvement of competition authorities in quantifying harm, available presumptions and judicial estimation provisions, procedural peculiarities of passing on and passing on defence), injunctions, declaratory actions, nullity actions, and interim relief, and (7) evidence rules (including standard and burden of proof, evidentiary measures, access to evidence). Due to limited capacity and to stay within the framework, alternative dispute

resolution and collective redress, albeit being important topics in competition proceedings, could not be discussed.

- 8 Overall, this chapter shows two systems for competition law enforcement: the EU and the US model. In the US, private competition actions are long established and, as we will see in this chapter, generally seen as an instrument of deterrence and even punishment. This is demonstrated by issues such as treble damages or the exclusion of action by indirect purchasers. In the US, private actions have long substituted public enforcement.² Even today, public enforcement in the US is often limited to criminal enforcement of 'hard-core' violations of competition law and injunctive relief, leaving a deterrence gap to be filled by follow-on treble damages actions.³ In the EU, private actions are a relatively new phenomenon, slowly developing next to the predominant public enforcement of the European Commission and the Member State's competition authorities. Private competition law actions are built around the predominantly civil traditions of the Member States of the European Union and the basic procedural principles established by the European Court of Justice, giving the Member States procedural autonomy, which is limited by the principles of effectiveness and equivalence.⁴ Therefore, the focus of EU competition action lies in compensation or other effective remedies to guarantee EU rights, but at the same time using private actions as a way of enforcing EU law.⁵ EU law generally has more (statutory) limitations compared to rather free and encompassing US competition law, and can be seen as an overall careful and balanced approach, aiming at sustaining rights but not creating a 'claims-industry'.
- 9 While many other countries and systems around the globe all have their distinct procedural systems and procedural peculiarities, including in competition law, which should not be undermined, they seem to follow either the US or the EU model on a general or conceptual level when it comes to private actions. At times, they also follow a cherry-picking approach and choose aspects from both models. Sometimes, specific procedural mechanisms are also only known outside the EU-US contexts, making those systems interesting from a comparative perspective. Although two models, reflecting an EU-US divide, are evident in competition proceedings, every system of the world is unique and handles the procedural problems arising in competition proceedings in varying manners, making it difficult to categorise competition proceedings. Nevertheless, the following chapter tries to show overarching themes in a comparative manner.

² D I Baker, 'Revisiting History - What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?' (2004) 16 *Loyola Consumer Law Review* 382.

³ W P J Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40(1) *World Competition: Law and Economics Review* 15.

⁴ *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case 33-76 (CJEU), Judgment of the Court of 16 December 1976 [ECLI:EU:C:1976:188], Rz 5.

⁵ B Hess, *Europäisches Zivilprozessrecht* (2nd edn, Walter de Gruyter 2021) 813.

2 LEGISLATIVE FRAMEWORK

- 10 Written competition provisions form the basis for private competition proceedings around the globe. The respective competition acts cover the above-mentioned anticompetitive agreements on the one hand, such as Art 101 TFEU in the EU, for example, and abuse of dominance on the other hand, such as Art 102 TFEU in the EU, for example. In most jurisdictions, a violation of any of these competition laws may also result in a private competition action.⁶
- 11 In some jurisdictions, private actions are limited to specific competition law violations. In Canada, for example, private actions for damages are only available for breaches of the Competition Act's criminal provisions, such as price fixing and market allocation.⁷ A violation of the abuse of dominance, refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction provisions⁸ cannot be enforced via damages actions but private parties can commence a private prosecution before the Canadian Competition Tribunal.⁹ The Tribunal then may make an order prohibiting that practice.¹⁰ In some jurisdictions, such as China¹¹ or Australia¹², not only competition law violations but also merger control provisions, specifically carrying out concentrations with restrictive effects on competition without the competition authority's prior approval, can be enforced by private entities. Other jurisdictions, such as Colombia¹³, provide rules in their unfair competition acts serving as basis for private actions, because the acquisition of a competitive advantage through the violation of a legal rule, including competition law, is seen as unfair competition. Similarly in Austria, competition law may also constitute an infringement of Section 1 Austrian Unfair Competition Act as long as the infringement is capable of giving the infringer an advantage in competition, which will regularly be the case.¹⁴

⁶ For example, Section 50 חוק ההגבלים עסקיים (Restrictive Trade Practices Law / Economic Competition Law) No 5748 of 1988 (Israel) or Art 109 독점규제 및 공정거래에 관한 법률 (Monopoly Regulation and Fair Trade Act) 1980 (South Korea).

⁷ Section 36 Competition Act 1985 (Canada), for an overview see J S Tyhurst, *Canadian Competition Law and Policy* (1st edn, Irwin Law 2021).

⁸ Section 75 – 79 Competition Act 1985 (Canada).

⁹ Section 103 1 *ibid.*

¹⁰ Section 79 *ibid.*

¹¹ Art 50 反垄断法 (Anti-Monopoly Law) Order No 68 of 30 August 2007 (People's Republic of China); Y Yunting 'Full Text of Judicial Interpretation on Anti-Monopoly Law of China Supreme Court' (Bridge IP Law Commentary, 9 May 2012) <<https://www.chinaiplawyer.com/full-text-judicial-interpretation-anti-monopoly-law-china-supreme-court/>> accessed 22 June 2023; Y Jin and others, 'China' in International Chamber of Commerce (editor), *Compendium of Antitrust Damages Actions* (1st edition, ICC 2021) 164.

¹² Section 82 Competition and Consumer Act 2020 (Australia); Bridges T and Henderson W, 'Australia' in Gotts I K and Schwartz K S (editors), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

¹³ Art 18 Unfair Competition Act No 256 of 1996 (Colombia).

¹⁴ F Ruffler and R A Steinwender, 'Allgemeines Wettbewerbsrecht' in M Holoubek and M Potacs (editors), *Öffentliches Wirtschaftsrecht* (4th edition, Verlag Österreich 2019) 651, 688; N Gugerbauer, *Kartellgesetz und Wettbewerbsgesetz* (3rd edn Verlag Österreich 2017) 527.

12 The level of detail of the rules governing private enforcement actions vary to a great deal. Some jurisdictions provide for detailed special rules on private competition law actions, either as a standalone act or as a section of their general competition act. The acts include substantive and/or procedural rules on competition proceedings. The EU, for example, already provided and continues to provide some rules relevant for private actions in its general procedural Regulation 1/2003 on the implementation of the rules on competition (Regulation 1/2003), accompanied by guidelines, for example, on the cooperation between national courts and the European Commission.¹⁵ Notably, the EU has adopted the EU Damages Directive¹⁶ in 2014, containing detailed procedural and substantive rules on competition law damages actions, such as rules on disclosure or judicial damages estimation etc.¹⁷ The EU Damages Directive is generally applicable as of 27 December 2016 but includes a rule on temporal application.¹⁸ The general debate on which rules of the Damages Directive constitute procedural, and which substantive rules, has recently been addressed by the European Court of Justice (ECJ) in multiple judgments.¹⁹

¹⁵ Art 15 Council Regulation on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, 1/2003 of 16 December 2002 (EU); Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC' (Communication) COM (2004) C 101/04 54.

¹⁶ Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014/104 of 26 November 2014 (EU Damages Directive);

¹⁷ On the Damages Directive, *inter alia*, F P Maier-Rigaud, 'Towards A European Directive On Damages Actions' (2014) 10 Journal of Competition Law & Economics 341; S Peyer, 'The Antitrust Damages Directive - Much Ado about Nothing?' in Marquis M and Cisotta R (editors), *Litigation and Arbitration in EU Competition Law* (1st edition, Edward Elgar 2015); A Piszcz, 'Piecemeal Harmonisation through the Damages Directive: Remarks on What Received Too Little Attention in Relation to Private Enforcement of EU Competition Law' (2015) 12 Yearbook of Antitrust and Regulatory Studies 79; K Wright, 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive' (2016) 43 Legal Issues of Economic Integration 15; E Truli, 'Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition Law Infringements' (2016) 7 Journal of European Competition Law & Practice 299; P L Parcu, G Monti and M Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (1st edn, Edward Elgar 2018); P Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law: A Law and Economics Analysis* (Edward Elgar 2021).

¹⁸ P 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; According to Art 22 Damages Directive, substantive provisions do not apply retroactively but Member States could make procedural provisions applicable 'to actions for damages of which a national court was seized prior to 26 December 2014'.

¹⁹ AB Volvo and DAF Trucks NV v RM, Case 267/20 (CJEU), Judgment of the Court (First Chamber) of 22 June 2022 [ECLI:EU:C:2022:494]; Pesticide Action Network Europe and Others, Case 162/21 (CJEU), Judgment of the Court (First Chamber) of 19 January 2023 [ECLI:EU:C:2023:30]; RegioJet a.s., Case 57/21 (CJEU), Judgment of the Court (Second Chamber) of 12 January 2023 [ECLI:EU:C:2023:6]; Tráficos Manuel Ferrer, Case 312/21 (CJEU), Judgment of the Court (Second Chamber) of 16 February 2023 [ECLI:EU:C:2023:99]; A and Others v Repsol Comercial de Productos Petrolíferos SA, Case 25/21 (CJEU), Judgment of the Court (First Chamber) of 20 April 2023 [ECLI:EU:C:2023:298].

- 13 Following this Directive, the Member States of the EU have adopted or amended their private competition law rules to implement the EU requirements into national law.²⁰ Even non-EU countries have used the EU Damages Directive as a model. Albania, for example, has aimed at transposing the EU Damages Directive as a candidate country to the EU.²¹ The UK as a former member of the EU is equally heavily influenced by the EU private enforcement *acquis*, in particular when it comes to retained EU law, ie, EU law and EU-derived domestic legislation in force before 1 January 2021, which continues to have effect and forms part of UK domestic law.²² Following the implementation of the EU Damages Directive, the UK has laid down detailed rules governing private enforcement actions, which continue to apply.²³ Outside the EU, other jurisdictions have equally detailed rules comparable to the EU private enforcement regime, such as Hong Kong,²⁴ setting out substantive and procedural rules for competition law private enforcement actions.
- 14 Furthermore, for example in Argentina²⁵, Israel²⁶, Japan²⁷, South Korea²⁸, or Turkey²⁹, the respective competition act provides a rule as a basis for private enforcement, but otherwise the general rules of civil liability and/or civil procedure law apply. Some jurisdictions, such as Germany, had a similar model before the implementation of the EU Damages Directive.³⁰ The new regime in Brazil foresees more detailed rules, particularly on damages and leniency,³¹ but the general civil liability and civil procedure rules also

²⁰ On the transposition of the EU Damages Directive in the Member States B Rodger, M S Ferro and F Marcos (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press 2019); A Biondi, G Muscolo and R Nazzini (eds), *After the Damages Directive: Policy and Practice in the EU Member States and the United Kingdom* (Wolters Kluwer Law International 2022).

²¹ G Skara, 'The Transposition of the Antitrust Damages Directive in Albania as an EU Candidate Country' (2021) 12 *Journal of European Competition Law & Practice* 326.

²² Section 2 and 3 European Union Withdrawal Act 2018 (UK).

²³ Schedule 8A Competition Act 1998 (UK).

²⁴ Art 109 et seq 競爭條例 / 竞争条例 (Competition Ordinance) 2012 (Hong Kong, People's Republic of China).

²⁵ Art 62 Ley N° 27,442, de 9 de mayo de 2018 de Defensa de la Competencia (Law No 27,442 of May 9, 2018 on Protection of Competition (Argentina); Art 1716 Código Civil y Comercial de la República Argentina (Civil and Commercial Code of the Argentine Republic) Law No. 26.994 of 1 October 2014 (Argentina).

²⁶ Section 50 Competition Act Israel (n 6)

²⁷ Art 709 民法 (Civil Code) Act No 89 of 27 April 1896 (Japan); Art 25 独占禁止法 (Antimonopoly Act) Act No 54 of 14 April 1947 (Japan).

²⁸ Art 109 Competition Act South Korea (n 6); Art 750 민법/民法 (Civil Code) Law No. 471 of 1958 (South Korea).

²⁹ Art 56 Sayılı Rekabetin Korunması Hakkında Kanun (Act on the Protection of Competition) Law No. 4054 of 1994 (Türkiye).

³⁰ F Bien, 'Erleichterungen Des Privaten Rechtsschutzes Im Kartellrecht Durch Die 8 GWB-Novelle' (2013) *Zeitschrift für Wettbewerbsrecht* 448.

³¹ Art 47 LEI Nº 14,470, DE 16 DE NOVEMBRO DE 2022 altera a Lei nº 12,529, de 30 de novembro de 2011 - Lei de Defesa da Concorrência, para prever novas disposições aplicáveis à repressão de infrações à ordem econômica (Law No 14,470, of November 16, 2022 amending Law No 12,529, of November 30, 2011 - Competition Defense Law, to establish new provisions applicable to the repression of economic order violations) (Brazil).

continue to apply.³² Generally, even in jurisdictions maintaining special rules for private competition law actions, the general rules of civil liability or procedural law often influence private competition law actions. In case the special rules for private competition law enforcement do not provide any guidelines, the general civil liability or procedural law is applicable.³³

- 15 US federal competition law, the private competition action pioneer, provides for certain requirements for private enforcement actions in the Clayton Act³⁴, which are usually mirrored on state level.³⁵ Yet, US private enforcement is heavily influenced by case-law, specifically the one of the US Supreme Court (USC).³⁶ Generally, private enforcement of competition law around the world is often determined and further developed through jurisprudence. EU private enforcement law prior to the implementation of the EU Damages Directive, for example, mainly evolved through the jurisprudence of the ECJ, using the *effet utile* of EU competition law as a basis for private enforcement actions.³⁷

3 COURTS AND TRIBUNALS

- 16 Even though systems vary to a great deal when it comes to the question of court organisation for private competition actions, they can be divided into two broad categories: private enforcement at ordinary civil and commercial courts and private enforcement at specialized courts and tribunals.

³² Art 53, 186 Código de Processo Civil (Code for Civil Procedure) 2015 (Brazil); Art 927 Código Civil Brasileiro (Brazilian Civil Code) Law No 10,406 of 10 January 2002 (Brazil).

³³ For Israel, E Epstein and M Matzkevich and I Rosenblum Brand, 'Israel' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

³⁴ Sections 4 and 16 Clayton Antitrust Act 1914 (US) codified as Sections 15 et seq, Section 26 Title 15 United States Code.

³⁵ P Chul and others, 'USA' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

³⁶ A A Foer and R M Stutz (eds), *Private Enforcement of Antitrust Law in the United States: A Handbook* (1st edn, Edward Elgar 2012).

³⁷ *Courage Ltd v Bernard Crehan and Others*, Case 453/99 (CJEU), Judgment of the Court of 20 September 2001 [ECLI:EU:C:2001:465].

3.1 Various Approaches towards Court Organisation and Jurisdiction

- 17 On the one hand, in several systems, such as many Member States of the EU³⁸, the United States³⁹, Australia⁴⁰, Argentina⁴¹, Brazil⁴², or Turkey⁴³, the ordinary civil and commercial courts have jurisdiction to handle private enforcement cases. However, many differences remain, including, for example, which particular court has jurisdiction or whether jurisdiction for private enforcement actions is concentrated at a single first instance civil or commercial court. In Poland, for example, private competition actions fall in the jurisdiction of the district courts, regardless of the value of the claim and despite having a specialised court for public enforcement actions.⁴⁴ In Germany, for example, the regional courts have first instance jurisdiction for cartel damages actions.⁴⁵ Germany introduced special rules on concentration of jurisdictions, so the 'Länder' in Germany can concentrate jurisdiction in cartel actions to a regional court for the districts of several regional courts.⁴⁶ In some systems, such as Lithuania, jurisdiction is centralised with one civil and commercial court; in the case of Lithuania, the Vilnius Regional Court.⁴⁷ In systems with federal and state levels, the question of whether a federal or state court has jurisdiction depends on whether the claimant wants to sue for a breach of federal or state competition law.⁴⁸
- 18 On the other hand, other systems have special courts or chambers for private enforcement of competition law, which should provide for specific competition expertise. In several countries, these courts have exclusive jurisdiction. In Chile, for example, the Competition Court has exclusive jurisdiction for (public and) private competition law enforcement actions.⁴⁹ In Mexico, special first and second instance courts for competition law actions, including private enforcement of competition law, exist.⁵⁰ In Greece, both first and second level jurisdiction is centralised for damages actions.⁵¹ Art 13 Damages Act provides for the creation of specialised divisions at the Athens Court of First Instance and

³⁸ For Poland, Art 11 Ustawa z dnia 21 kwietnia 2017 r o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji (Act of April 21, 2017, on claims for compensation for damage caused by infringements of competition law) (Poland).

³⁹ Section 15 Title 15 United States Code.

⁴⁰ Section 86(1) Competition Act Australia (n 12)

⁴¹ Art 62 Argentinian Competition Act (n 25); Art 1716 Argentinian Civil and Commercial Code (n 41).

⁴² Art 53 V Brazilian Code of Civil Procedure (n 32).

⁴³ Section 5 Turkish Competition Act (n 29); hereto F Toksoy and others, 'Turkey' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

⁴⁴ Art 11 Polish Private Enforcement Act (n 38).

⁴⁵ Section 87 Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act) 2004 (Germany).

⁴⁶ Section 89 *ibid*.

⁴⁷ Art 51(2) Konkurencijos įstatymas (Law on Competition) 23 March 1999 (Lithuania).

⁴⁸ For Australia, Bridges and Henderson (n 12).

⁴⁹ Art 30 Ley N° 20 169 que regula la Competencia Desleal (Law No 20 169 on Unfair Competition) 2007 (Chile).

⁵⁰ Art 94 Constitución Política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican States) 1917 (Mexico).

⁵¹ Nteka L and Komninos A, 'The Damages Directive in Greece' in Biondi A and Muscolo G and Nazzini R, *After the Damages Directive* (Wolters Kluwer 2022) 225, 253.

the Athens Court of Appeal to adjudicate cases under the Damages Act. In some systems, several specialised courts exist. In Italy, for example, competition proceedings are concentrated before three specialised courts for business claims in Milan for the north, Rome for the centre (and Sardinia) and Naples for the south (and Sicily).⁵² Some systems foresee jurisdiction of specialised courts or chambers only for certain violations. In Canada, for example, the private parties can apply to prohibit certain anti-competitive practices, such as refusal to deal, with the Competition Tribunal.⁵³ In Austria, for example, any undertaking or association of undertakings, which has a legal or economic interest in the decision, has a right of application to the Cartel Court, where they can file for cease and desist or declaratory actions (not damages actions).⁵⁴

19 Some systems know both private enforcement actions in ordinary and special courts. In Hong Kong, the Competition Tribunal is a specialist court within the Court of First Instance of Hong Kong, which has exclusive jurisdiction to handle claims exclusively dealing with competition law matters.⁵⁵ Actions that involve both competition and non-competition claims can be brought before either a normal chamber of the Court of First Instance or the Competition Tribunal.⁵⁶ Furthermore, the Competition Appeals Tribunal of the UK has gained a certain prominence due to its high profile cases and good reputation.⁵⁷ It is a specialised competition claims court, which has exclusive jurisdiction for collective actions.⁵⁸ Outside of collective actions, claimants may also bring actions in the High Court of England and Wales; claimants can choose between the Competition Appeals Tribunal and the High Court.⁵⁹ In China, usually ordinary civil courts have jurisdiction for private enforcement of competition law actions. Only courts above a certain level, intermediate courts of the provincial capitals and major municipalities, have jurisdiction.⁶⁰ However, as long as an intellectual property court is established, for example in Beijing, Shanghai, or Guangzhou, they exclusive jurisdiction to hear, inter alia, private enforcement actions in these areas.⁶¹ Similarly, in France, commercial courts generally have jurisdiction over

⁵² Decreto Legislativo 2017, n 3 (Legislative Decree No 3/2017) (Italy); Art 2 Legge 9 luglio 2015, n 114 (Law of 9 July 2015 No 114) (Italy).

⁵³ Section 103.1 et seq Competition Act Canada (n 7).

⁵⁴ Section 36(4) No 4 Competition Act Austria (n 1).

⁵⁵ Section 119 Hong Kong Competition Ordinance (n 24).

⁵⁶ C Lam and C Xu, 'Hong Kong' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

⁵⁷ A Andreangeli, 'The Changing Structure of Competition Enforcement in the UK: The Competition Appeal Tribunal between Present Challenges and an Uncertain Future' (2015) 3 *Journal of Antitrust Enforcement* 1; T De La Mare, 'Private Actions in the Competition Appeal Tribunal: The Consumer Rights Act Giveth and the 2015 Competition Appeal Tribunal Rules Taketh Away' (2015) 14 *Competition Law Journal* 219; D George, 'Reforms to Private Actions in the Competition Appeal Tribunal - Taking Stock One Year On' (2016) 15 *Competition Law Journal* 225.

⁵⁸ Section 47B UK Competition Act (n 23).

⁵⁹ Section 47A and Schedule 8A *ibid*.

⁶⁰ Art 3 Chinese Antitrust Judicial Interpretations (n 11).

⁶¹ 北大法律英文网, 'Notice of the Supreme People's Court on Issues Concerning the Jurisdiction of Intellectual Property Courts over Cases' (Law Info China) <<http://www.lawinfochina.com/display.aspx?id=38600&lib=law&EncodingName=gb2312>> accessed 20 June 2023

competition damages actions.⁶² Yet, proceedings are concentrated in eight specific commercial courts, which should in theory, be specialised in competition matters.⁶³

3.2 Judges

- 20 At the ordinary civil and commercial courts, ordinary professional judges who are not necessarily specifically trained in competition law, adjudicate over private competition actions. They are chosen in the usual manner, unspecific to competition law. Even at most of the specialised courts, ordinary professional judges without a special competition law training form the bench. Their competition law expertise stems from the repeated handling of competition actions. In several specialised courts, judges are chosen due to their prior competition law expertise, such as at the Competition Appeal Tribunal in the UK.⁶⁴
- 21 In very few systems, expert lay judges from the business community join the bench to better assess the practical relevant competition specific aspects of a private enforcement case. In Switzerland, for example, notably at the prominent Commercial Court in Zurich, private enforcement of competition law falls into the jurisdiction of the commercial court, which is staffed with two professional and three commercial expert lay judges.⁶⁵ The commercial judges are distributed among chambers according to their own industry affiliation and legal expertise, inter alia, in competition law.⁶⁶ Furthermore, in Canada, the Competition Tribunal consists of professional judges and expert lay judges.⁶⁷ The latter should be knowledgeable in economics, industry, commerce or public affairs.⁶⁸ At the Competition Appeal Tribunal, specifically in damages actions, usually an expert judge, an economist, is part of the bench.⁶⁹ In Austria, those private competition law actions at the Austrian Cartel Court involve expert lay judges with professional experience in the legal or economic field and a corresponding law, business or economics degree.⁷⁰ Crucially, those expert lay judges are not involved in private damages actions for the violation of competition law because the jurisdiction lies with the ordinary civil courts, and not the

⁶² Art L721-3 Code de Commerce (Commercial Code) 1807 (France).

⁶³ Art L420-7, R-420-3, Annex 4-2 *ibid*.

⁶⁴ Generally on CAT, A Andreangeli, 'The Changing Structure of Competition Enforcement in the UK: The Competition Appeal Tribunal between Present Challenges and an Uncertain Future' (2015) 3 *Journal of Antitrust Enforcement* 1; D George, 'Reforms to Private Actions in the Competition Appeal Tribunal - Taking Stock One Year On' (2016) 15 *Competition Law Journal* 225; T De La Mare, 'Private Actions in the Competition Appeal Tribunal: The Consumer Rights Act Giveth and the 2015 Competition Appeal Tribunal Rules Taketh Away' (2015) 14 *Competition Law Journal* 219

⁶⁵ Section 39(2) Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess (Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure) 2020 (Zurich, Switzerland).

⁶⁶ Fleischer H and Danninger N, 'Die Kammer Für Handelssachen: Entwicklungslinien Und Zukunftsperspektiven' (2017) 38 *Zeitschrift für Wirtschaftsrecht* 205, 208.

⁶⁷ Section 3(2)(b) Competition Tribunal Act 1985 (Canada).

⁶⁸ Section 3(3) *ibid*.

⁶⁹ On CAT, Andreangeli (n64).; George (n64); De La Mare (n64).

⁷⁰ Section 66 of the Austrian Competition Act (n 1).

Austrian Cartel Court.⁷¹ However, generally, the practice of using expert lay judges in private enforcement of competition law remains relatively rare worldwide but shows great potential to facilitate damages calculation in damages actions in particular.⁷²

4 PARTIES AND STANDING

22 In private competition law actions, proceedings take place between persons violating competition law and persons harmed or otherwise affected by their anti-competitive behaviour. In damages actions usually harmed persons claim damages from the competition law violating person. The situation is similar for injunctions. Most systems also foresee positive and negative declaratory actions.⁷³ In these cases, the procedural situations can be reversed. Reversed procedural situations can also occur in case the nullity of a contract due to competition violations is claimed or in unjust enrichment cases.⁷⁴ Third parties sometimes join or intervene in the private enforcement proceedings in case they are interested in or even want to be bound by the outcome of the case.⁷⁵ In the following, the standing for usual procedural situations between claimants affected by competition law violations and defendants that have presumably violated competition law will be discussed.

4.1 Standing of Claimants

23 The standing of claimants in private enforcement of competition law can be a controversial topic in some jurisdictions, depending on the category of claimant. Some jurisdictions foresee a far-reaching concept of standing for private enforcement of competition law by giving any natural or legal person standing in private actions who has suffered harm from or is affected by an infringement of competition law or seeks to have a contractual clause declared null and void.

24 In the EU, the judgments in *Courage*⁷⁶ and *Manfredi*⁷⁷, for example, have established a broad notion for EU private competition law actions. Accordingly, direct and indirect⁷⁸

⁷¹ Rüdfler (n 14) 651, 686–688.

⁷² On expert lay judges in private enforcement of competition law L Hornkohl, 'Leave It to the Experts: A Comparative Analysis of Competition Expert Lay Judges in Private Enforcement of Competition Law' (2022) 15 (25) Yearbook of Antitrust and Regulatory Studies 7.

⁷³ See below at 6.3.

⁷⁴ H Ullrich, 'Private Enforcement of the EU Rules on Competition – Nullity Neglected' (2021) 52 International Review of Intellectual Property and Competition Law 606.

⁷⁵ On third party intervention M Brealey and G Kyla, *Competition Litigation: UK Practice and Procedure* (2nd edn, Oxford University Press 2019) 3.01 et seq.

⁷⁶ *Courage Ltd v Bernar* (n 37).

⁷⁷ *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, Case 295/04 (CJEU), Judgment of the Court (Third Chamber) of 13 July 2006 [ECLI:EU:C:2006:461].

⁷⁸ For example, Art 12(1), 14 EU Damages Directive (n 16); in detail, Commission, 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser'

purchasers, distributors or final consumers but also parties to restrictive agreements⁷⁹ are covered.⁸⁰ The 2014 EU Damages Directive provides several alleviations for indirect purchasers particularly, discussed more in detail in this chapter.⁸¹ The open concept of standing in the EU includes so-called umbrella claimants – umbrella pricing being the price effect that results from competitors tending to match the prices of the cartel⁸² – according to the judgement in *Kone*⁸³. In *Otis*⁸⁴, the European Court of Justice further held that even a public body that granted loans on favourable terms in order to acquire assets subject to a cartel has standing to claim damages, for example from increased loan and funding requirements.⁸⁵ Nevertheless, in these remote cases, the causal link between the infringement and the loss still has to be established in the course of the proceedings and is not self-evident.⁸⁶

- 25 The broad view regarding standing, especially regarding indirect purchasers, is now shared by most EU Member States in relation to their national competition law.⁸⁷ Many non-EU countries follow a similar approach and give standing to anybody harmed by a competition

(Communication) COM (2019) C 267/07; in general under EU law, *Ireks-Arkady GmbH v Council and Commission of the European Communities*, Case 238/78 (CJEU), Judgment of the Court of 4 October 1979 [ECLI:EU:C:1979:226] para 14; *Kapniki Michailidis AE v Idryma Koinonikon Asfaliseion (IKA)*, Case 441/98 (CJEU), Judgment of the Court (Fifth Chamber) of 21 September 2000 [ECLI:EU:C:2000:479] para 33 et seq; *Lady & Kid A/S and Others v Skatteministeriet*, Case 398/09 (CJEU), Judgment of the Court (Grand Chamber) of 6 September 2011 [ECLI:EU:C:2011:540]; Case C-129/00 *Commission v Italian Republic* [2003] ECR I-14637, Opinion of AG Geelhoed, para 78.

⁷⁹ *Hereto Courage Ltd v Bernard* (n 38).

⁸⁰ M Botta, 'The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive' (2017) 25(5) *European Review of Private Law* 881; M Strand, 'Indirect Purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) *European Competition Journal* 1744.

⁸¹ Art 12(1), 14 EU Damages Directive (n 16).

⁸² M Ströber, 'Schadensersatzhaftung Für Preisschirmeffekte Bei Verstößen Gegen Deutsches Oder Europäisches Kartellrecht' (2014) *Europäische Zeitschrift für Wirtschaftsrecht* 257; J Franck, 'Umbrella Pricing and Cartel Damages under EU Competition Law' (2015) 11 *European Competition Journal* 135.

⁸³ *Kone AG and Others v ÖBB-Infrastruktur AG*, Case 557/12 (CJEU), Judgment of the Court (Fifth Chamber) of 5 June 2014 [ECLI:EU:C:2014:1317].

⁸⁴ *Otis Gesellschaft mbH and Others v Land Oberösterreich and Others*, Case 435/18 (CJEU), Judgment of the Court (Fifth Chamber) of 12 December 2019 [ECLI:EU:C:2019:1069].

⁸⁵ B Cullen, 'Otis: Effet Utile and the Endless Expansion of Art 101 TFEU' (2019) 10 *Journal of European Competition Law & Practice* 618; A Lepière and M Vandenneucker, 'Arrêt « Otis » : L'action En Réparation Pour Toute Personne Ayant Subi Un Préjudice Indirect à La Suite d'un Cartel' (2020) *Journal de droit européen* 167; B Freund, 'Compensation for Remote Economic Losses Caused by Infringements of Art 101 TFEU – Otis and Others v Land Oberösterreich and Others (C-435/18)' (2020) 69 *GRUR International* 496.

⁸⁶ C-435/18 *Otis Gesellschaft mbH ao v Land Oberösterreich ao* [2019] ECLI:EU:C:2019:1069, Opinion of AG Kokott, para 47 et seq.

⁸⁷ For example, Art 1 Italian Legislative Decree No 3/2017 (n 52) or Art XVII 72 Code de droit économique / Wetboek van economisch recht (Code of Economic Law) 2013 (Belgium).

law infringement, including indirect purchasers, such as Argentina⁸⁸, China⁸⁹, Japan⁹⁰, Israel⁹¹, South Korea⁹² or UK⁹³. In some States, such as Hong Kong⁹⁴, the respective rule on standing is drafted in such an open manner but in practice it has actually not been confirmed by jurisprudence whether especially indirect purchasers or any other person who suffered loss or damage as an indirect result of anticompetitive conduct has standing in private enforcement actions.

26 In the USA, the so-called remoteness doctrine applicable on the federal level limits standing in private enforcement of competition law. Under the remoteness doctrine, a claimant's injury cannot be too remote from the defendant's conduct.⁹⁵ Particularly, the Supreme Court used the remoteness doctrine in *Illinois Brick*⁹⁶ to bar indirect purchasers from bringing private enforcement actions.⁹⁷ With *Illinois Brick*, the Supreme Court reacted to its jurisprudence in *Hanover Shoe*⁹⁸. In the latter, the Supreme Court rejected the so-called passing-on defence⁹⁹ - according to which a claimant could not be entitled to damages because it had passed-on the overcharge to its customers – on effectiveness and efficiency grounds.¹⁰⁰ To avoid multiple recovery of the same damages by both direct and indirect purchasers in the absence of a passing-on defence and by stating that '*the antitrust laws [would] be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge*'¹⁰¹ to bring damages actions, the Supreme Court rejected

⁸⁸ Del Pino and Del Rio, 'Argentina' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

⁸⁹ Tian Junwei v. Carrefour Shuangjing Store and Abbott (High People's Court Beijing, China), Judgement of 2016 [Jing Min Zhong No. 214].

⁹⁰ K Yanagisawa, 'Japan' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

⁹¹ Epstein, Matzkevich and Rosenblum Brand (n 27).

⁹² K H Kwon, J W Lee and J Kim, 'South Korea' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

⁹³ Section 9 Schedule 8A UK Competition Act 1998 (n 23); *Sainsbury's Supermarkets Ltd v MasterCard Inc (CAT, UK)*, Judgement of 2016 [1241/5/7/15 T].

⁹⁴ Section 110 Hong Kong Competition Ordinance (n 24).

⁹⁵ On the remoteness doctrine in general *Associated General Contractors of California, Inc v California State Council of Carpenters (Supreme Court, US)*, Judgement of 22 February 1983 [459 US 519, 529, 540, No 81-334].

⁹⁶ *Illinois Brick Co v Illinois (Supreme Court, US)*, Judgement of 9 June 1977 [431 US 720].

⁹⁷ On the contrast and convergences to the EU concept of standing G Bacharis, 'Is "More" Better? Broadening the Right to Sue in Competition Damages Claims in Both Sides of the Atlantic' (2022) 13 *Journal of European Competition Law & Practice* 217; S Smith, 'The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment' (2021) 17(3) *Journal of Competition Law & Economics* 642 <<https://academic.oup.com/jcle/Art-abstract/17/3/642/6149298?redirectedFrom=fulltext>> accessed 28 June 2023

⁹⁸ *Hanover Shoe, Inc v United Shoe Machinery Corp (Supreme Court, US)*, Judgement of 17 June 1968 [392 US 481].

⁹⁹ See below at 6.1.7.2.

¹⁰⁰ F Cengiz, 'Antitrust Damages Actions: Lessons From American Indirect Purchasers Litigation' (2010) 59 *International & Comparative Law Quarterly* 39.

¹⁰¹ *Illinois Brick Co v Illinois* (n 96).

standing for indirect purchasers in *Illinois Brick*.¹⁰² However, according to later case-law, indirect purchasers have standing when the direct purchaser was a co-cartelist.¹⁰³ Contrary to the federal level, on the state level, several states of the USA generally permit standing to indirect purchasers.¹⁰⁴ Even though the Supreme Court did not have to decide on umbrella claims, the predominant view is that umbrella damages are not covered in line with the *Illinois Brick* judgment on federal level.¹⁰⁵ Again, on state level, for example under the California Cartwright Act, umbrella claimants are granted standing.¹⁰⁶

27 In some systems, differences in standing connected to the chosen legal basis exist. In Colombia, for example, anyone who has suffered damages or seeks to have a contractual clause declared null and void has standing.¹⁰⁷ For actions based on unfair competition law, the claimant must demonstrate the intention to participate in the Colombian market and a possible harm of the economic interests. In Canada, for example, the concept of standing in private actions for damages for violation of the criminal provisions of the Canadian Competition act is similarly broad as the concept in EU law and, contrary to US competition law, includes indirect¹⁰⁸ and even umbrella purchasers¹⁰⁹. As for non-criminal restrictive trade practices, claims are limited in Canada¹¹⁰ and the Competition Tribunal only grants leave where there is reason to believe that the claimant is directly and substantially affected in its business by the practice.¹¹¹

¹⁰² On early critical discussion E Pollock, 'Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine' (1966) 32 Antitrust Law Journal 5.

¹⁰³ *Insulate SB, Inc v Advanced Finishing Systems* (8th Circuit Court of Appeals, US), Judgement of 13 August 2015 [797 F3d 538, 542]; *Paper Systems v Nippon Paper Industries Co* (7th Circuit Court of Appeals, US), Judgement of 6 February 2002 [281 F 3d 629, 631]; *Campos v Ticketmaster Corp* (8th Circuit Court of Appeals, US), Judgement of April 10 1998 [140 F3d 1166, 1171]; *Arizona v Shamrock Foods* (9th Circuit Court of Appeals, US), Judgement of April 3 1984 [729 F3d 1208];

¹⁰⁴ For example, *Supreme Auto Transport, LLC v Arcelor Mittal USA, Inc* (7th Circuit Court of Appeals, US), Judgement of 2008 [902 F 3d 735] dealing inter alia with the Cartwright Act of 1907 (California, US) or *Ciardi v F Hoffmann-La Roche* (State Supreme Judicial Court Massachusetts, US), Judgment of 8 February 2003 [436 Mass 53, SJC-08495].

¹⁰⁵ A J Fuller, 'Let the State Decide: The Efficient Antitrust Enforcer and the Avoidance of Anticompetitive Remedies' (2017) 10(2) *The Journal of Business, Entrepreneurship & the Law* 203; *In re Coordinated Pretrial Proceedings in Petroleum Product* (9th Circuit Court of Appeals, US), Judgement of 4 May 1982 [691 F 2d 1335, 1341].

¹⁰⁶ *County of San Mateo v CSL Ltd* (District Court Northern District of California, US), Judgement of 20 August 2014 [10-CV-05686-JSC, 2014 WL 4100602].

¹⁰⁷ F Serrano and J F Traber, 'Colombia' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

¹⁰⁸ *Pro-Sys Consultants Ltd v Microsoft Corp* (Supreme Court, Canada), Judgement of 31 October 2013 [SCJ 57];

Sun Rype Products Ltd v Archer Daniels Midland Co (Supreme Court, Canada), Judgement of 31 October 2013 [SCC 58]; *Infineon Technologies AG v Option Consommateurs* (Supreme Court, Canada), Judgement of 31 October 2013 [SCJ 59].

¹⁰⁹ *Pioneer Corp v Godfrey* (Supreme Court, Canada), Judgement of 20 September 2019 [SCC 42] paras 76–78.

¹¹⁰ See above at 2.

¹¹¹ D Vaillancourt and M Binetti, 'Canada' in I K Gotts and K S Schwartz (eds), *The Private Enforcement Review* (15th edn, The Law Reviews 2022).

4.2 Standing of Defendants

- 28 The standing of defendants usually does not raise problems. Competition law violators can generally be sued jointly or separately.¹¹² In jurisdictions, such as the European Union, which also prohibits active contributions in full knowledge of the relevant facts to the implementation and continuation of a cartel among producers active on a market that is separate from that on which the contributing undertaking itself operates,¹¹³ a private enforcement action can also be taken against these aiding and abetting companies.
- 29 With regard to the question of which party may be sued, particularly in the EU, the concept of undertaking and the single economic unit doctrine has been discussed to a great extent.¹¹⁴ The latter concept leads to group liability for competition law violation and, incidentally, an extraterritorial scope of application of EU competition law, also in its private enforcement dimension.¹¹⁵ Early on, the ECJ established the so-called single economic unit or entity doctrine to interpret the concept of undertaking for public enforcement of EU competition law.¹¹⁶ The European Court of Justice has consistently held that an undertaking within the meaning of Arts 101 and 102 TFEU is '*any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*'.¹¹⁷ EU competition law addresses the undertaking as a single economic unit. Instead of being based on legal entities, the concept of undertaking in EU competition law is thus functional.¹¹⁸ Many Member States, such as Belgium, Luxembourg, the Netherlands and Portugal, have included the EU definition of undertaking in their national private enforcement laws.¹¹⁹

¹¹² See below at 5.1.3.1.

¹¹³ *AC-Treuhand AG v European Commission*, Case 194/14 P (CJEU), Judgment of the Court (Second Chamber) of 22 October 2015 [ECLI:EU:C:2015:717].

¹¹⁴ O Okeoghene and D Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51 *Common Market Law Review* 1721; D Braun, *Das Konzept Der Gesamtschuldnerischen Verantwortlichkeit von Konzerngesellschaften Im Europäischen Wettbewerbsrecht* (Nomos 2018); N I Pauer, *The Single Economic Entity Doctrine and Corporate Group Responsibility in European Antitrust Law* (Kluwer Law International 2014).

¹¹⁵ L Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) 1 MPILux Research Paper Series.

¹¹⁶ *Imperial Chemical Industries Ltd. v Commission of the European Communities*, Case 48-69 (CJEU), Judgment of the Court of 14 July 1972 [ECLI:EU:C:1972:70] para 64; *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72 (CJEU), Order of the Court (First Chamber) of 18 April 1975 [ECLI:EU:C:1975:50] para 15.

¹¹⁷ *Klaus Höfner and Fritz Elser v Macrotron GmbH*, Case 41/90 (CJEU), Judgment of the Court (Sixth Chamber) of 23 April 1991 [ECLI:EU:C:1991:161].

¹¹⁸ Okeoghene and Bailey (n 114).

¹¹⁹ B Rodger, M S Ferro and F Marcos, 'A Panacea for Competition Law Damages Actions in the EU? A Comparative View of the Implementation of the EU Antitrust Damages Directive in Sixteen Member States' (2019) 26 *Maastricht Journal of European and Comparative Law* 480, 482 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3444376,> accessed 27 June 2023.

- 30 According to the single economic entity doctrine in EU law, several distinct legal entities can constitute a single economic entity, ie, one undertaking, for competition law purposes.¹²⁰ Under this case-law, particularly a mother company can be held liable for its subsidiary's competition law violations if it is exercising decisive influence over the subsidiary.¹²¹ The European Court of Justice even established a presumption of decisive influence or parental liability doctrine in *Akzo Nobel* by stating that '*where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary [...] and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary [...]*'.¹²² Lately, the Court of Justice has refined the parental liability doctrine to a parent company holding '*directly or indirectly, all or almost all of the capital in a subsidiary*' or all (and almost all) of the voting rights.¹²³ But a subsidiary may also be held liable for the conduct of the parent or sister company, provided that there are economic, organisational, and legal links among the entities and that there is a specific link between the economic activity of the subsidiary and the infringement committed by the parent or sister company.¹²⁴ The latter can be demonstrated when the infringement concerns the same products as those marketed by the liable entity.¹²⁵ Under this doctrine, subsidiaries, sister and parent companies in one group can therefore be held liable for each other's competition law infringements and can all be sued in their respective jurisdictions.¹²⁶ The claimant can choose one legal entity of a single economic entity to sue as a defendant.¹²⁷ Applying this uniform concept of undertaking in private enforcement can also lead to interesting cross-border situations and extend the private enforcement of EU competition law beyond the territorial scope of the EU.¹²⁸
- 31 The single economic entity doctrine has also been applied outside the EU with a similar effect on the standing of defendants. In Singapore, for example, the Competition Appeal Board applied a single economic entity doctrine modelled on the EU concept and literally referring to EU case-law in the *Express Bus Operators Appeal No 3*¹²⁹ and *Manuchar*

¹²⁰ E Fischer and P Zickgraf, 'Zur Reichweite der wirtschaftlichen Einheit im Kartellrecht' (2022) 186 ZHR 125, 130.

¹²¹ *Imperial Chemical Industries Ltd. v Commission of the European Communities* (n 116).

¹²² *Akzo Nobel NV and Others v Commission of the European Communities*, Case 97/08 P (CJEU), Judgment of the Court (Third Chamber) of 10 September 2009 [ECLI:EU:C:2009:536].

¹²³ *The Goldman Sachs Group Inc v European Commission*, Case 595/18 P (CJEU), Judgment of the Court (Second Chamber) of 27 January 2021 [ECLI:EU:C:2021:73].

¹²⁴ *Sumal, SL v Mercedes Benz Trucks España, SL*, Case 882/19 (CJEU), Judgment of the Court (Grand Chamber) of 6 October 2021 [ECLI:EU:C:2021:800] para 51.

¹²⁵ *ibid.*

¹²⁶ L Hornkohl, Die internationalzivilprozessualen Folgen der unionskartellrechtlichen Konzernhaftung, IPRax 2023, 254.

¹²⁷ *ibid.*, 263.

¹²⁸ Hornkohl (n 115).

¹²⁹ *Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Transtar Travel Pte Ltd and Regent Star Travel Pte Ltd* (SGCAB, Singapore), Decision of 2011 [Express Bus Operators Appeal

*Steel*¹³⁰. In India, Section 2(h) 2002 Competition Act entails a clear reference to the single economic entity doctrine by defining 'enterprise' as 'a person or a department' working 'directly or through one or more of its units or divisions or subsidiaries'. Furthermore, the doctrine was applied in case-law.¹³¹ In China, even though not explicitly set out in the Antimonopoly law, the single economic entity doctrine was applied in the context of parental liability cases.¹³² However, the enforcement still depends on the discretion of the relevant authorities, creating uncertainties.

32 Outside the EU and the mentioned systems using the single economic entity doctrine for the concept of standing, the concept is often assessed from a different perspective. In the EU, the focus lies on the enforcement dimension in the sense that it has been used as a device by competition authorities and claimants in private enforcement cases to enforce competition law against all legal entities in group companies.¹³³ Outside the EU, businesses use the single economic entity doctrine primarily as a defensive mechanism to forego competition law violations. The so-called intra group exemption (in the US called intra-enterprise conspiracy doctrine) entails that agreements between distinct legal entities of one single economic entity are generally not seen as anticompetitive.¹³⁴

No 3] para 67; Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA, Case 217/05 (CJEU) Judgment of the Court (Third Chamber) of 14 December 2006 [ECLI:EU:C:2006:784] para 40.

¹³⁰ *Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd* (SGHC, Singapore), Judgement of 23 September 2014 [No 927 of 2023].

¹³¹ *Exclusive Motors Pvt Ltd v Automobili Lamborghini SPA*, Competition Appellate Tribunal (Competition Appellate Tribunal, India), Judgement of 28 February 2014 [Appeal No 1/2013]; *Shamsher Kataria v Honda siel & Ors* (CCI, India), Judgement of 25 October 2014 [No 03/2011]; *National Insurance Companies Ltd & Ors v Competition Commission of India* (CCI, India), Judgement of 2017 [Comp LR 1]; *Delhi Jal Board v Grasim Industries Ltd & Ors, Competition Commission of India* (CCI, India), Judgement of 5 October 2017 [Ref Case No 03 and 04 of 2013].

¹³² Josh Yi Xue and Wei Yu, 'The "Single Economic Entity Doctrine" in Chinese Anti-monopoly Law Enforcement' (*Lexology*) <<https://www.lexology.com/library/detail.aspx?g=4ae5a236-9b29-48f6-8ef1-1ab402af67ce>> accessed 26 June 2023.

¹³³ But, as described above, the EU competition Law also knows intra group exemption see *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*, Case 66/86 (CJEU), Judgment of the Court of 11 April 1989 [ECLI:EU:C:1989:140] 803 Rz 3 5; *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc.*, Case 15-74 (CJEU), Judgment of the Court of 31 October 1974 [ECLI:EU:C:1974:114]

1147 Rz 4 1; *Viho Europe BV v Commission of the European Communities*, Case 73/95 P (CJEU), Judgment of the Court (Sixth Chamber) of 24 October 1996 [ECLI:EU:C:1996:405] II-17 Rz 47 ff and I-5457 ZIP 1997 87 Rz 13 ff; *Corinne Bodson v SA Pompes funèbres des régions libérées*, Case 30/87 (CJEU), Judgment of the Court (Sixth Chamber) of 4 May 1988 [ECLI:EU:C:1988:225] 2479 Rz 19 ff; *Tréfileurope Sales SARL v Commission of the European Communities*, Case 141/89 (CJEU), Judgment of the Court of First Instance (First Chamber) of 6 April 1995 [ECLI:EU:T:1995:62] II-791 Rz 129; *Béguelin Import Co v SAGL Import Export*, Case 22-71 (CJEU), Judgment of the Court of 25 November 1971 [ECLI:EU:C:1971:113]; S Thomas, 'Konzernprivileg und Gemeinschaftsunternehmen - Die kartellrechtliche Beurteilung konzerninterner Wettbewerbsbeschränkungen mit Gemeinschaftsunternehmen' (2005) 3 Zeitschrift für Wettbewerbsrechts 236.

¹³⁴ *United States v Yellow Cab Co* (Supreme Court, US) Judgement of 23 June 1947 [332 US 218].

However, as the single economic entity concept is inherently double-edged¹³⁵, countries foreseeing an intra group exemption should vice versa also accept the single economic entity doctrine to extend the reach of competition law fines and damages to all legal entities belonging to a single economic entity.

33 In the US, the emphasis lies on the defensive dimension of the single economic entity doctrine.¹³⁶ In this context, the US Supreme Court has been playing ping-pong with their *rule of reason* and *per se* doctrines. In the early 1947 case *Yellow Cab*, the Supreme Court established the intra-enterprise conspiracy doctrine, according to which a single economic entity does not *per se* escapes a conspiracy violation in the sense of Art 1 Sherman Antitrust Act.¹³⁷ Rather intra-group agreements were assessed under the *rule of reason* analysis, balancing the pro- and anticompetitive effects of such agreements.¹³⁸ The approach changed with the 1984 *Copperweld* case.¹³⁹ The *Copperweld* case is often viewed as a *per se* exemption, while actually the US Supreme Court held that a single economic entity – multiple legal entities effectively working as one person –, constitutes one person in the sense of Section 1 Sherman Antitrust Act, thereby not fulfilling the conditions for conspiracy requiring two persons, at least.¹⁴⁰ In the 2010 *American Needle* judgment, the Supreme Court again took a different point of view and clarified its analysis of the single entity doctrine.¹⁴¹ Instead of connecting the single entity doctrine to the question of personhood under Section 1 Sherman Antitrust Act, the Supreme Court went back to a *rule of reason* analysis.¹⁴² *American Needle* concerned the question whether the NFL and its constituent teams comprise a single economic enterprise for the purposes of their licensing business.¹⁴³ The US Supreme Court took a functional and *rule of reason*

¹³⁵ P Van Cleynenbreugel, 'Single entity tests in U.S. antitrust and EU competition law' (2011) KU Leuven - Faculty of Law 1 <<https://orbi.uliege.be/bitstream/2268/201655/1/SSRN-id1889232.pdf>> accessed 27 June 2023;

¹³⁶ *ibid.*

¹³⁷ *United States v Yellow Cab Co* (Supreme Court, US) Judgement of 23 June 1947 [332 US 218].

¹³⁸ *Sunkist Growers, Inc v Winckler & Smith Citrus Products Co.* (Supreme Court, US), Judgement of 28 May 1962 [370 US 19]; *United States v Citizens & Southern National Bank* (Supreme Court, US), Judgement of 17 June 1975 [422 US 86].

¹³⁹ Van Cleynenbreugel (n 135).

¹⁴⁰ *Copperweld v Independence Tube* (Supreme Court, US) Judgement of 19 June 1984 [467 US 752].

¹⁴¹ *American Needle, Inc v National Football League* (Supreme Court, US), Judgement of 24 May 2010 [560 US 183, Docket No 08-661].

¹⁴² Van Cleynenbreugel (n 135).

¹⁴³ M Edelman, 'Why the 'Single Entity' Defense can never apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports' (2008) 18 *Fordham Intellectual Property, Media and Entertainment Law Journal* 891-927; N Grow, 'A Proper Analysis of the National Football League Under Section One of the Sherman Act' (2009) 9 *Texas Review of Entertainment & Sports Law* 281-305; J McKeown, 'Antitrust Developments in Professional Sports: To the Single Entity and Beyond' (2009) 19 *Marquette Sports Law Review* 363 -393; P R Morrison, 'Shutting Down the Offense: Why the Supreme Court Should Designate the NFL a Single Entity for Antitrust Purposes' (2009) 3 *Journal of Business, Entrepreneurship and the Law* 97-132; Semeraro S, 'Is the National Football League a "Single Entity" Incapable of Conspiring under the Sherman Act?: The Supreme Court will Decide' (2009) 32(1) *Thomas Jefferson Law Review* 1; R S Jeffrey, 'Beyond the Hype: The Legal and Practical Consequences of American Needle' (2010) 11 *Florida Coastal Law Review* 667-686; M McCann, 'The NBA and the Single Entity Defense: A Better Case?' (2010) 1 *Harvard Journal of Sports and Entertainment Law* 39-61; M

approach focusing on whether separate economic actors pursuing separate economic interests were involved in the alleged behavior, depriving the market of independent decisionmakers, concurring entrepreneurial interests and actual or potential competition.¹⁴⁴ Agreements within one single economic entity are presumed non-anticompetitive but in rare cases, where *'the parties to the agreement act on interests separate from those of the firm itself and the intra-firm agreements may simply be a formalistic shell for ongoing concerted action'*¹⁴⁵ the rule of reason analysis under the named parameters may lead to a conspiracy under Section 1 Sherman Antitrust Act. Ultimately, the US single economic entity doctrine focuses not on common ownership necessarily but allows overall for a balanced approach towards the single economic entity doctrine, which could have implications on the standing of defendants.

5 TYPES OF ACTIONS

34 Competition proceedings are generally categorised in two types of actions: follow-on actions and stand-alone actions. Follow-on actions are filed subsequent or parallel to public enforcement proceedings of competition authorities or courts. Stand-alone actions are filed without a prior or parallel to a public enforcement action. In both, specific procedural problems can arise that are characteristic for the type of procedure.

35 The type of procedure often connects to the type of remedy sought.¹⁴⁶ Follow-on damages actions play a large role in Europe, while stand-alone actions played a bigger role for injunctions in abuse of dominance cases.¹⁴⁷ Similar is true for other systems, such as Japan. In Japan, damages actions are only possible after a public enforcement decision.¹⁴⁸ Other types of remedies, such as injunctions, can be sought and are pursued through stand-alone actions.¹⁴⁹ Due to the different procedural traditions, as discussed more in

Jakobzse, 'Kicking 'Single-Entity' to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer after American Needle and the 2010 Collective Bargaining Agreement' (2010) 31 Northern Illinois University Law Review 131-174.

¹⁴⁴ J E Stone and J D Wright, 'Antitrust Formalism is Dead! Long Live Antitrust Formalism! Some implications of American Needle v NFL' (2010) 10-40 Cato Supreme Court Review 394.

¹⁴⁵ *ibid*, 2215.

¹⁴⁶ See below at 6.

¹⁴⁷ Kruse: 'Kartellrecht in Zahlen: Eine quantitative Auswertung der kartellgerichtlichen Entscheidungspraxis' (2022) NZKart 138, 140.

¹⁴⁸ Art 26(1) Antimonopoly Act Japan (n 27).

¹⁴⁹ S Vande Walle, Private Enforcement of Antitrust Law in Japan: An Empirical Analysis, (2011) 8(1) *CompLRev* 7, 22.

detail below,¹⁵⁰ the situation is different in the US: even for damages actions, the majority of cases are stand-alone cases.¹⁵¹

5.1 Follow-on Actions

36 As follow-on actions are filed after public enforcement proceedings, the influence of the public enforcement proceedings, especially the decision, on private actions is crucial. They raise related procedural particularities, such as the publication of public enforcement decisions, the evidentiary value of public enforcement decisions, including those based on special types of public enforcement on private actions, such as leniency, settlements and commitments, and the role of competition authorities in private claims, especially for damages quantification. The latter will be discussed in the context of damages quantification below.¹⁵² Generally, follow-on actions take the form of damages actions and, in the systems foreseeing such a remedy, also restitution, as the anti-competitive conduct usually has seized after the public enforcement phase. The need for injunctions, declaratory relief and interim remedies is mitigated in the follow-on phase.

5.1.1 Publication of Public Enforcement Decisions and Information on Public Enforcement Proceedings

37 Access to information generally plays a decisive role in private competition proceedings.¹⁵³ In order to know of the members of a cartel and therefore possible defendants of a private follow-on action and their anticompetitive conduct, possible claimants have an interest in the public enforcement decision. Next to access to the competition authority file discussed below,¹⁵⁴ the publication of the public enforcement decision, even in form of a summary decision or a non-confidential version of the decision, might provide claimants with the necessary information to contemplate the next steps, such as whether they are harmed by the anticompetitive activity of the perpetrators or where to file the claim.

38 In the EU, the publication of decisions of competition authorities is the norm. According to Art 30 of Regulation 1/2003, the EU Commission shall publish its decision, including the names of the parties and the main content of the decision but needs to pay regard to the legitimate interests of undertakings in the protection of their business secrets.¹⁵⁵ In practice, the Commission usually published the whole decision in a non-confidential

¹⁵⁰ See below at 6.

¹⁵¹ R Hempel, 'Private Follow-on-Klagen im Kartellrecht' (2005) WUW 137, 139; Kauper T E and Synder E A, 'An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and independently initiated cases compared' (1986) 74 Geo LJ 1163ff.

¹⁵² See below at 6.1.2.

¹⁵³ See below at 7.4.

¹⁵⁴ See below at 7.

¹⁵⁵ H Andersson, 'The Quest for Evidence - Still an Uphill Battle for Cartel Victims?' in Strand M, Bastidas Venegas V and Iacovides M C (editors), *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Oxford, Hart Publishing 2019).

version. While it may take the Commission some time, sometimes even years¹⁵⁶, to publish the non-confidential versions, the Commission adapted its approach and is willing to publish more lengthy and detailed infringement decisions giving victims relevant information.¹⁵⁷ This can be met by resistance of the infringers.¹⁵⁸ In the meantime, when the Commission issues a decision, it has become common practice to issue a press release with information on the parties, the problematic anti-competitive conduct and the relevant timelines. The press releases lately also contain the following or a similar standard paragraph on the possibility for damages actions, urging harmed parties to file damages actions: *'Any person or company affected by the anti-competitive behaviour described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision constitutes binding proof that the behaviour took place and was illegal. Even though the Commission has fined the cartel participants concerned, damages may be awarded without being reduced on account of the Commission fine. The Antitrust Damages Directive makes it easier for victims of anti-competitive practices to obtain damages. More information on antitrust damages actions, including a practical guide on how to quantify antitrust harm, is available here.'*¹⁵⁹

39 EU Member States are generally not required by EU law to publish decisions. Yet, many Member States' laws foresee rules on decision publication, or the publication of decisions has become a custom. Germany, for example, has quite detailed rules on decision publication. Certain decisions have to be published in the Federal Gazette.¹⁶⁰ The German Competition Authority is also required to publish information on the facts of the case, the type and period of the infringement, the undertakings involved and the goods and services concerned on its website at the latest after the conclusion of the administrative proceedings.¹⁶¹ In addition, the German Competition Authority can carry out public relations work by issuing press releases or by other means.¹⁶² Also outside the EU, some statutes foresee that decisions have to be published. In Korea, for example hearings and resolutions by the Korean Free Trade Council are made public and the authority also published press releases.¹⁶³

¹⁵⁶ The decision in the Google Android case, for example, took over a year from 18 July 2018 to 20 September 2019 to be published, see Google Android (Case AT 40099) Commission Decision C(2018) 4761 final [2018] OJ C402/19.

¹⁵⁷ Andersson (n 155) 133, 146.

¹⁵⁸ *Evonik Degussa GmbH v European Commission*, Case 162/15 P (CJEU), Judgment of the Court (Grand Chamber) of 14 March 2017 [ECLI:EU:C:2017:205].

¹⁵⁹ For example, European Commission, 'Antitrust: Commission fines styrene purchasers €157 million in cartel settlement' (European Commission, 29 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7168> accessed 28 June 2023.

¹⁶⁰ Section 61(3) German Competition Act (n 45).

¹⁶¹ Section 53(5) *ibid.*

¹⁶² Section 53(4) *ibid.*

¹⁶³ Art 65 MRFTA South Korea (n 6).

40 However, many other EU Member States and competition authorities around the globe also publish their decision without any statutory obligation, such as France, Italy, Spain, the United Kingdom, the United States, Chile, Brazil. Usually, decisions are published in a non-confidential or summary form. Since cartels can span across states and, thus, sometimes a global interest in a case exist, many states publish press releases and information on cases in varying detail on their homepages. The Japanese Fair Trade Commission, for example, tends to publish very detailed and nuanced information in English.¹⁶⁴

5.1.2 Effect and Evidentiary Value of Public Enforcement Decisions on Follow-On Private Actions

41 Connected to the publication of public enforcement decisions is their effect and evidentiary value for follow-on private actions. This question is quite unique for competition proceedings and is also not solved in all the systems analysed in this chapter. This issue differs from the general civil procedural rule of *res judicata* (ie, the principle that a final judgment is binding and cannot be re-litigated) in subsequent proceedings, because it deals specifically with how authoritative public enforcement decisions are treated in later private civil cases in some legal systems.¹⁶⁵ The issue at hand is whether the burden of proving the infringement is removed or reduced in cases where there is a prior public enforcement decision, either in the form of an authority decision or a decision of a review court, and whether the public enforcement decision has probative value, constitutes *prima facie* evidence or is even binding in the follow-on actions. Any such effect could facilitate private competition law actions, since a claimant does not have to prove the relevant facts or make the legal arguments in respect of the question of infringement.¹⁶⁶

42 In the EU, Art 16(1) of Regulation 1/2003 provides that '*[w]hen national courts rule on agreements, decisions or practices under Art [101] or Art [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.*'¹⁶⁷ Thus, European Commission decisions are binding on national courts in the Member States of the EU in the sense that national courts are under a duty to abstain from conflicting decisions (negative duty).¹⁶⁸ This makes a positive or negative final decision on the infringement in the relevant personal and temporal scope effectively binding in subsequent private actions, but the binding effect

¹⁶⁴ For example, Japan Fair Trade Commission, 'The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders against the Former General Electricity Utilities, etc' (Japan Fair Trade Commission, 30 March 2023) <https://www.jftc.go.jp/file/230330EN_PressRelease.pdf> accessed 30 June 2023

¹⁶⁵ Hereto T Andersson, 'The Binding Effects of Decisions and Judgments under EU Competition Law.' in Strand M, Bastidas Venegas V and Iacovides M C (editors), *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Oxford, Hart Publishing 2019).

¹⁶⁶ *A and Others v Repsol* (n 19) para 61.

¹⁶⁷ *Masterfoods Ltd v HB Ice Cream Ltd, Case 344/98 (CJEU)*, Judgment of the Court of 14 December 2000 [ECLI:EU:C:2000:689] para 52.

¹⁶⁸ Ashton D, *Competition Damages Actions in the EU* (2nd edn, Edward Elgar Publishing 2018) 138; Andersson (n 165) 97, 104.

does not include the fault, the existence of damages, the causation, or quantification.¹⁶⁹ The binding effect inherent in Art 16(1) of Regulation 1/2003 covers all types of decisions where the Commission decided on the merits. This includes cease and desist decisions according to Art 7 of the Regulation 1/2003, inapplicability decisions according to Art 10 of the Regulation 1/2003, decisions imposing fines according to Art 23 of the Regulation 1/2003, as far as they establish an infringement within the meaning of Art 7 of the Regulation 1/2003.¹⁷⁰

- 43 With regard to decisions of national competition authorities, the EU Damages Directive harmonized the approach on their effect and evidentiary value for damages actions. Art 9 Damages Directive differs between a final decision of an own national competition authority or a review court and such a decision taken in another Member State. Regarding the former, according to Art 9(1) Damages Directive, '*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 Art 101 or 102 TFEU or under national competition law.*' Instead of having a binding effect such as Art 16(1) Regulation 1/2003, one might say Art 9(1) Damages Directive is a rule of evidence amounting to a *res judicata* effect in respect of the finding of the infringement.¹⁷¹ In a sense, this resembles a *res judicata*-like form of preclusion by creating an irrebuttable presumption, which functionally removes the need to prove the infringement anew. Nevertheless, this mechanism does not constitute *res judicata* in the strict sense of a binding judicial determination. Rather than functioning as a rule of evidence, it is more appropriately characterised as a doctrinal form of preclusion. Contrary to Art 16(1) Regulation 1/2003, Art 9(1) Damages Directive also only covers decisions finding an infringement and only applies for subsequent damages actions, not in actions for any other of the above-mentioned remedies.¹⁷² When it comes to decisions taken in another Member State, Art 9(2) Damages Directive mandates that such final decisions must at least constitute '*prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.*' This somehow entails that the decision is sufficient proof of the infringement and a shift of proof to the defendant, who can nevertheless and in contrast to Art 9(1) Damages Directive, prove the inexistence of an infringement.¹⁷³
- 44 Even though the EU Member States were required to transpose the rules of the Damages Directive, including its Art 9 already, the provision raised opposition in some Member

¹⁶⁹ *Europese Gemeenschap v Otis NV and Others, Case 199/11 (CJEU)*, Judgment of the Court (Grand Chamber) of 6 November 2012 [ECLI:EU:C:2012:684] paras 51 et seq, 65.

¹⁷⁰ D Dohrn, *Die Bindungswirkung kartellrechtlicher Entscheidungen der Kommission sowie deutscher und mitgliedstaatlicher Kartellbehörden und Gerichte im deutschen Zivilprozess* (1st edn, Carl Heymanns Verlag 2019) 56;

¹⁷¹ Wright (n 17) 22;

¹⁷² Andersson (n 165) 97, 103.

¹⁷³ Similar in a case predating the Damages Directive (n 16) *A and Others v Repsol* (n 19) para 63.

States, for example in Italy,¹⁷⁴ and doubts about its constitutionality, particularly the separation of power and independence of judges.¹⁷⁵ In the end, all Member States transposed Art 9(1) Damages Directive.¹⁷⁶ With regard to Art 9(2) Damages Directive and the probative value of public enforcement decisions from other Member States, the EU Member States took different approaches. Member States had the opportunity to gold plate the Damages Directive and go beyond a *prima facie* effect of public enforcement decisions from other Member States ('at least'). And while some Member States, such as Ireland, Portugal and Spain, had more ambitious drafts initially that were subsequently abandoned,¹⁷⁷ others went beyond the *prima facie* effect prescribed by Art 9(2) Damages Directive. In Germany, for example, final decisions of a competition authority of another Member State, or a court acting as such or final court judgements on appeals against competition authority decisions regarding an infringement of Arts 101 and 102 TFEU, are binding on the court in follow-on actions.¹⁷⁸ However, the German legislator did not consider it necessary to transpose that the findings of an infringement of national competition law of a competition authority of another Member State are to be regarded at least as *prima facie* evidence, but an application of German civil procedural law in conformity with the Directive is possible.¹⁷⁹ Most Member States that transposed Art 9(2) Damages Directive consider final decisions of a competition authority of another Member State, or a court acting as such or final court judgements on appeals against competition authority decisions, either as *prima facie* evidence, such as Lithuania¹⁸⁰ and Italy¹⁸¹, amongst others¹⁸², or the beginning of evidence ('*un début de preuve/een begin van bewijs*'), such as Belgium¹⁸³ or rebuttable presumptions, such as Latvia¹⁸⁴, Portugal¹⁸⁵, and

¹⁷⁴ Tavassi M, 'The Damages Directive in Italy' in Biondi A and Muscolo G and Nazzini R, *After the Damages Directive* (Wolters Kluwer 2022) 297, 309.

¹⁷⁵ Rodger and Ferro and Marcos (n 119) 495 – 596.

¹⁷⁶ Commission, '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' (Staff Working Document) COM (2020) SWD 338 final <<https://data.consilium.europa.eu/doc/document/ST-14083-2020-INIT/en/pdf>> accessed 26 June 2023, 7.

¹⁷⁷ Rodger and Ferro and Marcos (n 119) 495.

¹⁷⁸ Section 33b German Competition Act (n 45); A Weitbrecht, 'Bindungswirkung nationaler Entscheidungen' (2017) WuW 244.

¹⁷⁹ Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (Ninth Act Amending the Act Against Restraints of Competition) 2017 [18/10207] (Germany) 56; Bach A and Wolf C, 'Neue Instrumente im Kartellschadensersatzrecht - Zu den Regeln über Offenlegung, Verjährung und Bindungswirkung' (2017) NZKart 285, 294.

¹⁸⁰ Art 51(4) Law on Competition Lithuania (n 47).

¹⁸¹ Art 7(2) Legislative Decree 2017 No 3 Italy (n 52).

¹⁸² Rodger and Ferro and Marcos (n 119) 495.

¹⁸³ Art XVII 82 Section 2 Code of Economic Law Belgium (n 87).

¹⁸⁴ Art 250 Civilprocesa likums (Civil Procedure Law) 1998 (Latvia).

¹⁸⁵ Art 7 Direito a indemnização por infração ao direito da concorrência, transpõe a Diretiva 2014/104/UE, do Parlamento Europeu e do Conselho, de 26 de novembro de 2014 (Law on compensation for infringement of competition law, transposing Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014) 2018 (Portugal).

Spain¹⁸⁶. In France¹⁸⁷ and Luxembourg¹⁸⁸ final decisions stemming from another Member State simply constitute piece of evidence for the infringement and are to be assessed along with any other evidence adduced by the parties.¹⁸⁹

- 45 Even though follow-on cases play a smaller role in the US compared to stand-alone actions, the development on binding or evidentiary effects of public enforcement decisions for follow-on private actions in Europe was inspired by long-established US federal law.¹⁹⁰ According to Section 5(a) Clayton Act¹⁹¹, '*[a] final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.*' In US procedural law, the term *prima facie* means that the decision is sufficient to raise a presumption (of an antitrust infringement in this case) unless disproved or rebutted.¹⁹² Section 5(a) Clayton Act covers only decisions by US courts, and explicitly not '*any finding made by the Federal Trade Commission.*' Infringement decisions of other states have no evidentiary value in the US. According to Section 5(a) Clayton Act, only the violation of competition laws is covered by the *prima facie* value of public enforcement decisions, not other facts. Compared to the solution on the European level, in follow-on actions in the US, public enforcement decisions of courts are not binding as the decisions of the European Commission under Art 16(1) Regulation 1/2003 but have *prima facie* effect, similar to public enforcement decisions of other Member State authorities per Art 9(2) Damages Directive.
- 46 Some of the other systems also have rules or jurisprudence on the evidentiary value of public enforcement decisions. Australia, for example, more or less followed the US model. In Australia, where infringement decisions are also taken by courts, not agencies, findings of any fact (not just the infringement as in the US) by an Australian court made in public

¹⁸⁶ Art 75(2) Ley N° 15/2007, de 3 de julio de 2007, de Defensa de la Competencia (Law No. 15/2007 of 3 July 2007 on the Protection of Competition) (Spain).

¹⁸⁷ Ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles (Order No. 2017-303 of 9 March 2017, regarding actions for damages resulting from anti-competitive practices) 2017 (France); ArtArt L 481–2 Commercial Code France (n 62).

¹⁸⁸ Art 6(2) Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence et modifiant la loi modifiée du 23 octobre 2011 relative à la concurrence. (Law of 5 December 2016 on certain rules governing actions for damages for infringements of competition law and amending the amended Law of 23 October 2011 on competition) 2016 (Luxembourg).

¹⁸⁹ J Malinauskaite and C Cauffman, 'The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective' (2018) 9(8) JECLAP 496, 505.

¹⁹⁰ Franck J, 'GWB § 33 Beseitigungs- und Unterlassungsanspruch' in Immenga U and Mestmäcker E, *Wettbewerbsrecht* (6th Edition, CH Beck 2020) para 2.

¹⁹¹ 15 USC (n 39) Section16.

¹⁹² G N Herlitz, 'The Meaning of the Term "Prima Facie" ' (1994) 55(2) Louisiana Law Review 391.

enforcement proceedings constitute *prima facie* evidence in follow-on damages proceedings; foreign decisions have no probative value.¹⁹³ In its recent amendments of its provisions on private enforcement, Brazil introduced a new rule that the decisions of the Brazilian competition authority constitute evidence for the granting of provisional measures by courts to the benefit of the claimant in follow-on private actions.¹⁹⁴ It only applies to provisional measures, which usually take the form of interim injunction, not in the context of primary relief sought in damages actions. Therefore, as mentioned-above, since the anti-competitive conduct usually has ceased after the public enforcement phase, any such evidence rule might not help claimants much.¹⁹⁵ Decisions from the Brazilian Competition Authority CADE are otherwise not binding in follow-on civil actions. The majority of other systems do not have any rules on the evidentiary value of public enforcement decisions.

5.1.3 Influence of Special Types of Public Enforcement on Follow-On Private Actions: Leniency, Settlements, and Commitments

47 Public enforcement of competition law knows special types of procedures, which can influence follow-on private actions. Primarily, this chapter deals with leniency as well as settlement and commitment procedures. The semi-voluntary nature of these procedures on the public enforcement stage, make their impact on a subsequent private action very delicate.

¹⁹³ Section 83 Competition and Consumer Act Australia (n 12).

¹⁹⁴ Art 47A Brazilian Competition Act (n 31).

¹⁹⁵ Gabriel Nogueira Dias and Leonardo Peixoto Barbosa, 'New Regulation to Boost Antitrust Damages Actions in Brazil: Will it Work?' (*Kluwer Competition Law Blog*, 2 January 2023) <<https://competitionlawblog.kluwercompetitionlaw.com/2023/01/02/new-regulation-to-boost-antitrust-damages-actions-in-brazil-will-it-work/>> accessed 26 June 2023.

5.1.3.1 Leniency

- 48 Many systems, such as the EU¹⁹⁶ and its Member States¹⁹⁷, Australia¹⁹⁸, Brazil¹⁹⁹, Japan²⁰⁰, Chile²⁰¹, South Korea²⁰², the US²⁰³, for example, have so-called leniency programs. Those programs are based on the principle that competition authorities are to grant immunity from fines to the undertaking that reports its participation in a cartel if it is the first to submit evidence.²⁰⁴ Some, such as the EU²⁰⁵ and its Member States²⁰⁶, even have a reduction of fines for other undertakings which do not qualify for immunity but can provide the competition authority with significant added value with respect to the evidence already in its possession. Generally, the fact that an investigation leading to a public enforcement decision has been commenced by a leniency application does not have an effect on follow-on private actions. Particularly, as the binding effect, for example in the EU inherent in Art 16(1) of Regulation 1/2003 and Art 9 Damages Directive cover all types of decisions where the competition authority decided on the merits, this includes decisions issued within the framework of leniency proceedings.²⁰⁷
- 49 However, since leniency applicants voluntarily admit their participation in a cartel and submit corresponding and encompassing evidence, the protection of leniency applications in disclosure of evidence is problematic and further discussed below.²⁰⁸ In that context, some systems also foresee special rules on the above-mentioned publication of public enforcement decisions containing leniency information. In the EU, for example, Art 30(2)

¹⁹⁶ Commission, 'Notice on Immunity from fines and reduction of fines in cartel cases' (Communication) COM (2006) C 298/11 paras 8 et seq.

¹⁹⁷ Art 17 Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2019/1 of 11 December 2018 (EU).

¹⁹⁸ Australian Competition & Consumer Commission, 'Immunity and cooperation policy for cartel conduct' (ACCC, 2019) <https://www.accc.gov.au/system/files/1579_ACCC%20immunity%20%26%20cooperation%20policy%20for%20cartel%20conduct%20-%20October%202019_FA.pdf> accessed 29 June 2023.

¹⁹⁹ Art 86 et seq Brazil Competition Act (n 31).

²⁰⁰ Art 7-4(5) AMA Japan (n 27); Japan Fair Trade Commission, 'Guidelines to Reduction System for Cooperation in Investigation' (*Japan Fair Trade Commission*, 2019) <https://www.jftc.go.jp/en/legislation_gls/201225002.pdf> accessed 28 June 2023.

²⁰¹ Fiscalía Nacional Económica, 'Internal Guidelines on Leniency in Cartel Cases' (Fiscalía Nacional Económica, March 2017) <https://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines_Leniency_Cartel_Cases.pdf> accessed 28 June 2023.

²⁰² Art 44 MRFTA South Korea (n 6).

²⁰³ Antitrust Division US Department of Justice, '7-3 300 - Antitrust Division Leniency Policy and Procedures' (*United States Department of Justice*, 2024).

²⁰⁴ For example, *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del mercato*, Case 428/14 (CJEU), Judgment of the Court (Second Chamber) of 20 January 2016 [ECLI:EU:C:2016:27] para 54.

²⁰⁵ Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), paras (23) et seq.

²⁰⁶ Art 18 Directive 2019/1 (n 197).

²⁰⁷ *Dohrn* (n 170) 56;

²⁰⁸ See below at 7.4.

Regulation 1/2003 states that the publication '*shall have regard to the legitimate interest of undertakings in the protection of their business secrets.*' According to the ECJ, this can include the publication of a leniency application and verbatim quotes from the information, although the publication of information contained in the leniency application is generally permissible as long as business secrecy protection is maintained.²⁰⁹

50 Moreover, discussion persists on the immunity for leniency applicants not only from public enforcement but also from civil actions.²¹⁰ The underlying argument is to incentivize leniency applications, which play a crucial role in public enforcement and should not be undermined by private enforcement actions.²¹¹ In Europe, a proposal²¹² of the German Monopolkommission to grant leniency recipients total immunity against damages has re-introduced the debate.²¹³ In the drafting process of the EU Damages Directive, it was already proposed that a leniency applicant would only be liable to the share of the damage corresponding to the leniency applicant's market share in the cartelised market or give a leniency applicant a conditional rebate also on the damages claim.²¹⁴ The final version of the EU Damages Directive now limits joint and several liability only of immunity recipients in follow-on damages actions. According to Art 11(4) Damages Directive, an immunity recipient is only '*jointly and severally liable as follows: (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.*'²¹⁵ Furthermore, a possible contribution claim between joint and several liable infringers is also limited.²¹⁶ According to Art 11(5) Damages Directive, an immunity recipient could not be liable to pay a sum which '*exceed[s] the amount of the harm it caused to its own direct or indirect purchasers or providers.*' According to Art 11(6) Damages Directive, '*to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.*'

²⁰⁹ *Evonik Degussa GmbH v European Commission* (n 158) paras 69, 87, 96 et seq; *AGC Glass Europe and Others v European Commission*, Case 517/15 P (CJEU), Judgment of the Court (Sixth Chamber) of 26 July 2017 [ECLI:EU:C:2017:598] paras 79 et seq.

²¹⁰ W Wils, 'Should the EU Competition Damages Directive Be Revised to Grant Companies that Have Received Immunity from Fines under the Competition Authorities' Leniency Programmes also Immunity from Damages?' (2023) *Wirtschaft und Wettbewerb* 1.

²¹¹ Recital 38 Damages Directive (n 16).

²¹² Monopolkommission, *Hauptgutachten Wettbewerb 2022 XXIV Hauptgutachten der Monopolkommission gemäß § 44 Abs 1 Satz 1 GWB* (1st edition, Nomos 2022) p 172, 173.

²¹³ T Makatsch and T Bäuerle, 'Kronzeugenschutz und Kartellschadensersatz: Stimmt die Balance noch?' (2022) *WUW* 529; C Kersting, 'Privilegierung von Kronzeugen de lege ferenda' (2021) *GRUR* 250.

²¹⁴ Options 29 and 30 of the Commission, 'Damages actions for breach of the EC antitrust rules' (Green Paper) COM (2005) 672 final.

²¹⁵ M Seegers, 'Interaction of the Rules on Joint and Several Liability and Settlements under the EU Directive on Damage Actions' (2014) 3 *GCLR* 140.

²¹⁶ D Ashton, *Competition Damages Actions in the EU* (2nd edn, Edward Elgar Publishing 2018) 225.

51 In the US, similar considerations to incentivize leniency applications have led to the Antitrust Criminal Penalty Enhancement and Reform Act.²¹⁷ Leniency applicants are not immune from civil liability but, instead of having to pay the above-mentioned treble damages, they only have to pay the '*actual*' damages suffered by the claimants. Furthermore, the damage is limited to those '*attributable to the commerce done by the applicant in the goods or services affected by the violation*' instead of the commerce done by all jointly and severally liable defendants. Brazil has more or less followed the US approach in its recent new law, excluding leniency applicants from the newly introduced double damages and limiting liability to the damages caused to the injured party, at the same time excluding the joint and several liability caused by the other co-infringers.²¹⁸ Many other systems do not provide any immunity from civil claims or beneficial treatment comparable to the EU, US, and Brazilian approach, such as Chile or Japan.

5.1.3.2 Settlements and commitments

52 Many systems have some form of amicable resolution of the public enforcement stage, either named settlements and/or commitment procedures. EU competition law, for example, knows both settlements and commitments on the public enforcement stage. A settlement procedure is possible for cartel cases and effectively results in a normal infringement decision per Art 7 Regulation 1/2003, albeit using a simplified and speedier procedure if the parties agree to the Commission's findings on the infringement.²¹⁹ In particular, parties choose to acknowledge their involvement in the cartel and their liability for it.²²⁰ Accordingly, they receive a 10 % reduction in fines.²²¹ A commitment decision, on the other hand, is a special form of decision under Art 9 Regulation 1/2003, in which the Commission does not find an infringement and does not issue a fine. The commitments are voluntarily offered by the undertakings to meet competition concerns expressed by the Commission in a preliminary assessment phase. The Commission can then adopt the commitment decision requiring that the behaviour is brought to an end and make the commitments binding on the undertakings. Such a decision concludes that there are no longer grounds for action. Even though both procedures are conceptually different and lead to different results, they both require active cooperation of the undertakings involved, which might have an impact on follow-on private litigation.

²¹⁷ An Act to encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards, and for other purposes 2004 [Public Law 108–237] (US) Section 213(a)-(b); Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act 2020 [PUBLIC LAW 116–257] (US).

²¹⁸ Art 47 Section 2, Section 3 Brazilian Competition Act (n 31).

²¹⁹ Commission, 'Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art 7 and Art 23 of Council Regulation (EC) No 1/2003 in cartel cases' (Communication) COM (2008) C 167/01 (EU Settlement Notice); F ArtArtLaina and E Laurinen, 'The EU Cartel Settlement Procedure: Current Status and Challenges' (2013) JECLAP 302.

²²⁰ Para 20 Settlement Notice (n 219)

²²¹ Para 32 *ibid.*

- 53 Especially in settlement procedures in the EU, the undertakings acknowledge their involvement in the cartel and their liability for it. The protection of settlement applications in disclosure of evidence is problematic and further discussed below.²²² Otherwise, settlement decisions are included in the publication obligation under Art 30 Regulation 1/2003, but the Commission must respect the undertakings legitimate interest in the protection of their business secrets. Moreover, decisions issued within the framework of settlement proceedings as usual decisions under Art 7 of the Regulation 1/2003 have binding effect under Art 16 Regulation 1/2003.²²³ In some systems, settlements are further encouraged. In Brazil, for example, parties who have settled with the Brazilian Competition Authority (Administrative Council for Economic Defense or CADE) are only liable for the compensation of actual damages and not double damages.²²⁴
- 54 For commitment decisions according to Art 9 Regulation 1/2003, the fact that the public enforcement decision takes the form of a commitment decision does not have an effect on the publication obligation of the Commission; commitment decisions fall under the publication obligation of Art 30 Regulation 1/2003. However, commitment decisions are not covered by the binding effect of Art 16(1) Regulation 1/2003.²²⁵ According to Art 9(1) Regulation 1/2003, such a decision only contains the conclusion that there are no longer grounds for action by the Commission and there is no formal finding of an infringement of Art 101 and 102 TFEU; rather they are built on competition concerns in the sense of a preliminary assessment.²²⁶ Therefore, '*[c]ommitment decisions are without prejudice to the powers of courts of the Member States to make such a finding [of infringement] and decide upon the case.*'²²⁷ Commitment decisions nevertheless could contain useful facts and the commitment decision can serve as a red flag for further scrutiny of a company's

²²² See below at 7.4.

²²³ Dohrn (n 170) 56;

²²⁴ Art 47 Section 1 Brazilian Competition Act (n 31) <https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/l14470.htm> accessed 28 June 2023.

²²⁵ J Temple Lang, 'Commitment Decisions under Reg 1/2003 – Legal Aspects of a new kind of Competition Decision' (2003) 8 ECLR 347, 350; S Saitzek, *Verpflichtungszusagen im europäischen Kartellrecht - Nach Artikel 9 Verordnung (EG) Nr. 1/2003 des Rates vom 16. Dezember 2002 zur Durchführung der Artikel 81 und 82 des EG-Vertrages* (Wissenschaftlicher Verlag Dr Kovač 2008) 239; B Kreße, 'Die Verpflichtungszusage als Instrument der europäischen Wettbewerbsaufsicht' (2014) WRP 1261, 1265; S Hossenfelder and M Lutz, 'Die neue Durchführungsverordnung zu den Artikeln 81 und 82 EG-Vertrag' (2003) *Wirtschaft und Wettbewerb* 118, 123;

K Schmidt, 'Umdenken im Kartellverfahrensrecht! Gedanken zur Europäischen VO Nr 1/2003' (2003) *Betriebs-Berater* 1237, 1242; S Hirsbrunner and L Rhomberg, 'Verpflichtungszusagen im EG-Kartellrechtsverfahren – Erste praktische Erfahrungen mit der Neuregelung der Kartellverfahrensverordnung 1/2003' (2005) *EWS* 61, 64; G De Bronett, 'Plädoyer für eine Reform der Aufgabenverteilung zwischen der Kommission und dem Gerichtshof der EU bei der Anwendung der Art 101 und 102 AEUV in Einzelfällen' (2012) *ZWeR* 157, 200; J Hartlieb, '"Drum prüfe, wer sich ewig bindet" - Bindungswirkung und Durchsetzung von Verpflichtungsbeschlüssen der Kommission' (2017) *NZKart* 458, 461.

²²⁶ Dohrn (n 170) 60; B C Becker, 'Faktische Bindungswirkung kartellbehördlicher Zusageentscheidungen zu Gunsten von follow-on-Schadensersatzklägern – Das Urteil des Tribunal de commerce de Paris im Fall DKT v Eco-Emballages als Türöffner für private Schadensersatzklagen?' (2016) *NZKart* 58.

²²⁷ Recital 13 Regulation 1/2003 (n 15).

conduct by a potential claimant.²²⁸ However, on national level, a *de facto* binding effect is often assumed in the sense that the national court is usually guided by the assessment of the European Commission.²²⁹ The ECJ has even held that, subsequent to Commission commitment decisions, national courts must '*take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue.*'²³⁰

55 Similar to the discussion at European level regarding commitment decisions, in the US, if the public enforcement proceedings are concluded by agreement – in civil proceedings by consent decree or consent judgment, in criminal proceedings by *nolo contendere* plea – the *prima facie* effect does not apply.²³¹ In the US, the exception for consensual decisions is intended to encourage the addressees of a public enforcement procedure to settle at an early stage, saving resources on the part of public enforcement.²³²

5.2 Stand-Alone Actions

56 Stand-alone actions are filed without a prior or a parallel public enforcement action. There is also a (mitigated) need for coordination, especially in federal or semi-federal level to avoid diverging decisions and consistency in the application of competition law, including a possible involvement of competition authorities in private proceedings. This is demonstrated by the EU, where in recital 21 of Regulation 1/2003 calls for the consistency in the application of competition rules and calls for cooperation between the courts of the EU Member States and the EU Commission. Contrary to follow-on actions that mainly concentrate on follow-on damages actions, stand-alone actions include all forms of remedies. Yet, some forms of remedies are particularly suitable for stand-alone actions, such as interim injunctions aimed at stopping anti-competitive behaviour before even any public enforcement action is commenced. Generally, the need for evidence without a public enforcement decision to rely on is particularly large in stand-alone actions.

5.2.1 Coordination with Parallel Public Enforcement

57 One of the key issue when it comes to stand-alone private actions is their eventual coordination with possible public enforcement action of competition authorities commenced after the initiation of the stand-alone action. In some systems, such as Japan,

²²⁸ Ashton (n 216) 140.

²²⁹ For example *DKT c Eco-Emballages et Valorplast* (Tribunal de commerce de Paris, France), Judgement of 30 March 2015 [RG 2012000109];

P M Bodnár, 'Hungary', in A Piszcz (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (University of Warsaw Faculty of Management Press 2017) p 130; B C Becker, *Kartellschadensersatz trotz Zusagenentscheidung?* (1st edn, Nomos 2018) p 295 et seq.

²³⁰ *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA, Case 547/16 (CJEU)*, Judgment of the Court (Third Chamber) of 23 November 2017 [ECLI:EU:C:2017:891] para 29.

²³¹ Hempel (n 151) 138 – 139.

²³² J O Von Kalinowski and others, *Antitrust Laws and Trade Regulation*, (2nd edn, Matthew Bender & Company July 2002) Section169 01 (2), 169-3 f.

the civil court has to notify the competition authority when an action to suspend or prevent an infringement has been filed, to make the competition authority aware of anti-competitive behaviour, which might incline the authority to become active itself.²³³

58 In some systems, the stand-alone private actions are stayed once a public enforcement procedure is commenced. In these systems, primarily those with a federal structure, the underlining objective relates to the uniformity of competition law enforcement with one authority setting the tone. Such an approach is followed in EU competition law. In the *Masterfoods* case the ECJ established that a national court can rule on a private action for the violation of EU competition law in parallel to public enforcement by the Commission.²³⁴ However, the national court cannot make a decision running counter to that of the Commission.²³⁵ Therefore, '*when the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the [Union] Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.*'²³⁶ This jurisprudence was later included in the text of Art 16 Regulation 1/2003. According to Art 16 Regulation 1/2003, '*when national courts rule on agreements, decisions or practices under Art [101] or Art [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings.*' To further substantiate the relationship between the EU Member States Courts and the European Commission, the EU Commission has issued a Notice on the co-operation between the Commission and the courts of the EU Member States.²³⁷ When a Member State court considers whether it needs to stay its proceedings in order to avoid a conflict with a pending Commission decision, national courts are entitled to ask the Commission whether proceedings have been initiated and whether and when a decision can be expected.²³⁸ The Commission must then prioritize this case in its public enforcement proceedings.²³⁹ Otherwise, the staying of national proceeding depends on the certainty with which the outcome of the

²³³ Art 79(1) Antimonopoly Act Japan (n 27).

²³⁴ *Masterfoods Ltd v HB Ice Cream Ltd* (n 167) para 51.

²³⁵ *ibid.*

²³⁶ *ibid* para 57.

²³⁷ Commission Notice on the co-operation between the Commission and the courts of the EU Member States (n 15) p 54.

²³⁸ *ibid* para 12, 21.

²³⁹ *ibid* para 12.

Commission's assessment can be foreseen.²⁴⁰ When the case concerns a straightforward infringement in the practice of the Commission, the national court will not stay its proceedings while in doubtful cases it will stay its proceedings.

- 59 Other systems know the concept of staying of stand-alone actions during parallel public enforcement proceedings as well. In Brazil, for example, private actions are usually not stayed as an ongoing investigation by CADE regarding the same conduct, but defendants can seek the stay of a claim if a parallel decision by CADE is under judicial review. No special competition law proceedings apply, but the general rules of the Brazilian Code of Civil Procedure.²⁴¹ A similar rule applies in Switzerland. Under general Swiss Civil Procedure law, procedures can be stayed if they are dependent on the outcome of a similar procedure;²⁴² a parallel public enforcement decision under judicial review can therefore lead to a stay of the civil action.
- 60 Other systems, the stay of stand-alone private actions is less common but other rules exist on incentivizing private actions, mainly relating to the statute of limitation. In the US, for example, the commencement of any administrative or criminal competition proceedings suspends the statute of limitations for private actions during the pendency of any administrative or criminal competition proceedings and for one year thereafter.²⁴³ The maximum suspension period for treble damages actions²⁴⁴ is four years.²⁴⁵ Similarly, in Brazil to coordinate private and public enforcement, the statute of limitation of five years does not run during the CADE proceedings and only begins after the publication of CADE's final decision.²⁴⁶

5.2.2 Involvement of Competition Authorities

- 61 Even though stand-alone private actions are organized independently of public enforcement proceedings at competition authorities, the competition authorities could anyway be involved in stand-alone private actions either a) because the parties or court requests their assistance or consult them on economic, factual and legal matters concerning the application of competition law or b) on their own initiative as *amicus curiae*. The procedural instruments discussed in the subsequent sections could equally be used in follow-on actions but are to some degree more relevant for stand-alone actions

²⁴⁰ K L Ritter and M Wirtz, 'VO 1/2003 Art 13 Aussetzung und Einstellung des Verfahrens' in U Immenga and E Mestmäcker, *Wettbewerbsrecht* (6th Edition, CH Beck 2020) Art 16 Rn 7.

²⁴¹ Art 313 (V) a) Brazilian Code of Civil Procedure (n 32).

²⁴² Section 126 Schweizerische Zivilprozessordnung (Civil Procedure Act) 2008 (Switzerland).

²⁴³ 15 US Code Section 16 (i).

²⁴⁴ See below at 6.

²⁴⁵ 15 USC (n 39) Section 16 (i).

²⁴⁶ Art 46A Brazil Competition Act (n 31).

where there is no prior public enforcement action, which could, as discussed above²⁴⁷ have a binding effect or be used as prima facie evidence in the follow-on stage.

5.2.2.1 Assistance

62 Concerning the request of assistance and consultation, in EU competition law, Art 15(1) Regulation 1/2003 provides that '*[i]n proceedings for the application of Art [101] or Art [102] of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the [Union] competition rules.*' Both are voluntary upon the discretion of the national court, unless, in very rare situations, the general EU principle of loyal cooperation requires such a request.²⁴⁸ With regard to the request for opinions, in the Notice on the co-operation between the Commission and the courts of the EU Member States, the Commission refers to the case-law of the EU courts and the many Commission regulations, decisions, notices and guidelines on Arts 101 and 102, which the national court should first seek for guidance.²⁴⁹ Especially the guidelines and notices, which, as non-legislative acts, usually only have a self-binding effect on the EU Commission, become relevant also on national level. If such tools offer no sufficient guidance, the national court can ask the Commission for an opinion '*on economic, factual and legal matters*'.²⁵⁰ In legal matters, a national court also has the possibility and in some instances the obligation to refer a question for a preliminary ruling to the ECJ according to Art 267 TFEU. Especially in cases of obligatory preliminary references per Art 267(3) TFEU in legal matters, the preliminary reference procedure takes precedence over the possibility to ask the Commission for an opinion under Art 15(1) Regulation 1/2003. On the Commission website, the Commission asks the national courts to '*include a brief account of the subject-matter of the dispute and the relevant findings of fact, or, at least, set out the factual situation on which the question referred is based, explain the reasons which prompted the national court to request an opinion; and include, where appropriate, a summary of the main arguments of the parties.*'²⁵¹ Furthermore, the national courts should '*keep requests for an opinion as short as possible and to use simple, clear and concise language, in view of the frequent need for the Commission to translate them; number the points or paragraphs of the request for an*

²⁴⁷ See above at 5.1.2.

²⁴⁸ Ritter and Wirtz (n 240) Art 15 Rn 2.

²⁴⁹ Notice on the co-operation between the Commission and the courts of the EU Member States (n 15) para 27.

²⁵⁰ *Stergios Delimitis v Henninger Bräu AG*, Case 234/89 (CJEU), Judgment of the Court of 28 February 1991 [ECLI:EU:C:1991:91] 53; Joined cases: *Dijkstra and Others v Friesland (Frico Domo) Coöperatie and Others*, Case 319/93 (CJEU), Judgment of the Court of 12 December 1995 [ECLI:EU:C:1995:433] 34 and *Cornelis van Roessel and others v De coöperatieve vereniging Zuivelcoöperatie Campina Melkunie VA*, Case 40/94, Judgment of the Court of 12 December 1995 [ECLI:EU:C:1995:433] and *Willem de Bie and others v De Coöperatieve Zuivelcoöperatie Campina Melkunie BA*, Case 224/94, Judgment of the Court of 12 December 1995 [ECLI:EU:C:1995:433].

²⁵¹ European Commission, 'Requests for information or for an opinion - Art 15(1)' (*European Commission*) <https://competition-policy.ec.europa.eu/antitrust/national-courts/requests-information-or-opinion_en> (accessed 19 June 2023)

*opinion; and include the question(s) of the request in a clearly identified section.*¹²⁵² The Commission can also ask for more information should the national court not abide by these instructions.²⁵³ The opinion of the Commission under Art 15(1) Regulation 1/2003 should be issued quickly (within four months) and without any right to be heard by the parties but, contrary to above-mentioned binding effect of Commission decisions,²⁵⁴ it will not be binding on the national court.²⁵⁵ Nevertheless, they might at least indirectly influence the national (stand-alone) case.²⁵⁶ These opinions are therefore of particular relevance to stand-alone actions, where national courts have no prior Commission decision (or another national competition authority decision) for orientation. While the Commission might be of little help regarding damages quantification as discussed below, their assessment on the possible unlawful action of undertakings could aid national court, which are sometimes less experienced with questions on competition law. If the national court has granted permission, the Commission later publishes their opinion on its website.²⁵⁷ In these cases, the Commission opinions could have further indirect effects on other national procedures with similar economic, factual or legal questions.

63 Furthermore, per Art 15(1) Regulation 1/2003, national courts can not only ask the Commission to provide a (non-binding) opinion, but also '*to transmit to them information in its possession*'. According to the Notice on the co-operation between the Commission and the courts of the EU Member States, this possibility should mainly be used '*for documents in its possession or for information of a procedural nature*',²⁵⁸ the latter referring to the above-mentioned²⁵⁹ procedural information on the state of the Commission proceedings. According to the Commission, Art 15(1) Regulation 1/2003 is mainly used for this purpose.²⁶⁰ The Notice also emphasizes the confidential information and business secrets possibly provided in the transmitted information, abiding national courts to guarantee their protection.²⁶¹ Leniency documents are exempted from such submissions.²⁶² Compared to the new rules under the Damages Directive on disclosure of

²⁵² *ibid.*

²⁵³ European Commission Notice (n 15) para 28.

²⁵⁴ On the binding nature of Commission decisions see above at 5.1.2.

²⁵⁵ European Commission Notice (n 15) para 29.

²⁵⁶ K Wright 'The European Commission's Own "Preliminary Reference Procedure" in Competition Cases?' (2010) 16(6) European Law Journal 736.

²⁵⁷ European Commission (n 251).

²⁵⁸ European Commission Notice (n 15) para 21.

²⁵⁹ See above at 5.1.2.

²⁶⁰ Commission, 'Ten Years of Antitrust Enforcement under Regulation 1/2003 Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' (Staff Working Document) COM (2014) SWD 0230 final para 245.

²⁶¹ European Commission Notice (n 15) para 23 – 25.

²⁶² Case T-164/12 R *Alstom v European Commission* [2012] ECLI:EU:T:2012:637, Order of the President of the General Court of 29 November 2012; Case T-173/12 *Areva v Commission* [2012] ECLI:EU:T:2012:349, Order of the President of the Fourth Chamber of the General Court of 6 July 2012; European Commission Notice (n 15) para 26.

documents also in the possession of a competition authority discussed below,²⁶³ the request to transmit information in the possession might be of limited interest.

- 64 Many EU Member States also foresee rules on assistance and consultation of national competition authorities, such as Lithuania²⁶⁴ or France²⁶⁵. In France, for example, the judge can request assistance by the French Competition Authority, which then drafts a non-binding report.²⁶⁶ In stand-alone actions, the draft report of the French Competition Authority is subject to comments of the parties before a final report is submitted to the court.²⁶⁷ In some Member States, the courts have to notify the national competition authorities of any private action commenced (be it a stand-alone or follow-on action), such as Germany²⁶⁸ or Latvia.²⁶⁹ The national competition authorities can then decide whether to be involved in the proceedings as *amicus curiae*,²⁷⁰ the procedure of which is discussed further below.²⁷¹
- 65 Outside the EU, assistance and consultation is also known. Switzerland, for example, follows a unique approach. Questions concerning the restriction of competition in civil proceedings have to be submitted to the Swiss Competition Commission for an expert opinion.²⁷² This procedure is limited to questions on the restriction of competition per se and not other issues relevant in private competition litigation. In other systems, such as Japan, in an action to suspend or prevent an infringement²⁷³ or damages actions²⁷⁴, the court may ask for the opinion of the Japanese Competition Authority. In some states, the position of the competition authority is more formal. In Australia, for example, the competition authority has no formal process of expressing its view in private competition litigation but can formally intervene as a third party in private actions.²⁷⁵ In these cases, the Australian Competition Authority *'is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party'*.²⁷⁶ The Australian Competition Authority

²⁶³ See below at 7.4.

²⁶⁴ Ashton (n 216) 276.

²⁶⁵ Art L 462–3 Commercial Code France (n 62).

²⁶⁶ *Artibid*; Case II-10217 (Paris Court of Appeal, France), Judgement of 13 January 1998 [JCP G 1998]; Case (Paris Court of Appeal, France), Judgement of 22 October 2001 [Jurisdata n° 2001–157128].

²⁶⁷ Art L 462–3 (1) Commercial Code France (n 62).

²⁶⁸ Section 90 (1) Gesetz gegen Wettbewerbsbeschränkungen (Cartel Act) 1998 (Germany).

²⁶⁹ Ashton (n 216) 277.

²⁷⁰ For example, Section 90(2) Cartel Act Germany (n 268).

²⁷¹ See below at 5.2.2.2.

²⁷² Art 15(1) Bundesgesetz gegen den unlauteren Wettbewerb (Unfair Competition Act) 1986 (Switzerland).

²⁷³ Art 79(2) Antimonopoly Act Japan (n 27).

²⁷⁴ Art 84(1) *ibid*.

²⁷⁵ Art 87CA Competition and Consumer Act Australia (n 12).

²⁷⁶ Art 87CA(2) *ibid*.

has discretion as to when to intervene and will likely only intervene in cases with significant public interest or novel issues of competition law.²⁷⁷

5.2.2.2 Amicus curiae

- 66 Generally, competition authorities might want to act as an *amicus curiae* on their own initiative. This is possible in many systems, for example in Australia²⁷⁸, Brazil²⁷⁹, the US²⁸⁰, or in the EU and various Member States.
- 67 In the EU, for example, the EU Commission can send *amicus curiae* submissions to national courts to guarantee the coherent application of Arts 101 and 102 TFEU.²⁸¹ Usually, they take up the form of written submissions but can also be provided in oral form if the national court permits such an oral observation.²⁸² Generally, national procedural rules for the submission of *amicus curiae* statements prevail in the limits of the EU principles of equivalence and effectiveness.²⁸³ The Commission rarely submits an *amicus curiae* observation; if it does, where the national court gave permission to publish the submissions those submissions will be displayed on the Commission's website.²⁸⁴ The submissions are not of general nature but limited to an economic and legal analysis of the facts underlying the case pending before the national court.²⁸⁵
- 68 In several Member States, such as Germany, the national competition authorities can also submit *amicus curiae* statements.²⁸⁶ This *amicus curiae* participation may consist of written statements, point out facts and evidence, attend the hearings and address questions to parties, witnesses and experts.²⁸⁷ Other Member States, such as France²⁸⁸, or Portugal²⁸⁹, also foresee *amicus curiae* statements by the competition authority. Additionally, in France, also the Minister for the economy can also file *amicus curiae* submissions.²⁹⁰ As a general rule, in the EU, any facts presented by competition authorities (national and the Commission) only become part of the subject matter of the proceedings

²⁷⁷ Australian Competition & Consumer Commission, 'Intervention in Private Proceedings' (ACCC) <<https://www.accc.gov.au/system/files/ACCC%20Intervention%20in%20Private%20Proceedings.pdf>> accessed 19 June 2023.

²⁷⁸ *ibid.*

²⁷⁹ Art 118 of the Brazilian Antitrust Law (n 31); Art 138 of the Brazilian Code of Civil Procedure (n 32).

²⁸⁰ United States Code Title 28 Section 517.

²⁸¹ Art 15 (3) Regulation 1/2003 (n15)

²⁸² *ibid.*

²⁸³ European Commission Notice (n 15) para 35.

²⁸⁴ European Commission, 'Amicus curiae observations – Antitrust' (*European Commission*) <https://competition-policy.ec.europa.eu/antitrust-and-cartels/national-courts/amicus-curiae-observations_en> accessed 19 June 2023.

²⁸⁵ European Commission Notice (n 15) para 32.

²⁸⁶ Section 90 (2), (3) Cartel Act Germany (n 268).

²⁸⁷ *ibid.*

²⁸⁸ Art L 462–3 Commercial Code France (n 62).

²⁸⁹ See hereto David Ashton, *Competition Damages Actions in the EU*, 2018, 280.

²⁹⁰ Art L 470–5 Commercial Code France (n 62).

in most of the systems following an adversarial nature, if a party includes them by explicit or implicit reference.²⁹¹ However, in Portugal, in some cases, the civil court based its conclusions on information submitted by the Portuguese Competition Authority in an *amicus curiae* statement without being disputed by the parties or included in their statements.²⁹² Generally, the *amicus* submissions are not binding on the courts, but courts often take them into consideration.²⁹³

69 In the US, statement of interest submissions by the Department of Justice in private competition litigation have gained novel prominence in the last years. The Department of Justice can file such a statement of interest 'to attend to the interests of the United States in a suit pending in a court of the United States'.²⁹⁴ While this practice has not been used much in the past, since the change of policy to file more statements in 2018, 43 statements of interest have been filed all over the US, which the Department of Justice publishes on their website.²⁹⁵ The cases mainly relate to the intersection of IP and competition law but also focuses on anti-competitive labour law cases, such as no-poach agreements. The public interest of the United States brought forward in these statements mainly relates to the correct application and interpretation of competition law. For example, in a recent statement, the Department of Justice argues that they submit a statement of interest since '[t]he United States enforces the federal antitrust laws and has a strong interest in their correct interpretation'.²⁹⁶ Thus, the Department of Justice is clarifying their understanding of the law and also lays groundwork for any future public enforcement while, at the same time, fewer resources are being used and the stakes are generally lower.²⁹⁷ Furthermore, the Japanese Competition Authority is also allowed to file *amicus curiae* submissions.²⁹⁸

²⁹¹ Schmidt K '§ 90 GWB' in Immenga U and Mestmäcker E, *Wettbewerbsrecht* (1st edition, CH Beck 1981) Rn 8; Von der Groeben H and Schwarze J and Hatje A, *Europäisches Unionsrecht* (7th edition, Nomos 2015); Art 15 Regulation 1/2003 (n 15) Rn 80 ff.

²⁹² *Sociedade Central de Cervejas v Carmo Augusto Nascimento* (Lisbon Judicial Tribunal, Portugal), Judgement of 14 March 2005 [No 8942/03]; *Sociedade Central de Cervejas v Factorfina* (Lisbon Judicial Tribunal, Portugal), Judgement of 2 November 2005 [No 67/02].

²⁹³ Ritter and Wirtz (n 240) Rn 15; *Kingdom of the Netherlands and Gerard van der Wal v Commission of the European Communities*, Joined Cases 174/98 P and 189/98 P (CJEU), Judgment of the Court of 11 January 2000 [ECLI:EU:C:2000:1] Rn 25.

²⁹⁴ Title 28 USC (n 280) Section 517.

²⁹⁵ Antitrust Division U.S Department of Justice, 'Statements of Interest' (*United States Department of Justice*) <<https://www.justice.gov/atr/statements-interest>> accessed 19 June 2023.

²⁹⁶ Letter from Peter M Bozzo to Honourable Anita B Brody, regarding *Fuentes v Jiffy Lube International, Inc*, No 2:18-cv-05174-AB (12 June 2023) <<https://www.justice.gov/atr/case-document/file/1587126/dl?inline=>> accessed 27 June 2023.

²⁹⁷ V Zapana, 'The Statement of Interest as a Tool in Federal Civil Rights Enforcement' (2017) 52 *Harvard Civil Rights-Civil Liberties Law Review* 227, 230.

²⁹⁸ Art 79(3) Antimonopoly Act Japan (n 27).

6 REMEDIES

70 Most jurisdictions foresee a myriad of remedies available in private enforcement actions for competition law violations. Some aspects of the different remedies are already touched upon above. This section shows the procedural peculiarities of different remedies and their special role in competition proceedings in more detail.

6.1 Damages Actions

71 Damages are a crucial remedy for private enforcement of competition law. In the EU, for example, it has been long hold that *'the full effectiveness of Art [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Art [101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.'*²⁹⁹ Competition law damages actions, particularly due to burdensome damages quantification, fact intensive proceedings, and information asymmetries, perfectly demonstrate how substance drives procedure in these types of actions. To mitigate these difficulties, many systems provide for special procedural instruments, such as quantification guidelines, presumptions, or involve competition authorities in damages proceedings.

72 Based on the respective competition provisions, private enforcement of competition law is usually actionable as a breach of statutory duty and therefore viewed as an extension of tort law.³⁰⁰ As mentioned above, there is a varying level of detail when it comes to the rules underlying private enforcement actions in general and damages actions in particular.³⁰¹ Some systems foresee detailed rules, while others rely on general clauses and their overall tort laws and civil procedural rules. The latter two in any case influence private damages actions even in systems with more detailed rules.

73 Before addressing specific procedural issues when it comes to damages actions, the substantive conditions for these claims are shortly outlined. In general, the substantive conditions under the tort law or competition specific provisions are more or less aligned in the different systems. They require a wrongful act in the form of a competition law violation with the above-mentioned³⁰² limitations in terms of which competition law violations might be covered.³⁰³ For example, US law requires an antitrust injury, which entails a violation of US competition law.³⁰⁴ Second, some form of fault regarding the wrongful act is usually necessary. In Germany, for example, both intent and negligence

²⁹⁹ *Courage Ltd v Bernard Crehan and Others* (n 37) para 26.

³⁰⁰ Whish R and Bailey D, *Competition Law* (10th edn, Oxford University Press 2021) 309.

³⁰¹ See above at 2.

³⁰² See above at 2.

³⁰³ For example, Art 927 Brazilian Civil Code (n 32).

³⁰⁴ *Brunswick Corp v Pueblo Bowl-O-Mat, Inc* (Supreme Court, US), Judgement of 25 January 1977 [429 US 477, 488]; *Cargill, Inc v Monfort of Colorado, Inc* (Supreme Court, US), Judgement of 9 December 1986 [479 US 104, No 85-473] 104, 110 n5.

are sufficient to fulfil the fault-requirement.³⁰⁵ Third, a damage claim requires the existence of harm and an amount of harm.³⁰⁶ Fourth, there needs to be a causal link between the wrongful act and the harm.³⁰⁷ Usually, co-infringers are jointly and severally liable for damages caused by competition law violations around the globe.³⁰⁸ Joint and several liability entails that a victim can claim full compensation from any co-infringer.³⁰⁹ A co-infringer that has compensated above their individual share of responsibility can ask for reimbursement against the other joint infringers for the part of the compensation towards the victim that does not correspond to the individual responsibility.³¹⁰

6.1.1 Function

- 74 Generally, competition damages actions have manifold functions.³¹¹ On the one hand, they aim to compensate the victims who suffered harm because of an infringement of competition law (compensatory function).³¹² On the other hand, private competition damages actions are directed to prevent, discourage, and dissuade future competition law violations (preventive function).³¹³ Connected to the latter is a deterrent function underlining private enforcement of competition law, although it has a different meaning in different systems and dates back to the classic US-EU divide.
- 75 In the EU, private enforcement of competition law plays an integral part of the overall system of competition law enforcement, next to public enforcement by competition authorities.³¹⁴ The right to claim damages stems directly from primary EU law, the

³⁰⁵ For example, Case KZR 24/17 (BGH, Germany), Judgement of 28 January 2020 para 18, 19.

³⁰⁶ For example, Art 927 Brazilian Civil Code (n 32)

³⁰⁷ For example, Art 403 Brazilian Civil Code (n 32); *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (n 95).

³⁰⁸ Sadrak K, *Joint and Several Liability in EU Competition Law* (Cambridge University Press 2022); T Bauermeister, *Gesamtschuld Und Regress in Der Schadensersatzrichtlinie* (Mohr Siebeck 2021); P M Bodnár and R Szuchy, 'Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States' (2017) 10 Yearbook of Antitrust and Regulatory Studies 85; C Koenig, 'Making Contribution Work: The Liability of Privileged and Non-Privileged Injurers in EU Competition Law' (2018) 14 European Competition Journal 110; R F Pastore, L G Da Motta and R R Ignácio, 'Responsabilização Solidária de Cartelistas Em Ações Indenizatórias: Reflexões, Limites e Desafios - Análise Crítica Dos Julgados No Poder Judiciário Envolvendo Matéria Concorrencial' in Bruno de Luca Drago and Bruno Lanna Peixoto (eds), *A Livre Concorrência e os Tribunais Brasileiros* (Editora Singular 2018); J England, 'Joint and Several Liability, Contribution, and Claim Reduction' (2008) 3 Issues of Competition Law and Policy 2369.

³⁰⁹ Inter alia, Koenig (n 308) 111.

³¹⁰ Generally, *ibid.*

³¹¹ For example on functions of EU and US competition law, C I Nagy, 'What Role for Private Enforcement in EU Competition Law? A Religion in Quest of a Founder' in T Tóth (ed), *The Cambridge Handbook of Competition Law Sanctions* (Cambridge University Press 2022).

³¹² *Courage Ltd v Bernard Crehan and Others* (n 37) para 25; *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni ao* (n 77) para 95.

³¹³ *Courage Ltd v Bernard Crehan and Others* (n 37) para 27; *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni ao* (n 77) para 91.

³¹⁴ *Sumal, SL v Mercedes Benz Trucks Espana* (n 124) para 37; *Wils* (n 3) 15.

effective enforcement of Arts 101 and 102 TFEU.³¹⁵ Historically, the focus was on public enforcement.³¹⁶ Private enforcement only gained importance over the years and through influence of the jurisprudence of the ECJ. Yet, particularly the right to compensation strengthens '*the working of the EU competition rules*' and contributes '*to the maintenance of effective competition in the European Union*'.³¹⁷ Thus, private enforcement of EU competition is also about the effective enforcement (*effet utile*) of competition law itself. In that sense, it tries to remedy '*the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned*'.³¹⁸

76 In the US, deterrence and even punishment through damages actions play a much bigger role.³¹⁹ Competition law enforcement is largely privatized³²⁰: Treble damages, generous discovery rules, opt-out class actions or asymmetric cost rules, contingency fees, and other financial incentives still today demonstrate that competition law is mainly enforced through private damages actions (private attorney general)³²¹, leaving public enforcement mainly for criminal enforcement of hard-core cartels.³²² This often leads to overcompensation not only through the treble damages themselves but also in the sense that the damage payment accrues to one person or one class despite the harm having been caused to the market structure and society as a whole. In other systems, the latter is mainly remedied through fines. Any deterrent function, even the one of private enforcement of EU competition law, aims to remedy this indirect harm to society. However, in the EU, any overcompensation and unjustified accumulation of damages payments beyond the harm, is avoided through Art 3(3) EU Damages Directive.

6.1.2 Different Kinds of Damages and their General Quantification

77 At the centre of damages claims lies the question what constitutes harm, how to calculate the damages in private enforcement of competition law and what substantive and

³¹⁵ *Courage Ltd v Bernard Crehan and Others* (n 37) para 27.

³¹⁶ See above at 1.

³¹⁷ *Courage Ltd v Bernard Crehan and Others* (n 37) para 27; *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, Case 724/17 (CJEU), Judgment of the Court (Second Chamber) of 14 March 2019 [ECLI:EU:C:2019:204] para 44; *Sumal, SL v Mercedes Benz Trucks Espana* (n 124) para 35.

³¹⁸ *Sumal, SL v Mercedes Benz Trucks Espana* (n 124) para 36; *Tráficos Manuel Ferrer* (n 19).

³¹⁹ For example *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* (Supreme Court, US), Judgment of 2 July 1985 [473 US 614, 635, No 83-1569]; *Nagy* (n 311) p 219.

³²⁰ *Zenith Radio Corp v Hazeltine Research, Inc* (Supreme Court, US), Judgment of 19 May 1969 [395 US 100] 130–131; *Hawaii v Standard Oil Co of California* (Supreme Court, US), Judgment of 1 March 1972 [405 US 251, 262].

³²¹ J C Coffee Jr, 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working' (1983) 42 Maryland Law Review 215, 216; W B Rubenstein, 'On What a "Private Attorney General" Is – and Why It Matters' (2004) 57 Vanderbilt Law Review 2129, 2148 & 2142–55; C W Hittinger and J M Bona, 'The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court' (2009) 4 Journal of Business & Technology Law 167.

³²² *Baker* (n 2); *Wils* (n 3) 15.

procedural tools the various systems foresee to help claimants in that regard. Damages actions for competition law violations can concern different forms of damages. One has to differentiate between material – actual losses, loss of profit and interest – and immaterial losses as well as punitive damages. The following discussion will show that damages are manifold, but they do not always give rise to compensation claims. In the US, for example, damages only include the overcharge, albeit as treble damages. Furthermore, not every system gives compensation for immaterial loss. Furthermore, the following discussion will show the immense difficulty in private enforcement claims to quantify damages based on economic considerations, which underlines and influences procedural discussions on how to choose an expert or whether judges should have economic expertise in competition damages actions.

6.1.2.1 Actual Loss

78 All the systems foreseeing damages claims cover material losses.³²³ Many systems include the actual losses (*damnum emergens*), ie, reduction in a person's assets, caused by the competition law violation.³²⁴ Two scenarios have to be distinguished: price-raising infringements and exclusionary infringements. First, cartels and other competition law violations can result directly or indirectly in overcharges of prices paid for cartelised goods (or an undercharge in case of buyer cartels)³²⁵.³²⁶ Cartel members raise prices and therefore their (direct) customers must pay more than what they would have to pay without the cartel.³²⁷ In some systems, such as the US, the main goal of damages actions is the recovery of such under- or overcharge.³²⁸ Second, exclusionary anti-competitive practices might exclude or reduce the market share of competitors (foreclosure), which ultimately harms customers through raised prices due to diminished competitive pressure in a market.³²⁹ In predatory pricing scenarios, for example, an infringer might face a temporary reduction in profits to implement the infringement but will later raise prices and recoup a temporary loss in the distorted market conditions, where competitors have

³²³ For example, Commission, 'Communication from the Commission on quantifying harm in actions for damages based on breaches of Art 101 or 102 of the Treaty on the Functioning of the European Union' (Communication) COM (2013) C 167/19Art; Commission, 'Practical guide on the quantification of harm in actions for damages based on breaches of Art 101 or 102 TFEU' (Staff Working Document) COM (2013) SWD 205 Artpara 1.

³²⁴ For example, Art 3(2) EU Damages Directive (n 16); *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni ao* (77) para 95.

³²⁵ For example, European Commission Practical guide (n 323) Artpara 134; European Commission Communication (n 78) para 65.

³²⁶ For example, European Commission Practical guide (n 323) Artparas 21, 126 et seq; Case 238/78 *Ireks-Arkady GmbH v Council and Commission of the European Communities* [1979] ECR 1979 -02955, Opinion of AG Capotorti para 9; For the US, *Hanover Shoe, Inc v United Shoe Machinery Corp* (n 98); For an empirical meta study of cartel overcharges M Boyer and R Kotchoni, 'How Much Do Cartel Overcharge?' (2015) 47 *Review of Industrial Organization* 119, passim.

³²⁷ For example, European Commission Practical guide Art(n 323) paras 21, 128, 136 et seq.

³²⁸ *City of Atlanta v Chattanooga Foundry & Pipe Works*, (Supreme Court, US), Judgment of 3 December 1906 [101 F 900, 901, CEED Tenn 1900 aff'd, 203 US 390]; *Hanover Shoe, Inc v United Shoe Machinery Corp* (n 98).

³²⁹ European Commission Practical guide (n 323) Artparas 21, 209.

been excluded because of the initial low prices.³³⁰ This overcharge resulting from recoupment might lead to a similar effect, ie raise in price for customers, as the overcharges caused by prise-raising infringements.³³¹

79 Many systems foresee a precise calculation of overcharge. As competition law usually belongs to the field of tort law, the damage has to be calculated as precisely as possible and over- or undercompensation must be avoided.³³² The precise calculation of the over- or undercharge constitutes one of the main challenges of private enforcement actions around the globe.³³³ The common compensatory principle underlying damages calculation looks simple and is based on a hypothetical counterfactual analysis³³⁴: A person who has suffered harm must be placed in the position in which that person would have been but for the infringement of competition law.³³⁵ The focus lies, especially in Europe, to restore the initial status of the harmed claimant (*in integrum restitutio*).³³⁶ However, it is impossible to know what would have happened but for the infringement, so the obtainable damages always only represent the second-best optimum.³³⁷ Best estimates based on assumptions and approximations are quite common in practice.³³⁸ The hypothetical but-for analysis is typical for any damages claims.³³⁹ Competition cases are nevertheless more complex as the analysis often entails reconstructing entire market structures, it involves many economic variables, and '*prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic interactions between market participants that are not easily estimated*'.³⁴⁰ These calculations are viewed legally burdensome, very fact-intensive and require complex economic models and the

³³⁰ Artibid paras 21, 210.

³³¹ Artibid paras 21, 209.

³³² For example, Art 3(3) Damages Directive (n 16).

³³³ For example, F P Maier-Rigaud and C Milde and P Bönisch, 'Quantification of Damage on Both Sides of the Atlantic: What's the Difference?' in Keyte J A (editor), *International Antitrust Law & Policy: Fordham Competition Law* (Juris Publishing 2015).

³³⁴ Hereto, R Inderst and U Schwalbe, 'Das Kontrafaktische Szenario Bei Der Berechnung von Kartellschäden' (2012) 2 *Wirtschaft und Wettbewerb* 122, passim.

³³⁵ For example, for the EU Art 3(2) EU Damages Directive (n 16) and European Commission Practical guide (n 323) Art para 11 et seq; OECD, 'Roundtable on Quantifying Harm to Competition by National Courts and Competition Agencies - Note by the United States' (*Federal Trade Commission*, 11 February 2011) <<https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/1102roundtableharm.pdf>> accessed 28 June 2023, 11, 8; For Australia, Section 82 Australian Competition and Consumer Act (n 12);

³³⁶ Nagy (n 311) p 223.

³³⁷ A Howard, 'Too Little, Too Late?: The European Commission's Legislative Proposals on Anti-Trust Damages Actions' (2013) 4 *Journal of European Competition Law & Practice* 455, 459; *J Truett Payne C v Chrysler Motors Corp* (Supreme Court, US), Judgement of 18 May 1981 [51 US 557] 566.

³³⁸ For example, *Albion Water Limited v Dŵr Cymru Cyfyngedig* (CAT, UK), Judgement of 28 March 2013 [No 1166/5/7/10].

³³⁹ Opinion of Advocate General Capotorti (n 326) para 9.

³⁴⁰ European Commission Practical guide (n 323).Art

involvement of economists as experts, which are costly and timely, and, thus, constitute a substantial barrier for effective compensation claims.³⁴¹

80 The economic models used to calculate over- or undercharge are manifold.³⁴² The most important methods for determining the damage caused by price overcharge are comparator-based methods, comparing the infringement price with a non-infringement scenario.³⁴³ For this purpose, temporal, spatial and factual comparative markets come into consideration.³⁴⁴ A comparison over time on the same market, '*consists in comparing the actual situation during the period when the infringement produced effects with the situation on the same market before the infringement produced effects or after they ceased.*'³⁴⁵ This is the preferred method in US overcharge calculation.³⁴⁶ In this respect, it is problematic that the end and beginning of the cartel must be precisely determined. In addition, there may also be after-effects of competition law infringements, which have to be taken into account when considering the period after the infringement.³⁴⁷ A geographic comparator market method considers the relevant product and time market of the cartelised product in a different geographic area.³⁴⁸ A comparison with data from other product markets takes a product similar to the cartelised product into account as the object of comparison.³⁴⁹ In both latter cases, the market structures must correspond as closely as possible to the cartelised market.

81 Due to the inherent difficulties of finding a close-enough comparison market, the different comparable market concepts are often combined with each other, whereby the consideration of non-cartel factors for the price formation must be included in the calculation.³⁵⁰ Other factors, such as wage increases or changes in demand behaviour, can

³⁴¹ Recital 15 EU Damages Directive (n 16).

³⁴² For example, M Brealey and K George, 'Chapter 16: Damages' in M Brealey and K George (eds), *Competition Litigation: UK Practice and Procedure* (2nd edition, Oxford University Press 2019); R Inderst and S Thomas, *Schadensersatz Bei Kartellverstößen: Juristische Und Ökonomische Grundlagen Und Methoden* (2nd edition, Handelsblatt Fachmedien 2018); C Brömmelmeyer, 'Die Ermittlung Des Kartellschadens Nach Der Richtlinie 2014/104/EU' (2016) 4(1) *Neue Zeitschrift für Kartellrecht* 2; G Niels and R Noble, 'Quantifying Antitrust Damages – Economics and the Law' in K Hüscherlath and H Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe* (Springer 2014) 127; S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Applications and Measurement* (Sweet & Maxwell 2010); P Davis and E Garcés, *Quantitative Techniques for Competition and Antitrust Analysis* (1st edn, Princeton University Press 2009); P E Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (3rd edn, Wolters Kluwer Law & Business 2007) 394–395, 354–400.

³⁴³ European Commission Practical guide (n 323) Art paras 32 et seq; OECD (n 335) 11, 8.

³⁴⁴ European Commission Practical guide (n 323) Art paras 33, 38 et seq;

³⁴⁵ Artibid para 38.

³⁴⁶ OECD (n 335) 11, 8.

³⁴⁷ R Inderst and Z Jakubovic, 'Nachwirkungen von Kartellen' (2013) 63(1) *Wirtschaft und Wettbewerb* 5.

³⁴⁸ European Commission Practical guide (n 323) Art paras 49 et seq; American Bar Association, *Proving Antitrust Damages: Legal and Economic Issues* (2nd edition, UNKNO 2010) 174-176.

³⁴⁹ European Commission Practical guide Art(n 323) paras 54 et seq.

³⁵⁰ European Commission Practical guide (n 323) Art paras 56 et seq; OECD (n 335) 11, 8.

also influence the competitive price. In very few cases can a price development be attributed exclusively to the cartel. To sufficiently take these other factors into account, so-called regression analysis or other econometric models come into play.³⁵¹ Regression analysis is a statistical technique used to examine patterns in the relationships between economic variables.³⁵² Regression analysis makes it possible to measure the extent to which a particular target variable, such as price, was affected by the cartel and by other variables not affected by the cartel, such as the cost of raw materials, fluctuations in demand, product characteristics, the degree of market concentration, the size of the customer and the volume of orders, production technology, the size and cost structure of the supplier or advertising expenditure.³⁵³

82 In addition to the comparative market concept, a market simulation model can also be used in which the cartelised market is compared with a simulated market.³⁵⁴ The simulation of the non-infringed market relies on price determining variables, such as demand elasticity and marginal costs. This model therefore requires a complex calculation and a huge amount of data to achieve realistic results.

83 Another, more frequently used model is the cost-oriented determination of the hypothetical competitive price.³⁵⁵ A reasonable profit that would have been achieved without the infringement is added to the average unit costs of the cartelised products. The average unit costs, in turn, are obtained by deducting the corresponding costs incurred from the profit actually made by the cartelist. However, these costs must not have been incurred in general, but must be specifically attributable to the cartelised products. The infringement-free unit cost price can then be compared with the cartelist's actual unit cost price. Again, many factors such as market conditions, cost structures, capacity utilisation and strategic decisions can influence both price and profit developments, making this model equally burdensome. In addition, there are financial-based methods that compare the financial and profit situation of the plaintiff or defendant company.³⁵⁶

6.1.2.2 Loss of profit

84 Next to the actual losses in form of overcharge, most systems include the loss of profits (*lucrum cessans*) as material damages, such as the EU.³⁵⁷ A loss of profit can again occur

³⁵¹ OECD (n 335) 11, 8; Areeda (n 342) p 354–400.

³⁵² European Commission Practical guide (n 323) Artparas 69 et seq.

³⁵³ Artibid.

³⁵⁴ European Commission Practical guide (n 323) Artparas 96 et seq; F Deuflhard, P C Heller and A Winkler, 'Industrieökonomische Simulationsmodelle Zur Schadensquantifiz' (2021) *Neue Zeitschrift für Kartellrecht* 147.

³⁵⁵ European Commission Practical guide (n 323) Artparas 106 et seq; J M Connor, ' "Our Customers Are Our Enemies": The Lysine Cartel of 1992-1995' (2001) 18 *Rev of Ind Org* 5.

³⁵⁶ European Commission Practical guide (n 323) Artparas 106 et seq.

³⁵⁷ Art 3(2) EU Damages Directive (n 16); *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni ao* (n 77) para 95; Opinion of Advocate General Capotorti (n 326) para 9.

in the two different scenarios, differentiating between the prise-raising and exclusionary infringements. Loss of profit can thus influence even further the specific models useable for experts in competition proceedings.

- 85 First, price fixing, market sharing, or output limitation cartels may lead to a raise in price, which in turn not only leads to an over- or undercharge but also to less demand, since customers might not be able to afford the overpriced product or view that the higher price exceeds the value of owning the product (volume or quantity effect).³⁵⁸ For those customers who would use the cartelised product in their own commercial activities, this volume or quantity effect might lead to a loss of profits due to the fact that they either could have made more profit if they would be able to buy the cartelised good at a non-cartelised price or they would have made more profit if they would have sold more units they failed to sell because they also had to raise prices in turn.³⁵⁹ In that sense, the volume effect is linked to pass-on.³⁶⁰ On the contrary, final- or end-consumers, who are not able to afford the overpriced product cannot lose any profits, since they are not using the cartelised product for any own commercial activities.³⁶¹ If they pay a higher price for a cartelised good or a substitute good, an actual loss occurs.³⁶² Otherwise final- or end-consumers fail to enjoy the utility of these products, which is not in itself an actual loss or loss of profits,³⁶³ but could result in an immaterial harm.
- 86 Second, anti-competitive practices, such as unilateral conduct, like margin squeeze, or foreclosing concerted conduct, such as vertical exclusivity agreements, might exclude competitors from a market or minimize their market share. These competitors, in turn, lose their connected profits because of 'reduced revenues (eg, through the reduction in the quantity that such competitors can sell) or increased costs (eg, when the infringement affects the price of an input)³⁶⁴ due to the foreclosure. In the US, the majority of lost profits cases arise following exclusionary conduct.³⁶⁵

³⁵⁸ European Commission Practical guide (n 323) Artparas 21, 130, 132.

³⁵⁹ R Inderst and S Thomas, 'Pass-on bei entgeltlicher Nutzungsüberlassung auf nachgelagerten Märkten' (2018) 6(4) NZKart 158; B Durand and I Williams, 'The Importance of Accounting for Passing-on When Calculating Damages That Result from Infringements of Competition Law' (2017) 79 ERA Forum 86; F Weber, 'The Volume Effect in Cartel Cases—a Special Challenge for Damage Quantification?' (2021) 9 Journal of Antitrust Enforcement 436.

³⁶⁰ Weber (n 361) 436, 439; J P Van der Veer and A Lofaro, 'Estimating Pass-on' (2010) 2 The CPI Antitrust Journal 4; U Schwalbe, 'Lucrum Cessans und Schäden durch Kartelle bei Zulieferern, Herstellern von Komplementär'gü'tern sowie weiteren Parteien' (2017) 5(4) NZKart 157.

³⁶¹ European Commission Practical guide (n 323) Artparas 21, 128, 133. N Rosenboom and V Kocsis and J Mulder, 'Consumer Damages for Breach of Antitrust Rules' (2017) 13(4) Journal of Competition Law & Economics 710; U Laitenberger and F Smuda, 'Estimating Consumer Damages in Cartel Cases' (2015) 11(4) Journal of Competition Law & Economics 955.

³⁶² European Commission Practical guide (n 323) Artparas 21, 128, 133; *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni ao* (n 77) para 95.

³⁶³ European Commission Practical guide (n 323) Artparas 21, 128, 133.

³⁶⁴ European Commission Practical guide (n 323) Artpara 184.

³⁶⁵ OECD (n 335) 11, 6.

- 87 In both cases, loss of profit means the *'loss of an increase in those assets, which would have occurred if the harmful act had not taken place'*³⁶⁶ or *'that an increase in those assets, which would have occurred without the infringement, did not happen'*³⁶⁷. Consequently, similar as the actual losses, the loss of profit analysis equally entails a but-for counterfactual scenario of what would have happened without the infringement, but the analysis of the loss of profit focuses on the *'difference between the actual profits generated by an undertaking and the profits it would have generated in the absence of the infringement'*.³⁶⁸ These calculations are, however, not less burdensome, since it equally requires the restoration of market conditions and hypothetical entering and exiting of firms has to be taken into account as well as exclusionary harm extending to the future.³⁶⁹ The calculation of the lost profit is therefore even more complicated by the fact that, in addition to the hypothetical market development, the hypothetical development of the parties affected by the cartel must also be taken into account.³⁷⁰ The extent of the loss of profit must take into account the reduction in demand and the original profit margin.³⁷¹
- 88 Yet, usually similar economic models apply.³⁷² Particularly the comparator-based methods are equally, whereby another company can also be used as a reference object.³⁷³ Another suitable variation for calculating the loss of profit is the market share method and other models that shed light on the financial and profit situation of the plaintiff or defendant company.³⁷⁴ The loss of profit is calculated by comparing the actual and the hypothetical market share and multiplying this by the total quantity of goods. Difficulties arise with this method in case several companies are affected on the same market, the market cannot be clearly defined, or too little information is available. In case of future loss of profits, further speculative factors are added to the calculation.³⁷⁵

6.1.2.3 Interest

- 89 Often, the different systems also foresee that injured persons can seek interest as an essential component of compensation.³⁷⁶ Granting interest aims at compensating for the

³⁶⁶ Opinion of Advocate General Capotorti (n 326) para 9.

³⁶⁷ European Commission Practical guide (n 323) Artpara 1.

³⁶⁸ European Commission Practical guide (n 323) Artpara 183.

³⁶⁹ R Inderst and S Thomas (n 342) 456.

³⁷⁰ F Weber, 'Entgangener Gewinn, Entgangene Klageanreize – Der Problematische Art 12 (3) Der Kartellschadensersatzrichtlinie' (2018) *Neue Zeitschrift für Kartellrecht* 13; *Schwalbe* (n 362).

³⁷¹ N von Hinten-Reed and F Wandschneider, 'Ökonomischer Nachweis der Wirkungs des Kartells und der Höhe des Schadens' in F Stancke and G Weidenbach and R Lahme (eds), *Kartellrechtliche Schadensersatzklagen* (2nd edn, Fachmedien Recht und Wirtschaft Mediengruppe 2017) 406.

³⁷² Weber (n 361) 436.

³⁷³ European Commission Practical guide (n 323) Artparas 175 et seq, 184 et seq.

³⁷⁴ Artibid; H J Hovenkamp, 'A Primer on Antitrust Damages' (2010) University of Iowa Legal Studies Research Paper <<http://ssrn.com/abstract=1685919>> accessed 28 June 2023, 41–50, 52–56; OECD (n 335) 11, 9.

³⁷⁵ European Commission Practical guide (n 323) Artparas 206 et seq.

³⁷⁶ *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni ao* (n 77) paras 95, 97; *Ireks-Arkady GmbH v Council and Commission* (n 326) para 20.

effects – monetary devaluation³⁷⁷ and the lost opportunity for the injured party to have the capital at its disposal³⁷⁸ – resulting from the lapse of time since the occurrence of the harm caused by the infringement.³⁷⁹

90 In the EU,³⁸⁰ case-law only requires providing for interest as an integral part of compensation.³⁸¹ It is then left to the Member States to regulate interest, provided that the rules governing the calculation of interest, including the applicable rate, uphold the EU principles of effectiveness and equivalence.³⁸² Case-law of the ECJ, by relying on the principles of effectiveness and equivalence, limits the discretion of national courts when it comes to interest, particularly with regard to the fact that interest should be rewarded for the full time between the date of harm and the payment of compensation.³⁸³ Contrary to the US, the EU allows for pre-trial interest.³⁸⁴ EU Member State courts are freer in deciding between simple or compound interest.³⁸⁵ In their comparative report, *Van Leeuwen* and *Monti* have established that in the EU Member States '*there are two techniques used to calculate the damages and interest awards. In some systems the damages portion is calculated in such a way that in addition to the loss suffered at a given point in time, the loss resulting from the claimant not having the money at his/her disposal is calculated as part of the damages. In these legal systems, interest then begins to run from the time the claim is brought. In other legal systems instead, interest runs from the time that the loss is suffered.*'³⁸⁶ The rates of interest across the EU seems to equally vary, overall leading to a great extent of heterogeneity in the EU.³⁸⁷ In Germany, for example, a claim for damages shall bear interest at a rate of five percentage points above the

³⁷⁷ *Alfredo Grifoni v European Atomic Energy Community*, Case 308/87 (CJEU), Judgment of the Court (Sixth Chamber) of 27 March 1990 [ECLI:EU:C:1990:134] II para 40; *J M Mulder and others and Otto Heinemann v Council of the European Communities and Commission of the European Communities*, Joined Cases 104/89 and 37/90 (CJEU), Judgment of the Court of 19 May 1992 [ECLI:EU:C:1992:217] para 51.

³⁷⁸ Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission of the European Communities* [1992] ECR I-03061, Opinion of AG Saggio para 105.

³⁷⁹ European Commission Practical guide (n 323) Artpara 20; *M Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, Case 271/91 (CJEU), Judgment of the Court of 2 August 1993 [ECLI:EU:C:1993:335] para 31.

³⁸⁰ In detail, study by G Monti (ed), 'EU law and interest on damages for infringements of competition law – A comparative report' (2016) 11 EUI Working Paper LAW 1 <<https://cadmus.eui.eu/handle/1814/40464>> accessed 27 June 2023.

³⁸¹ *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni ao* (n 77) paras 95, 97.

³⁸² European Commission Practical guide (n 323) Artpara 20;

³⁸³ For example, *Mulder and others v Council and Commission* (n 380) para 63; *Mariana Irimie v Administrația Finanțelor Publice Sibiu and Administrația Fondului pentru Mediu*, Case 565/11 (CJEU), Judgment of the Court (Third Chamber) of 18 April 2013 [ECLI:EU:C:2013:250] paras 26 et seq.

³⁸⁴ E Bueren and K Hüscherlath and T Veith, 'Time is Money – How Much Money is Time? Interest and Inflation in Competition Law Actions for Damages' (2014)14-008 ZEW Centre for European Economic Research 1.

³⁸⁵ Monti (n 382) para 26.

³⁸⁶ *ibid* para 75.

³⁸⁷ *Rodger and Ferro and Marcos* (n 119) 498.

respective base interest rate.³⁸⁸ Austria, on the other hand, sets the statutory interest rate at 4% pa,³⁸⁹ unless the damage can be classified as contractual damage between commercial parties; in that case the debtor must pay interest amounting to 9.2% above the base rate.³⁹⁰

6.1.2.4 Immaterial loss

- 91 Less frequently, systems even cover immaterial losses. Immaterial damages claims give compensation for non-monetary losses, ie, losses that cannot be objectively measured in monetary terms or monetary goods. In Brazil, for example, non-pecuniary losses in the form of pain and suffering are covered by cartel damages claims.³⁹¹ Literature suggests awarding these immaterial damages for the overall reduction of consumer welfare in context of essential products, such as healthcare products, because consumers could either not afford the products due to overcharge or they were less available due to a reduction of supply.³⁹² As usual, in lack of constituent parameters, non-material damages are difficult to calculate. Past case-law from Brazil shows that the intensity of suffering is typically taken into account. However, this approach has, in practice, resulted in a wide range of outcomes.³⁹³
- 92 EU law does not explicitly foresee immaterial damages either in primary law, the case-law, or the EU Damages Directive.³⁹⁴ Nonetheless, the Quantifying Guidelines of the Commission provided for national courts in order to facilitate damages calculation point to the possibility of immaterial damage provided for by Member State law.³⁹⁵ Regarding the volume effect, final- or end-consumers, who are not able to afford the overpriced product cannot lose any profits but fail to enjoy the utility of these products, which is not in itself a damage measurable in monetary terms or monetary goods.³⁹⁶ The Guidelines point to Member State laws, which might include rules on compensation of such immaterial harm resulting in the failure to enjoy the product.³⁹⁷ Therefore, and due to the fact that the Damages Directive only contains minimum harmonization rules³⁹⁸, Member

³⁸⁸ Section 33a(4) German Competition Act (n 45); Section 288 (1) Bürgerliches Gesetzbuch (Civil Code) 1896 (Germany).

³⁸⁹ Section 37d(2) Austrian Competition Act (n 1); 1333, 1000(1) Allgemeines bürgerliches Gesetzbuch (General Civil Code) 1811 (Austria).

³⁹⁰ Section 37d(2) Austrian Competition Act (n 1); 1333, 1000(1) Austrian Civil Code (n 391); 456 Unternehmensgesetzbuch (Commercial Code) 1897 (Austria).

³⁹¹ J Honda and others, 'Brazil' in International Chamber of Commerce (editor), *Compendium of Antitrust Damages Actions* (1st edition, ICC 2021) 120.

³⁹² Honda and others (n 391) 122, 123.

³⁹³ *ibid* 123.

³⁹⁴ Hereto, W Wurmnest and M Gömann, 'Comparing Private Enforcement of EU Competition and Data Protection Law' (2022) 13 *Journal of European Tort Law* 154, 172.

³⁹⁵ European Commission Practical guide (n 323) Artpara 133.

³⁹⁶ *Artibid*.

³⁹⁷ *Artibid*.

³⁹⁸ For example, Art 5(8) Damages Directive (n 16); M Hjærtström and J Nowag, 'EU Competences and the Damages Directive: The Continuum Between Minimum and Full Harmonisation' in M Strand and V

States are, in principle, free to regulate non-material damages in their national laws. To the best of the author's knowledge, no Member State has foreseen immaterial damages for competition law violations. Germany, for example, only provides for monetary compensation of immaterial damages either on a statutory basis, which is not the case for competition damages claims, or for an injury to body, health, freedom, or sexual self-determination.³⁹⁹

6.1.2.5 Punitive damages

93 Moreover, only some systems know the concept of punitive damages, including multiple or exemplary damages. The laws of most EU Member States, Australia, Japan, Turkey, for example, do not know the concept. In the EU, particularly punitive damages are generally forbidden.⁴⁰⁰ However, the ECJ held on multiple occasions that compensatory damages that should be calculated as precisely as possible also serve a punitive function.⁴⁰¹ In *Tráficos Manuel Ferrer*, for example, the ECJ held '*[t]hat participation by the private sphere in the financial penalisation of anticompetitive conduct and, therefore, also in its prevention, is all the more desirable because it is capable not only of providing a remedy for the direct damage alleged to have been suffered by the person in question, but also for the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned.*' Ireland and the UK had punitive damages in the past.⁴⁰² To follow the general provision under the Damages Directive, they introduced a rule prohibiting exemplary damages previously available in case-law.⁴⁰³ As mentioned above, the UK had transposed the Damages Directive before leaving the EU. One must await if the UK will go back to the system of exemplary damages.

94 The United States of America are at the forefront of punitive damages because it foresees so-called treble damages on the federal level; all but five states also foresee treble damages.⁴⁰⁴ Section 4 of the Clayton Act states that a victim of an antitrust law violation '*may sue [...] and shall recover threefold the damages by him sustained*'. While a claimant

Bastidas Venegas and M C Iacovides (eds), *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Oxford, Hart Publishing 2019) 8.

³⁹⁹ Section 253 German Civil Code (n 390).

⁴⁰⁰ Art 3(3) Damages Directive (n 16)

⁴⁰¹ *Sumal, SL v Mercedes Benz Trucks Espana* (n 124); *AD v PACCAR Inc and Others*, Case 163/21 (CJEU), Judgment of the Court (Second Chamber) of 10 November 2022 [ECLI:EU:C:2022:863] para 56; *Tráficos Manuel Ferrer* (n 19) para 42.

⁴⁰² For example, *2Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd* (CAT, UK), Judgement of 2012 [1187/5/7/11] 19; *Rookes v Barnard* (House of Lords, UK), Judgement of 1964 [UKHL 1, AC 1129] 367; V Wilcox, 'Punitive Damages in England' in H Koziol and V Wilcox (editors), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 7 et seq.

⁴⁰³ For Irish law, 4(3) and 4(4) SI No 43 of 2017 European Union (Actions for Damages for Infringements of Competition Law) 2017 (Ireland).

⁴⁰⁴ J A Sebok, 'Punitive Damages in the United States' in H Koziol and V Wilcox (editors), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 155; M L Rustada, 'The Closing of Punitive Damages' *Iron Cage* (2005) 38 *Loyola of Los Angeles Law Review* 1297.

must show the fact of a damage and measure the damage, the damage calculated in this respect is automatically tripled by the court.⁴⁰⁵ Therefore, treble damages are not completely disconnected from the compensatory function⁴⁰⁶, but the tripling of the damage then clearly shows the punitive function of US damages claims.⁴⁰⁷ However, economic studies focusing primarily on the US showed that actual damages awarded are seldom more than double the overcharge and many cases actually lead to awards below the overcharge.⁴⁰⁸ Leniency recipients are also excluded from treble damages and only have to pay the actual damage.⁴⁰⁹

95 A few other countries follow the US model. In South Korea⁴¹⁰ or Turkey⁴¹¹, for example, punitive damages in the form of treble damages are available. Similarly, Mexico knows the concept of punitive damages.⁴¹² Brazil has also recently made a move towards punitive damages, albeit not fully following the US model. In Brazil, in the aim of facilitating and creating incentives for private claimants, the new Law No. 14,470/2022 introduced the concept of double damages for all injured parties for private enforcement actions.⁴¹³ At the same time, to incentivize leniency applications and settlements with the Brazilian Competition Authority CADE, and similar to the US approach, double damages will not apply to leniency applicants or parties that have settled with CADE.⁴¹⁴ Those parties are only liable for the compensation of actual damages.

6.1.3 Quantifying Guidelines

96 As mentioned above, quantifying the actual loss or the loss of profit includes difficulties and courts as well as parties often have to recourse to economic experts. Unfortunately, despite these difficulties, only very few systems provide for any official guidance regarding the calculation of actual loss or the loss of profit. Only a few systems help the parties and courts with guidelines or in another manner.

⁴⁰⁵ W J Bruckner and M R Salzwedel, 'Plaintiffs' remedies' in A A Foer and R M Stutz (editors) *Private Enforcement of Antitrust Law in the United States: A Handbook* (Elgar, 2012) 236.

⁴⁰⁶ Nagy (n 311) p 219.

⁴⁰⁷ *Zenith Radio Corp v Hazeltine Research, Inc* (n 320) 130–131; *Hawaii v Standard Oil Co of California* (n 320) 262.

⁴⁰⁸ Connor M J and Lande R H, 'Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages' (2015) 100 Iowa Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548712> accessed 26 June 2023; M J Connor and R H Lande, 'The Prevalence and Injuriousness of Cartels Worldwide' in Whelan P (editor), *Elgar Research Handbook on Cartels* (UK, Edward Elgar Publishing 2023).

⁴⁰⁹ Antitrust Criminal Penalty Enhancement and Reform Act 2004 [Public Law 108-237] (US) Section 213(a)-(b); Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act (n 218).

⁴¹⁰ Art 56 (3), 109(1) Monopoly Regulation and Fair Trade Act (n 6)

⁴¹¹ Art 58 Turkish Competition Act (n 29).

⁴¹² ICC, 'ICC Compendium of Antitrust Damages Actions' (ICC Mexico, 2021) 8 <<https://iccmex.mx/comision/posturas-herramientas/compendio-de-la-icc-sobre-acciones-de-danos-y-perjuicios-en-materia-de-defensa-de-la-competencia.pdf>> accessed 30 June 2023.

⁴¹³ Art 47 Section 1 Brazilian Competition Act (n 31).

⁴¹⁴ Art 47 Section 2 Brazilian Competition Act (n 31).

97 In the EU, the European Commission has issued a 'Practical guide on the quantification of harm in actions for damages based on breaches of Art 101 or 102 TFEU'.⁴¹⁵ This Guide serves to help claimants and defendants, including their party-appointed experts and the national courts with quantifying the harm. It is not used as evidence but as an aiding tool for inspiration for experts and the courts. The Guide sets out the above-mentioned quantification methods, such as comparator-based methods, regression analysis, cost-based analysis, or the simulation model. It describes them in detail, giving practical examples and model calculations. However, it leaves it to the parties or the court to pick a method suitable for the case at hand. Many courts across the EU have used the Guide and referred to it in their judgments.⁴¹⁶ In some Member States, such as Lithuania, the competition rules require courts and economic experts to follow the Guide.⁴¹⁷ In Germany, for example, albeit in a non-cartel damages case, a court has rejected a quantification method because it inter alia was not included in the Guide.⁴¹⁸ Courts in the EU have used or referred to all the methods described in the Guide, including a comparison with unaffected markets⁴¹⁹ or over time⁴²⁰, regression analysis⁴²¹, cost-based analysis⁴²², and the simulation model⁴²³. In non-EU countries, for example in the UK, still heavily influenced by its former EU-membership, courts have also taken recourse to the Guide, or the models described therein.⁴²⁴

98 On the contrary, many systems have no further guidance on damages calculation. In the majority of systems, only past case-law or academic output could be used for inspiration. Especially when it comes to past case-law, the rate of settlements is decisive. In Australia,

⁴¹⁵ European Commission Practical guide (n 323).Art

⁴¹⁶ See, eg, Case KRB 10/17 (BGH, Germany), Order of 9 October 2018 [BeckRS 2018, 36788] para 20.

⁴¹⁷ Art 44(4) and (5) Competition Law Lithuania (n 47).

⁴¹⁸ Case KRB 10/17 (BGH, Germany), Order of 9 October 2018 [BeckRS 2018, 36788] para 20.

⁴¹⁹ For example, Case 2 U 10/03 Kart (KG, Germany), Judgement of 1 October 2009 [Berliner Transportbeton]; *Fondiara SAI SPA v Nigdello* (Supreme Court, Italy), Judgement of 2 February 2007 [No 2305 4].

⁴²⁰ For example, Case 17 R 91/07 p (Regional Court Graz, Austria), Judgement of 17 August 2007 [Driving Schools Cartel]; *SNC Doux Aliments Bretagne at al v Societe Ajinomoto Eurolysin* (Appeal Court Paris, France), Judgement of 27 February 2014 [10/18285]; Case RNL2017-403031 (District Court Gelderland, Netherlands), Judgement of 29 March 2017 [ECLI:NL:RBGEL:2017:1724].

⁴²¹ Case 278/2019 (Commercial Court of Oviedo, Spain), Judgement of 19 May 2021 Case 16/277 (Helsinki Court of Appeal, Finland), Judgement of 21 May 2018; Case L 11/53753 (Helsinki District Court, Finland), Judgement of 31 August 2017; Case 14PA02419 (Administrative Court of Appeal Paris, France), Judgement of 13 June 2019.

⁴²² *Nestlé España et al v Ebro Puleva, SA* (Supreme Court, Spain), Judgement of 7 November 2013 [No 651/2013, STS 5819/2013].

⁴²³ *Cheminova A/S v Akzo Nobel Functional Chemicals BV et al* (Maritime and Commercial Court, Denmark), Judgement of 15 January 2015 [U-0004-07]; Case 33 O 69/15 (Regional Court Cologne, Germany), Judgement of 9 October 2020.

⁴²⁴ *Britned Development Ltd v ABB AB and ABB Ltd* (EWHC, UK), Judgement of 9 October 2018 [EWHC 2616 Ch].

for example, many cases have been settled in the past and cannot be used for future guidance.⁴²⁵

6.1.4 Involvement of Competition Authorities in Damages Quantification

99 Guidance for the quantification of harm could come from competition authorities, especially in follow-on actions.⁴²⁶ However, usually competition authorities do not quantify damages during their public enforcement investigations.⁴²⁷ In the EU, for example, the European Commission⁴²⁸, the German Competition Authority⁴²⁹ or the Slovenian Competition Authority⁴³⁰, calculate fines on the basis of the value of the sales of goods or services to which the infringement relates, ie, the offence-related turnover, not on the basis of the damage caused. The cartel-related additional revenue and a skimming of profits, which itself does not usually go hand in hand with the damage,⁴³¹ do not play a huge role in public enforcement in Europe.⁴³²

100 The US follows a slightly different model when it comes to quantification at the level of the competition authorities. In the US, competition authorities are also not required to precisely quantify damages as a part of enforcing the antitrust laws.⁴³³ Yet, the cartel injury plays a role in the determination of the fines. A US criminal law provision occasionally relied upon in antitrust cases foresees that '*if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the*

⁴²⁵ For example, *Jarra Creek Central Packing Shed Pty Ltd. v Amcor Limited* (FCA, Australia), Judgement of 15 June 2011 [FCA 671].

⁴²⁶ See above on follow-on actions at 5.1.

⁴²⁷ Komninos A and others, *Quantifying antitrust damages: Towards non-binding guidance for courts* (Publications Office of the European Union 2009) p 97 – 99; Bechtold R, 'Kartell ist nicht gleich Kartell – Zur Indizwirkung von Bußgeldentscheidungen für den Schaden der Marktgegenseite und zur Bindungswirkung für den Schadensrichter' in J Kokott and P Pohlmann and R Polley (editors) *Europäisches, deutsches und internationales Kartellrecht: Festschrift für Dirk Schroeder* (Otto Schmidt 2018) 99, 104 ff; Emmerich V, 'AEUV Art 101 Abs 1 Verbot wettbewerbsbeschränkender Vereinbarungen und Verhaltensweisen' in Immenga U and Mestmäcker R (editors) *Wettbewerbsrecht Band 1 EU* (5th edition, CH Beck 2012); § 34 Cartel Act Germany (n 268) Rn 7.

⁴²⁸ Commission, 'Guidelines on the method of setting fines imposed pursuant to Art 23(2)(a) of Regulation No 1/2003' (Communication) COM (2006) C 210/02 Artpara 5.

⁴²⁹ Section 81c subsection 2, 3 and Section 81d subsection 1 no 1 Cartel Act Germany (n 268).

⁴³⁰ E Vogrinec and D Vogrinec, 'The Damages Directive in Slovenia' in Biondi A and Muscolo G and Nazzini R, *After the Damages Directive* (Wolters Kluwer 2022) p 499, 509.

⁴³¹ The harm caused by a competition law violation exceeds the gain or profit because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher price, see C Breyer and P Cushwa and J Wroblewski, 'United States Sentencing Commission Guidelines Manual' (*United States Sentencing Commission*, 2021) Section 2R1.1 Commentary para 3 <<https://www.uscourts.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf>> accessed 19 June 2023

⁴³² On the developments in Germany on Section 34 Cartel Act Germany (n 268), C Kersting, 'Abschöpfung von Gewinnen nach dem Referentenentwurf zur 11. GWB-Novelle' (2002) NZKart 659.

⁴³³ OECD (n 335) 1.

gross loss.⁴³⁴ Furthermore, the United States Sentencing Commission Guidelines Manual states that „[i]n selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization.⁴³⁵ This means that damage caused by the cartel is included as a 'loss' in the calculation of the fine.⁴³⁶ Yet, competition authorities do not precisely quantify the damages in each case 'to avoid the time and expense that would be required for the court to determine the actual gain or loss'.⁴³⁷ Rather, the base fine is usually set at 20% of the volume of affected commerce.⁴³⁸ The 20% dates back to the fact that 'the average gain from price-fixing is 10 percent of the selling price' but the 'loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices'.⁴³⁹ However, '[i]n cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.'⁴⁴⁰ Especially in the latter cases, any finding of US competition authorities on the possible amount of damages could be used for private damages actions.

101 In those systems where competition authorities do not provide specific damage quantifications, the question of how they can assist does not include whether courts can access the authorities' case files, whether the authorities will share their calculations with the courts, what value those calculations might have as evidence, or whether the courts would be obligated to follow those calculations.⁴⁴¹ Rather, a court may need assistance of a competition authority, especially those with economist teams, to further assess and analyse arguments on damages quantification.⁴⁴² In these cases, the competition authority might even be helpful if it has not examined the case in public enforcement, since the main task is mainly to help the court understand highly complex economic calculations.

102 In the EU, Art 17(3) Damages Directive foresees such a rule, namely that '*Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.*' This has led to transpositions in the different Member States of the EU, such as Belgium, where a court

⁴³⁴ United States Code Title 18 (US) Section 3571(d).

⁴³⁵ United States Sentencing Commission (n 433) Section2 R1 1 Commentary para 3.

⁴³⁶ On the connection between damage and fine also W M Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 University of Chicago Law Review 652.

⁴³⁷ United States Sentencing Commission (n 433) Section2R1 1 Commentary para 3.

⁴³⁸ *ibid* Section2R1 1(d)(1).

⁴³⁹ *ibid* Section2R1 1 Commentary para 3.

⁴⁴⁰ *ibid*.

⁴⁴¹ See below at 7.4.

⁴⁴² Rodger and Ferro and Marcos (n 119) 49 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3444376> accessed 28 June 2023;

can ask the national competition authority to assist in damages quantification if the court deems such assistance to be appropriate.⁴⁴³ Similarly, in Slovenia, civil courts can ask the Slovenian Competition Authority and authorities of other Member States for an opinion on the determination of the extent and calculation of harm.⁴⁴⁴ Equally, in Italy, the court can ask for economic advice from the AGCM to quantify the damages.⁴⁴⁵

103 Beyond the EU, in some systems the competition authorities are marginally involved or help with damages calculation. In Brazil, for example, the competition authority offers case specific studies and guidance for judges in future follow-on actions.⁴⁴⁶ Furthermore, in Brazil, the courts competent to deal with damages actions have the power to request further information from the competition authority, including information on estimation of damages it acquired in the course of the administrative investigations.⁴⁴⁷ Similarly, in Japan, in an action for damages, the court may ask for the opinion of the Japanese Competition authority with respect to the calculation of the amount of damages.⁴⁴⁸ Lastly, also with regard to damages quantification, the courts can make use of the above-mentioned *amicus curiae* provisions.⁴⁴⁹ When it comes to damages quantification specifically, the *amicus* submissions are not binding on the courts, but courts often take them into consideration, especially when it comes to market analysis or helpful guidance on damages quantification.⁴⁵⁰

6.1.5 Presumptions of Harm

104 Several systems try to solve procedural problems in quantifying and proving damages with presumptions of harm.⁴⁵¹ A rebuttable presumption is a statutory assumption or inference in favour of a particular fact drawn from another fact or group of facts found or otherwise established in the action that shifts the burden of proof.⁴⁵² For competition proceedings, presumptions of harm are mainly foreseen in the EU.

105 On EU level, Art 17(2) Damages Directive includes a rebuttable presumption that cartels cause harm. This presumption only covers cartels and not other competition law

⁴⁴³ Art XVII 77 Section 2 of the Code of Economic Law (Belgium) (n 87).

⁴⁴⁴ Art 62k Zakon o preprečevanju omejevanja konkurence (Prevention of the Restriction of Competition Act) 2022 (Slovenia).

⁴⁴⁵ Art 14, para 3 of Legislative Decree No 3 (Italy) (n 52).

⁴⁴⁶ For instance, Case 08700 002821/2014-09 (CADE, Brazil), Judgement of 7 June 2017 [Administrative Process, Commissioner Paulo Burnier da Silveira].

⁴⁴⁷ For example, Honda and others (n 391) 123.

⁴⁴⁸ Art 84(1) Japanese Competition Act (n 27).

⁴⁴⁹ See above at 5.2.2.2.

⁴⁵⁰ Ritter and Wirtz (n 240) Rn 15; *Kingdom of the Netherlands and Gerard van der Wal v Commission of the European Communities* (n 293) Rn 25.

⁴⁵¹ L Hornkohl, 'The Presumption of Harm in EU Private Enforcement of Competition Law - Effectiveness vs Overcompensation, EU and Comparative Law Issues and Challenges Series' (2021) 5 ECLIC 29; See below on burden of proof at 7.1.

⁴⁵² 'presumptions' *Black's Law Dictionary* (12th edition, Thomas Reuters); Art 344(1) Código Civil (Civil Code) Decree-Law No 47344/66 of 25 November 1966 (Portugal).

infringements. 'Harm' includes both the actual loss and the loss of profit and 'cause' includes the causal relationship between that harm and the cartel infringement. Yet, Recital 47 Damages Directive makes clear that the presumption should not include the amount of harm. Nevertheless, a presumption that states that harm has occurred entails that damages must be greater than zero.⁴⁵³ The presumption applies on all market levels. For indirect purchasers, the presumption in Art 17(2) Damages Directive must be read together with the presumption of pass-on discussed below.⁴⁵⁴ The presumption is rebuttable, which ultimately indicates a reversal of the burden of proof for the occurrence of harm. The infringer itself often holds the necessary evidence to meet the burden of proof that no harm or lesser has occurred.

106 Some EU Member States have gone beyond the EU approach in transposing the EU rules. In Poland, for example, the presumption of harm⁴⁵⁵ does not only cover cartels but any violation of competition law, such as information exchanges and vertical restraints and Art 102 TFEU violations.⁴⁵⁶ In France, such practice was covered by case-law prior to the transposition of the Damages Directive.⁴⁵⁷ In Germany, for example, the presumption explicitly extends to the cartel affectedness by stating: '*It shall be rebuttably presumed that transactions concerning goods or services with undertakings participating in a cartel, which fall within the scope of a cartel in terms of object, time and place, were affected by that cartel.*'⁴⁵⁸ Some Member States have even introduced presumptions relating to the amount of harm. Hungary⁴⁵⁹ and Latvia⁴⁶⁰ have a rebuttable presumption of 10% overcharge for cartels. Romania provides for a rebuttable presumption that cartels cause an overcharge of 20%.⁴⁶¹ The former Member State UK also envisaged a 20% rebuttable

⁴⁵³ Case KZR 25/14 (BGH, Germany), Judgement of 12 June 2016 [Lottoblock II] 436, 441; Iacovides M, 'The Presumption and Quantification of Harm in the Directive and the Practical Guide' in Bergström M, Iacovides M and Strand M (editors), *Harmonizing EU Competition Litigation: The Damages Directive and Beyond* (Hart Publishing, 2016) 300; Kersting C, 'Bindungswirkung des kartellbehördlichen Verfahrens für einen Schadensersatzprozess – Lottoblock II' (2016) LMK.

⁴⁵⁴ On the presumption of pass on, see below at 6.1.7.2.

⁴⁵⁵ Art 7 Ustawa z dnia 21 kwietnia 2017 (Poland) (n 38).

⁴⁵⁶ Piszcz A and Wolski D 'Poland' in Piszcz A (editor) *Implementation of the EU Damages Directive in Central and Eastern European countries* (University of Warsaw Faculty of Management Press 2017); Bernatt M and Gac M, 'Poland' in Rodger B, Ferro M S and Marcos F (editors), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press 2018) p 298; *DKT v Eco-Emballages and Valorplast* (Commercial Court Paris, France), Judgement of 30 March 2015 [Case No 2012000109]; *Numéricable et a v France Telecom* (Commercial Court Paris, France), Judgement of 30 March 2011 [Case No. 2009073089]; *JCB Sales et a v SA Central Parts* (Appeal Court Paris, France), Judgement of 26 June 2013.

⁴⁵⁸ Section 33a(2) Cartel Act (Germany) (n 268).

⁴⁵⁹ Art 88/G(6) évi LVII törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról (Act No LVII the Prohibition of Unfair Market Practices and Restriction of Competition) 1996 (Hungary); Nagy C I, 'Schadensersatzklagen im Falle kartellrechtlicher Rechtsverletzungen in Ungarn' (2010) 59(9) WUW 902; R Noble and S Pilsbury, 'Is 10 per cent the answer?: The role of legal presumptions in private competition litigation' (2008) 1(3) GCLR 124.

⁴⁶⁰ 21(3) Konkurences likums (Competition Law) 2004 (Latvia).

⁴⁶¹ Art 16(2) RDONANȚĂ DE URGENȚĂ nr 170 din 14 octombrie 2020 (Emergency Ordinance No 170 of 14 October 2020) 2020 (Romania); C de Jonge, 'The new rules in cartel damages claims and calculation of fines for infringement of competition law' (*bpv*, 5 November 2020) <<https://www.bpv->

presumption of overcharge but abandoned the idea after a wave of criticism regarding the fairness and appropriateness of implementing automatic presumptions of overcharges in cartel litigation, particularly in light of the substantial financial implications involved.⁴⁶² Beyond the EU, in the US, as discussed above, cartels are assumed to have overcharged consumers by 10% when it comes to calculating fines, not in private damages litigation.⁴⁶³

6.1.6 Judicial Damages Estimation

107 In the vein of further facilitating the burdensome damages quantification, some systems allow for the judicial estimation of harm. While this may mean something different in the various systems, the overarching theme is to lower the standard of proof,⁴⁶⁴ to allow for an imprecise damages calculations based on the evidence available.

108 In the EU, for example, Art 17(1) Damages Directive states that '*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.*' Yet, the Directive does not specify what exactly is meant by judicial estimation and what judicial estimation entails. The burden for '*practically impossible or excessively difficult*' on the other hand is set quite high.⁴⁶⁵ In its first jurisprudence on the matter, the case of *Tráficos Manuel Ferrer*, the ECJ established first interpretations on the matter. It held that the mere existence of uncertainties in damages quantification '*inherent in proceedings concerning liability and which arise, in actual fact, from the confrontation of arguments and expert reports in the exchange of arguments, does not correspond to the degree of complexity in the assessment of damages required to allow the application of the judicial estimation provided for in Art 17(1).*'⁴⁶⁶ Rather, such difficulties may stem from '*particularly significant difficulties in interpreting the documents disclosed as regards the proportion of the passing on of the overcharge resulting from the cartel on prices of products acquired by the claimant from one of the parties to the cartel.*'⁴⁶⁷ Especially if a claimant's inability to quantify damages is based on

[grigorescu.com/the-new-rules-in-cartel-damages-claims-and-calculation-of-fines-for-infringement-of-competition-law/](https://www.grigorescu.com/the-new-rules-in-cartel-damages-claims-and-calculation-of-fines-for-infringement-of-competition-law/)> accessed 27 June 2023.

⁴⁶² S Campbell and T Feunteun, 'Designing a Balanced System: Damages, Deterrence, Leniency and Litigants' Rights - A Claimant's Perspective' in Lowe P, *Integrating Public and Private Enforcement, Implications for Courts and Agencies* (Hart Publishing 2014) 33; Hüscherlath K and Müller K and Veith T, 'Concrete Shoes for Competition: The Effect of the German Cement cartel on market price' (2014) 9(1) *Journal of Competition Law and Economics* 97, 122.

⁴⁶³ United States Sentencing Commission (n 433) Section2R1 1 Commentary para 3.

⁴⁶⁴ See also below at 7.2.

⁴⁶⁵ *Tráficos Manuel Ferrer* (n 19).

⁴⁶⁶ *ibid* para 52.

⁴⁶⁷ *ibid* para 53.

the lack of available evidence, claimants first have to take recourse to disclosure,⁴⁶⁸ which is described in more detail below.⁴⁶⁹

109 Most of the Member States simply copied the rule of Art 17(1) Damages Directive, so it remains to be seen how the European Court of Justice will continue to interpret the notion of '*practically impossible or excessively difficult*'.⁴⁷⁰ In Spain, for example, the courts seem to be relatively lenient when it comes to allowing judicial estimation. Even after the preliminary reference decision in *Tráficos Manuel Ferrer*, contradictory expert opinions alone are sufficient to meet the requirements of Art 17(1) Damages Directive.⁴⁷¹ Recently, the Spanish Supreme Court has held that an estimation of overcharge of 5% of the purchase price in the trucks cartel is considered correct as long as it is not proven that the amount of the damage is higher or lower than this estimate.⁴⁷²

110 Several Member States of the EU already allowed for a judicial damage estimation in their civil procedural law, but need to make sure, that those rules and the interpretation by courts comply with the Damages Directive understanding.⁴⁷³ In Germany, for example, § 33a (3) GWB, § 287 ZPO foresees such a judicial estimation of harm. This estimation includes a lowered standard of proof for claimants by reducing the requirements for judicial conviction.⁴⁷⁴ The full conviction of the court is not required, but rather an overwhelming probability is sufficient, which must, however, be based on a secure foundation. Claimants must not claim a specific amount of damages but must still claim an approximate amount as well as a minimum amount.⁴⁷⁵ Claimants must still present and prove facts that provide the court with a basis for estimating the amount of damages (so-called connecting factors).⁴⁷⁶ While the German courts must at least determine the damage that is to be regarded as having been incurred with sufficient certainty (so-called minimum damage),⁴⁷⁷ a court can still, even if it considers the occurrence of damage to be proven, reject an estimate because it lacks a sufficient basis.⁴⁷⁸ This means that under German law, an estimated (minimum) damage may not be based on a mere completely abstract calculation. In the first judgment in which a damages estimation was conducted, the Berlin Regional Court refers to the claimant's expert report, which showed a 5 – 14 %

⁴⁶⁸ *ibid* paras 56, 57.

⁴⁶⁹ On disclosure see below at 7.4.

⁴⁷⁰ *Rodger and Ferro and Marcos* (n 119) 50.

⁴⁷¹ Case 24/2023 (Commercial Court Valencia, Spain), Judgement of 10 March 2023 [Juzgado de lo Mercantil no 3]; Case 231/2023 (Provincial Court Madrid, Spain), Judgement of 9 March 2023; Case 185/2023 (Provincial Court Valencia, Spain), Judgement of 23 February 2023.

⁴⁷² Case 185/2023 (Provincial Court Valencia, Spain), Judgement of 23 February 2023.

⁴⁷³ *Rodger and Ferro and Marcos* (n 119) 50;

⁴⁷⁴ *Franck* (n 190); Cartel Act Germany (n 268) Section 33a Rn 97.

⁴⁷⁵ Case KZR 42/08 (BGH, Germany), Order of 7 April 2009 [WRP 2009, 745].

⁴⁷⁶ Case *Berliner Transportbeton* (n 421) WuW/E DE-R 2773, 2780 = *Juris*, Rn 72.

⁴⁷⁷ *ibid*, WuW/E DE-R 2773, 2777 = *Juris*, Rn 37; Case *Lottoblock II* (n 455).

⁴⁷⁸ Case VI ZR 37/11 (BGH, Germany), Judgement of 8 May 2012, NJW 2012, 2267, Rn 9.

overcharge of the purchase price, leading to the judges to estimate the overcharge at 5% of the purchase price in the trucks cartel.⁴⁷⁹

- 111 Also outside the EU, judicial estimation leading to a 5% of overcharge of the purchase price had recently become the norm for the trucks cartel. In the first judgment of the UK Competition and Appeals Tribunal in the trucks case, the judges faced problems by the models and calculations presented by the economic experts. Despite that, the evidence seemed to suggest that it is more plausible that the cartel caused an overcharge.⁴⁸⁰ Therefore, without recourseing to any mathematical precision, the CAT estimated the overcharge at half of what the claimant requested at 5% of the purchase price.⁴⁸¹
- 112 Similarly, in Japan, the non-formalistic approach warrants that if it is extremely difficult to prove the precise amount of damages from the nature of the damages, the court can determine a reasonable amount of damages.⁴⁸² Equally, in Taiwan, when a claimant can prove that damages have occurred but has difficulties in proving the precise amount of harm, the court may, at its discretion set an amount of damages based on the overall circumstances of a case.⁴⁸³ Also in Korea, if a claimant has proven the existence of damage but has considerable difficulties to prove the amount of damages, the court can estimate a reasonable amount, taking into consideration all circumstances of the case, in particular the pleadings and otherwise available evidence.⁴⁸⁴ Similarly, in Switzerland, the damage that cannot be proven in figures is to be estimated at the discretion of the judge, taking into account the ordinary course of events and the measures taken by the injured party.⁴⁸⁵
- 113 The US system also knows the concept of estimation of harm but in a more strict and formalistic manner. Once a claimant has proven that damage occurred, the standard of proof for the amount of damages is relaxed. A '*just-and-reasonable inference*' standard applies for the calculation of damages, which relaxes the requirements for damages calculation and the dependence on the economic models.⁴⁸⁶ A '*just-and-reasonable*'

⁴⁷⁹ Case 16a O 1/20 (LG, Berlin), Judgement of 19 June 2023.

⁴⁸⁰ *Royal Mail Group Limited v DAF Trucks Limited and Others* (CAT, UK), Case of 21 June 2018 para 476.

⁴⁸¹ *ibid* para 484.

⁴⁸² Art 248 民事訴訟法 (Code of Civil Procedure Act) No 109 of 26 June 1996 (Japan).

⁴⁸³ Art 222(2) 民事訴訟法 (Code of Civil Procedure) 1929 (Taiwan).

⁴⁸⁴ Art 202-2 민사소송법 (Civil Procedure Act) Act No 547 of 4 April 1960 (South Korea); Art 115 MRFTA South Korea (n 6).

⁴⁸⁵ Art 42(2) Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches Fünfter Teil: Obligationenrecht (Federal Act on the Amendment of the Swiss Civil Code Part Five: The Code of Obligations) 1911 (Switzerland).

⁴⁸⁶ *In re Plywood Antitrust Litig* (Court of Appeals, US), Judgement of 4 November 1981 [655 F2d 627, 635, 5th Cir 1981].

standard includes a just and reasonable estimate but the amount of damages cannot be a product of '*speculation or guess work*'.⁴⁸⁷

6.1.7 Passing-On of Overcharge and Passing-On Defence

114 Outside the above-mentioned issues of standing of indirect purchasers,⁴⁸⁸ the phenomenon of passing-on of overcharge is of particular relevance in competition damages actions, albeit generally being an issue of civil law and civil procedure.⁴⁸⁹ The harm caused by infringements of the EU competition rules can be passed on, in the form of overcharge, along the production or distribution chain.⁴⁹⁰ Procedurally, passing-on could therefore become relevant either as a sword or shield.⁴⁹¹

115 In general, it is '*extremely difficult to identify who ultimately bore the loss caused by a competition infringement*'⁴⁹². Procedural measures to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level would be needed.⁴⁹³ Some systems, such as Austria, foresee such procedural rules relating to the centralization of claims. In Austria, the defendant can include an indirect purchaser in its proceedings commenced by a direct purchaser, or a direct purchaser when sued by an indirect purchaser.⁴⁹⁴

6.1.7.1 Calculating pass-on and alleviating measures

116 Used as a sword, the issue relates to the question if an indirect consumer can claim damages because the overcharge was passed on by the direct or another indirect purchaser. Next to the above-mentioned question of standing of indirect purchasers in this case,⁴⁹⁵ the main issue in those systems allowing indirect purchaser standing is proving that the harm was actually passed-on to the level of the indirect purchaser and to calculate the pass-on related price effect.

117 Thus, compared to the difficulties calculating the overcharge alone, as discussed above,⁴⁹⁶ the calculation of the amount of pass-on adds another level of complexity. An indirect purchaser would have to prove not only the overcharge for the direct purchaser

⁴⁸⁷ *Bigelow v RKO Radio Pictures, Inc* (Supreme Court, US), Judgement of 25 February 1946 [327 US 251, 261-63]; *City of Atlanta v Chattanooga Foundry & Pipe Works* (n 328).

⁴⁸⁸ On indirect purchasers see above at 3.1.

⁴⁸⁹ Strand (n 80) 361, 362.

⁴⁹⁰ Generally, Botta, (n 80) 881, 883.

⁴⁹¹ Strand (n 80) 361, 362.

⁴⁹² De Sousa P C, EU and National Approaches to Passing On and Causation in Competition Damages Cases (2018) Common Market Law Review 1.

⁴⁹³ Art 12((2) Damages Directive (n 16).

⁴⁹⁴ Section 37f(4) Competition Act Austria (n 1).

⁴⁹⁵ See above at 3.1.

⁴⁹⁶ See above at 6.1.2.1.

but also the amount that was passed on.⁴⁹⁷ The damage to the indirect purchaser must be determined on the basis of the price level that would have been reached at the next market level without the anti-competitive overcharge.⁴⁹⁸ The estimation of pass-on on the different levels of the production or distribution chains requires an advanced economic assessment and it cannot be assumed that overcharge is generally passed on to the next level,⁴⁹⁹ eg, in cases where '*the direct customer operates in a highly competitive market while the indirect customer has a strong buyer power*'.⁵⁰⁰ Also the value of the goods subject to the overcharge within the overall production costs impacts on whether and to what degree overcharge is passed-on.⁵⁰¹ In cases the cartelized good only represents a small part of the overall production cost of the final product down the production chain, pass-on is less likely.⁵⁰² Also, the pricing leeway achieved through special commercial performance and efforts of the resupplying direct customer has to be taken into account.⁵⁰³ Difficulties also arise if the indirect buyer has purchased partly non-cartelised goods. Thus, the market structure, the commercial strategy of the commercial players on each value chain, the price elasticity of supply and demand, the duration of the cartel law infringement, the intensity of competition on the lower market levels, the possibilities of evasion of the buyers as well as the question of whether the goods were further processed have to be considered.⁵⁰⁴

118 Yet, some systems foresee further procedural measures to facilitate damages actions for indirect purchasers and to alleviate their difficulties in proving that harm was passed on to them. In the EU, for example, while the claimant has the burden to prove whether, or to what degree, an overcharge was passed on, Art 14(2) Damages Directive establishes a rebuttable presumption of pass-on. This presumption applies despite the fact that pass-on cannot generally be assumed to incentivize indirect purchaser claims while, at the same time, the fact that the presumption is rebuttable takes account of the commercial practice in the respective area.⁵⁰⁵ According to the Commission, it is not beyond all probability that a price increase on the aftermarkets occurring in connection with a competition law violation can be causally attributed to the violation.⁵⁰⁶ Thus, as per Art 14(2) Damages

⁴⁹⁷ For example, F Weber, Tackling pass-on in cartel cases: a comparative analysis of the interplay between damages law and economic insights (2020) European Competition Journal 570; Komninos and others (n 429) <ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 27 June 2023, 16.

⁴⁹⁸ S Thomas, 'Schadensverteilung im Rahmen von Vertriebsketten bei Verstoß gegen europäisches und deutsches Kartellrecht' (2016) ZHR 45, 48.

⁴⁹⁹ I Williams and others, 'Study on the Passing on of Overcharges: final report' (2016) Publications Office 30.

⁵⁰⁰ Botta (n 80) 881, 890.

⁵⁰¹ Ibid.

⁵⁰² Williams and others (n 502).

⁵⁰³ Case KZR 75/10 (BGH, Germany), Judgement of 28 June 2011 Rn 47.

⁵⁰⁴ Ibid Rn 69; Confirmed in Case KZR 8/18 (BGH, Germany), Judgement of 19 May 2020 Rn.51; Case KZR 4/19 (BGH, Germany), Judgement of 23 September 2020 Rn 38.

⁵⁰⁵ Recital 41 Damages Directive (n 16).

⁵⁰⁶ J Keßler, 'Die europäische Richtlinie über Schadensersatz im Wettbewerbsrecht – Cui bono?' (2015) 3 VuR 83, 87.

Directive, 'the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that 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 containing them.' Regarding (b), the above-mentioned rebuttable presumption of harm of Art 17(2) Damages Directive applies.⁵⁰⁷ Correspondingly to the above-mentioned Art 17(1) Damages Directive, according to Art 12(5) Damages Directive, national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on. Lastly, Art 16 Damages Directive foresees that the Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser. This Guideline was published in 2019 and includes detailed calculation methods and examples.⁵⁰⁸

119 On EU Member State level, many countries did not know the concept of indirect purchaser standing and issues with passing-on of overcharge before the Damages Directive and have literally transposed the rules of the Damages Directive on passing-on by letter, such as Latvia⁵⁰⁹. Interestingly, in Lithuania, the legislation explicitly refers to the European Guidance for the calculation of pass-on.⁵¹⁰ Some Member States, such as Germany, had to adapt their practice on pass-on after the Damages Directive.⁵¹¹ Germany did not accept a presumption of pass-on before the Damages Directive according to its *ORWI*⁵¹² case-law.⁵¹³ Now, the presumption of pass-on is included in § 33c GWB.

120 Otherwise, outside the EU, only very few rules relating to pass on exist. The UK had transposed the rules of the EU Damages Directive before deciding to leave the European Union. Therefore, the Competition Act still includes detailed rules corresponding to the EU regime.⁵¹⁴ In the US, indirect purchasers generally do not have standing to begin with due to the mentioned complexities to determine who ultimately bore the damage on a production and distribution chain⁵¹⁵ and therefore no further rules and jurisprudence on pass-on exist.

⁵⁰⁷ Makatsch T and Mir A S 'Die neue EU-Richtlinie zu Kartellschadensersatzklagen – Angst vor der eigenen "Courage"?' (2015) *EuZW* 7, 12.

⁵⁰⁸ Communication from the Commission – Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (n 78).

⁵⁰⁹ Section 21 of the Competition Law in Latvia (n 462).

⁵¹⁰ Art 47(1) the Law on Competition Lithuania (n 47).

⁵¹¹ Rodger and Ferro and Marcos (n 119) 501; Ashton (n 216) p 60.

⁵¹² Case KRZ 75/10 (n 506) Rn 57.

⁵¹³ Soyev V, 'The Damages Directive in Germany' in Biondi A and Muscolo G and Nazzini R, *After the Damages Directive* (Wolters Kluwer 2022) p 210.

⁵¹⁴ Part 2 Schedule 8A of the UK Competition Act (n 23).

⁵¹⁵ On the distribution chain see above at 3.1.

6.1.7.2 Passing-on defence

121 As a shield, pass-on could be used as a defence against claims for damages. In systems foreseeing such a defence, a defendant can invoke the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law against a claim for damages during the proceedings. The passing-on defence is an expression of the general liability principle *compensatio lucri cum damno*⁵¹⁶ and prevention of unjust enrichment⁵¹⁷ of the damaging event. Usually, the passing-on defence is invoked against claims by direct purchasers but could also be invoked against claimants further down the production or distribution chain, provided that another level upon to which the overcharge is passed-on exist.⁵¹⁸

122 In the EU, the Damages Directive enshrines in Art 3(3), that full compensation should not lead to overcompensation.⁵¹⁹ Furthermore, Art 13 Damages Directive puts the passing-on defence on statutory footing, according to which '*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.*' The EU Member States have generally either transposed the passing on defence in law for the first time, such as Lithuania,⁵²⁰ while others transposed the pre-existing doctrine on the passing-on defence adapted to the prerequisites of the Damages Directive into law, such as Italy⁵²¹ or Slovenia⁵²². Some Member States, such as Germany, had to also adapt their practice on the passing-on defence slightly after the Damages Directive.⁵²³ According to *ORWI*⁵²⁴ the passing-on defence was conditional on showing that the claimant had not incurred any further damage in the form of a loss of profit due to a reduction in the amount sold.⁵²⁵ This was a burdensome encounter, since loss of profit (volume effect) is often incurred by direct purchasers.⁵²⁶ This approach has changed after the transposition of the Damages Directive into German law.⁵²⁷ Showing that the claimant has not suffered a loss of profits is no longer a condition of the passing-on defence.⁵²⁸

⁵¹⁶ Eichhoff E, *Über die Compensatio lucri cum damno* (Verlag Baedeker 1898), *passim*.

⁵¹⁷ *Courage Ltd v Bernard Crehan and Others* (n 37) para 30; *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (n 77) para 94.

⁵¹⁸ Thomas (n 501) 45, 64.

⁵¹⁹ Ashton (n 216) 49.

⁵²⁰ Art 47 (2) Competition Law Lithuania (n 47).

⁵²¹ M Tavassi (n 174) 297, 312.

⁵²² Art 131 Obligacijski zakonik (Obligations Code) 2001 (Slovenia); Art 62I Slovenian Prevention of the Restriction of Competition Act (n 446).

⁵²³ *Rodger and Ferro and Marcos* (n 119) 501; Ashton, (n 216) 60.

⁵²⁴ KZR 75/10 (n 506) Rn 57.

⁵²⁵ *ibid* Rn 69.

⁵²⁶ Weber (n 500).

⁵²⁷ Thomas (n 501) 45, 68; Schweitzer H, 'Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen' (2014) NZKart 335, 338.

⁵²⁸ Found in the following jurisprudence KZR 8/18 (n 507) Rn 46; KZR 4/19 (n 507) Rn 36 ff.

Rather, the claimant can claim the loss of profit despite the passing on defence raised by the infringer.⁵²⁹

123 Outside the EU, generally two strands on the passing-on defence can be witnessed. On the one hand, as demonstrated by the US approach, the passing-on defence is excluded. In *Hanover Shoe*, the Supreme Court rejected the passing-on defence on effectiveness and efficiency grounds: it would be too difficult and burdensome to estimate what share of the price overcharge had been transferred by the direct to the indirect customer.⁵³⁰ Therefore, indirect purchasers do not have standing to claim damages⁵³¹ and defendants cannot raise the passing-on defence. In Canada, albeit allowing standing for indirect customers in private actions for damages for violation of the criminal provisions of the Canadian Competition Act, the passing on defence itself is excluded.⁵³²

124 On the other hand, many systems around the globe know the concept of passing-on defence. In many systems, such as Korea⁵³³ or Australia⁵³⁴, the courts have alluded to the passing-on defence without expressly recognizing it. In the new Brazilian competition law contains rules on the proof for the passing on defence. Before, it was upon the claimants to proof that this pass-on did not happen. Now, a presumption exists that overcharges by an entity harmed by the anticompetitive conduct have not been passed on, which in turn needs to be proved by the defendant.⁵³⁵

6.2 Injunctions

125 Next to damages actions, most systems provide for injunctions,⁵³⁶ for example, in Australia⁵³⁷, Austria⁵³⁸, Belgium⁵³⁹, Brazil⁵⁴⁰, Germany⁵⁴¹, Japan⁵⁴², South Korea⁵⁴³, UK⁵⁴⁴,

⁵²⁹ *Thomas (n 501)*, 45, 49; Kersting C, 'Kartellschadensersatzrecht nach der 9 GWB-Novelle' (2017) *Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht* 581, 586; K Stomper, 'Kartellrechtlicher Schadensersatz bei mehrgliedrigen Absatzketten: Art 12-15 der Schadensersatz-Richtlinie und § 33c RefE-GWB' (2016) *WuW* 410, 411; on the calculation also Weber (n 500);

⁵³⁰ *Hanover Shoe v United Shoe Machinery Corp* (n 98).

⁵³¹ *Illinois Brick Co v Illinois*, (n 96).

⁵³² *Pro-Sys Consultants Ltd v Microsoft Corp* (n 108); *Sun Rype Products Ltd v Archer Daniels Midland Co* (n 108); *Infineon Technologies AG v. Option Consommateurs* (n 108).

⁵³³ Case 2017GAHap536468 (Seoul District Court, South Korea), Judgement of 2017.

⁵³⁴ *Auskay International Manufacturing & Trade Pty Ltd v Qanat Airways Ltd* (FCA, Australia), Judgement of 28 September 2008 [251 ALR 166].

⁵³⁵ Art 47 Section 3 Brazil Competition Act (n 31).

⁵³⁶ In some systems, injunctions are called interdict or cease-and-desist-orders.

⁵³⁷ Section 80 Competition and Consumer Act 2010 (n 12).

⁵³⁸ Sections 26, 36(4) No 4 Competition Act Austria (n 1).

⁵³⁹ Arts Art VI 104, XVII 1 to XVII13 and XVII 27 Code of Economic Law Belgium (n 87)

⁵⁴⁰ Art 47 of the Brazilian Antitrust Law (n 31) and Arts 294 to 311 of the Brazilian Code of Civil Procedure (n 32).

⁵⁴¹ Section 33 Cartel Act Germany (n 268).

⁵⁴² Art 24 Antimonopoly Act Japan (n 27).

⁵⁴³ Monopoly Regulation and Fair Trade Act South Korea (n 6).

⁵⁴⁴ Section 47A(3)(c) Competition Act 1998 UK (n 23).

USA⁵⁴⁵, or Switzerland⁵⁴⁶. In the EU, the special rules of the Damages Directive, for example the rules on disclosure, do not cover injunctions. Therefore, injunctions are more determined by Member State laws albeit needing to ensure the effectiveness and equivalence of EU competition law.⁵⁴⁷

126 An injunction is an order requiring the defendant to do a specified act or refrain from doing a specified act. The former could consist, for example, in ordering supply of goods or services, in case of an anti-competitive refusal to deal⁵⁴⁸ or in the case of abusively excessive prices, a claim for adjustment of prices for the future⁵⁴⁹. Such an order could even be more beneficial to a claimant compared to a damages action, which would only compensate, for example, for the loss arising out of a refusal to deal. The latter, the injunction requiring restraint, usually relates to the cessation of an ongoing anti-competitive conduct but can also be directed at the future when a concrete risk of infringement is pertinent.⁵⁵⁰ Both, the ordering of an action and a restraint overlap when a consequence of infringement based on past conduct coincides with a continuing infringement or when an infringement relates to both the cessation, for example of a refusal to deal with the request to supply goods or services.⁵⁵¹

127 Across the globe, the conditions for injunctions are comparable. They all require an anti-competitive conduct, ie, a violation of a competition law provision.⁵⁵² To order restraint, the unlawful action must still be ongoing.⁵⁵³ Any future-oriented restraint order is usually only possible when there is a concrete risk that an infringement will be committed or repeated.⁵⁵⁴ Some countries require further conditions. In some countries, such as Japan, as a further condition, the claimant must also demonstrate to suffer or likely to suffer extreme damage.⁵⁵⁵ The US goes even further. According to case-law, '*a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury;*

⁵⁴⁵ Section 16 of the Clayton Act (15 USC Section 26) (n 34).

⁵⁴⁶ Section 12 Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Cartel Act) 1995 (Switzerland).

⁵⁴⁷ J Franck J, *Marktordnung durch Haftung - Legitimation, Reichweite und Steuerung der Haftung auf Schadensersatz zur Durchsetzung marktordnenden Rechts* (Jus Privatum 2016) 200-205.

⁵⁴⁸ For example, albeit an interim injunction case, *Dahabshill Transfer Services Ltd v Barclays Bank plc* (EWHC, UK), Judgement of 2013 [3379 Ch].

⁵⁴⁹ For example, Case KZR 2/15 (BGH, Germany), Judgement of 24 January 2017 [Kabelkanalanlagen I] in

NZKart 2017, 198 = Juris, Rn 50; 87 Competition and Consumer Act 2010 Australia (n 12).

⁵⁵⁰ For example, *Teleunit SPA v Vodafone Omnitel NV* (First Instance Court Milan, Italy), Judgement of 10 October 2013 [75623/2008].

⁵⁵¹ Franck (n 190); Cartel Act Germany (n 268) Section 33 Rn 28; P Thyri '§§ 26 KartgG' in A Egger and N Harsdorf-Borsch (editors), *Kartellrecht Kommentar* (1st edition, Linde Verlag 2022) para 16.

⁵⁵² For example, Art 24 Antimonopoly Act Japan (n 27); Section 80 Competition and Consumer Act 2010 (n 12).

⁵⁵³ For example, Section 12 Cartel Act Switzerland (n 550).

⁵⁵⁴ For example, Case KZR 59/16 (BGH, Germany), Judgement of 17 October 2017 [Unzulässige Vereinbarung eines Mindestverkaufspreises - Vitalkost-Aktion, GRUR-RR 2018] 131.

⁵⁵⁵ Art 24 Antimonopoly Act Japan (n 27).

(2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.⁵⁵⁶ Thus, in the US, a permanent injunction seems to be secondary to damages actions.

6.3 Declaratory Relief

128 In the majority of systems some form of declaratory relief is available. They range from positive declaratory actions that there has been a competition law breach or a damage, to negative declaratory actions – where the usual roles of claimants and defendants are reversed -, that there was no competition law violation, or even to the declaration of the nullity of a contract due to a competition law violation. Not all systems cover all forms of declaratory relief, if any.

129 In Austria, for example, private parties can claim for declaratory relief of an anti-competitive conduct once the conduct has ceased.⁵⁵⁷ However, there needs to be a legitimate interest for the declaration and the claimant undertaking or association of undertakings must assert a legal or economic interest, which may also exist in future proceedings for damages.⁵⁵⁸ As in all Member States of the European Union, however, the Austrian Cartel Court is only allowed to issue positive declaratory judgments on questions of a violation of EU competition law.⁵⁵⁹ The Cartel Court is not allowed to find that an infringement does not fall under Arts 101 and 102 TFEU, as this negative factual decision may only remain with the European Commission.⁵⁶⁰ Similarly, in Belgium, positive or negative declaratory decisions are possible, to prevent the violation of a seriously threatened right.⁵⁶¹ However, regarding negative declaration of non-violation of EU competition law, the same limitations as in Austria apply .

130 In the UK, a private party can claim for declaratory relief, which lies in the discretion of the court, that a certain conduct of another party is anticompetitive.⁵⁶² The power to issue declaratory actions even, in principle, includes negative declaratory actions that the claimant is not liable to the defendant for an alleged loss due to a competition law

⁵⁵⁶ *eBay Inc v MercExchange LLC* (Supreme Court, US), Judgment of 29 March 2006 [547 US 388, 391, 05-130];

Weinberger v Romero-Barcelo (Supreme Court, US), Judgement of 27 April 1982 [456 US 305, 311–313, No 80-1990].

⁵⁵⁷ Sections 28(1), 36(4) No 4 Competition Act Austria (n 1).

⁵⁵⁸ Sections 28(1), 36(4) No 4 Competition Act Austria (n 1).

⁵⁵⁹ Thyri (n 555) para 18.

⁵⁶⁰ *ibid.*

⁵⁶¹ Art 18(2) *Gerechterlijk Wetboek / Code Judiciaire* (Code of Judicial Organization and Procedure) 1967 (Belgium).

⁵⁶² For example, *Rolls-Royce plc v Unite the Union* (EWCA, UK), Judgement of 2009 [Civ 387]; *Milebush Properties Ltd v Tameside Metropolitan Borough Council* (EWCA, UK), Judgement of 2011 [Civ 270].

violation, as long as such a declaration serves any legitimate, useful purpose.⁵⁶³ The latter particularly relates to the possibility of a positive claim for damages.⁵⁶⁴ In Germany, the possibility to issue negative declaratory actions that an competition law violation has not harmed another party is well established.⁵⁶⁵ A negative declaratory action is only possible if the claimant can demonstrate sufficient interest⁵⁶⁶, which entails that the defendant is invoking the right to claim damages.⁵⁶⁷ However, Germany knows other declaratory actions as well, for example, positive declaratory actions of the obligation to pay damages pursuant to § 33a GWB.⁵⁶⁸ Such positive declaratory actions, however, usually lacks the required interest in case another more favourable action is possible, such as a damages action⁵⁶⁹ or a staged action⁵⁷⁰.

131 In many states, declaratory relief is connected to the fact that anti-competitive conduct leads to the nullity of anti-competitive agreements. In the EU, Art 101(2) TFEU directly foresees such a consequence as a matter of primary EU law, having a sanctioning function.⁵⁷¹ Even though Art 102 TFEU does not foresee such a nullity-consequence directly in the text of the provision, in case abusive conduct takes the form of restrictive contracts, such contracts are also subject to the sanction of nullity under national law.⁵⁷² Anti-competitive contracts are automatically void, but claimants might have an interest in declaring the nullity of a contract. Consequently, actions for declaratory relief can be directed at establishing the nullity of contracts that violate competition law, for example

⁵⁶³ *Wolseley UK Limited and Others v Fiat Chrysler Automobiles NV and others* (CAT, UK), Judgement of 2019 [CAT 12] para 21; *WH Newson Holdings Ltd v IMI Plc* (EWCA, UK), Judgment of 2016 [Civ 773].

⁵⁶⁴ *Wolseley UK Limited and Others v Fiat Chrysler Automobiles NV and others* (n 567).

⁵⁶⁵ K Schmidt (n 291); Cartel Act Germany (n 268) Section 87 para 18, 19; Ollerdißen H, 'Feststellungsklagen' in Wiedemann G, *Handbuch des Kartellrechts | § 61 Zivilprozessualer Rechtsschutz in Kartellsachen (ohne Kartellschadensersatzprozesse)* (4th edition, CH Beck 2020), § 61 para 7.

⁵⁶⁶ Zivilprozessordnung (Code of Civil Procedure) 1950 (Germany).

⁵⁶⁷ For an early example, Case Rossignol (OLG , Germany) Judgement of 14 November 1974 [WuW/E OLG 1540].

⁵⁶⁸ For example, Case Grauzementkartell II (BGH, Germany) Judgment of 12 June 2018 [NZKart 2018, 315].

⁵⁶⁹ Case *Anwaltsbücherdienst* (LG Köln, Germany), Judgement of 26 May 1976 [WuW/E LG/AG 406, 408];

Case *Allkauf-Saba* (OLG Karlsruhe, Germany), Judgement of 12 March 1980 [WuW/E OLG 2217, 2222]; Critically: Case *Zeitschriften-Einkaufsgemeinschaft* (LG Mannheim, Germany), Judgement of 13 February 1976 [WuW/E LG/AG 399, 400]; Case I-22 U 37/15 (OLG Düsseldorf, Germany), Judgement of 23 October 2015.

⁵⁷⁰ Case *Feststellungsinteresse III* (BGH, Germany) Judgement of 15 May 2003 [NJW 2003, 3274].

⁵⁷¹ *SA Brasserie de Haecht v Wilkin-Janssen*, Case 48-72 (CJEU), Judgment of the Court of 6 February 1973 [ECLI:EU:C:1973:11, de Haecht II] Rep 1973, 77, 86 para 5 et seq; *Eco Swiss China Time Ltd v Benetton International NV*, Case 126/97 (CJEU), Judgment of the Court of 1 June 1999 [ECLI:EU:C:1999:269] Rep 1999 I 3079 at 3092 paras 36 et seq.

⁵⁷² *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (n 133) Rep 1989, 803, 851, para 45; In detail Hanns (n 74); A Di Gio, 'Contract and Restitution Law and the Private Enforcement of EC Competition Law' (2009) 32(2) *World Competition* 199.

in Belgium⁵⁷³, Germany⁵⁷⁴ or the Netherlands^{575, 576}. Such a possibility is also available outside the EU, for example, in Australia⁵⁷⁷. Conversely to declaratory actions, the nullity of anti-competitive contracts could also be used as a defence or counterclaim against an enforcement action of a contract.

6.4 Restitution and Unjust Enrichment

132 Another remedy often overlooked is restitution. Restitution as used in this chapter covers two conceptually different forms: (1) restitutionary damages, as a remedy for the tortious cause of action for a breach of statutory duty that does not aim to restore the position of the claimant but for the competition law violation, but that aims at skimming the profits earned through the competition law violation from the perpetrator, and (2) restitution to reverse an unjust enrichment, ie, mistaken payments under an anti-competitive illegal and thus null and void contract.⁵⁷⁸ Both could be an alternative to damages actions, avoiding complicated damages quantification as well as proving causation and allowing for a reversal of the burden of proof.⁵⁷⁹

6.4.1 Restitutionary Damages

133 The former, restitutionary damages, is not a common remedy. The UK in principle allows restitutionary damages as a remedy for proprietary torts when compensatory damages are an inadequate remedy.⁵⁸⁰ UK law is much more reserved when it comes to non-proprietary torts, of which breach of statutory duty, such as competition damages, is an example.⁵⁸¹ The seminal decision *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* did not allow restitutionary damages for breach of competition law.⁵⁸²

⁵⁷³ Art 1108 Code Civil / Burgerlijk Wetboek (Civil Code) 1804 (Belgium); Case KZR 5/01 (BGH, Germany), Judgement of 16 April 2002 [WuW/E DE-R 909, Wettbewerbsverbot in Realteilungsvertrag].

⁵⁷⁴ Ollerdißen (n 569) Rn 5.

⁵⁷⁵ Art 3:302 Nieuwe Burgerlijk Wetboek (New Civil Code) 1992 (Netherlands).

⁵⁷⁶ In general Di Gio (n 576) 201.

⁵⁷⁷ Section 87(2) Competition and Consumer Act 2010 (Australia).

⁵⁷⁸ In detail, R Mulheron, 'Restitution Relief in Competition Law Class Actions: An Evolving Landscape' (2018) 26 Restitution Law Review 1, 2; A Al-Ameen, 'Restitutionary Remedies in Competition Law: Bull in a China Shop?' (2009) 32(3) World Competition 327, 328.

⁵⁷⁹ Hornkohl (n 453) 219.

⁵⁸⁰ *A-G v Blake* (House of Lords, UK), Judgement of 27 July 2000 [AC 268, 285, Lord Nicholls of Birkenhead]; *Enfield LBC v Outdoor Plus Ltd* (EWCA, UK), Judgement of 2012 [Civ 608, 53]; *Ramzan v Brookwide Ltd* (EWHC, UK), Judgement of 2010 [2453 Ch, 27]; *MOD v Ashman* (EGLR, UK), Judgement of 1993 [2 EGLR 102, CA]; *MOD v Thompson* (EGLR, UK), Judgement of 1993 [2 EGLR 107, CA]; *Walsh v Shanahan* (EWCA, UK), Judgement of 201 [Civ 411, 57].

⁵⁸¹ On this critically Rotherham C, 'Gain-Based Relief in Tort after *AG v Blake*' (2010) 126 LQR 102; Giving examples, Mulheron (n 582).

⁵⁸² *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & others* (EWHC, UK), Judgement of 19 October 2007 [Case No HC05C00468, HC05C00467, EWHC 2394 Ch, Lewison J]; *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & others* (EWCA, UK), Judgement of 14 October 2008 [Case No A3/2008/0080,

134 In some systems, competition authorities can file such restitutionary damages claims. In the US, for example, the Federal Trade Commission can obtain a permanent injunction and restitution or disgorgement order in federal courts against a perpetrator of a competition law violation.⁵⁸³ However, in *AMG Capital Management, LLC v. Federal Trade Commission*⁵⁸⁴, the Supreme Court held that the FTC cannot seek and a court cannot order restitution or disgorgement for violations of Section 5 of the FTC Act for '*unfair methods of competition*' and '*unfair or deceptive acts or practices*.' Restitution or disgorgement for other violations under the FTC Act remain possible.⁵⁸⁵ German competition law also gives the Competition Authority in § 34(1) GWB the possibility to disgorge any benefits: '*If an undertaking has intentionally or negligently violated a provision of this Part, Art 101 or Art 102 of the Treaty on the Functioning of the European Union or a decision of the competition authority and in this way gained an economic benefit, the competition authority may order the disgorgement of the economic benefit and require the undertaking to pay a corresponding amount of money.*' However, disgorgement is ordered in administrative enforcement proceedings, not in a civil judicial action. In any case, the provision was never used in practice.⁵⁸⁶

6.4.2 Restitution and Unjust Enrichment

135 Restitution to reverse an unjust enrichment is widely available as a remedy. It is usually an element of corrective justice: a claimant that has made payments under an illegal anti-competitive contract is allowed to recover that illicit gain from the perpetrator. The perpetrator, conversely, can usually claim restitution for the cartelized product sold, ie, the return of the products themselves or the corresponding value in a counterclaim or on a stand-alone basis.

136 In Canada, restitution for unjust enrichment is a prominent and easily accessible remedy. While usually in a claim for restitution of unjust enrichment, a claimant must prove the benefit of the defendant, its own loss corresponding to the benefit and the absence of a legal reason for the benefit and the loss.⁵⁸⁷ However, the '*corresponding loss*' does not need to be established since '*once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic*'.⁵⁸⁸ In the UK, there is no other precedent for the restitution of unjust enrichment cases, but

EWCA Civ 1086]; in the case, the claimants have claimed restitutionary damages in the amount of the defendant's wrongful net profits.

⁵⁸³ *FTC v Mylan Laboratories, Inc* (District Court of Columbia, US), Judgement of 7 July 1999 [62 F Supp 2d 25, 36-27]; *FTC v Perrigo Co and Alphanma Inc* (District Court of Columbia, US), Judgement of 12 August 2004 [Civ No 1:04CV1397 RMC]; Al-Ameen (n 582) 327, 339 et seq.

⁵⁸⁴ *AMG Capital Management, LLC v Federal Trade Commission* (Supreme Court, US) Judgement of 22 April 2021 [No 19-508, 141 S Ct 1341, 1344].

⁵⁸⁵ *ibid.*

⁵⁸⁶ Kersting (n 434).

⁵⁸⁷ In general, McInnes M, *The Canadian Law of Unjust Enrichment and Restitution* (2nd Edition, LexisNexis Canada 2022).

⁵⁸⁸ *Peter v Beblow* (Supreme Court, Canada), Judgement of 25 March 1993 [1 SCR 980, 1012].

literature has applied the basic concepts under UK law to competition law violations.⁵⁸⁹ The conditions for restitution claims based on unjust enrichment are similar to the above-mentioned Canadian example,⁵⁹⁰ but an enrichment on the part of the defendant does not automatically correspond to a loss on the part of the claimant.⁵⁹¹ Furthermore, Japan also knows the concept of restitution claims based on unjust enrichment under similar conditions.⁵⁹² In the prominent and large volume Tokyo District Court decision in the jet fuel bid-rigging case, the Japanese State won a follow-on unjust enrichment civil case against oil companies who had engaged in bid-rigging for the supply of jet fuel and other oil products supplied to the Japanese military.⁵⁹³ The restitution of the purchase price paid by the Japanese State was relatively straightforward. The corresponding restitution of the supplied oil products was more complicated. These products have been consumed and the oil companies were entitled to claim the corresponding value, whose objective value at the time of the consumption is usually difficult to calculate for the counter-claiming perpetrators.⁵⁹⁴ The Tokyo District Court took recourse to a well-known concept in damages actions:⁵⁹⁵ a hypothetical but-for scenario. It allowed a calculation of the value of the oil products based on the hypothetical purchase price the Japanese military would have paid without the anti-competitive bid-rigging.⁵⁹⁶ This case demonstrates that while unjust enrichment cases could also include difficult calculations of such hypothetical prices but-for the anti-competitive infringement, at least parties affected by competition law infringements benefit from a reversal of the burden of proof.⁵⁹⁷

⁵⁸⁹ Odudu O and Virgo G, 'Remedies for Breach of Statutory Duty' (2009) 68(1) *The Cambridge Law Journal* 32; C A Banfi, 'Defining the Competition Torts as Intentional Wrongs' (2011) 70(1) *The Cambridge Law Journal* 83, 109; Mulheron (n 582) 40.

⁵⁹⁰ See Mulheron (n 582) 32, the conditions are: (i) a benefit must have been gained by the defendant; (ii) that benefit must have been obtained at claimants' expense; (iii) there must exist an unjust factor, rendering it unjust for the defendant to retain the benefit; and (iv) there is no defence available to extinguish or reduce defendant's liability to make restitution; *Lowick Rose LLP (in liq) (Appellant) v Swynson Limited and another (Respondents)* (Supreme Court, UK), Judgement of 11 April 2017 [UKSC 32, AC 313, 110]; *The Commissioners for Her Majesty's Revenue and Customs (Appellants) v The Investment Trust Companies (in liq) (Respondents)* (Supreme Court, UK), Judgement of 11 April 2017 [UKSC 29, AC 275, 24]; *Bank of Cyprus UK Limited (Respondent) v Menelaou (Appellant)* (Supreme Court, UK), Judgement of 4 November 2015 [UKSC 66, AC 176, 18]; *Benedetti v Sawiris* (Supreme Court, UK), Judgement of 17 July 2013 [UKSC 50, AC 938, 10]. *Banque Financière De La Cité v Parc (Battersea) Limited and Others* (House of Lords, UK), Judgement of 26 February 1998 [1 AC 221,227].

⁵⁹¹ *The Commissioners for Her Majesty's Revenue and Customs (Appellants) v The Investment Trust Companies (in liq) (Respondents)* (n 595) 43; *Banque Financière De La Cité v Parc (Battersea) Limited and Others* (n595) [1999, 1 AC 221, 237].

⁵⁹² 703 and 704 Civil Code Japan (n 27).

⁵⁹³ *Japan v Kosumo Sekiyu KK et al* (Tokyo District Court, Japan), Judgement of 27 June 2011 [Heisei 17 No 26475, 2129 HANREI JIHŌ 46].

⁵⁹⁴ S Vande Walle, 'Antitrust Damages Actions Styled as Unjust Enrichment Claims: A Comment on the Tokyo District Court's Decision in the Jet Fuel Bid-Rigging Case' (2011) *e-Competitions Bulletin* 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216472> accessed 27 June 2023.

⁵⁹⁵ *Japan v Kosumo Sekiyu KK et al* (Tokyo District Court, Japan) (n 598).

⁵⁹⁶ Vande Walle (n 599).

⁵⁹⁷ Hornkohl (n 453) 49.

137 In EU law, the ECJ did not yet have to decide on the question whether the restitution for unjust enrichment constitutes a remedy directly required by EU law.⁵⁹⁸ While primary law requires the nullity of contracts violating Art 101 and 102 TFEU⁵⁹⁹ and the ECJ also held that primary law gives any individual a right to sue for damages,⁶⁰⁰ the question remains whether voidness necessarily encompasses an individual's right to obtain restitution for an unjust enrichment of the perpetrator.⁶⁰¹ The ECJ has also repeatedly held that outside of special EU rules, such as the Damages Directive, the private law consequences of anti-competitive behaviour are subject to national law but must abide by the principles of effectiveness and equivalence.⁶⁰² Nevertheless, compelling arguments support the idea that restitution for unjust enrichment is a remedy that EU competition law requires directly.⁶⁰³ Especially the ECJ reasoning in the seminal *Courage* judgment on damages actions based on an EU competition law violation is transferrable.⁶⁰⁴ There, the ECJ held that the full effectiveness of the competition provisions would be put at risk without individual's rights to claim damages.⁶⁰⁵ This could equally apply to restitution for unjust enrichment, giving claimants another remedy, which might be easier to obtain than damages due to the reversal of the burden of proof and, thus, making private competition enforcement more effective. Moreover, many '*Romanistic, Germanic and common law families and, consequently, [...] the law of many Member States*' know the concept of restitution for unjust enrichment.⁶⁰⁶ Indeed, restitution for unjust enrichment in

⁵⁹⁸ On the issue Strand, M, 'Beyond the Competition Damages Directive: What Room for Competition Law Restitution?' in Bergström M and Iacovides M and Strand M (editors) *Harmonising EU Competition Litigation: The New Directive and Beyond* (Oxford, Hart Publishing 2016) 279, 280; Critically, R Williams, 'Case Comment: The Beer Tie Cases' (2001) 23 *Dublin ULJ* 194; R Williams, *Unjust Enrichment and Public Law – A Comparative Study of England, France and the EU* (1st edition, Bloomsbury Publishing 2010) 270-274; J Edelman and O Odudu, 'Compensatory Damages for Breach of Art 101' (2002) 27 *Euro L Rev* 327.

⁵⁹⁹ See above at 6.1.1.

⁶⁰⁰ See above at 6.1.1.

⁶⁰¹ Di Gio (n 576) 204; Strand (n 603) 279 et seq.

⁶⁰² *Courage Ltd v Bernard Crehan and Others* (n 37) para 29; *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (n77); *Kone AG and Others v ÖBB-Infrastruktur AG* (n 83).

⁶⁰³ A Komninos, 'EC Private Antitrust Enforcement - Decentralised Application of EC Competition Law by National Courts' (2008) (Oxford, Hart Publishing) 172 ff.

⁶⁰⁴ Mulheron (n 582) 33.

⁶⁰⁵ *Courage Ltd v Bernard Crehan and Others* (n 37) para 26.

⁶⁰⁶ Jones A, 'Recovery of benefits conferred under contractual obligations prohibited by Arts 85 or 86 of the Treaty of Rome' (1992) 112 *LQR* 606, 626; J Turner, 'The UK Competition Act 1998 and Private Rights' (1999) 20 *Euro Comp L Rev* 62, 67.

competition law cases is available in many Member States, including, for example Germany⁶⁰⁷ or the Netherlands⁶⁰⁸.

6.5 Interim Remedies

138 Next to the final remedies, many systems have some form of interim relief. Interim relief usually takes the form of a separate action pending determination of an application for a final judgment where immediate action is needed to prevent detrimental cause irreparable or immeasurable damage by continuing the anticompetitive conduct.⁶⁰⁹

139 Many systems allow for interim remedies in the form of an interim injunction. Australia⁶¹⁰, Austria⁶¹¹, Brazil⁶¹², France⁶¹³, Greece⁶¹⁴, Germany⁶¹⁵, Norway⁶¹⁶, South Korea⁶¹⁷, Spain⁶¹⁸, Switzerland⁶¹⁹, the US⁶²⁰, or the UK,⁶²¹ amongst others, foresee the possibility for interim injunctions by private claimants. The two key conditions to when a court can grant an interim injunction are comparable in most of the different systems, even though differences exist concerning the details. First, the claimant must demonstrate a probable prima facie case, *ie*, a sufficient likelihood or probability of success of the primary action (*fumus boni iuris*).⁶²² Second, the claimant must demonstrate urgency, *eg*,

⁶⁰⁷ A Dreher, 'Die Anfechtung und Abwicklung kartellbefangener Verträge nach §§ 123, 812 ff BGB – Bereicherungsrecht als Alternative zum kartellrechtlichen Schadenersatz' in Studienvereinigung Kartellrecht (editor) *Kartellrecht in Theorie und Praxis: Festschrift für Cornelis Canenbley zum 70. Geburtstag* (CH Beck 2012);

K Westermann K, '§ 11 Zivilrechtliche Nichtigkeit kartellrechtswidriger Verträge und einseitiger Rechtsgeschäfte, bereicherungsrechtliche Rückabwicklung kartellrechtswidriger Verträge' in A Fuchs and A Weitbrecht (eds), *Handbuch Private Kartellrechtsdurchsetzung* (München, CH Beck 2019); Woeste K, 'Bereicherungsrecht als Alternative zum Kartellschadenersatz: Passing-on defense im Bereicherungsausgleich?' (2018) 4 ZWeR 392;

C Kahle, *Die Leistungskondition als Alternative zum Kartellschadenersatzanspruch: Zur Anfechtbarkeit und Rückabwicklung von Kartellfolgeverträgen* (1st edition, Nomos, 2013).

⁶⁰⁸ Art 6:203 Dutch Civil Code (n 579).

⁶⁰⁹ For example, *Preventx Limited v Royal Mail Group Limited* (EWHC, UK), Judgement of 20 August 2020 [2276 Ch, Case No: CP-2020-000011].

⁶¹⁰ Section 80(2) Australian Competition and Consumer Act (n 12).

⁶¹¹ Section 48 Competition Act Austria (n 1).

⁶¹² Art 47-A Brazil Competition Act (n 31).

⁶¹³ Art 834 et seq and 872 et seq Code de procédure civile (New Code of Civil Procedure) 2007 (France).

⁶¹⁴ Art 682 Κώδικας Πολιτικής Δικονομίας (Code of Civil Procedure) 1968 (Greece).

⁶¹⁵ Section 935 German Code of Civil Procedure (n 570); Section 33 German Competition Act (n 45).

⁶¹⁶ Chapters 32 – 34 Lov om mekling og rettergang i sivile tvister – tvisteloven (Act relating to mediation and procedure in civil disputes - The Dispute Act) 2008 (Norway).

⁶¹⁷ Art 108(1) MRFTA South Korea (n 6).

⁶¹⁸ Arts 721 et seq Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Law 1/2000, of January 7, on Civil Procedure) (Spain).

⁶¹⁹ Arts 261 et seq Swiss Civil Procedure Code (n 242).

⁶²⁰ 15 USC (n 39) Section 26.

⁶²¹ Part 25 1 Civil Procedure Rules 1998 (UK); Section 47A 1998 UK Competition Act (n 23).

⁶²² For example, *ACCC v Pacific National* (FCA, Australia), Judgement of 2018 [1221] paras 5 – 15; *American Cyanamid v Ethicon* (House of Lords, UK), Judgement of 1975 [AC 396]; Section 48 Competition Act Austria (n 1); Section 34-2 Norwegian Disputes Act (n 621); 15 USC (n 39) Section 26; Art 728(2) Spanish Civil Procedure Rules (n 623).

the necessity for the interim injunction to prevent detrimental cause irreparable or immeasurable harm (*periculum in mora*).⁶²³

140 Some systems require further conditions, such as a proportionality requirement or balancing test. In Australia and the UK, for example, a balance of convenience test requires to balance the harm of granting the interim injunction against not granting the interim injunction.⁶²⁴ Norwegian civil procedural law, for example, an interim measure '*cannot be granted if the loss or inconvenience to the defendant is clearly disproportionate to the interests of the claimant in the interim measure being granted.*' In some systems, the payment of a security, for example in Spain⁶²⁵ or Switzerland⁶²⁶ can be required. In some systems, such as Germany⁶²⁷ or Switzerland⁶²⁸, the suspension of an interim injunction is possible against the provision of security in exceptional circumstances. Some systems also foresee a substantive claim for damages in case the injunctive interim relief proves to be unjustified, such as Germany⁶²⁹ Switzerland.⁶³⁰

141 In some systems, such as Norway⁶³¹ or Germany⁶³², the interim injunctive relief can lead to an obligation to contract and supply within very narrow limits, requiring an existing imminent state of emergency, *ie*, that the non-supply threatens financial losses which cannot be compensated for in the foreseeable future by awaiting the ordinary proceedings. Some systems, such as France⁶³³ or Switzerland⁶³⁴, even know the concept of interim damages.

7 EVIDENCE

142 As already indicated in the context of this chapter, competition proceedings generally involve a complex factual assessment.⁶³⁵ The rules on evidence are therefore crucial in the practice of competition proceedings. While to a large extent normal civil procedural evidence rules apply, several systems have foreseen special rules specifically on the

⁶²³ For example, Arts 835(1) and 873(1) Code of Civil Procedure France (n 618); 682 Code of Civil Procedure Greece (n 619); Art 108(1) MRFTA South Korea (n 6); Section 34-1 Norwegian Disputes Act (n 621); Art 728(1) Spanish Civil Procedure Rules (n 623); 15 USC (n 39) Section 26; Art 261 Swiss Civil Procedure Code (n 242)

⁶²⁴ *ACCC v Pacific National* [2018] FCA 1221, paras 5 – 15; *American Cyanamid v Ethicon* [1975] AC 396; Art 261 Swiss Civil Procedure Code (n 242).

⁶²⁵ Art 728(3) Spanish Civil Procedure Rules (n 623).

⁶²⁶ Art 264(1) Swiss Civil Procedure Code (n 242).

⁶²⁷ Section 939 German Code of Civil Procedure (n 570).

⁶²⁸ Art 261(2) Swiss Civil Procedure Code (n 242).

⁶²⁹ Section 945 German Code of Civil Procedure (n 570).

⁶³⁰ Art 264(2) Swiss Civil Procedure Code (n 242).

⁶³¹ Section 34-3 Norwegian Disputes Act (n 621).

⁶³² For an overview, O Sosnitzer, 'Die Leistungsverfügung im Kartellrecht - Anmerkungen zum Urteil des KG v 26 6 2003' (2004) WRP 62 et seq.

⁶³³ Arts 835(2) and 873(2) Code of Civil Procedure France (n 618).

⁶³⁴ Art 262 lit e Swiss Civil Procedure Code (n 242).

⁶³⁵ Recital 15 EU Damages Directive (n 16).

burden of proof and the available forms of evidence, some of which have already been touched upon above. Furthermore, private competition litigation is characterised by an information asymmetry warranting special rules on access to evidence.

7.1 Burden of Proof

143 The general rule on the burden of proof is similar in most systems: the party bears the burden of proof for the existence of the facts favourable to him, irrespective of the procedural role.⁶³⁶ In competition proceedings, this entails, for example, that a claimant in a damages action bears the burden of proof for the infringement, the defendant's culpability, and the harm caused.⁶³⁷ If an indirect customer asserts a claim for damages against the infringer, the pass-on of the overcharge also has to be proven by the claimant.⁶³⁸ On the contrary, in those systems allowing a passing-on defence, the corresponding burden of proof rests with the defendant.⁶³⁹ For claims including other remedies, the burden of proof is similar. In negative declaratory actions – where the usual roles of claimants and defendants are reversed – the claimant must prove, for example, that there was no competition law violation or damage.⁶⁴⁰ When the nullity of anti-competitive contracts is used as a defence against an enforcement action of a contract, the party claiming the nullity bears the corresponding burden of proof.

144 While these application of the burden of proof usually stem from general written or unwritten rules of civil procedure. However, in some systems, several aspects of the burden of proof in competition proceedings are explicitly laid down in law. Outside the EU, only few explicit rules on the burden of proof in competition proceedings exist. As mentioned above, the new Brazilian competition law contains a rebuttable presumption that overcharges by an entity harmed by the anticompetitive conduct have not been passed on, which in turn needs to be proved by the defendant.⁶⁴¹ In Korea, for example, a defendant bears the burden to prove the absence of intent or negligence of a competition law violation underlying a civil action.⁶⁴²

145 In the EU, several rules impacting on the burden of proof exist, as already mentioned throughout this chapter. In the EU, as discussed above, the binding nature of Commission decisions on national courts raise questions the application of evidentiary rules, *res*

⁶³⁶ For example, Art 338 I Greek Civil Procedure Code (n 619); Art 750 Civil Procedure Act South Korea (n 487); Art 342 Civil Code Portugal (n 454).

⁶³⁷ C Willems, 'Kein Durchgang durch die „Doppeltür“? Möglichkeiten und Grenzen der Abmilderung von Informationsasymmetrien im Kartellzivilrecht nach der RL 2014/104/EU zum Kartellschadensersatz' (2015) WRP 819.

⁶³⁸ For example KZR 75/10 (n 506) Rn 44; Keßler (n 509) 87; Thomas (n 501) 48; Kersting (n 533) 586; Stomper (n 533) 412.

⁶³⁹ For example, KZR 75/10 (n 506) Rn 69; KZR 8/18 (n 507) Rn 46; KZR 4/19 (n 507) Rn 37.

⁶⁴⁰ For example, *Rossignol* (n 571).

⁶⁴¹ Art 47 Section 3 Brazil Competition Act (n 31).

⁶⁴² Art 109(1) MRFTA South Korea (n 6).

judicata and the extent to which proof may be required.⁶⁴³ Furthermore, as also mentioned above⁶⁴⁴, the Damages Directive and national transposing laws regulate the evidentiary value of national competition authority decisions, for example, as *prima facie* evidence.⁶⁴⁵ The Damages Directive moreover foresees certain other already mentioned rules on the burden of proof in the context of passing-on of overcharge. Should the defendant raise the passing-on defence, Art 13 Damages Directive states that the corresponding burden of proof rests with the defendant. On the contrary, for indirect purchasers claims, according to Art 14 Damages Directive, '*the burden of proving the existence and scope of such a passing-on shall rest with the claimant*'. The EU Member States have either transposed these rules on the burden of proof regarding passing-on by letter into their national competition and/or procedural law, such as Cyprus⁶⁴⁶ or Slovenia⁶⁴⁷, or refrained from transposing these rules because the general rule of the distribution of the burden of proof was sufficient, such as Germany⁶⁴⁸ or Estonia⁶⁴⁹. Additionally, the Damages Directives includes, as already mentioned above,⁶⁵⁰ certain rebuttable presumptions impacting on the burden of proof. A rebuttable presumption is a statutory assumption or inference in favor of a particular fact drawn from another fact or group of facts found or otherwise established in the action that shifts the burden of proof.⁶⁵¹ As mentioned above,⁶⁵² Art 17(2) Damages Directive includes a rebuttable presumption that cartels cause harm. Furthermore, Art 14(2) Damages Directive establishes a rebuttable presumption of pass-on for indirect purchaser claims.

7.2 Standard of Proof

146 The rules on the standard of proof determine what level of evidence and degree of belief or probability are sufficient for a claim to be deemed as proven. Usually, in competition proceedings the normal rules on the standard of proof apply across the board. This leads to two standard of proofs that tend to apply in competition proceedings. On the one hand, some civil law traditions require a full conviction of the court beyond any reasonable doubt, such as Germany⁶⁵³ or Greece⁶⁵⁴. On the other hand, systems are more lenient and require a preponderance of the evidence or balance of probabilities

⁶⁴³ Art 16(1) of Regulation 1/2003 (n 15); On the binding nature of Commission decisions see above at 5.1.2.

⁶⁴⁴ See above at 5.1.2.

⁶⁴⁵ Art 9 Damages Directive (n 16).

⁶⁴⁶ Art 65 of Civil Wrongs Law 1933 (Cyprus).

⁶⁴⁷ Art 62l, 62m Slovenian Prevention of the Restriction of Competition Act (n 446).

⁶⁴⁸ BT-Drs 18/10207 (n 179) 57.

⁶⁴⁹ Explanatory Note to the Estonian transposition law, Appendix 1, 10-12.

⁶⁵⁰ On the rebuttable presumption of the EU Damages Directive see above at 6.1.5.

⁶⁵¹ 'Presumptions' in *Black's Law Dictionary* (n 454); For example Art 344(1) Civil Code Portugal (n 454).

⁶⁵² On the rebuttable presumption of the EU Damages Directive see above at 6.1.5.

⁶⁵³ Section 286 Abs 1 S 1 ZPO (n 570).

⁶⁵⁴ Art 240 Greek Code of Civil Procedure (n 619)

standard, ie, more probable than not, for example in Korea⁶⁵⁵ or the US⁶⁵⁶. Nevertheless, in both systems, courts establish their convictions through free appreciation of evidence, permitting an independent evaluation and assessment of the proof, as can be seen for example in the Code of Civil Procedure of Switzerland⁶⁵⁷ or Italy⁶⁵⁸.

147 Contrary to many other aspects of competition proceedings, the general standard of proof has not been harmonised on EU level, so these rules are for the Member States to determine, subject to the principles of equivalence and effectiveness of EU law. For some limited aspects, the EU Damages foresees rules on the standard of proof. Art 17(1) first sentence Damages Directive states 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. As no precise legal obligations follow from this rule, Member States have not transposed this into national law. Rather, Art 17(1) first sentence Damages Directive has been used to interpret Art 17(1) second sentence Damages Directive on the rules of judicial estimation. As discussed above, the power for judicial damages estimation according to Art 17(1) Damages Directive and other rules on judicial damages estimation lowers the standard of proof and allow for an imprecise damages calculations based on the evidence available in cases of difficulties to precisely quantify the harm suffered.

7.3 Forms of Evidence

148 In competition proceedings around the globe, usually the general rules on the available forms of evidence apply, for example in Australia⁶⁵⁹, Greece⁶⁶⁰, the Netherlands⁶⁶¹ or Norway⁶⁶². Special rules on the forms of evidence are not foreseen in these systems. Thus, like in general civil procedure law, the available form of evidence can vary from system to system. In Greece, for example, Art 339 Greek Civil Procedure Rules lays down exclusively the forms of evidence: confession, direct proof, especially viewing the premises, expert reports, documentary evidence, examination of parties, testimony, presumptions and sworn attestations. Spain, on the other hand, provides a non-exhaustive list of forms of evidence in Art 299 of the Spanish Civil Procedure Rules, suggesting witnesses, documents, and expert reports. Correspondingly, also the conditions for granting a specific form of evidence vary from system to system, like in general civil procedural law. In Australia, for example, evidence needs to be relevant and

⁶⁵⁵ Case 2008Da6755 (Supreme Court, South Korea) Decision of 28 October 2010.

⁶⁵⁶ J Leubsdorf, 'The Surprising History of the Preponderance Standard of Civil Proof' (2016) 67 Florida Law Review 1569.

⁶⁵⁷ On free assessment of evidence, 157 Swiss Code of Civil Procedure (n 242).

⁶⁵⁸ On free assessment of evidence, 116 Codice di Procedura Civile (Civil Procedure Code) 28 October 1940 (Italy).

⁶⁵⁹ Evidence Act 1995 (Australia).

⁶⁶⁰ Art 339 Greek Code of Civil Procedure (n 619).

⁶⁶¹ 152(1) Wetboek van Burgerlijke Rechtsvordering (Civil procedure Code) 1838 (Netherlands).

⁶⁶² 21-3 Dispute Act Norway (n 621).

cannot be excluded by any other applicable rule, eg, the prohibition of hearsay.⁶⁶³ A similar rule applies in Norway.⁶⁶⁴

149 However, some forms of evidence are more relevant in competition proceedings than others. Generally, competition proceedings largely rely on documentary evidence and expert evidence. Particularly expert evidence plays a vital role in competition proceedings. They are used to help quantifying the amount of damages in damages proceedings are also essential in determining the relevant market or other aspects of competition law violations, particularly in *stand-alone* actions where courts cannot rely on the above-mentioned evidentiary value of competition authority decisions.

150 The conditions and scope of expert evidence, like in general civil procedure law, differ greatly in the various systems. In some systems, the admissibility of expert opinions has no further conditions, in others, such as the US⁶⁶⁵ or Norway⁶⁶⁶, resolute conditions for expert evidence apply. In general, there is a vast difference in approaches as to whether party-appointed or court-appointed experts or both are admissible. In some systems, an expert can be requested by the parties or by the court, for example, in Brazil⁶⁶⁷, Portugal⁶⁶⁸ or Spain⁶⁶⁹. In some systems, such as Germany⁶⁷⁰ or Taiwan⁶⁷¹, however, only a court-appointed expert constitutes expert evidence. A party-appointed expert only constitutes documentary evidence, for example in the case of Taiwan, or a party submission in the case of Germany, with a different evidentiary value compared to a court-appointed expert. In any case, a common problem relates to the fact of contradicting party opinions. In these cases, usually the court appoints a third court-appointed expert, such as in Germany⁶⁷², or through a joint expert conference or a joint expert report identifying agreed and disagreed matter, such as in Australia.⁶⁷³

151 In the context of expert evidence, a key problem in competition proceedings manifests: competition proceedings are usually very costly due to the necessity to rely on one or often multiple expert opinions, since the experts are contradicting one another. This problem is not sufficiently dealt with around the globe, but in some systems, alleviating measures exist to avoid relying on expert opinions, such as the above-discussed

⁶⁶³ Art 56(2) Evidence Act Australia (n 667)

⁶⁶⁴ Art 21-3 Dispute Act Norway (n 621)

⁶⁶⁵ 702 Federal Rules of Civil Procedure 1937 (US).

⁶⁶⁶ Art 21-12 Dispute Act Norway (n 621)

⁶⁶⁷ Art 370 of the Brazilian Code of Civil Procedure (n 32).

⁶⁶⁸ 388 Civil Code (n 454) and 467 Código de Processo Civil (Code for Civil Procedure) Law No 41 of 26 June 2013 (Portugal).

⁶⁶⁹ 299 Civil Procedure Rules Spain (n 623).

⁶⁷⁰ See eg Case III ZR 201/80 (Germany, BGH) Judgment of 27 May 1982 [NJW 1982, 287].

⁶⁷¹ 326, 335 Code of Civil Procedure Taiwan (n 486).

⁶⁷² Case VIII ZR 304/00 (Germany, BGH) Judgment of 9 January 2002 [NJW 2002, 1651].

⁶⁷³ Evidence Act (n 667); Part 23 Federal Court Rules 2011 (Australia); James Leslie Bain Allsop, 'Expert Evidence Practice Note (GPN-EXPT)' (*Federal Court of Australia*, 25 October 2016) <<https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt>> accessed 21 June 2023

possibilities of judicial estimation of damages.⁶⁷⁴ The general problem of diverging expert opinions, costs and general mistrust surrounding expert evidence and contradicting opinions typical for competition proceedings was recently perfectly summarised by the English Competition and Appeal Tribunal, stating: *'It is perhaps a flaw in the system but in any event appeared quite marked to us in this case that all the experts, [...] who opined on a number of different issues, came to conclusions that favoured their clients [...]. Perhaps that is an inevitable consequence of the adversarial process and one should expect a party to have an expert that supported their case. But we consider that there should have been more recognition, on certain issues, of the scope for a range of possible results and of the reasonableness of the other expert's opinion. As they are aware, the experts' primary duty is to assist us in understanding the factors behind their differing conclusions, rather than defending the conclusions which favoured their respective clients' positions. When there are fine and difficult issues for us to decide, it is important that we are able to trust the independence of the experts'*⁶⁷⁵ In the case at hand, the Competition Appeals Tribunal, in the end dismissed the diverging regression analysis of the many different experts opinions and concluded with an estimated overcharge of 5 %, half of what was requested by the claimant.⁶⁷⁶

7.4 Access to Evidence and Discovery/Disclosure

152 Access to evidence is one of the key issues in private competition law actions, particularly competition damages actions.⁶⁷⁷ An information asymmetry is inherent in competition proceedings.⁶⁷⁸ The claimant lacks the necessary evidence to prove particularly the amount of damages.⁶⁷⁹ Direct or indirect customers are usually active in another market than the cartel and have no insight into the cartelised market, which is, however, necessary for the damage calculation. A claimant needs internal information of the defendant and other market participants on price-setting policies to calculate and prove a concrete amount of harm, which the claimant does not have. Likewise, insofar as the injuring party asserts the passing-on defence, the proof warrants an understanding of the customers behaviour on subsequent market levels in a sufficiently concrete manner, even though the defendant is not active on these markets and also has no other

⁶⁷⁴ On judicial damages estimation see above at 6.1.4.

⁶⁷⁵ *Royal Mail v DAF Trucks* (n 483) para 235; Hereto also: Francisco Marcos, 'Cutting the Baby in Half – The First Decision of the UK Competition Appeals Tribunal on Damages in the Trucks Cartel' (*Kluwer Competition Law Blog*, 31 March 2023) <https://comptitionlawblog.kluwercompetitionlaw.com/2023/03/31/cutting-the-baby-in-half-the-first-decision-of-the-uk-competition-appeals-tribunal-on-damages-in-the-trucks-cartel/> accessed 26 June 2023

⁶⁷⁶ *Royal Mail v DAF Trucks* (n 483) para 486.

⁶⁷⁷ H Andersson, 'The Quest for Evidence - Still an Uphill Battle for Cartel Victims?' in M Strand, V Bastidas Venegas and M C Iacovides (editors), *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Oxford, Hart Publishing 2019) 133.

⁶⁷⁸ Recital 15 Damages Directive (n 16); In detail L Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (Mohr Siebeck 2021) 59 et seq.

⁶⁷⁹ Recital 15 Damages Directive (n 16).

knowledge of internal information of the customers.⁶⁸⁰ Outside of damages actions, proving the infringement for a stand-alone injunction might also face considerable information asymmetries due to the secrecy of cartel agreements, in particular.⁶⁸¹ The necessary is often held by the counterparty or a third party and is generally unavailable to the party needing the evidence to fulfil their burden of proof.⁶⁸²

153 The approach towards access to evidence in competition proceedings used to represent a classic US-EU divide:⁶⁸³ while the US has a long-established system of discovery, in the Member States of the EU and in EU law in general, there was either no system of disclosure or the systems varied to a large degree before the Damages Directive.⁶⁸⁴

154 In the US, discovery is generally available in civil procedure under the Federal Rules of Civil Procedure⁶⁸⁵ (and in state rules⁶⁸⁶) to further adversarial litigation in full possession of the relevant facts, increase the efficiency of the administration of justice, encourage settlements, and ultimately reduce the number of trials.⁶⁸⁷ US discovery is quite far-reaching, requires minimal conditions, and includes pre-trial discovery⁶⁸⁸, depositions⁶⁸⁹, interrogatories⁶⁹⁰, requests for the production of documents⁶⁹¹, and automatic disclosure⁶⁹², all commenced and ultimately managed by the parties⁶⁹³; the court is only involved when parties cannot agree. The procedure of discovery in US law is not unique

⁶⁸⁰ Commission, 'Impact Assessment Report Damages actions for breach of the EU antitrust rules Accompanying the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Staff Working Document) COM (2013) SWD 203 final paras 106 et seq.

⁶⁸¹ D Calisti and L Haasbeek and F Kubik, 'The Directive on Antitrust Damages Actions: Towards a stronger competition culture in Europe, founded on the combined power of public and private enforcement of the EU competition rules' (2014) 12 *Neue Zeitschrift für Kartellrecht* 466, 467.

⁶⁸² Recital 15 Damages Directive (n 16).

⁶⁸³ A Ruster and S Von Massow, 'Disclosure in European Competition Litigation Through the Lens of US Discovery' (2020) 43(3) *World Competition* 347, 348; R Becker, 'Kartellrechtliche Schadenersatzklagen à l'américaine' in Möschel W and Bien F (editors) *Kartellrechtsdurchsetzung durch private Schadenersatzklagen?* (Nomos 2010) 37.

⁶⁸⁴ Malinauskaite and Cauffman (n 189) 500, 501; Rodger and Ferro and Marcos (n 119) 487; Commission, 'Staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules' (Staff Working Document) COM (2008) SEC 0404 final, Rn 90, 104; Waelbroeck D and Slater D and Even-Shoshan G, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) Ashurst 61.

⁶⁸⁵ Rules 26 – 37 Federal Rules of Civil Procedure (n 673).

⁶⁸⁶ For example, California, ss 2016–2036, Civil Discovery Act 1986 (California, US); Title 4 of the Code of Civil Procedure 1872 (California, US).

⁶⁸⁷ Ruster and Von Massow (n 692) 347, 349.

⁶⁸⁸ Rule 26(a)(3) Federal Rules of Civil Procedure (n 673).

⁶⁸⁹ For example Rule 27 *ibid*.

⁶⁹⁰ Rule 33 *ibid*.

⁶⁹¹ Rule 34 *ibid*.

⁶⁹² Rule 26 (a) *ibid*.

⁶⁹³ Ruster and Von Massow (n 692) 347, 349.

for competition proceedings and available in general civil proceedings, but heavily relied on in competition proceedings to obtain the relevant evidence.⁶⁹⁴

155 Before the Damages Directive in the EU, mainly the UK provided a full-fledged discovery in the Anglo-American style⁶⁹⁵ but also Luxembourg had far-reaching rules on access to evidence⁶⁹⁶. On the contrary, several countries did not have rules on disclosure, such as Lithuania.⁶⁹⁷ In others, some form of disclosure was available. In Germany, for example, limited disclosure was and is available under general civil procedure rules but the required documents have to be precisely described, which could hardly be overcome due to the information asymmetry.⁶⁹⁸ Some Member States also limited the possibilities to request disclosure to parties to the proceedings, excluding third parties, or require separate proceedings.⁶⁹⁹ While in general civil procedure this divide between US and EU civil procedure and the divergences amongst the EU Member States seems to continue – albeit calls for a general principle of disclosure in EU civil procedure law have been made⁷⁰⁰ – for competition proceedings, the Damages Directive reached a minimum harmonisation on the matter,⁷⁰¹ following the UK model.⁷⁰²

156 The EU legislators claimed that the full effectiveness, particularly the effective enforcement of European competition law, is threatened, if claimants refrain from asserting private actions because the requirements in terms of burden of proof are too

⁶⁹⁴ T B McElroy, 'Federal Pre-Trial Procedure in an Antitrust Suit' (1977) 31 South Western Law Journal 649;

Chapman Y, 'Pretrial Discovery in Antitrust Cases' (1978) 8(3) Memphis State University Law Review 615.

⁶⁹⁵ Part 31 Civil Procedure Rules UK (n 626); V Brandt, *Das englische Disclosure-Verfahren* (Mohr Siebeck 2015) passim.

⁶⁹⁶ Art 59 Nouveau Code de Procédure Civile (New Code of Civil Procedure) 2001 (Luxembourg); Malinauskaite and Cauffman (n 189) 501.

⁶⁹⁷ Stripeikiene J, 'Klevo Lapas v ORLEN Lietuva' in Monti G and Parcu P L (editors) *European Networking and Training for National Competition Enforcers (ENTraNCE 2012). Selected Case Notes* (RSCAS 2014/68, Robert Schuman Centre for Advanced Studies 2014) 37 <http://cadmus.eui.eu/bitstream/handle/1814/31771/RSCAS_2014_68.pdf?sequence=1> accessed 25 June 2023.

⁶⁹⁸ Hornkohl L, 'Überwindung von ungewissen Sachverhalten – Ist die Zeit reif für eine allgemeine Offenlegung von Beweismitteln im deutschen Zivilprozess?' (2012) GVRZ 17; Commission Staff Working Paper White Paper (n 693) Rn 90, 104; Calisit and Haasbeek and Kubik (n 690) 466, 467; Kersting (n 533) 581, 565; S Jungermann, 'Weltweit erste Auslieferung an die USA wegen Kartellverstoss - aus Deutschland' (2014) 6 WuW 563, 4-5; Janssen H 'Schadensersatz wegen Verletzung des Kartellrechts – Auswirkungen der neuen EU-Richtlinie' (2015) CB 35-37 <https://www.luther-lawfirm.com/uploads/tx_fwluther/cb-2015-1-2_Janssen.pdf> accessed 24 June 2023; Schweitzer (n 531) 335, 341; H Hellmann and B Steinbrück, 'Discovery Light – Informations- und Beweismittelbeschaffung im Rahmen von Kartellschadensersatzklagen (2017) NZKart 164, 165.

⁶⁹⁹ Commission Staff Working Document Impact Assessment Report (n 689) para 41.

⁷⁰⁰ Case C-163/21 *AD v PACCAR Inc and Others* [2022] ECLI:EU:C:2022:863, Opinion of AG Szpunar para 50.

⁷⁰¹ Art 5(8) Damages Directive (n 16).

⁷⁰² A Howard, 'The Damages Directive in the United Kingdom' in A Biondo and G Muscolo and R Nazzini (editors) *After the Damages Directive: Policy and Practice in the EU Member States and the United Kingdom* (Kluwer Law International 2022) 577, 578.

high and they lacked the necessary evidence.⁷⁰³ Therefore, Chapter 2 of the Damages Directive ensures that claimants are afforded the right to obtain disclosure because the indispensable evidence is in the hands of the party who does not hold the burden of proof or is not involved in the proceedings. Following the principle of equality of arms, the Directive affords the same rights to defendants, so they may obtain the necessary means to defend themselves.⁷⁰⁴ The Damages Directive also foresees disclosure in special situations, such as for claims of indirect purchasers⁷⁰⁵ or for the passing-on defence.⁷⁰⁶ Contrary to US-style disclosure, Arts 5 and 6 Damages Directive provide for detailed requirements for disclosure. Art 5(1) – (3) Damages Directive lays down the basic conditions, according to which claimants (or defendants) who have presented a reasoned justification containing available facts and evidence sufficient to support the plausibility of its claim for damages can request the proportional disclosure of relevant evidence from defendants (or the opposing party), third parties and competition authorities, without it being necessary for them to specify individual items of evidence. Particularly the condition of proportionality of the disclosure according to Art 5(3) Damages Directive is crucial to prevent fishing expeditions.⁷⁰⁷ Proportionality of disclosure has to be assessed *ex officio* by the courts.⁷⁰⁸ Furthermore, the Damages Directive also alludes to the crucial issue of protecting confidential information during disclosure.⁷⁰⁹ In Art 6 Damages Directive, several limitations with regard to disclosure of evidence included in the file of a competition authority are laid down. Most prominently the so-called white, grey and black lists are notable. As the ECJ noted in its recent *RegioJet* judgment, the rules of the Damages Directive led to three categories of disclosure:

'As regards, first of all, evidence relating to leniency statements and settlement submissions ('evidence on the blacklist'), Art 6(6) of Directive 2014/104 provides that Member States are to ensure that national courts cannot at any time order a party or a third party to disclose that evidence. Next, as regards information that was prepared by a natural or legal person specifically for administrative proceedings initiated by a competition authority, information that that latter authority has drawn up and sent to the parties in the course of those proceedings, and settlement submissions that have been withdrawn, Art 6(5) of Directive 2014/104 provides that national courts may order the disclosure of those categories of evidence ('evidence on the grey list') only after a competition authority, by adopting a decision or otherwise, has closed its proceedings. Lastly, in accordance with Art 6(9) of Directive 2014/104, the disclosure

⁷⁰³ Commission Staff Working Document Impact Assessment Report (n 689) paras 106 et seq.

⁷⁰⁴ Recital 15 Damages Directive (n 16).

⁷⁰⁵ Art 14 (1) *ibid.*

⁷⁰⁶ Art 13 *ibid.*

⁷⁰⁷ B Kreße, 'Der Zugang Kartellgeschädigter zu Verfahrensdokumenten der Europäischen Kommission als Wettbewerbsbehörde' (2016) WRP 567, 573.

⁷⁰⁸ Hornkohl (n 687) p 143.

⁷⁰⁹ L Hornkohl, 'The Protection of Confidential Information and Disclosure in EU Private Enforcement of Competition Law' (2023) *Global Competition Litigation Review* 46 et seq; In detail: Hornkohl (n 687) *passim*.

*of evidence in the file of a competition authority that does not fall into any of the categories referred to previously ('the evidence on the white list') may be ordered in actions for damages at any time, without prejudice to that Art.'*⁷¹⁰

157 The rules on disclosure of evidence were transposed in the law of most Member States and, together with the rules on disclosure in IP proceedings as foreseen by the IP Enforcement Directive⁷¹¹, lead to a change in the procedural tradition and approach towards disclosure in some Member States.⁷¹² Yet, since many Member States follow a civil law tradition and are therefore unfamiliar with disclosure as a procedural tool, it might still take a while to be fully established throughout the EU.⁷¹³ Moreover, Member States chose different approaches to transpose the rules on disclosure of the Damages Directive. Most Member States opted for procedural tools, such as Austria⁷¹⁴, Hungary,⁷¹⁵ Italy⁷¹⁶ or Spain.⁷¹⁷ Germany foresees procedural disclosure in Section 89b GWB, which the claimant or defendant can rely on during the damages proceedings.⁷¹⁸

158 Outside the EU or US contexts, several other systems also foresee some form of disclosure. In some systems, the general rules on disclosure apply. For example, Australia foresees (pre-trial) discovery rules, which have been applied regularly in competition law proceedings.⁷¹⁹ A similar approach exists in Taiwan.⁷²⁰ Other systems rely on (partly) specialised disclosure and access to evidence provisions for competition proceedings. As mentioned above, disclosure was already well-rooted in general UK civil procedure. However, a practice direction specifically for competition claims was added in the transposition of the Damages Directive before the UK left the EU.⁷²¹ Practice Direction 31C – Disclosure and Inspection in Relation to Competition Claims - includes special rules, for example, on documents on the grey or black lists.⁷²² Furthermore, in Brazil, special rules

⁷¹⁰ *RegioJet* (n 19), paras 57 – 59.

⁷¹¹ Arts 6 – 8 Directive of the European Parliament and of the Council on the enforcement of intellectual property rights, 2004/48 of 29 April 2004 (EU).

⁷¹² Hornkohl (n 707) 17.

⁷¹³ *Rodger and Ferro and Marcos* (n 119) 487.

⁷¹⁴ Section 37j Competition Act Austria (n 1).

⁷¹⁵ Section 88/J Act LVII on the Prohibition of Unfair Trading Practices and Unfair Competition (n 461).

⁷¹⁶ Art 3, 4, and 5 Legislative Decree 14 January 2017 No 3 (n 52).

⁷¹⁷ Arts 283bis(a) ff Spanish Civil Procedure Rules (n 623).

⁷¹⁸ Hereto recently Case KZR 20/21 (BGH, Germany), Judgement of 4 April 2023 [ECLI:DE:BGH:2023:040423UKZR20.21.0]; BT-Drs 18/10207 (n 179) 62.

⁷¹⁹ Rules 7 22, 7 23, 20 Federal Court Rules (n 681); *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* (FCAFC, Australia), Judgement of 2017 [193].

⁷²⁰ Arts 342 et seq Code of Civil Procedure Taiwan (n 486).

⁷²¹ UK Ministry of Justice, 'Practice Direction 31C – Disclosure and Inspection in Relation to Competition Claims' (UK Ministry of Justice, 2023) <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31/practice-direction-31c-disclosure-and-inspection-in-relation-to-competition-claims>> accessed 30 June 2023

⁷²² Section 2 Practice Direction 31C *ibid*.

exist regarding access to evidence in the files of competition authorities, particularly leniency documents.⁷²³

8 CONCLUSIONS

159 This chapter has explored the distinctive procedural landscape of private competition law proceedings across jurisdictions, highlighting their slowly but steady evolution into a distinct subject matter within civil and commercial litigation. While still a relatively new area outside of the United States, private enforcement of competition law is increasingly recognized as essential. Through a comparative lens, the chapter detailed how procedural peculiarities in private competition law, such as unique standing requirements, evidentiary mechanisms, and the interplay with public enforcement, justify its consideration as a special category within civil procedure.

160 One of the central findings is the complex duality between public and private enforcement. While public authorities play a primary enforcement role, private litigation acts as both a compensatory and corrective mechanism. This chapter illustrates that while no uniform global model exists, a convergence around two main paradigms, the EU model focused on compensation and procedural balance, and the U.S. model emphasizing deterrence and punishment, is shaping the global landscape of private competition proceedings. Yet, each jurisdiction retains procedural autonomy, resulting in a dynamic and evolving field that blends public and private legal traditions to ensure effective enforcement of competition norms.

⁷²³ RESOLUÇÃO No 21, DE 11 DE SETEMBRO DE 2018 (CADE Resolution No 21, of September 11 2018) 2018 (Brazil).

ABBREVIATIONS AND ACRONYMS

AB	Appeal Board
ABA	American Bar Association
AC	Appeal Case (UK)
ACCC	Australian Competition and Consumer Commission
Aff'd	decision affirmed by higher court
AG	<i>Aktiengesellschaft</i> (stock corporation/public limited company)
A-G	Attorney General (UK)
AGCM	<i>Autorità Garante della Concorrenza e del Mercato</i> (Italian Competition Authority)
ALR	Australian Law Reports
Art	Art
AT	Antitrust Case
Aufl	<i>Auflage</i> (edition)
BB	<i>Betriebs-Berater</i> (German Journal)
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
BGH	<i>Bundesgerichtshof</i> (German Federal Court of Justice)
BT-Drs	<i>Bundestags-Drucksache</i> (German Bundestag Printed Document)
BVerfG	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
C-	Case of the European Court of Justice (ECJ)
CA	Court of Appeal (UK)
CADE	<i>Conselho Administrativo de Defesa Econômica</i> (Brazilian Competition Authority)
CAT	Competition Appeal Tribunal of the United Kingdom
CB	<i>Compliance-Berater</i> (German Journal)
CCED Tenn	Circuit Court Eastern District of Tennessee (US)
CCI	Competition Commission of India
Civ	Civil case
CJEU	The Court of Justice of the European Union (ECJ & GC)
CLJ	Cambridge Law Journal
CPC	<i>Código de Processo Civil</i> (Brazilian Code of Civil Procedure)
Co	Company
Comp LR	Competition Law Reports (India)
Corp	Corporation
DAF COMP WD	Directorate for Financial and Enterprise Affairs Competition Policy Working Document (OECD)
DCC	Dutch Civil Code
DDC	District Court for the District of Columbia (US)
ECLI	European Case Law Identifier

ECLIC	EU and Comparative Law Issues and Challenges (International Scientific Conference)
ECLR	European Competition Law Review (UK Journal)
ECJ	European Court of Justice
ECR	European Court Reports (EU)
edn	edition
ed	editor/edited by
eds	editors
EGLR	Estate Gazette Law Reports (UK)
eg	<i>exempli gratia</i> (for example)
ERA Forum	<i>Forum der Europäischen Rechtsakademie Trier</i> (German Legal Journal)
EU	European Union
EuG	<i>Europäisches Gericht</i> (General Court of the European Union)
EuGH	Europäischer Gerichtshof (European Court of Justice)
et al	<i>et alia</i> (and others)
et seq	<i>et sequentia</i> (and the following)
EWCA Civ	England and Wales Court of Appeal Civil Division
EWHC Ch	England and Wales High Court Chancery Division
F-	Case of the Civil Service Tribunal of the European Union
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
ff	and the following
F Supp	Federal Supplement (US case law reporter)
FTC	Federal Trade Commission of the US
F 3d	Federal Reporter Third Series (US)
GAHap	Civil Case in District Court of South Korea (가합)
GC	General Court (of the European Union)
<i>Gesellschaft mbH/GmbH</i>	<i>Gesellschaft mit beschränkter Haftung</i> (company with limited liability)
Geo LJ	Georgetown Law Journal (US)
GRUR-RR	<i>Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungs-Report</i> (German Journal on rulings related to intellectual property law and commercial law)
GVRZ	<i>Zeitschrift für das gesamte Verfahrensrecht</i> (German Journal for Procedural Law)
GWB	<i>Gesetz gegen Wettbewerbsbeschränkungen</i> (German Cartel Act)
ICC	International Chamber of Commerce
Inc	Incorporated
ie	<i>id est</i> (that is)
in liq	in liquidation
IP	Information Press Release

JECLAP	Journal of European Competition Law & Practice (UK)
JFTC	Japan Fair Trade Commission
JSC	Jacqueline Scott Corley the United States Magistrate Judge
KartG	<i>Kartellgesetz</i> (Competition Act of Austria)
KG	Kammergericht (Higher Regional Court of Berlin)
KZR	Kartell-Zivilsache Revision (Cartel Civil Appeal case before BGH)
LG	Landgericht (Regional Court of Germany)
ltd	private limited company
Lgs D	<i>Decreto Legislativo</i> (Legislative Decree)
LQR	Law Quarterly Review (UK legal journal)
MOD	Ministry of Defence (UK)
MRFTA	Monopoly Regulation and Fair Trade Act of South Korea
n	footnote (internal, ie, within the same chapter)
ND Cal	Northern District California
NJW	<i>Neue Juristische Wochenschrift</i> (German Journal)
No/ n°	number/numbers
NZKart	<i>Neue Zeitschrift für Kartellrecht</i> (German Journal for Competition Law)
NZM	<i>Neue Zeitschrift für Miet- und Wohnungseigentumsrecht</i> (German Journal for Tenancy and Residential Property Law)
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the EU
P	<i>pourvoi</i> (appeal)
p	page
para	paragraph/paragraphs
per se	by itself/in itself
prima facie	at first sight
Ref	reference
RG	<i>Répertoire Général</i> (General Register)
RG	Reichsgericht (supreme criminal and civil court of Germany from 1879 to 1945)
Rn	<i>Randnummer</i> (marginal number)
RSCAS	Robert Schuman Centre for Advanced Studies (EUI)
Rz	<i>Randziffer</i> (paragraph number)
S	<i>Seite</i> (page)
SCC	Supreme Court of Canada
S Ct	Supreme Court (of the United States)
SCJ	Supreme Court Judgements (of the Supreme Court of Canada)
SCR	Supreme Court Reports of Canada
Sec	section
SGCAB	Singapore Court of Appeal

SGHC	Singapore High Court
SI	Statutory Instrument
Slg	<i>Sammlung</i> (official report series of the court's judgment)
SWD	Staff Working Document of the European Commission
T-	Case of the General Court of the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
UKSC	UK Supreme Court
ULJ Dublin	University Law Journal Dublin Trinity College
US/USA	United States of America
USC	United States Supreme Court
USC	United States Code
UWG	<i>Bundesgesetz gegen den unlauteren Wettbewerb</i> (German Unfair Competition Act)
v	<i>versus</i> (against)
VersR	<i>Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht</i> (German Journal)
VO	<i>EU Verordnung</i> (EU Regulation)
Vol	Volume
WL	Westlaw legal research database
WRP	<i>Wettbewerb in Recht und Praxis</i> (German Journal)
WuW	<i>Wettbewerbs- und Wirtschaftsrecht</i> (German Journal)
ZHR	<i>Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht Journal</i> (German Journal)
ZPO	<i>Zivilprozessordnung</i> (German Code of Civil Procedure)
ZWeR	<i>Zeitschrift für Wettbewerbsrecht</i> (German Journal)
*th Cir	US Court of Appeals for the *th Circuit

LEGISLATION

International/Supranational

Council Regulation on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, 1/2003 of 16 December 2002 (EU)

Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014/104 of 26 November 2014 (EU Damages Directive)

Directive of the European Parliament and of the Council on the enforcement of intellectual property rights, 2004/48 of 29 April 2004 (EU)

Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2019/1 of 11 December 2018 (EU)

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Allgemeines bürgerliches Gesetzbuch (General Civil Code) 1811 (Austria).

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