

CONSUMER WELFARE AND PRIVATE ACTIONS FOR DAMAGES
IN EUROPEAN UNION COMPETITION LAW

by

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ABSTRACT

In the European Union (“EU”) public enforcement of competition law prevails. Private enforcement is scarce and has not been encouraged or advocated for until the end of 2014, when the EU Parliament passed Directive 2014/104/EU, which sets out an EU-wide framework aimed at promoting and facilitating private damages actions for parties harmed by anticompetitive behaviour.

This thesis inquires whether Directive 2014/104/EU succeeds in creating sufficient and appropriate incentives for victims of competition law infringements. The main argument is that while the preparatory work leading to the adoption of the Directive focused on lowering the barriers of access to justice for victims of anticompetitive conduct and incentivizing victims to take legal action against infringing firms, the final version of the Directive partly misses these points. The limited access to evidence provided by the Directive undermines the goal of lowering the burden and standard of proof, because it will still be difficult for claimants to obtain the necessary evidence for building their case, especially in standalone actions. The complete lack of any provisions facilitating class actions for the recovery of damages fails to lower litigation costs and has the effect of keeping in a particularly disadvantaged position consumers and small firms, for which litigation costs are usually prohibitive. These problems are exacerbated by the limitations of public enforcement: public enforcement agencies, due to their limited resources, have to prioritize the violations that warrant enforcement action and let some infringements go unpunished. In this context, despite the consumer welfare objective of EU competition law aiming to prevent the situation where wealth is illegally redistributed from consumers to competition law infringers, the restricted ability of victims to recover damages has the effect of allowing competition law infringers to keep most of their illegal gains.

LAY SUMMARY

This research has had three main objectives:

1. To review the content of Directive 2014/104/EU on the right to bring private damages actions for competition law violations;
2. To assess the strengths and weaknesses of the Directive's provisions with respect to their effectiveness in encouraging citizens and small businesses to claim damages from companies that charge prices above the competitive level as a result of their involvement in anticompetitive practices; and
3. To recommend solutions for increasing the efficacy of the Directive's framework through its implementation by the Member States of the European Union.

The main contribution of the thesis is that it identifies the areas which require improvement and refinement before the Directive can reach its full compensatory potential. By doing so, the thesis also explains why the present formulation of the Directive's provisions does not offer sufficient mechanisms for adequately protecting the compensation rights of victims of competition law infringements.

PREFACE

This thesis is original, independent and unpublished work by the author, Ivona-Elena Zegrean.

TABLE OF CONTENTS

ABSTRACT	ii
LAY SUMMARY	iii
PREFACE.....	iv
TABLE OF CONTENTS	v
LIST OF FIGURES.....	vii
LIST OF ABBREVIATIONS.....	viii
ACKNOWLEDGEMENTS.....	ix
DEDICATION.....	x
1 INTRODUCTION.....	1
1.1. Research Project Motivation.....	1
1.2. Overview of the Argument.....	2
1.3. Methodological and Theoretical Reflections.....	5
2 WHAT IS EUROPEAN UNION COMPETITION LAW?.....	10
2.1. The European Union	10
2.2. The European Union’s Legal Order.....	13
2.3. Competition Law In the European Union	21
3 PUBLIC ENFORCEMENT AND ITS LIMITATIONS.....	26
3.1. The Early Days of Public Enforcement of EU Competition Law: Regulation 17/62 ...	26
3.2. The Modernization Process and Regulation 1/2003	29
3.3. Limitations of Public Enforcement.....	35
3.3.1 General deterrence theory and optimal penalties in competition law	35
3.3.2 Fines as sanctions	40
3.4. Chapter Conclusion	44
4 CONSUMER WELFARE AS ANALYTICAL FRAMEWORK FOR DIRECTIVE 2014/104/EU	47
4.1. Justification and Other Possible Options	47
4.2. The Economic Perspective: “Welfare” As “Surplus”	51
4.3. Consumer Welfare in the Commission’s Competition Policy.....	60

4.4.	Consumer Welfare in the CJEU Jurisprudence	70
4.5.	Chapter Conclusion	76
5	PRIVATE ENFORCEMENT OF COMPETITION LAW	77
5.1.	Incentives, Human Behaviour and Private Enforcement.....	77
5.2.	Balancing Incentives in Directive 2014/104/EU.....	79
5.2.1	Standing of indirect purchasers and the passing-on defence	79
5.2.2	Assessing harm and quantifying damages	85
5.2.3	Access to evidence	92
5.3.	Boosting Incentives: Collective Redress	98
5.4.	Chapter Conclusion	102
6	CONCLUSION.....	104
	BIBLIOGRAPHY	109

LIST OF FIGURES

Figure 1: Law of demand.....52

Figure 2: Law of supply.....52

Figure 3: Perfect equilibrium52

Figure 4: Consumer surplus and deadweight loss.....54

LIST OF ABBREVIATIONS

ACRPDP	Advisory Committee on Restrictive Practices and Dominant Positions
CJEU	Court of Justice of the European Union
EC	European Community
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
MS	Member State
NCA	National Competition Authority
OJ	Official Journal of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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Lui Luci

1 INTRODUCTION

1.1. RESEARCH PROJECT MOTIVATION

In the European Union (“EU”), public enforcement of competition law prevails. Competition provisions are being enforced in a few Member States (“MSs”) by private parties through damages actions, but private enforcement of competition law in the EU is generally scarce. A study conducted in 2004 for the European Commission (“the Commission”) found that at that time only three Member States allowed private damages claims on the basis of EU law, while twelve Member States allowed them on the basis of national competition laws¹. The study concluded that the law on private enforcement was underdeveloped in terms of the procedures and substantive requirements for bringing private damages claims. Moreover, victims did not have sufficient or adequate incentives to engage in this type of litigation. The greatest obstacles identified by the study were the high burden and standard of proof², difficult access to evidence³, unaffordable litigation

¹ Denis Waelbroek, Donald Slater and Gil Even-Shoshan, *Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules*, of 31 August 2004, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>, at p. 1 [2004 Study].

² The terms used in the Member States’ domestic legislation regarding the standard of proof expected from the claimant could be placed on a spectrum that ranged from: “balance of probabilities” in Cyprus, Ireland, Poland, the UK and Malta; to “high degree of probability” in Denmark; to “no reasonable or serious doubt” in Slovakia; to “beyond reasonable doubt” in Greece and Lithuania; to “certainty” in Slovenia: 2004 Study, *supra* note 3, at p. 55.

³ Pre-trial discovery, in the sense of disclosure of all materials relevant to the case, was non-existent in all the MSs, with the exception of Cyprus, the UK and Ireland. Out of these, only the UK obliged parties to disclose to the other party the existence of all documents which are or have been in their control which are material to the issues and the proceedings. Ireland required the party seeking discovery to specify the category of documents and the reasons why they are requested: 2004 Study, *supra* note 3, at p. 61.

costs⁴ and short limitation periods. Access to justice by individual consumers and small firms was further impeded by the absence of provisions for class actions, which would allow claimants with small claims to join together in a single action, in order to lower the costs of litigation by spreading them among many claimants.

To address these concerns, in November 2014, the EU Parliament passed Directive 2014/104/EU⁵ (“the Directive”) on private actions for damages, the result of a decade of consultations and debates on the desirability of strengthening private enforcement of competition law. The Directive’s main objective is to address the adequacy and sufficiency of incentives available to private parties for enforcing the EU competition norms. The Directive creates an EU-wide framework applicable in all MSs that sets out the minimum requirements for a harmonized system of private enforcement at EU level.

1.2. OVERVIEW OF THE ARGUMENT

This thesis inquires whether Directive 2014/104/EU succeeds in creating sufficient and appropriate incentives for private parties harmed by anticompetitive behaviour to bring damages claims. The right to bring damages actions comes from the direct effect of Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)⁶. Member States have an obligation to adequately protect the rights granted to individuals in Articles

⁴ Historically, contingency fees (forms of payment which depend on the outcome of the case, i.e. the lawyer only gets paid for his services if he wins the action) were prohibited in most European countries. At present, contingency fees are allowed in: Estonia, Finland, Germany, Hungary, Italy, Lithuania, Slovakia, Slovenia, Spain and the UK: Daniel R. Kelemen, “Euroleaglism and the European Legal Field”, in Antoine Vauchez and Bruno de Witte, eds., *Lawyering Europe: European Law as a Transnational Social Field* (Oxford and Portland: Hart Publishing, 2013), at pp. 254-5.

⁵ OJ L 349, 5.12.2014.

⁶ Articles 101 and 102 TFEU are the main provisions of EU competition law.

101 and 102 TFEU. This was stressed by the Court of Justice of the European Union (“CJEU”) in the case *Courage v Crehan*⁷, which clarified that compensation for damages caused by competition law infringements must be available in private disputes brought before national courts on the basis of Article 101 or 102 TFEU. Otherwise, these provisions would not reach their full effectiveness, as their application would be restricted to public enforcers⁸. The Directive formally recognizes the right to compensation as a European Union right – whether, and how, this right will be exercised remains to be seen.

The hypothesis of this thesis is that private enforcement of competition law in the EU will not become more vigorous following the implementation of Directive 2014/104/RU, unless the Directive’s provisions are supplemented at national level by rules whose content is above the minimum set out in the EU instrument. The reason for doubting the Directive’s practical impact is that the incentives it purports to create to encourage private damages actions are insufficient. The main argument is that while the preparatory work leading to the adoption of the Directive focused on lowering the barriers of access to justice for victims of anticompetitive conduct and creating a uniform framework of incentives for these victims to take legal action against infringing firms, the final version of the Directive partly misses these points. The strict protections against the disclosure of leniency documents in the files of competition authorities undermine the goal of lowering the burden and standard of proof of claimants, because it will still be difficult for them to gain access to evidence for building their case. The complete lack of any provisions facilitating class actions for the recovery of damages fails to lower litigation costs and has the effect of

⁷ Case C453/99 *Courage Ltd. v. Bernard Crehan* 2001 ECR I-6297.

⁸ *Ibid.*, at paras 26-27.

keeping in a particularly disadvantaged position consumers and small firms, for which litigation costs are usually prohibitive. Public enforcement agencies, due to their limited resources, have to prioritize the violations that warrant enforcement action and let some infringements go unpunished. In this context, despite the consumer welfare objective of EU competition law aiming to prevent the situation where wealth is illegally redistributed from consumers to competition law infringers, the restricted ability of victims to recover damages has the effect of allowing competition law infringers to keep most⁹ of their illegal gains.

It is assumed throughout the thesis that victims of anticompetitive acts will be unlikely to incur expenses on enforcing their right to compensation in the absence of sufficient safeguards indicating a possibility of succeeding in litigation. This is a traditional assumption of law and economics, namely that people are rational, self-interested beings, who want to avoid paying costs that exceed the benefits they will get when responding to the incentives offered to them. For victims of anticompetitive acts, this assumption translates into the necessity of litigation costs being lower than the recoverable compensation. On this reasoning, the purpose of legislation creating private enforcement systems should be to lower litigation costs as much as possible. If compensation rights are to be adequately protected by the EU through a system of private enforcement of competition law, that system needs to be one that facilitates equal access to compensation for all victims of illegal practices, by providing mechanisms for reducing litigation costs, such as class actions.

⁹ Since damages are usually calculated on the basis of the loss suffered by the claimant, not the gain accrued to the defendant, it cannot be said that damages awards strip competition law violators of all their illegal gains. The remedy that achieves this is disgorgement – the repayment with interest of all ill-gotten gains. However, asking defendants to disgorge their gains to the victims who claim damages may result in the unjust enrichment of the claimants.

The argument proceeds by explaining how the European Union and its legal system have evolved and places the EU competition provisions in this framework. Once readers understand the particularities of the EU, they are then introduced to the system of public enforcement of competition law in the EU. Here, I describe how competition law is enforced by the Commission and the National Competition Authorities (“NCAs”) and underline some shortcomings of the public enforcement system that point to an acute need for stronger private enforcement. Next, I argue for consumer welfare as the most appropriate analytical framework for assessing the substantive provisions of Directive 2014/104/EU. Then, the incentives package formalized by the Directive is evaluated to determine whether it is adequate and sufficient for encouraging victims of competition law violations to demand compensation through private actions for damages. Finally, a conclusion is drawn as to how the newly created EU system of private enforcement will interact with the already established system of public enforcement.

1.3. METHODOLOGICAL AND THEORETICAL REFLECTIONS

The thesis proceeds with a clearly evaluative¹⁰ goal in mind. The objective is to examine whether the Directive’s provisions meet the requirements of consumer welfare, as understood in economic theory. The thesis assesses the effectiveness of the legal rules contained in Directive 2014/104/EU from the point of view of economics, so the research

¹⁰ Mark Van Hoecke, ed., *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford and Portland, Oregon: Hart Publishing, 2011).

takes an external view¹¹, and can properly be characterized as research about law, rather than research in law.

The research carried out for this thesis is minimally doctrinal, as it resorts to discussions of case law only descriptively, e.g. to explain the legal system of the EU (in chapter 2), or as evidence for certain claims (in chapters 4 and 5). The EU rules on public enforcement of competition law are analysed doctrinally in chapter 3 to illustrate the shortcomings of the public enforcement system. Therefore, references to cases and legal rules are not intended to offer systematic analyses of black letter law or general theories of law.

The interdisciplinary approach is particularly evident in chapter 4, on consumer welfare, and in chapter 5, which applies the consumer welfare standard to the Directive's provisions. In economics, consumer welfare typically refers to the surplus that consumers enjoy as a result of differences between their willingness to pay and the price of a certain good. The Commission and the CJEU have used the consumer welfare standard for evaluating practices that could distort competition, but without explicitly adopting the economic definition of the term, or a specific, legal, definition of the concept. The European Commission's notion of consumer welfare includes terms like the prevention of "consumer harm" and the elimination of possible "detriments to consumers", which points to the economic understanding of consumer welfare as consumer surplus. Doctrinal research is used in this chapter to analyse the decision-making practice of the European Commission and the CJEU's jurisprudence, to discern a legal concept of "consumer welfare". To avoid

¹¹ As opposed to the internal point of view referred to by Hart, as the way in which the members of the group to whom the rule applies perceive the obligation it imposes: HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

the uncertainty surrounding the legal concept of consumer welfare, the conceptually stable economic notion of consumer surplus is adopted as the benchmark for analysis in following chapters. Chapter 5 is doctrinal only to the extent that it takes the legal rules set out in Directive 2014/104/EU as the object of inquiry. The actual assessment relies mostly on analysis of policy documents issued by the Commission during the process of defining the final content of the Directive. Economic theory also informs this chapter, as the arguments put forward are supported with evidence from this discipline.

Law and economics is the preferred method of research for this thesis, mainly because it is the most widely employed in relation to antitrust, the body of law regulating the most basic concept of economics, namely, the market. Competition law was built on the basis of microeconomic theory, so the development and interpretation of the competition provisions must always make economic sense. The tradition of looking at antitrust law through the lens of economics comes from the United States (“US”), as the vast majority of early antitrust scholarship originated in that country. The US system of competition law dates from 1890. American antitrust scholarship was very influential in the birth and evolution of competition law in the EU, since the latter only emerged in the 1960s, and was based, to a large extent, on the framework developed in the US. By transplanting the foundations of a competition law system from the United States’ jurisprudence and scholarship, the EU was able to tweak the system to respond to its political and economic realities without the costs associated with institutionalizing a completely new one.

The most intensely advocated normative value of competition law is consumer welfare, advanced by US Judge Robert Bork as the only legitimate goal that competition policy

should pursue¹². Despite sounding morally-charged, consumer welfare is a positive (i.e. descriptive), economic concept, because Bork's definition is concerned with the deadweight loss caused by a reduction of output in the case of monopoly power¹³. This idea is consistent with classical monopoly theory, which posits that "The standard economic rationale for making a cartel illegal is not that it charges too high a price or that it redistributes income from consumers to cartel members, but that it restricts output, causing a deadweight or efficiency loss [...] – a loss to consumers, without an offsetting gain to producers."¹⁴ In arguing strongly for consumer welfare as the exclusive goal of antitrust policy, Judge Bork was opposing the view that had started forming in the precedents of the US Supreme Court that competition policy should also be concerned with protecting the "small dealers and worthy men"¹⁵. The problem with protecting the welfare of small businesses was that it conflicted head on with the goal of consumer welfare, because it meant preserving inefficient firms in the market by protecting them from their more competitive rivals¹⁶. The main criticism of Bork's argument is that when talking about consumer welfare, he was actually referring to total welfare¹⁷ by emphasizing that consumer welfare is not concerned with the transfer of income from consumers to producers through monopoly prices.¹⁸

¹² Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York, USA: Basic Books, 1978), at p. 7

¹³ *Ibid.*, at p. 110.

¹⁴ William M. Landes, "Optimal Sanctions for Antitrust Violations", (1983) 50:2 U Chi L Rev 652, at p. 653.

¹⁵ Bork, *supra* note 12, at p. 41, citing Justice Brandeis in *Chicago Board of Trade v United States* 246 US 231 (1918), at pp. 238-241.

¹⁶ Bork, *supra* note 12, at p. 17.

¹⁷ Robert A. Skitol, "The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century", (1999) 9:1 Cornell LJ & Pub Pol'y 239, at p. 249.

¹⁸ Bork, *supra* note 12, at p. 110: "The consumer welfare model, which views consumers as a collectivity, does not take this income effect into account".

The total welfare standard, which is concerned with the maximization of wealth for society as a whole, is justified by the Potential Pareto Improvement Criterion (or Kaldor-Hicks efficiency). The Kaldor-Hicks concept of efficiency is based on the idea that if all consumers and producers are price-takers, then a change from one state of the economy to the other will increase welfare if the gains to the economy are greater than the losses, and any discrepancies in wealth distribution can be remedied through lump-sum transfers¹⁹. Kaldor-Hicks efficiency promotes a total welfare standard: as long as an act produces more gains to society (i.e. to both consumers and producers, through the maximization of either or both consumer surplus or/and producer surplus) than losses, the distribution of wealth between these does not matter. Distributional issues are irrelevant only as long as the winners are, in theory, able to compensate the losers. However, there is no requirement that compensation actually occur.

In conclusion, the bulk of this thesis is written from a value-neutral, law and economics perspective, using doctrinal analysis of law only descriptively or illustratively. While a strictly economic (methodological) approach to competition law is desirable, especially to ensure consistency in public enforcement, a deeper normative reason becomes necessary to ground a vigorous private enforcement system. The thesis recognizes consumer welfare as an appropriate normative compass, but adopts the more straightforward notion of consumer surplus as the analytical framework, to keep the arguments' exposition as clear as possible.

¹⁹ Nicholas Kaldor, "Welfare Propositions of Economics and Interpersonal Comparisons of Utility", (1939) 49:195 Econ J 549.

2 WHAT IS EUROPEAN UNION COMPETITION LAW?

2.1. THE EUROPEAN UNION

The conclusion of the Second World War in 1945 left Europe in a dire economic situation and in “political collapse”²⁰. A desire to combat further nationalist warfare and maintain peace among European nations prompted the introduction of an innovative model of cooperation in Europe. Initially aimed at economic integration, the current European Union is moving towards greater political integration as well.

The EU has its roots in the European Coal and Steel Community (“ECSC”), founded in 1951 by France, Germany, Italy, Belgium, the Netherlands and Luxembourg, as a means of re-establishing relations between France and Germany by engaging the two in peaceful cooperation on the newly created common market in coal and steel. The ECSC represented the first step of European integration. In 1952 and 1953, the six ECSC Member States tried to create the European Defence Community and the European Political Community, respectively, which pointed to the beginning of a federalization movement in Europe. However, both initiatives failed when the French national assembly rejected the ratification of the federalization project. It was only in 1992 that this plan was revisited and the foundations of the European Union laid down in the Treaty of Maastricht, which established

²⁰ Stanley Hoffmann, “Obstinate or Obsolete? The Fate of the Nation State and the Future of Western Europe”, (1966) 95:4 *Daedalus* 862, at p. 872.

a European political organization with “a mix of intergovernmental and supranational features”²¹.

Despite opposition to political integration, the impetus for economic integration triggered by the ECSC continued with the creation of the European Economic Community (“EEC”) and its common market through the Treaty of Rome in 1957. The EEC contained the same six Member States as the ECSC. The idea of the common market was based on the gradual removal of barriers to trade among the Member States and the introduction of a customs union for trade relations with external partners. In addition to the abolition of tariffs and quotas for internal trade, the common market would also be characterized by “four freedoms”: the free movement of goods, services, workers and capital within the EEC. Another feature of the Treaty of Rome was the requirement of approximation of economic policies of the Member States, thereby ensuring a level-playing field and the harmonious development of the EEC’s economy²². The EEC welcomed new members: in 1973, Ireland, Denmark and the United Kingdom; in 1981, Greece; and in 1986, Spain and Portugal.

In 1985 a White Paper was issued by the European Commission, the supranational authority of the EEC, which set out specific barriers that would have to be removed for the completion of the internal market, before a 1992 deadline. This became a political commitment of the EEC’s Member States²³ through the Single European Act, signed in 1986.

In addition to institutional changes in the governance of the EEC, the new agreement, in

²¹ Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials*, 3rd edition (Oxford University Press, 2003), at p. 23 [Craig and de Burca, 3rd edition].

²² Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials*, 6th edition (Oxford University Press, 2015), at p. 5 [Craig and de Burca, 6th edition].

²³ Craig and De Burca, 3rd edition, *supra* note 21, at p. 19.

Article 18, defined the internal market as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”.

The first important amendment to the Treaty of Rome was the Treaty on European Union (“TEU”) signed by the Member States in 1992 in Maastricht, which renamed the EEC Treaty of Rome the “European Community Treaty”, and the EEC the “European Community” (“EC”). The TEU of 1992 pushed economic and political integration in Europe further, by introducing the goal of monetary union and the intergovernmental “pillars” of Common Foreign and Security Policy, and Justice and Home Affairs.

The TEU also launched the idea of differentiated integration, allowing flexibility and exceptions to the concomitant involvement of all Member States in the EU’s policies. This meant that some Member States may not participate in certain policies at all, or may adopt those policies at a later date or only partially.²⁴ This development was necessary to allow Eastern European states to join the Union, without requiring them to achieve the same level of integration as the other Member States. Further amendments were made to the original EEC Treaty in the Treaty of Amsterdam in 1996 and the Treaty of Nice in 2000. These prepared the Union for its enlargement eastward in 2004, when ten new Member States²⁵ joined the Union. In 2007, Romania and Bulgaria joined, followed by Croatia in 2013.

The most significant changes to the Treaty of Rome were brought by the Lisbon reforms in 2009; the Treaty of Lisbon amended the Maastricht Treaty on European Union and renamed

²⁴ Craig and de Burca, 6th edition, *supra* note 22, at p. 13.

²⁵ These were: Cyprus, the Czech Republic, Hungary, Poland, Slovakia, Slovenia, Estonia, Latvia, Lithuania, and Malta.

the Treaty of Rome of 1957 the “Treaty on the Functioning of the European Union”. The 2009 TEU and TFEU are the ones currently governing the European Union. The 2009 reforms removed the “pillar structure” of the Union and introduced governing norms of a constitutional nature, in Title I – Common Provisions, Title II – Democratic Principles and Title III – Provisions on the Institutions²⁶. The existence of this kind of norms is a new feature of the EU, because, prior to the Lisbon Treaty, the Union failed to ratify a Constitutional Treaty, as a result of opposition from two founding Member States – France and the Netherlands. The Lisbon Treaty draws heavily on the Constitutional Treaty, but terminology that underlined the increased federalization of the Union was removed.

2.2. THE EUROPEAN UNION’S LEGAL ORDER

The European Union maintains its supranational character through the existence of institutions that govern the functioning of the Union autonomously and independently of the particular preferences of the Member States. Article 13 of the Treaty on European Union provides that the institutions of the EU are: the European Parliament, the European Council, the Council²⁷, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. It is important to note that the European Union does not abide by a strict separation of powers among its institutions. This enables both the European Parliament (composed of representative of the EU’s citizens²⁸) and the Council (made up of Ministers from each Member State²⁹) to exercise legislative and

²⁶ Craig and de Burca, 6th edition, *supra* note 22, at p. 21.

²⁷ This Council brings together all ministers of particular area from all the MSs, to decide on policy and propose legislation relating to that area, e.g. transportation, education, etc.

²⁸ Article 14(2) TEU.

²⁹ Article 16(2) TEU.

budgetary functions concurrently³⁰. The Heads of State and Government of the Member States meet four times a year in the European Council³¹, which defines the general political directions and priorities of the EU³², and has no legislative functions³³. The European Council decides by consensus³⁴. The promotion of the general interest of the EU and its external representation are the tasks of the Commission³⁵, an independent body, whose members cannot seek, nor take instructions from the Member States³⁶. The Commission is the truly supranational institution of the EU, due to this requirement of independence from the influence of the Member States. The Commission, together with the Court of Justice of the European Union, also exercises enforcement functions by ensuring that EU law is adequately applied throughout the Member States³⁷.

Participation by Member States in the European Union implies a limitation of national sovereignty. Hofmann et al. explain the phenomenon very eloquently:

“Prior to the creation within the European Communities of a supranational system of shared sovereignty in pursuit of European integration, states were more or less unrestrictedly sovereign within their territories. [...] the creation of the European Communities, with their supranational legal order, changed this radically. In particular, one of the most innovative consequences of the notion of shared

³⁰ Articles 14(1) and 16(1) TEU.

³¹ Articles 15(2) and 15(3) TEU.

³² Article 15(1) TEU.

³³ Article 15(1) TEU.

³⁴ Article 14(4) TEU.

³⁵ Article 17(1) TEU.

³⁶ Article 17(3) TEU.

³⁷ Articles 17(1) and 19(1) TEU.

sovereignty in a supranational legal system was the creation of an alternative to the traditional differentiation between internal functions of a state, expressed in national public law, and the external relations of the state conducted within the framework of public international law. With increasing European integration, the distinction between the ‘inner sphere’ of a state and its ‘outer sphere’ became less precise and less prominent. Member States allowed public power to be exercised externally to their own territorial base and organization. This opening toward a supranational system led to an ever more strongly developing de-territorialization through the joint exercise of public power.”³⁸

This extract emphasizes how Member States have surrendered part of their sovereign power to this supranational political organization that is the European Union, with the effect that the EU can now impose its legal order to the territories of the Member States. Not all sovereignty has been ceded, though. The European Union has “competence” in certain policy areas, i.e. it has the right to regulate those areas and the right to expect and enforce compliance from the Member States. The competences of the EU are limited by the principle of conferral, meaning that the EU only has those competences that the Member States have granted to it through the Treaties³⁹. In the absence of explicit conferral of competence by the Member States to the EU, the Union cannot intrude into the sovereign power of the Member States⁴⁰.

³⁸ Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Turk, *Administrative Law and Policy of the European Union* (Oxford and New York: Oxford University Press, 2011), at pp. 5-6.

³⁹ Article 5 TEU.

⁴⁰ Articles 5(1), 5(2) and 4(1) TEU.

There are three categories of competence, defined by Article 2 of the Treaty on the Functioning of the European Union: exclusive competence (Article 2(1) TFEU), competence shared with the Member States (Article 2(2) TFEU) and competence to support, coordinate or supplement the actions of the Member States (Article 2(5) TFEU). The areas in which the EU has exclusive right to legislate and decide on policy are: the customs union, the competition rules necessary for the functioning of the internal market, monetary policy of the Member States whose currency is the Euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy⁴¹. EU competence is shared with the Member States in actions related to: the internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice and public health. However, the list of areas of shared competence is not exhaustive. Article 6 TFEU provides that the EU can only take supporting, coordination or supplementary action in addition to any measure taken by the Member States in the following areas: protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation.

The exercise of competence by the EU through its institutions is subject to the principles of subsidiarity and proportionality. In the areas governed by Articles 4 and 6 TFEU, EU intervention is constrained by the principle of subsidiarity, defined in Article 5(3) TEU: the EU will only act if the goals of the intended action cannot be effectively achieved by the

⁴¹ Article 3(1) TFEU.

Member States on their own and those goals would be better achieved if action were taken at EU level. EU action must respect the principle of proportionality in all areas of competence, meaning that the content and form of Union action shall not exceed what is necessary to achieve the objectives set out in the Treaties⁴².

The EU exercises its competences through legal instruments and non-binding policy recommendations. Article 288 TFEU provides that EU legislation falls into one of the following categories: regulations, directives and decisions. These legal instruments are adopted through one of two legislative procedures. Most EU laws in the form of regulations or directives are passed through the ordinary legislative procedure⁴³, which involves the joint adoption by the European Parliament and Council, on a proposal by the Commission. The special legislative procedure in Article 289(4) TFEU has a very restricted scope and refers to the adoption of legislation by the Council unanimously or with the consent of, or after consultation with, the European Parliament; it also encompasses adoption by the European Parliament after approval by the Council.

In contrast to international law, EU law goes beyond regulating the relationship between its Member States, because it creates rights and obligations for EU citizens as well, based on the principle of direct effect of EU legislation. The concept was first coined by the Court of Justice of the European Union in the 1960s case *Van Gen den Loos*⁴⁴. At present, direct effect is accorded to Treaty provisions that are sufficiently clear, precise, and unconditional to be

⁴² Article 5(4) TEU.

⁴³ The detailed steps of the procedure are described in Article 294 TFEU.

⁴⁴ Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gen den Loos v Nederlandse Administratie der Belastingen* [1963] ECR 13.

invoked by individuals before national courts. This principle developed from the judgment of the CJEU in *Van Gen en Loos*⁴⁵, which established the criteria for direct effect as being: clear, negative (i.e. imposing an obligation to not do something), unconditional, containing no reservation (i.e. discretion) on the part of the Member State, and not dependent on any national implementing measure⁴⁶. In subsequent years, the CJEU extended the direct effect of Treaty Articles to circumstances where Member States retained discretion over the application of Treaty provisions⁴⁷ and to cases where implementing measures were required at national level, as long as the general principle underlying the Treaty provision was sufficiently certain⁴⁸. Treaty provisions having direct effect can be relied upon by private citizens in both vertical (i.e. against the State) and horizontal (i.e. against private individuals) disputes. The direct effect of a Treaty provision means that its application is no longer the exclusive domain of the European institutions, but national courts also have jurisdiction to decide in actions based on directly effective EU law provisions.

The direct effect of regulations is set out in Article 288 TFEU, which provides that they will be binding in their entirety and directly applicable in all Member States. Regulations, therefore, become part of national law automatically, without the need for implementing measures, in a similar way international law is incorporated by monist states. The CJEU affirmed the direct effect of regulations in the *Muñoz* case, where it said that “owing to

⁴⁵ Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gen den Loos v Nederlandse Administratie der Belastingen* [1963] ECR 13.

⁴⁶ *Ibid.*, at p.26.

⁴⁷ In Case 13/68 *SpA Salgoil v Italian Ministry of Foreign Trade* [1968] ECR 453 and in Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

⁴⁸ In Case 2/74 *Reyners v Belgium* [1974] ECR 631 and in Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483.

their very nature and their place in the system of sources of Community law, regulations operate to confer rights on individuals which the national courts have a duty to protect”.⁴⁹

With respect to directives, Article 288 TFEU says that they “shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. It is obvious from this formulation that, contrary to regulations, directives are not considered in the Treaty to be directly applicable. Within the EU’s legal order, directives are coordination mechanisms, whose role is to harmonize the law of the MSs on specific topics, by setting out objectives and a minimum content for the legal measures necessary for achieving them. Although discretion is given to the MSs as to the form and method of incorporating a directive’s aims into domestic law, MSs have an obligation to implement them within a certain period of time. Since implementing measures are always required to give effect to directives, it follows that directives do not meet all the conditions of direct effect set out by the CJEU in *Van Gen den Loos*⁵⁰. Nevertheless, the CJEU in *Van Duyn*⁵¹ recognized that directives can have vertical direct effect, i.e. can be invoked in disputes against the state. Otherwise, the CJEU reasoned, the “useful effect” of directives would be weakened if individuals could not rely on them before national courts⁵². Moreover, MSs cannot rely on their own failure to implement a directive in order to deny its binding effect⁵³. However, directives do not have horizontal direct effect, meaning that individuals cannot invoke them against other private

⁴⁹ Case C-253/00 *Muñoz v Frumar Ltd.* [2002] ECR I-7289, at para 27.

⁵⁰ *Supra* note 36.

⁵¹ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

⁵² *Ibid.*, at para 12.

⁵³ Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] ECR 1629, at para 23.

parties⁵⁴. This is a critical point in relation to Directive 2014/104/EU on private actions for damages, because citizens will not be able to benefit from its provisions unless it is timely and adequately implemented by MSs.

In applying national legal rules for resolving disputes, courts must interpret domestic legislation in accordance with EU law, including directives⁵⁵, to maintain the uniformity of the EU's legal order. Where a domestic provision contradicts a norm of EU law, the provision must be set aside and EU law applied instead, even if the applicable national law is the constitution⁵⁶. This means that EU law takes precedence over national law of whatever rank. This principle of supremacy of EU law over national law was developed by the CJEU in the case *Costa v ENEL*⁵⁷, where the Court based its reasoning on the surrender of sovereignty by the Member States and the already established direct effect of EU provisions. The principle of supremacy of EU law is premised on the need for consistency and uniformity across the Member States for the purpose of achieving the internal market objective of the Union. Allowing national norms that diverge from the norms of EU law would undermine the effort of market integration by diminishing the significance of the Treaty provisions on the common market – the very foundation of the European Union. The

⁵⁴ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723; confirmed in Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3347.

⁵⁵ National courts are under an obligation to interpret domestic laws, including pre-existing law and principles, in accordance with directives: Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR I-1892; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-04135.

⁵⁶ Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

⁵⁷ Case 5/64 *Flaminio Costa v ENEL* [1964] ECR 585.

fact that a national law is not applied, because it contradicts EU law, does not mean that the law is invalid or non-existent⁵⁸, but rather that it is “incompatible”⁵⁹ with EU provisions.

2.3. COMPETITION LAW IN THE EUROPEAN UNION

To achieve the overarching goal of creating and maintaining the internal market, Article 3(1)(b) of the 2009 Treaty on the Functioning of the European Union, gives the European Union competence to legislate in the area of competition policy. The core EU competition law provisions are contained in Articles 101 and 102 TFEU, which apply to anticompetitive practices that have the potential to undermine the goal of market integration by reducing or distorting the flow of trade between the Member States. It follows from the discussion in the previous section that the competition rules of the European Union are directly applicable by the courts of the Member States.

While Member States are free to enact their own competition laws, the principle of supremacy requires that domestic laws be compatible with Articles 101 and 102, i.e. that they do not set standards lower than those required by EU competition law. A condition for the applicability of Articles 101 and 102 is that the conduct in question must impact trade between the Member States; if an anticompetitive practice only affects a region of a Member State, the provisions of Articles 101 and 102 do not apply, and the conduct must be assessed under national law only.

⁵⁸ Joined Cases C-10-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl* [1998] ECR I-6307.

⁵⁹ Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 629.

Article 101 TFEU⁶⁰ regulates the competitive process between firms at the same level of the production chain and prohibits agreements between competitors, decisions by associations or concerted practices that attempt to distort parameters of competition such as price or output. Agreements that violate this prohibition are automatically void by virtue of Article 101(2) TFEU. Once an agreement is found to prevent, restrict or distort competition, it may be assessed under Article 101(3) to determine whether it creates any economic benefits to producers and consumers that would justify the restriction. Article 101(1) TFEU also applies to vertical restraints between firms at different levels in the production chain, such as restrictions imposed by a manufacturer to its distributors regarding the territory in which products can be sold.

⁶⁰ The full text of Article 101 TFEU is: “1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

Article 102 TFEU⁶¹ deals with abuses of dominant position, which are attempts by firms enjoying substantive power on the market to monopolize that market by excluding competitors or preventing potential competitors from entering the market.

The EU has the responsibility to clarify the interpretation and application of the competition provisions in Articles 101 and 102 through the enactment of relevant regulations or directives. Article 103(1) provides that such legislative instruments must be adopted by the Council, on a proposal by the Commission, after consulting the European Parliament. This means that for legislative acts relating to competition policy, the special legislative procedure detailed in Article 289(4) TFEU applies.

Another area of competition policy regulated by the EU is merger control. Merger and acquisitions activity is subject to notification to the Commission of any transactions that exceed a certain monetary threshold. The goal is to ensure that market power does not become concentrated in the hands of a few firms, because concentrations carry the risk of facilitating anticompetitive behaviour. The rules applicable to mergers are contained in Council Regulation 139/2004⁶², which sets out the notification procedure and the substantive test applicable for the assessment of the notified transaction. As merger

⁶¹ The full text of Article 102 TFEU is: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

⁶² OJ L 24, 29.01.2004.

control operates ex-ante and plays a more prophylactic role, it is outside the scope of this thesis, because mergers are not anticompetitive acts in themselves, and therefore do not merit punishment, as opposed to abuses of dominance and horizontal agreements.

Articles 101 and 102 TFEU go beyond making anticompetitive conduct in the EU illegal; they specify that such conduct is “prohibited as incompatible with the internal market”. This formulation underscores two important issues. First, it points to the administrative nature of EU competition law⁶³, which derives from the European Union’s power to regulate the functioning of the internal market and enforce the rules enacted for this purpose⁶⁴. The European Union’s competence in the area of criminal law is limited to the enactment of directives harmonizing the criminal procedure rules concerning the admissibility of evidence and the rights of defendants and of victims⁶⁵. The EU can establish minimum rules for the definition of criminal offences and sanctions only in areas of particularly serious crime with a cross-border dimension, like terrorism, trafficking of humans, drugs and arms, money

⁶³ For a detailed account of the administrative nature of the European Union, see Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Turk, *Administrative Law and Policy of the European Union* (Oxford and New York: Oxford University Press, 2011) and Mario P Chiti, “Forms of Administrative Action”, (2004) 68 LCP 37.

⁶⁴ Article 103 TFEU contains this regulatory power of the EU: “1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.”

⁶⁵ Article 82 TFEU.

laundrying, corruption, counterfeiting, cybercrime and organized crime⁶⁶. Since competition law is not included in either of the provisions dealing with the EU's competence in criminal matters, it follows that sanctions for violations of the EU competition provisions cannot be of a criminal nature. Therefore, any penalties for the infringement of EU competition law are administrative; they aim to induce compliance with the European Union rules governing the proper functioning of the internal market.

Secondly, the prohibition of anticompetitive practices as "incompatible with the internal market" underlines the fact that EU competition law is directed at maintaining the internal market. Article 3(1)(b) TFEU specifies that the competition rules enacted by the EU are for ensuring the functioning of the internal market. Competition policy in the European Union, therefore, is subordinated to the "single market imperative"⁶⁷.

⁶⁶ Article 83 TFEU.

⁶⁷ Richard Whish and David Bailey, *Competition Law*, 7th edition (Oxford and New York: Oxford University Press, 2012), at p. 23 [Whish and Bailey].

3 PUBLIC ENFORCEMENT AND ITS LIMITATIONS

Before proceeding to set out the analytical framework I will use to assess the provisions of Directive 2014/104/EU on private actions for damages, it is important to illustrate how the system of public enforcement of competition law has functioned within the European Union's legal order. Against this background, some shortcomings of the public enforcement system will be identified, which will point to the acute need for a stronger private enforcement.

3.1. THE EARLY DAYS OF PUBLIC ENFORCEMENT OF EU COMPETITION LAW: REGULATION 17/62

With the creation of the EEC in 1957, competition policy gained importance as a facilitative tool for the achievement of the Treaty's objective, namely accelerating growth through the establishment of the internal market and the approximation of the Member States' economic policies. In this context, Ehlermann argued that competition policy was both "the engine for completing the internal market and its essential component"⁶⁸, a characterization supported by the fact that the Treaty of Rome included "the institution of a system ensuring that competition in the common market is not distorted"⁶⁹ as a priority for the Member States' activities in the early days of the EEC. This indicated that a well thought-out competition law system was seen as a necessary foundation for an effective

⁶⁸ Claus-Dieter Ehlermann, "The Contribution of EC Competition Policy to the Single Market", (1992) 29:2 CML Rev 257, at p. 259-261.

⁶⁹ Article 3(f) of the Treaty of Rome.

internal market among the MSs, but also as the essential mechanism for its smooth operation. Article 87 of the 1957 Treaty of Rome imposed a timeline of three years for the implementation of a competition policy at the EEC level; in addition to clarifying the scope of the competition provisions contained in Article 85 and 86 (equivalent to Articles 101 and 102 TFEU) and setting up effective sanctions for violations, especially important was the designation of enforcement functions to the Commission and the CJEU⁷⁰. Until legislation was passed at EEC level, competition law enforcement was left to the competition authorities of each Member State.⁷¹

The first EEC legislative act on competition law enforcement was Regulation 17/62, passed by the Council, on a proposal from the Commission, in 1962.⁷² The first regulation implementing the Treaty's competition provisions gave the Commission the bulk of responsibility for competition law enforcement. However, national authorities and courts could not be excluded from applying Articles 85 and 86 of the Treaty of Rome, because these provisions became, under the supremacy principle, part of the Member States' laws without the need for implementing legislation at national level. Article 9(3) of Regulation 17/62 confirmed that national competition authorities retained the right to apply Articles 85 and 86, as long as their actions did not overlap with actions by the Commission in the same matter. However, national competence in relation to Article 85 (now Article 101 TFEU) was limited to the first two parts of that provision, namely the determination that certain horizontal agreements and practices infringed Article 85(1) and were, as a result, void under

⁷⁰ Article 87(2)(d) of the Treaty of Rome.

⁷¹ Article 88 of the Treaty of Rome.

⁷² And published in the Official Journal on 21 February 1962, OJ 204/62.

Article 85(2). It was ultra vires for domestic courts or competition authorities to engage in the application of the exception in Article 85(3).

The application of Article 85(3) fell under the exclusive jurisdiction of the Commission⁷³, meaning that it was the only body that could declare Article 85(1) inapplicable pursuant to Article 85(3). Regulation 17/62 imposed an obligation on firms that wanted the benefit of the exception in Article 85(3) to notify their agreements to the Commission; this, in order to simplify administration and ensure effective supervision in the application and interpretation of Article 85.⁷⁴ To ensure the availability of a defence where agreements were found contrary to Article 85(1), firms started notifying their agreements, as a risk management strategy, even when those agreements were perfectly legal. Additionally, Article 2 of Regulation 17/62 allowed firms to ask for negative clearance from the Commission for notified agreements that did not present competition concerns under Article 85. This notification system created a huge backlog for the Commission, which, in the years immediately following the entry into force of Regulation 17/62, was inundated with over 34,000 notifications.⁷⁵ To manage its workload, the Commission issued block exemptions for certain types of agreements and “de minimis” notices indicating minimum thresholds for triggering the application of Articles 85 and 86, and replaced formal decisions with “comfort letters” targeted at undertakings seeking negative clearance.⁷⁶ Nevertheless, even after more than three decades, over one thousand notifications were

⁷³ Article 9(1) of Regulation 17/62.

⁷⁴ Article 4(1) of Regulation 17/62.

⁷⁵ Claus-Dieter Ehlermann, “The Modernization of EC Competition Policy: A Legal and Cultural Revolution”, European University Institute Working Papers, RSC No. 2000/17.

⁷⁶ *Ibid.*

still pending in the Commission's docket⁷⁷. It appeared that the need for uniformity throughout the EEC, a standard stricter than coherence or consistency, advocated by France in 1960s, placed an undesirable burden on the Commission. Its resources in relation to competition law enforcement were largely dedicated to the review of notified agreements and the issuance of exemption decisions or comfort letters.

3.2. THE MODERNIZATION PROCESS AND REGULATION 1/2003

Evidently, the Commission's sole jurisdiction over Article 85(3) did all but simplify its administration. The assessment of notifications distracted the Commission from pursuing a targeted competition policy and focusing its efforts and resources on detecting, investigating and remedying truly anticompetitive behaviour. However, it is important to note that Regulation 17/62 remained in force for over 40 years, during which time, the EEC grew from six Member States in 1957, to fifteen⁷⁸ at the turn of the century. Therefore, the backlog was not due solely to the Commission's limited resources and capacity to deal with all notifications, but also to the changing realities of the EEC, which evolved into the EC through the Treaty of Maastricht of 1992 (that renumbered Articles 85 and 86 of the Treaty of Rome as Articles 81 and 82).

To respond to the challenges posed by the proposed enlargement of the Community eastward and the need for increased efficiency in competition policy, the Commission

⁷⁷ Claus-Dieter Ehlermann, *supra* note 75.

⁷⁸ Finland, Sweden and Austria became MSs in 1995.

published, in 1999, a White Paper⁷⁹ setting out its view of a modern system for the public enforcement of competition law, built on simplified administration, through the abolition of the notification obligation, and the decentralized application of Articles 81 and 82 by the competition authorities and courts of the Member States. The modernization process culminated in the adoption of Regulation 1/2003⁸⁰, which replaced Regulation 17/62 and entered into force in May 2004. In the discussion of whether and how to change the system of public enforcement in Regulation 17/62, two issues were particularly important: (i) the direct effect of Article 81(3); and (ii) the allocation of responsibilities between the Commission and NCAs to ensure efficiency and harmonious application and interpretation.

Opponents of the Commission's position that Article 81(3) was capable of having direct effect and, therefore, its application could be left to the courts and competition authorities of the Member States, based their arguments on two main grounds. First, they relied on Article 83(2)(b) of the Treaty of Maastricht, which required the legislation implementing Article 81 "to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other"⁸¹. The argument was that ending the Commission's monopoly over Article 81(3) would go against the requirement for effective supervision, and so, giving direct effect to Article 81(3) would amount to a violation of the Treaty. While this was a valid argument in the sense that giving national courts competence

⁷⁹ White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, Brussels, 28.04.1999.

⁸⁰ OJ L 001, 04/01/2003.

⁸¹ Article 83(2)(b) of the Treaty establishing the European Community (Treaty of Maastricht), OJ C 224, 31/08/1992 P. 0029.

over Article 81(3) would indeed reduce, in principle, the Commission's supervisory authority, 40 years of practice showed that the supervision by the Commission through the notification system was both ineffective and inefficient, so a new balance had to be found between the two goals in Article 83(2)(b).

The second objection to granting Article 81(3) direct effect referred to the *Van Gend en Loos* criteria, in particular, the requirement that a directly effective Treaty provision must be sufficiently precise. Article 81(3) subjects agreements found contrary to Article 81(1) to a further assessment to determine whether the agreement should be exempted from the application of Article 81(1). The cumulative exemption conditions are that: (i) the agreement either: gives rise to efficiencies in the production or distribution of goods, or promotes innovation; (ii) a fair share of these efficiencies is passed on to consumers in the form of lower prices, better quality, more variety, etc.; (iii) the restrictions of competition in the agreement are indispensable to the creation of these efficiencies; and (iv) the agreement does not result in the complete elimination of competition. Critics argued that Article 81(3) was not precise enough to have direct effect, because it required the weighing of competing interests, those of the parties to the agreement and those of society as a whole, which could extend to areas unrelated to competition policy, like public health or the environment. This carried the risk of national courts in different MSs reaching opposing conclusions in relation to similar agreements, or even with respect to cross-border agreements, which could be allowed in one MS and sanctioned in another. In the absence of any obligation of domestic courts to take into account prior Commission decisions or refer to court judgments in other MSs, it was considered likely that uniformity in the

interpretation of Article 81(3) would be compromised.⁸² One solution to this concern was Article 234 of the Treaty of Maastricht (now Article 267 TFEU), under which national courts can refer to the CJEU questions about the interpretation of Treaty provisions. The availability of the preliminary reference procedure in Article 267 weakens the argument that the direct effect of Article 81(3) would compromise uniformity, since the objective of this article is precisely to aid national courts in applying EU law in domestic cases in order to ensure the uniform interpretation of EU law across all MSs.

These arguments against reform, therefore, did not hold, and Regulation 1/2003 gave NCAs⁸³ and national courts⁸⁴ the power to apply Articles 81 and 82 in their entirety. Several mechanisms are set out in the new Regulation to reduce the risk of inconsistency in the decentralised application of these provisions. First, NCAs have the option to consult the Commission on matters of application in individual cases⁸⁵. Second, the Commission and NCAs have the right to intervene, on their own initiative, in proceedings before national courts by submitting written opinions, or, if authorized by the court, by making oral observations, if they perceive a risk of inconsistent interpretation or application of Articles 81 and 82 by the judiciary.⁸⁶ In order to facilitate the assessment of cases and the preparation of interventions, the NCAs or the Commission may request that the national

⁸² Ernst Steindorff, "Article 85, para 3: No Case for Application by National Courts", (1983) 20:1 CML Rev 125, at p. 127.

⁸³ "Article 5. Powers of the competition authorities of the Member States. The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases."

⁸⁴ "Article 6. Powers of the national courts. National courts shall have the power to apply Articles 81 and 82 of the Treaty."

⁸⁵ Article 11(5) of Regulation 1/2003.

⁸⁶ Article 15(3) of Regulation 1/2003.

court forward to them any relevant information⁸⁷. Third, Article 16 of the Regulation provides that neither the NCAs nor domestic courts may take decisions that run counter to those of the Commission. Therefore, decentralisation was not complete, because the Commission retained a quasi-supervisory role to ensure that national decisions do not contradict those adopted at Union level.

Having established that Article 81(3) could be given direct effect without compromising uniformity across the MSs, the problem remained of allocating enforcement responsibilities between the Commission and the NCAs and domestic courts in a way that did not cause delays or confusion regarding the competent enforcer. To tackle this, Regulation 1/2003, in Chapter IV, sets out a comprehensive framework for cooperation, which imposes obligations to inform, consult and disclose on both the Commission and national institutions (competition authorities and courts). For example, to achieve an efficient division of work with respect to the same case, the Commission and NCAs must inform each other of any investigations they plan to open and transfer information pertinent to the assessment of a case⁸⁸. NCAs have competence to take over a case only if there is a material link between the infringement in question and the territory of the particular NCA that claims competence⁸⁹. There are three cumulative conditions for an NCA to be considered well placed to handle a particular case where a material link is present: (i) the agreement or practice has, or will have, substantial effects on competition within its territory, is implemented within or originates from its territory; (ii) the authority is able to effectively

⁸⁷ Article 15(3) of Regulation 1/2003.

⁸⁸ Articles 11(2) and 11(3) of Regulation 1/2003.

⁸⁹ Article 9 of Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03) [Commission Notice on cooperation].

bring to an end the entire infringement; and (iii) the NCA can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement⁹⁰. When complaints in relation to the same case are lodged with two or more NCAs, or when two or more NCAs are applying the competition provisions to the same infringement by the same undertakings, an NCA currently working on that case may suspend or close its proceedings, but it has no obligation to do so⁹¹. An efficient allocation of resources would mandate that only one NCA deal with the case, namely, the one that is best placed to do so; however, NCAs may be pursuing different national interests and goals for competition policy through the application of their domestic laws, which are valid reasons for continuing the proceedings.

Where the anticompetitive effects of a violation affect at least three MSs, the Commission is best placed to take on the case⁹². The initiation of proceedings by the Commission relieves NCAs of competence. Nevertheless, NCAs still retain a role in the enforcement process: when the Commission intends to use its decision-making powers⁹³ under Regulation 1/2003, it has the obligation to consult an Advisory Committee on Restrictive Practices and Dominant Positions (“ACRPDP”), composed of representatives of the competition authorities of the MSs⁹⁴. The ACRPDP is empowered to issue written opinions about the Commission’s draft decisions⁹⁵. The Commission must take the utmost account of

⁹⁰ Article 8 of Commission Notice on cooperation, *supra* note 70.

⁹¹ Article 13 of Regulation 1/2003 and Article 22 of Commission Notice on cooperation, *supra* note 70.

⁹² Article 14 of Commission Notice on cooperation, *supra* note 70.

⁹³ E.g. to issue decisions finding infringements (Article 7 of Regulation 1/2003), ordering interim measures (Article 8 of Regulation 1/2003), imposing fines (Article 23 of Regulation 1/2003), or accepting commitments from undertakings (Article 10 of Regulation 1/2003).

⁹⁴ Articles 14(1) and (2) of Regulation 1/2003.

⁹⁵ Article 14(3) of Regulation 1/2003.

these opinions and inform the ACRPDP of the way in which it has done so⁹⁶. This mechanism allows NCAs to keep abreast of the Commission's actions in order to prioritize their own workload and offers them the opportunity to advocate for their national interests in relation to the Commission's proposed decision.

3.3. LIMITATIONS OF PUBLIC ENFORCEMENT

3.3.1 General deterrence theory and optimal penalties in competition law

The main trigger of the modernization process was the Commission's belief that strong and consistent enforcement of the competition rules will result in a decrease in the number of instances where economic actors decide to take anticompetitive actions. This reflects an assumption of deterrence theory, namely that, when actors are rational and make decisions based on a cost-benefit analysis, increasing the cost of a particular conduct will make them less likely to carry out that conduct.

The origins of the deterrence theory can be found in the writings of Thomas Hobbes, but it was Cesare Beccaria, the Italian utilitarian philosopher writing during the 18th century Enlightenment, who dealt specifically with the impact of sanctions on the number of socially undesirable acts in his work *On Crimes and Punishments*⁹⁷. For Beccaria, people were rationally self-interested, had free will, and acted following a cost-benefit analysis of the risks and potential gains that they might experience as a result of a particular act. So, they would not commit unlawful acts if the costs outweighed the benefits of doing so. In

⁹⁶ Article 14(5) of Regulation 1/2003.

⁹⁷ Richard Bellamy, ed., *Beccaria: 'On Crimes and Punishments' and Other Writings* (Cambridge, UK: Cambridge University Press, 1995).

Beccaria's view, the state was restricted in the magnitude and nature of the punishments it could impose for illicit behaviour: to discourage unlawful conduct, punishments must be proportionate, and calculated on the basis of the harm done to society by the illegal act. Punishment in excess of what is necessary to deter people from breaking the law is unjustified.

Classical deterrence theory relies on three elements: severity, certainty and swiftness of punishment. The more severe a punishment, the more likely it is that a rational being would desist from committing the unlawful act. However, any punishment that is too severe is unjust, as it is considered disproportionate to the harm it seeks to remedy. To discourage deviant behaviour, the legal system must have appropriate enforcement institutions and sanctions in place. Certainty of punishment requires that the sanction be applied consistently every time the unlawful act is committed. Beccaria's belief was that individuals who are aware that their illegal conduct will be sanctioned will refrain from offending in the future. Finally, the application of the punishment must be swift in order to send a deterrent message to society.

While eighteenth century theorists pointed to certainty of punishment as having a greater deterrence effect than the severity of the sanction, twentieth century economists focused their attention on the magnitude of sanctions by asking what level should penalties be set to in order to deter the optimal number of deviations from the competition rules? Becker's answer⁹⁸ was that in order for enforcement of competition law to be at optimal levels, the existing range of sanctions must be such that only the inefficient offences are deterred.

⁹⁸ Gary S. Becker, "Crime and Punishment: An Economic Approach", (1968) 76:2 J Pol Econ 169.

Inefficiency refers to situations where society as a whole suffers as a result of the anticompetitive behaviour: in the competition context, consumers are harmed by higher prices and producers have to reduce their production output as a result of demand shrinking due to the increase in prices. The negative effect higher prices have on consumers is that they are no longer able to satisfy their needs by buying the product that would give them most satisfaction, so they switch to other, less desirable, goods. The difference between what consumers were willing to pay for the most desired goods and the new, anticompetitive price shrinks, meaning that consumers have less money to spend. The increase in price from the competitive to the anticompetitive level is the overcharge. When prices are artificially inflated, there is a redistribution of income from consumers to producers. What the consumers lose, the producers gain. But the inefficiency is not caused by this redistribution. Rather, the reason why society as a whole is worse off in an anticompetitive environment is because of the deadweight loss (or social loss) that occurs when prices are set above the competitive (i.e. efficient) levels. The deadweight loss represents the net value of the quantities of goods that will not be produced and consumed anymore. In order to avoid this situation, sanctions must be high enough to ex-ante influence economic actors against acting anticompetitively.

Becker's model of deterrence aimed at minimizing the social loss from offences and assumed that the costs of enforcing the law are zero and the probability of detection is 100%. However, the model does not reflect the situation in the real world, where the probability of all anticompetitive acts being detected is less than 100% and enforcement agencies do not have infinite resources to investigate all suspicious behaviours and to

punish detected unlawful acts. The efforts of enforcement agencies depend to a great extent on the resources available. Without a generous budget, proper investigative technology, trained staff and well thought out strategies, the number of offenders detected and punished will be low. Given limited resources, enforcement agencies will have to set priorities for the anticompetitive behaviours they regard as most serious and harmful for society. By doing so, they will inevitably have to let some violations go unpunished. Moreover, regulatory agencies are not the only players in the game, because courts also play a role through judicial review proceedings. The availability of judicial review increases the uncertainty of infringers actually getting punished, because any findings of infringement by enforcement agencies can be overturned by the courts.

Any calculation of optimal penalties should take account of the practically low probabilities of detection, which in the European Union are estimated to be between 13% and 17%⁹⁹, in addition to the social harm caused by the anticompetitive behaviour. Landes¹⁰⁰ showed that to be effective, antitrust sanctions should be equal to the “net harm to others” caused by the infringement, divided by the probability of detection and punishment, to account for the fact that the probability of detection and conviction is less than 100% and enforcement costs are positive. For example, the “net harm to others” stemming from a cartel includes the deadweight loss, plus the aggregate overcharges. This rule models the sanction after the harm suffered by the victims of the cartel, not after the gain that accrued to the infringing firms as a result of the overcharges. The costs incurred by the violators in

⁹⁹ Emmanuel Combe, Constance Monnier and Renaud Legal, “Cartels: The Probability of Getting Caught in the European Union”, 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015061.

¹⁰⁰ Landes, *supra* note 14, at p. 655.

organizing and monitoring the cartel are not factored into the rule. Additionally, when the cartel's market share is less than 100% and there are other firms on the market which operate independently of the cartel, but take advantage of the overcharges imposed by it by also raising their prices to that anticompetitive level, those additional overcharges are also excluded from the "net harm to others" rule, if the firms are as efficient as the members of the cartels.

In cases of abuse of dominant position through predatory pricing, there is no net harm to others in the short run, in the sense discussed above, because consumers are not harmed by any price increase. On the contrary, they benefit from much lower prices than in a competitive setting, because the dominant firm is pricing below its cost. However, if predatory pricing is successful in achieving its aim (for example to exclude a competitor from the market) the dominant firm is likely to increase its prices to monopoly levels to recoup the losses it incurred during the predation period and to increase its profits. In this case, consumers are harmed in the long run by the price increase. So, under the net harm to others rule, the dominant firm should be penalized only after it starts recouping its losses from predation by an amount equal to the aggregate overcharge plus deadweight loss during the recoupment period, minus the benefits accrued to consumers during predation.

In practice, calculating the net harm to others is difficult, if not impossible, so enforcement authorities rely on presumptions as to how much the presence of a cartel increased the price of a good. The United States, for example, uses a 10% benchmark overcharge level to

establish fines.¹⁰¹ While some commentators have expressed concern that this is too high¹⁰², others have criticised the 10% presumption for underestimating the price increase imposed by a cartel. For example, Richard Posner, in a sample of 12 cartel cases, reported a value of 49.1% for average cartel overcharges¹⁰³ and in a 2004 article, following observations of 309 US cartels and 365 international cartels, that occurred between 1780 and 2004, Connor and Lande estimated a mean cartel overcharge for all types of cartels and all periods, of between 31% to 49%.¹⁰⁴

3.3.2 Fines as sanctions

The EU public enforcement model relies on administrative fines targeted at infringing companies to sanction anticompetitive behaviour. Fines can be of maximum 10% of the company's worldwide turnover¹⁰⁵, and, in many cases, they are in the order of hundreds of millions of euros. Parent companies are held financially responsible for the anti-competitive conduct of their subsidiaries and recidivists receive higher fines than first time offenders¹⁰⁶.

¹⁰¹ United States Sentencing Guidelines Manual §2R1.1 (2005).

¹⁰² Mark A. Cohen and David T. Scheffman. "The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?", (1989) 27:2 Am Crim L Rev 331, at p. 343: "At least in price-fixing cases involving a substantial volume of commerce, ten percent is almost certainly too high".

¹⁰³ Richard Posner, *Antitrust Law*, 2nd edition, (Chicago: The University of Chicago Press, 2001), at p. 304.

¹⁰⁴ John M. Connor and Robert H. Lande, "How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines", (2005-2006) 80 Tul L Rev 514, at p. 540.

¹⁰⁵ Article 23 of Regulation 1/2003.

¹⁰⁶ Commission Report on Competition Policy 2008 {SEC(2009) 10004}, COM(2009) 374 final, available at http://ec.europa.eu/competition/publications/annual_report/2008/en.pdf, para 9, at p.4.

Indeed, in recent years, the Commission has registered important triumphs, imposing fines of more than a billion euros in several cases¹⁰⁷.

Given this reality of enforcement, the question of whether the level of fines in the EU is optimal remains inconclusively answered by empirical studies. On the one hand, Combe and Monnier¹⁰⁸ analysed 64 cartels investigated by the European Commission from 1975 to 2009 and found that the fines imposed were overall suboptimal. On the other hand, Allain et al¹⁰⁹ conclude that the corporate fines imposed by the Commission between 2005 and 2012 are above optimal level, and therefore, too high.

Irrespective of their actual level, corporate fines do not fully achieve the goal of deterrence, because they are not targeted at the actual perpetrators of the anticompetitive practice. The focus of fines should be on the culpable individuals, rather than on the infringing company. The reason for this is that corporate fines are paid by innocent shareholders, as their capital is being used to cover the fine, impact capital markets and may also be passed on to consumers in the form of higher prices¹¹⁰, so they do not affect the incentives of the

¹⁰⁷ Fines of around €1bn were imposed in the following cases decided since 2000: *Vitamins* (OJ [2003] L 6/1, [2003] 4 CMLR 1030); *Elevators and escalators* (Commission decision of 21 February 2007, substantially upheld on appeal: Cases T-145/07 etc *OTIS v Commission* [2011] ECR II-000), *Gas Insulated Switchgear* (Commission decision of 24 January 2007, substantially upheld on appeal, Cases T-110/07 *Siemens v Commission* [2011] ECR II-000, [2011] 4 CMLR 1421); *Paraffin Wax* (Commission decision of 1 October 2008, on appeal Cases T-543/08 etc *RWE and REW Dea v Commission*, not yet decided); *Car Glass* (Commission decision of 12 November 2008, on appeal Cases T-59/09 etc *Saint-Gobain Glass France and others v Commission*, not yet decided); *Air Cargo Carriers* (Commission decision of 9 November 2010, on appeal Cases T-9/11 etc *Air Canada v Commission*, not yet decided).

¹⁰⁸ Emmanuel Combe and Constance Monnier, “Fines against hard core cartels in Europe: The myth of over-enforcement”, (2011) 56 *Antitrust Bull* 235.

¹⁰⁹ Marie-Laure Allain, Marcel Boyer, Rachidi Kotchoni and Jean-Pierre Ponsard, “Are Cartel Fines Optimal? Theory and Evidence from the European Union”, (2015) 42 *Int’l Rev L & Econ* 38.

¹¹⁰ Jesse Markham, “Antitrust Marathon V”, event at the University of Rome I (Sapienza) on March 13, 2013; published in (2013) 9:3 *Eur Comp J* 78 and also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373207.

right people. Individual fines, on the other hand, have the advantage of targeting the actual individuals involved in the anticompetitive act.

Moreover, the impact of sanctions may not be sufficient to deter infringement by firms, because business behaviour is sometimes motivated by other factors than a strict cost-benefit calculation. One of the assumptions made by proponents of the deterrence theory is that business people who behave anticompetitively do so for their own personal gain. However, what induces business people to violate competition rules is not always pure greed. In the context of motivations for entering into cartels by agreeing with competitors to manipulate parameters of competition (e.g. price), while greed may play a role, non-economic factors, such as socio-emotional ones, may also guide action:

“An agent may be motivated to fix prices to obtain financial and socioemotional rewards, such as bonuses awarded for meeting sales and profit targets, pay raises, promotions, the goodwill and approbation of fellow conspirators, and so on, or to avoid punishments, such as social ostracism, denial of promotions, demotions, or even firing. Or the agent may simply identify with the company and seek to enhance its position.”¹¹¹

Parker¹¹² argues that the likelihood of compliance with competition law is higher when the substance of the law accords with the values and attitudes of the people to whom it applies and when enforcement of the law is legitimate and fair. Assuming that the competition

¹¹¹ Wayne E. Baker and Robert R. Faulkner, “The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry”, (1993) 58:6 Am Soc Rev 837.

¹¹² Christine Parker and Vibeke Nielsen, “Deterrence and the Impact of Calculative Thinking on Business Compliance with Regulation”, (2011) 56:2 Antitrust Bull 377.

rules are seen as valuable, are socially accepted and enforcement by public authorities is not arbitrary and unjust, why do business people still choose to engage in anticompetitive acts? Parker's answer is that business behaviour is influenced more by the agents' subjective perceptions of the risk of detection and punishment, rather than by the objective severity of the punishment itself. For example, even if price fixing agreements are criminalized and sanctioned with 14 years of imprisonment (as is the case in Canada), but violators are not pursued vigorously either by the public enforcement agency or by private parties harmed, anticompetitive agreements will still be entered into by companies who realize that the probability of being detected and convicted is very low. Social and political attitudes also matter in creating the subjective perception that enforcement efforts are intense. If consumers were apathetic about their right to pay a fair price or if political support for the enforcement activity of the public agency was lacking, companies would engage in anticompetitive conduct more readily.

Empirical research in areas of regulation other than antitrust has indicated that business behaviour tends to be compliant where informal and third party social and economic sanctions are also possible. Braithwaite¹¹³ argues that good reputation is a valuable asset for companies, and being punished for engaging in unlawful behaviour carries the risk that the brand's goodwill among customers will diminish. Negative publicity also impacts stock price and a firm found guilty of violating the law will likely lose the confidence of its investors, resulting in stock price declines.

¹¹³ John Braithwaite, *Crime, Shame and Reintegration* (New York: Cambridge University Press, 1989).

Therefore, while the severity of a sanction may make business actors fear its imposition, this does not necessarily mean that knowledge of the penalty will lead them to choose the competitive alternative. Business behaviour is sometimes influenced by the economic agents' subjective perceptions of the probability of detection and punishment, not by the nature or magnitude of the sanction.

3.4. CHAPTER CONCLUSION

Effective deterrence of competition law infringements through a vigorous competition policy and high sanctions only became a priority for the Commission with Regulation 1/2003, which freed up its resources and allowed it to adopt a more proactive approach to detecting, investigating and punishing serious violations. At present, public enforcement is largely decentralised, with the Commission, the NCAs and the domestic courts of the MSs in charge of applying Articles 101 and 102 TFEU in full. Decentralization is not complete, as action by the Commission in a particular case relieves NCAs of competence in that case, and MSs' competition institutions have an obligation to follow the Commission's decisions in cases with similar facts.

Although infringing firms are subject to corporate fines of up to 10% of their worldwide turnover, this amount might not be sufficient to achieve general deterrence, for two reasons. First, the 10% of turnover fine will not always capture the full extent of the overcharge imposed by infringers on consumer through higher prices, in which case the penalty is suboptimal and violators are not effectively influenced against committing further anticompetitive acts. Second, the behaviour of economic actors is sometimes directed not

by the magnitude of the sanction, but by the perceived likelihood that the infringement will be detected and the sanction successfully imposed. Therefore, public enforcement efforts must be proactive, visible and consistent, in order to increase the probability of detection and punishment, and thereby increasing the cost for potential violators and diminishing the likelihood that they will engage in conduct that is anticompetitive.

Two further issues reduce the effectiveness of public enforcement in achieving deterrence: leniency programs and settlements, both of which are available in the European Union. The EU model of leniency¹¹⁴ grants complete immunity from fines to the first undertaking to reveal the existence of a cartel. Subsequent applicants are given a reduction in fine of 50% to 20%, depending on the order in which they come forward. In order to benefit from immunity from fines, the first leniency applicant must provide sufficient information to enable the Commission to inspect the premises of the other firms involved in the cartel. For the subsequent firms to be considered for the reduction in fine, they must provide evidence that represents “significant added value” to that already in the Commission’s file¹¹⁵. While leniency programs enable the Commission to detect, investigate and sanction a larger number of cartels, the problem remains that one of the participant firms, the first whistleblower, will not pay any sanction for its involvement. This poses a particularly acute fairness issue, especially when the immune firm is the one with the highest customer base, because when this happens, the magnitude of harm to consumers is very large and it not only goes unpunished, but the illegal gain is not even disgorged.

¹¹⁴ Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/11 [Leniency Notice].

¹¹⁵ Leniency Notice, *supra* note 96, at para 24.

The possibility of reaching settlements with the public enforcement authority also undermines deterrence, because firms settle for sums that are lower than the fine they would be liable for should they go to trial (the EU makes a 10% reduction in the amount of the fine¹¹⁶), making settlements less than optimal.

To avoid unfair situations where perpetrators get away with their wrongdoing without even disgorging their illegal gain, private parties harmed by the infringement should be in a position to hold those perpetrators accountable through private enforcement. If consumers have the right incentives to monitor firms' market behaviour, they can not only impose additional deterrence, through the possibility of claiming damages, but also act as policing and signalling devices that increase the chances of detection and action by public enforcers.

¹¹⁶ Commission Report on Competition Policy for 2008, {SEC(2009) 10004}, COM(2009) 374 final, available at http://ec.europa.eu/competition/publications/annual_report/2008/en.pdf.

4 CONSUMER WELFARE AS ANALYTICAL FRAMEWORK FOR DIRECTIVE 2014/104/EU

4.1. JUSTIFICATION AND OTHER POSSIBLE OPTIONS

Consumer welfare is preferred as the analytical standard, because it suggestively illustrates how the provisions of Directive 2014/104/EU can increase or diminish the benefit of consumers by enabling them (or not) to recover the overcharges paid as a result of anticompetitive conduct. For the purposes of this thesis, any provision that sufficiently incentivises consumers to bring damages claims is considered to increase consumer welfare. The question is whether the Directive is powerful enough to cause a redistribution of wealth from producers to consumers by inducing compensation. This is a narrow focus, since we are not concerned with whether the possible amount of compensation meets any criteria of justice or fairness. Indeed, it may even be that at the adjudication stage consumers lose and they do not, in fact, get compensated. Again, this scenario is beyond the scope of this thesis, although such a result could be attributed to the failure of the Directive's provisions to adequately remedy the imbalance of power between consumers and competition law infringers. Moreover, the Directive was proposed and advocated for by the European Commission, whose competition policy is built on the consumer welfare standard. So, it makes logical sense to evaluate the Directive's substantive provisions from this perspective, at least until the CJEU builds a body of case-law that proposes a different framework for assessment.

European Union competition law accepts a plurality of values as legitimate goals, any of which can serve as an appropriate framework for assessing the provisions of Directive 2014/104/EU. These goals range from market integration, to consumer welfare and the protection of competition in itself, although the interests of consumers always play a role in the assessment of the allegedly anticompetitive conduct. Market integration is the feature which distinguishes EU competition law from the antitrust law of other countries. The Court of Justice of the European Union has emphasized the importance of competition policy in achieving the European single market on numerous occasions¹¹⁷. The first case to reflect the common market imperative as one goal of EU competition law was *Consten and Grundig v Commission*¹¹⁸, where the issue was whether Consten's appointment as an exclusive distributor of Grundig products in France amounted to an anticompetitive act. The CJEU concluded that it did, on the basis that the practice imposed barriers to trade and divided the internal market according to national borders. The fact that no other distributor could supply Grundig products on the French market was considered by the CJEU as an absolute territorial protection granted to Consten, which was prohibited under Article 101 TFEU (formerly Article 85 EC)¹¹⁹. Such division of the internal market would frustrate the market integration objective that underpinned the whole European Union endeavour: there would be no point in requiring Member States to dismantle barriers to trade through the free

¹¹⁷ See, for example, Case C-126/97, *Eco Swiss China Time v Benetton International NV* [1999] ECR I-3055, [2000] 5 CMLR 816, at para 36; Case C-501/06 P *Commission v GlaxoSmithKline Services Unlimited* ECR I-9291, paras 59-62.

¹¹⁸ Cases C- 54/64 and C- 58/64 *Consten and Grundig v Commission*, [1966] ECR 299 [*Consten and Grundig*].

¹¹⁹ *Consten and Grundig*, *supra* note 118, at para 8: “[...] An agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers.”

movement of goods, services, workers and capital, if the same barriers could be erected again by private firms agreeing to serve different market allocations.

Advocate General Roemer in his Opinion¹²⁰ to the CJEU in *Consten and Grundig* argued that the practice of exclusive distribution was pro-competitive, since it opened the French market to Grundig products that would otherwise not be available to French customers, thereby increasing the variety of goods available to those consumers. Such an analysis reflects the consumer welfare goal of EU competition law, because it measures the benefit that the practice would bring to consumers. This divergence between the interpretations of the Advocate General and the CJEU regarding the nature of exclusive distribution shows that a practice can be described as either competitive or anticompetitive, depending on the normative stance adopted by the decision-maker regarding the goal pursued by the law in the particular case. Moreover, it also underlines the idea that market integration will take priority over consumer welfare as the measuring rod of the competitiveness of a particular practice.

Another goal of EU competition law is the protection of competition as an institution, a perspective most frequently adopted in the context of Article 102 TFEU (abuse of dominance), but which has also been applied to Article 101 TFEU (prohibition of horizontal agreements and vertical restraints). As early as 1974, the CJEU said in the *Continental Can* case that “Article 102 is not only aimed at practices which may cause damage to consumers

¹²⁰ Opinion of Mr. Advocate-General Roemer Delivered on 27 April 1966 in *Consten and Grundig*, *supra* note 100, available at <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30dd1eeof6d1baea49dc87138d576755feb1.e34KaxiLc3qMb40RchoSaxuRc310?text=&docid=87331&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=63595>.

directly, but also at those which are detrimental to them through their impact on an effective competition structure such as is mentioned in Article 3(1)(g) of the Treaty”.¹²¹ Therefore, it is not necessary to show that consumers are directly harmed by abuses of dominance before a practice of this type is deemed anticompetitive; it is sufficient that the structure of the market is altered through the abusive practice. For example, when a dominant firm engages in predation by lowering its price below cost, the structure of the market will be altered if firms that cannot match the low prices of the dominant undertaking are eliminated from the market. The CJEU refers to harm caused to consumers both “directly and indirectly” by anticompetitive conduct, but the relationship of this analysis to consumer welfare has not been explained by the Court, although it does indicate that the welfare of consumers is more important than that of producers.

In *British Airways*¹²², another case on Article 102 TFEU, Advocate General Kokott said that Article 102 is “not only designed to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution)”.¹²³ This view has also been endorsed by the CJEU in relation to Article 101 TFEU, as well, most prominently in *Spanish Glaxo*¹²⁴, a case dealing with a price discrimination strategy imposed by Glaxo on its Spanish wholesalers that prohibited them from exporting Glaxo drugs to other Member States (a practice called parallel trade). The CJEU in that case added that “for a finding that an agreement has an anticompetitive

¹²¹ Case 6/72 *Europemballage & Continental Can v EV Commission* [1973] ECR 215, at para 12.

¹²² Case C-95/04 *British Airways v Commission* [2007] ECR I-2331.

¹²³ Opinion of Advocate General Kokott in Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, at para 86.

¹²⁴ Case C-501/06 *Commission v GlaxoSmithKline Services Unlimited* [2009] ECR I-9291.

object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price”.¹²⁵ Therefore, the restriction on parallel trade was found to be unlawful, even though no concrete harm had been caused to consumers. The General Court¹²⁶ in *Spanish Glaxo* had ruled that the prevention of parallel trade did not amount to a violation of competition law on its own, because it did not reduce consumer welfare. What is striking about this case is how consumer welfare seems to be rejected by the CJEU as an appropriate goal of competition law. However, the point of the CJEU is that some types of anticompetitive practices can be deemed unlawful only by virtue of their occurrence, without the need to assess how they impact upon the benefits that might accrue to consumers. The court assumes that a practice like the prohibition of parallel trade will necessarily impact consumers, because they never get to enjoy lower prices brought about by an increase in supply.

4.2. THE ECONOMIC PERSPECTIVE: “WELFARE” AS “SURPLUS”

An optimal (i.e. most efficient) allocation of scarce resources is the result under perfect competition according to modern microeconomic theory. This theory, under partial equilibrium (i.e. focusing only on one sector of the economy)¹²⁷, is represented by the familiar demand and supply relationships. Under the “law of demand” price and quantity demanded are negatively related – buyers purchase more at lower prices – giving us downward-sloping demand curves (illustrated in Figure 1). In contrast, price and quantity supplied are positively related – sellers will be willing to supply more to markets when

¹²⁵ *GlaxoSmithKline*, *supra* note 123, at para 63.

¹²⁶ Case T-168/01 *GlaxoSmithKline Services and Others v Commission and Others* [2006] ECR II-02969.

¹²⁷ The model is described by Alfred Marshall in Chapter 2 of Book 3 of his *Principles of Economics* (London, UK: Macmillan and Co., first ed. 1890).

prices are higher. This gives us positively-sloped supply curves (illustrated in Figure 2). In a competitive market when prices are too high, supply exceeds demand creating a surplus and putting downward pressure on price. When prices are too low, demand exceeds supply and there are shortages, putting upward pressure on price. Prices are only stable when an “equilibrium” is achieved – this happens at a price at which the quantity demanded equals the quantity supplied (illustrated in Figure 3).

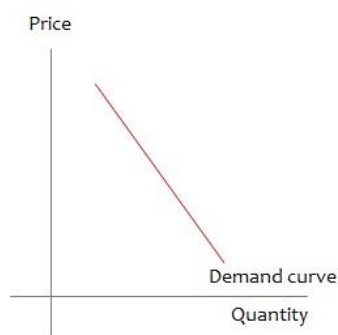


Figure 1: Demand curve

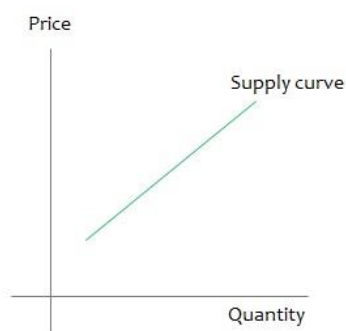


Figure 2: Supply curve

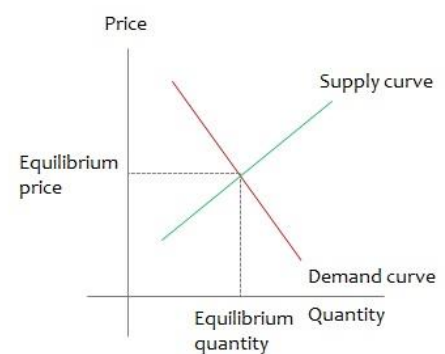


Figure 3: Competitive equilibrium

A perfectly competitive market has four characteristics: (1) there is an infinite number of buyers and sellers, each of which has a very small market share (i.e. controls a very small portion of the market), meaning that all buyers and sellers are price-takers (i.e. they cannot influence price); (2) all products are homogenous (identical); (3) buyers and sellers can freely and easily enter and exit the market (i.e. there are no barriers to entry and exit); (4) all buyers and sellers have perfect information about the parameters of the economy (i.e. everybody knows what the features of the goods are, the quantities produced and

demanded, the cost at which the goods are produced, the price at which they are sold by each seller)¹²⁸.

When studying various market structures, economists will be concerned with three types of efficiency: productive, allocative, and dynamic. Productive efficiency refers to goods being produced at the lowest possible cost. Allocative efficiency refers to the production of the right goods and their allocation to the right buyers and occurs when the price of a good equals its marginal cost (the cost of producing one more unit of the good). To achieve allocative efficiency the quantity produced must increase to the point where the price equals the marginal cost of production. Dynamic efficiency is concerned with the way firms take advantage of innovation and technological progress to create better products that offer benefits to consumers not only in terms of lower prices, but superior quality. In general, economists consider that competitive markets score very well in terms of these kinds of efficiency.

The most egregious restriction of competition occurs on a market where there is only one firm producing and selling a particular good. This kind of market is called “monopoly”. As the monopolist does not face competition from any other firm, it does not have to produce its good at the lowest possible cost and will raise its price above the competitive price and its marginal cost. The difference between the cost and the price at which the good is sold determines the producer surplus. The price increase causes a decrease in the quantity demanded, because some consumers cannot afford to pay for the good. The extent to which a consumer values a particular good is measured by his willingness to pay, i.e the

¹²⁸ Marshall, Alfred. *Principles of Economics* (London, UK: Macmillan and Co., first ed. 1890). Book 3. Chapter 2

maximum amount the consumer would pay for the good. The difference between the willingness to pay and the price actually paid by the consumer is the consumer surplus, which, added across all consumers in a market gives us the aggregate consumer surplus. When the market is a monopoly, the result is that some goods, which would have been bought at a competitive price, are never produced, causing a deadweight loss, i.e. a loss to society as a whole. This deadweight loss is reflected in Figure 4 below.

Therefore, a monopoly is inefficient, both from a productive and an allocative point of view: it produces at a higher cost and sells only to some consumers (those with a higher willingness to pay) or sells smaller quantities to each consumer who would like to have the product.

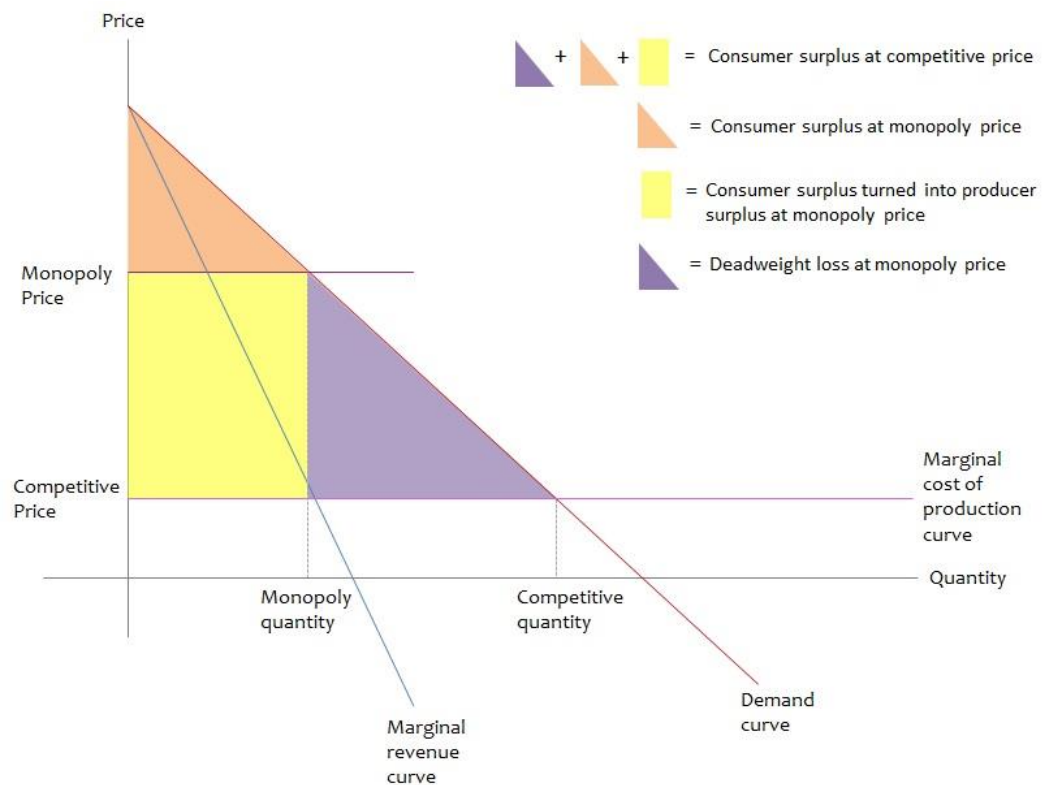


Figure 4: Consumer surplus and deadweight loss

Consumer welfare in the parlance of competition law is usually equated with consumer surplus. However, the terms “consumer welfare” and “consumer surplus” are not equivalent. In economics, consumer welfare is an individual measure of the benefits obtained by a consumer from a certain combination of goods and services, given their price and his available income. A consumer’s welfare is expressed through the personal (subjective) assessment of satisfaction. The term originates in rational choice theory, which sets out criteria for individual decision-making. It posits that individuals make decisions by rationally comparing the value of the options available for satisfying their needs and desires and choosing the one that brings them the greatest satisfaction.

Rational choice theory starts from the premise that people (agents) live in a structured, collective environment, have clear and consistent objectives and use reason to decide the best means for achieving them¹²⁹. Within the environment, people have alternatives in the way they could behave and they are free to choose among them. For every agent in the environment, there is a set of consequences associated with each alternative, which the agent experiences once he chooses to engage in a certain behaviour. As every alternative has a particular and specific consequence, no consequence is arbitrary.

The agent’s behaviour is dictated by his preferences¹³⁰. These are represented by a range of possible hypothetical choices among hypothetical alternatives. The theory assumes that such preferences are complete, i.e. an agent faced with two options must have some

¹²⁹ See K.J. Arrow, *Social Choice and Individual Values* (New York: Wiley, 1951); K.J. Arrow, “Economic Theory and the Hypothesis of Rationality”, in J. Eatwell, M. Milgrave, and P. Newman, eds., *The New Palgrave: A Dictionary of Economics* (New York: MacMillan Press Limited, 1984).

¹³⁰ J. von Neumann and O. Morgenstern, *Theory of Games and Economic Behaviour* (Princeton, USA and Woodstock, UK: Princeton University Press, 1947).

opinion about those options. Even though he can be indifferent between them, he cannot be clueless about what they mean or how choosing any of them would affect him. Rationality allows agents to establish ordering relations between their preferences regarding the available alternatives: acts can be organized in a sequence from most-preferred to least-preferred. One of the assumptions made by rational choice theory is that choices follow preferences or that preferences reveal choices¹³¹. This means that once an individual's preferences and their orderly sequence is known, his choice of behaviour can be easily predicted: the agent will choose to act in the way that reflects his most-preferred alternative.

The measure according to which individual preferences are ordered is utility¹³². However, for rational choice theory, utility is not used as a cardinal measure, but rather as an ordinal one. This means that the numerical values assigned to different levels of utility are not seen as absolute, but only as the relative standard according to which preferences are placed in a sequence. For example, the fact that the utility associated with act A is 1 and the utility associated with act B is 10 does not say anything about the intrinsic value of acts A and B or about their effect on individual welfare. The numerical values 1 and 10 only indicate that B is preferred to A and that given a choice between A and B, a rational individual would choose B instead of A.

¹³¹ G. Shafer, "Savage Revisited (including comments)", (1986) 1 Stat Sci 463.

¹³² But not in the traditional sense put forward by Jeremy Bentham. For the 18th century philosopher, people ought to behave in a way that maximizes pleasure and minimizes pain. His notion of utility was built on two assumptions: that the goodness or badness of an experience is quantifiable and that the individual quantities can be added up. The summed individual degrees of value indicated the quality of an action as good or bad. This aggregate value indicated what action would yield the greatest happiness for the greatest number.

Rational choice theory is applied in competition law to both producers and consumers. From the producers' perspective, it follows that market actors (economic agents) conduct an analysis of the alternative business behaviours available and make a decision according to their preferences regarding those alternatives, i.e. by taking into account the level of ordinal utility they would assign to each option. For example, given a choice between a competitive and an anticompetitive business practice, an economic agent would choose the most-preferred alternative, depending on the utility value assigned to each practice. In the free market context, in order to calculate the relative utility necessary to determine the order of preferences and of subsequent choices, it is assumed that individuals weigh the expected costs against the expected benefits of each practice. The behaviour chosen will be the one for which the benefits most exceed the costs. It is important to point out again that the absolute value obtained by extracting the costs from the benefits or vice versa does not tell us anything about the normative value or desirability of the behaviour under analysis. If the benefits derived from the anticompetitive behaviour outweigh the costs, and the balance exceeds that for the competitive act, the economic agent will choose to act anticompetitively, because the anticompetitive act is more preferred than the competitive one.

For consumers, preferences reveal what goods they would choose to buy. Their behaviour is dictated by the price of the goods and the income they have available for spending. When they have enough income to buy all the products they have ranked as most-preferred, their satisfaction (or welfare) is maximized. However, a necessary condition for consumers to buy a most-preferred good is that a sufficient quantity of that good is actually produced. In

a monopoly, the quantity produced of good X is smaller compared to the one on a competitive market. This means that not all consumers for whom good X is ranked as most-preferred can satisfy their want. Given that the price is increased above the competitive level, only those consumers with a high willingness to pay for the good will actually be able to satisfy their wants, and thereby maximize their welfare. The rest of consumers will have to opt for the second-most-preferred good. This diversion of custom towards the “second best”¹³³ good results in allocative inefficiency, because consumers are forced to spend their income on goods of lesser preference.

The differences between the concepts “consumer welfare” and “consumer surplus” are subtle, since both have their focus on a measure of the consumers’ well-being. While the former is a subjective, individual, measure of the satisfaction consumers gain through consumption, given their income and the prices of goods, the latter is an objective, easy to estimate, aggregate measure of the difference between the price consumers are willing to pay for a certain good and the price they actually pay. Despite the fact that the two terms are not interchangeable, it has become common, among judges and competition lawyers to mean “consumer surplus” when referring to “consumer welfare”. This is because competition law practitioners are rarely trained in economics, so it is difficult for them to grasp the conceptual differences between economic terms.

From the point of view of economists, the term “consumer surplus” is consistent with the methodology of competition law, while “consumer welfare” is not.¹³⁴ The analysis of a

¹³³ R.G. Lipsey and Kelvin Lancaster, “The General Theory of Second Best”, (1957) 24:1 Rev Econ 11.

¹³⁴ Barak Y. Orbach, “The Antitrust Consumer Welfare Paradox”, (2010) 7:1 J comp L & Econ 133.

potentially anticompetitive behaviour of state of affairs begins by defining the relevant product¹³⁵ and geographic¹³⁶ market and determining the market power¹³⁷ held by the parties alleged to have infringed competition laws, before proceeding to assess whether the behaviour of state of affairs in question meets the threshold of anticompetitiveness¹³⁸. Competition analysis typically looks at the allegedly anticompetitive practice only in the context of a relevant market isolated from all the other sectors of the economy¹³⁹ – in other words, from a partial equilibrium perspective.

In order to be consistent with the “consumer welfare” standard, the methodology of competition law should accommodate a values-based analysis that considers other aspects of consumer satisfaction beyond price, like the exclusivity of brands or the harmful nature of tobacco and alcohol. This would require the antitrust enforcer to consider the effect of the infringement on every consumer, to determine individual levels of (dis)satisfaction caused by the restriction of competition beyond its impact on product availability and price.

¹³⁵ Commission notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372 of 9.12.1997, at para 7: 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

¹³⁶ “Commission notice on the definition of relevant market for the purposes of Community competition law”, Official Journal C 372 of 9.12.1997, at para 8: 'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and Remand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.

¹³⁷ Defined in the OECD Glossary of Statistical Terms as: “the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition”. Available at <https://stats.oecd.org/glossary/detail.asp?ID=3256>

¹³⁸ Which differs depending of the particular practice and its legal definition

¹³⁹ Although in certain circumstances economists will look at multiple markets if they think there are significant connections between the markets.

Indeed, there are circumstances where looking strictly at price in the assessment of a seemingly anticompetitive practice may lead to incorrect results from a consumer welfare point of view. For example, customers who buy branded, luxury goods are willing to pay a premium price for the exclusivity and status that comes with ownership of that kind of goods. Antitrust interventions aimed at lowering the price of these luxury goods with the objective of increasing consumer surplus would end up decreasing consumer welfare. This is because a low price makes the goods available to more customers, reducing the exclusivity of the good, and thereby the welfare of consumers who were willing to pay a premium for the enhanced satisfaction gained by owning a status good¹⁴⁰.

Nevertheless, given the democratic deficit of having the judiciary make a normative decision on the value and desirability of particular goods, it is understandable that the methodology of competition law focuses on maximizing consumer surplus, rather than consumer welfare.

4.3. CONSUMER WELFARE IN THE COMMISSION'S COMPETITION POLICY

The concept of “consumer welfare” first appeared in EU competition law in 1997, when the Commission published a Green Paper on vertical restraints¹⁴¹, where it set out that

“To further the interest of the consumer is at the heart of competition policy. Effective competition is the best guarantee for consumers to be able to buy good quality products at the lowest possible prices. Whenever in this Green Paper the

¹⁴⁰ Orbach, *supra* note 134, at p. 153-156.

¹⁴¹ “Green Paper on Vertical Restraints in EC Competition Policy” of January 22, 1997, COM96(721) final [Green Paper on Vertical Restraints].

introduction or protection of effective competition is mentioned, the protection of the consumer's interest by ensuring low prices is implied.¹⁴²”

This paragraph clearly shows that the Commission is adopting a consumer surplus standard when it refers to consumer welfare, because the underlying goal of their proposed policy on vertical restraints is the achievement of the lowest possible price for consumers. The Commission's focus on consumer surplus becomes more consistent starting in 2004, as is apparent from the policy documents issued by the Commission following modernization of the system of public enforcement of competition law. As explained above, the reform process was based on the desire to streamline and optimize public enforcement by sharing the enforcement of Articles 101 and 102 TFEU with the national courts and competition authorities. In order to avoid inconsistency and create more legal certainty in respect of the new mechanism of public enforcement, the Commission published several guidelines detailing the interpretation it will adopt when applying the competition provisions.

The most obvious evidence of the Commission's focus on consumer surplus under the consumer welfare standard is found in Article 101(3) TFEU, which exempts horizontal agreements from the prohibition in Article 101(1) if they create efficiencies that are passed

¹⁴² Green Paper on Vertical Restraints, *supra* note 141, at p. 17, para 54.

on to consumers¹⁴³. The Commission's approach to the exemption in Article 101(3) TFEU post-modernization is clarified in the Guidelines on the application of Article 101(3)¹⁴⁴. For example, in paragraph 13 of the notice the Commission states that "The objective of Article [101 TFEU] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers."¹⁴⁵ Here, the Commission entwines the consumer welfare objective of competition policy with the overarching market integration goal of the European Union. This supports the idea expressed in Article 3(1)(b) TFEU that competition is both an end in itself and a tool for achieving a fully functioning internal market. Allocative efficiency serves to align the interests of producers with those of consumers, because producers are forced to sell at marginal cost to maximize their profits, while consumers benefit from the lowest possible prices, thereby maximizing their surplus.

¹⁴³ Article 101(3) TFEU: "The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

¹⁴⁴ Commission Notice "Guidelines on the application of Article [101(3)] of the Treaty", [2004] OJ C 101/97 [Guidelines on the application of Article 101(3) TFEU].

¹⁴⁵ Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at para 13. A similar formulation appears in the Commission's Notice "Guidelines on the application of Article [101] of the EC Treaty to technology transfer agreements", [2004] OJ C 101/2, at para 5.

Subsequently, the Commission's Guidelines deal explicitly with each of the four cumulative conditions in Article 101(3) TFEU which must be met before an agreement can be exempted. The first condition is that the prohibited agreement must produce efficiency gains by improving the production or distribution of goods or by promoting technical or economic progress¹⁴⁶. The Commission's modernized approach follows the 1965 case of *Consten and Grundig*, in which the CJEU indicated that only "objective advantages"¹⁴⁷ accrued to the infringing parties under the restrictive agreement can be claimed. This means that because efficiencies are not assessed from the subjective perspective of the parties, they do not include cost reductions caused by restrictions of output. Accepted efficiencies following the 2003-2004 reform can be caused by cheaper distribution, technology licensing, joint production and R&D, cost efficiencies as a result of improved technology use, and the development of new or improved products (qualitative efficiencies).¹⁴⁸

The Commission's focus on economic efficiencies means that considerations such as health, safety, or environmental protection are no longer acceptable under Article 101(3)¹⁴⁹. Prior to modernization, the Commission sometimes interpreted consumer welfare so as to include such broader interests. From the economic point of view, this is exactly what consumer welfare entails – a consideration of all factors that can increase consumers' satisfaction, going beyond their economic surplus created by the difference between willingness to pay and actual price. However, it was argued above that this approach is not in line with the methodology of competition law, which is carried out on the basis of the consumer surplus

¹⁴⁶ Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at para 48

¹⁴⁷ *Consten and Grundig*, *supra* note 118.

¹⁴⁸ Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at paras 53 and 59-72.

¹⁴⁹ KJ Cseres, "The Controversies of the Consumer Welfare Standard", (2007) 3:2 Comp L Rev 121, at p. 165.

standard. Allowing enforcers and courts to engage in value-based evaluations about what is good for consumers generally, under the consumer welfare standard, risks creating uncertainty in interpretation and may result in arbitrary decisions. For example, the *Asahi* decision¹⁵⁰ exempted a joint production agreement on the ground that it had the potential to increase product safety, in addition to lowering research and development costs for the firms involved in the joint venture¹⁵¹. Evidently, the Commission's analysis in this case was guided by the economic consumer welfare standard, which imposes normative judgments on what consumers should find valuable. That is why an agreement that should have been assessed under Article 101(3) only to determine the reductions in the cost of production or innovation ended up being exempted on an extraneous ground, namely product safety.

Had the joint production agreement been examined under the consumer surplus standard, the exemption would have been unlikely for at least three reasons. First, there was not a market for the large-scale production of the goods subject to the joint production agreement, so parties could not have demonstrated that cost reductions would have been passed on in the form of lower prices, since there was nobody to pass these costs on to. Secondly, the joint venture agreement stipulated that its purpose was not to carry out R&D on behalf of both firms, but to facilitate the sharing of information about R&D progress by the two. Therefore, the joint venture was intended as a mechanism for information sharing in an apparently legal setting, as the two firms had already developed the technology subject to the joint venture separately. So, the agreement intended to facilitate the exchange of information about improvements in that technology, which is anticompetitive,

¹⁵⁰ Commission Decision IV/33.863 – *Asahi/Saint Gobain*, OJ 1994, L354/87.

¹⁵¹ *Ibid.* at paras 24-26.

because it reduces the parties' incentives to continue to innovate on their own and offer better quality products. Thirdly, the agreement prohibited the two firms from expanding capacity for the production of goods using the technology subject to the joint venture. Restrictions on capacity are equivalent to restrictions in output. Such a provision was not indispensable for the achievement of the joint venture's goal, but was intended only as a safeguard against increased competition on the part of any of the parties. Therefore, a strict application of the conditions in Article 101(3) TFEU in search for economic efficiencies would likely have not exempted the joint venture agreement from the prohibition in Article 101(1) TFEU.

Similarly, in the *CECED* decision¹⁵², the Commission exempted an agreement to stop producing or importing into the EU washing machines that were not energy efficient on the ground that it would reduce pollution caused by electricity generation¹⁵³. Since 2004 non-economic objectives cannot be included under Article 101(3) unless they can be translated into economic gains¹⁵⁴.

The second condition of Article 101(3) is that a "fair share" of any economic efficiencies produced must be passed on to consumers¹⁵⁵. Otherwise, the agreement is not exempted. The Commission clarifies that "The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact

¹⁵² Commission Decision IV.F.1/36.718 – *CECED*, OJ 2000, L187/48.

¹⁵³ *Ibid.* at paras 47-57.

¹⁵⁴ L. Kjolbye, "The new Commission Guidelines on the application of Article [101(3)]: an economic approach to Article [101]", (2004) 25:9 *Eur Comp L Rev* 566.

¹⁵⁵ Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at para 85.

caused to them by the restriction of competition found under Article 101(1).”¹⁵⁶ Compensation of consumers through the pass-on of economic efficiencies must leave them at least in a neutral position after the restriction of competition¹⁵⁷. Consumers must not be worse off in any way following the prohibited agreement. However, not all efficiencies must be passed on. As long as enough benefits accrue to the consumers to offset the negative effects of the restriction of competition, the condition is satisfied. Moreover, it is not necessary that consumers are compensated immediately for the restriction of competition; in certain situations, beneficial effects may take time to materialize (e.g. in the case of research and development agreements). But, the longer the period between the restrictive agreement and the pass-on of benefits to consumers, the greater must be the efficiencies. Assessment under this second condition of Article 101(3) is conducted under the proportionality principle, meaning that an agreement that significantly reduces competition must produce, and pass-on to consumers, benefits that are at least equally significant. If the restriction of competition is substantial, but the cost savings are minimal, the second condition will not be satisfied¹⁵⁸.

This second condition of Article 101(3) is strong evidence that the Commission’s understanding of consumer welfare is consumer surplus. The actual distribution of income between consumers and producers is of great concern to the Commission, because the magnitude of the efficiency gains does not matter as long as those gains are retained by producers and consumers do not get to enjoy them. In order to avoid illegal redistributions

¹⁵⁶ Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at para 85.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, at paras 91-92.

of wealth, producers are required to at least compensate consumers for any increase in price by offering better quality or more innovative goods.

The third condition of Article 101(3) requires that any restrictions of competition be indispensable to the attainment of the economic efficiencies proved under the first condition. The Guidelines put forward a two-part test of indispensability. Under the first part, the parties to the restrictive agreement must show that the agreement as such was reasonably necessary to achieve the claimed efficiencies¹⁵⁹. For this, they must prove that they could not have brought about the efficiencies through a less restrictive type of agreement or on their own. For example, in the case of cost reductions from economies of scale under a joint production agreement, the parties must substantiate why they could not have achieved the same cost savings through internal growth or price competition¹⁶⁰.

The second part of the indispensability test requires proof that the individual restrictions of competition are reasonably necessary to produce the efficiencies. The Commission clarifies that “A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise”.¹⁶¹ The type of restriction matters, as the Commission warns that restrictions black listed in block exemption regulations (e.g. resale price maintenance) or hardcore

¹⁵⁹ Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at para 73.

¹⁶⁰ *Ibid.*, at para. 76.

¹⁶¹ *Ibid.*, at para 79.

restrictions (e.g. absolute territorial protection afforded to a distributor in a particular Member State) are unlikely to be considered indispensable.¹⁶²

The fourth condition of Article 101(3) is that the agreement must not completely eliminate competition for the product concerned.¹⁶³ This condition underlines the fact that, ultimately, the competitive process will have priority over any short-term efficiencies.¹⁶⁴ The analysis under the fourth condition will look at the various sources of competition on the market, the level of competitive constraint that they impose on the parties, and the effect of the agreement on these constraints, to determine the impact that the restrictive agreement will have on the competitive process. If the Commission believes that, after the conclusion of the agreement, the parties will be able to exercise market power by, for example, maintaining unjustified price increases, then the fourth condition will not be satisfied and the agreement will not be exempted under Article 101(3).

The Commission has been consistent in abiding by the “surplus” understanding of “welfare” throughout its post-modernization policy-making. Prior to the 2003-2004 reforms, there was confusion regarding the proper scope of consumer welfare. This is why, some Commission decisions dating from before 2004 include in the assessment of efficiencies considerations such as product safety. Following the reform package, but with timid beginnings in the 1990s in relation to Article 101 TFEU, the Commission has adopted a stricter economic approach to the assessment of anticompetitive practices, in order to increase predictability and legal certainty. The more economic approach entails the

¹⁶² Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at para 79.

¹⁶³ *Ibid.*, at para 105.

¹⁶⁴ *Ibid.*

assessment of the likely effects of allegedly anticompetitive practices on the basis of specialist economic evidence. It replaces the Commission's formalistic method that had characterized public enforcement until the modernization process, which ignored potential benefits of restrictions of competition, with the result that it condemned conduct that was in reality pro-competitive.

In addition to the Guidelines on Article 101(3), the first codification of the Commission's economic principle, the approach is further exemplified in the 2008 Guidance on the Commission's enforcement priorities in applying Article 82 TFEU¹⁶⁵. The Guidance sets out the Commission's analytical framework for assessing the potential anticompetitive effects of exclusionary conduct by dominant undertakings, thereby offering increased certainty to stakeholders as to what the economic approach is and how it is applied by the Commission. With the expansion of the EU and the application of the competition provisions by domestic institutions, the economic approach is intended to lay down a standard conceptual framework that will guide enforcement bodies towards uniform decision-making.

Despite the Commission advocating for the more economic approach and for the consumer welfare standard as maximization of consumer surplus, the CJEU has never specifically endorsed or defined the concept of "consumer welfare", although the term was mentioned once in the *Post Danmark* case¹⁶⁶.

¹⁶⁵ "Guidance on the Commission's enforcement priorities in applying Article 82 TFEU to abusive exclusionary conduct by dominant undertakings" [2009] OJ C 45/7.

¹⁶⁶ Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, at para 42.

4.4. CONSUMER WELFARE IN THE CJEU JURISPRUDENCE

The *Post Danmark* case was a preliminary ruling by the CJEU on a reference by a Danish court and arose in the context of Article 102 TFEU, which prohibits abuses of dominant position. A firm holds a dominant position on the market if it has substantial market power, i.e. economic strength that allows them to behave independently from competitors, customers and consumers.¹⁶⁷ Dominance is not illegal in itself; the dominant firm must abuse its position on the market (e.g. by pricing below cost (predatory pricing), refusing to supply a customer or charging an excessive price) in order to be held accountable under competition law. However, dominant firms have a stronger duty to abide by the competition rules than less powerful firms: there is a “special responsibility” on the part of a dominant firm to ensure that its conduct does not, in any way, impair competition¹⁶⁸. An abuse of dominant position occurs when the dominant firm engages in conduct which has the effect of diminishing the already low level of competition existing on the market.¹⁶⁹

¹⁶⁷ The concept of dominance was defined in the *Michelin I* case as “economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.”: Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* ECR 1983 -03461, at para 30 [*Michelin I*].

¹⁶⁸ *Michelin I*, *supra* note 148, at para 57: “A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.”

¹⁶⁹ Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, ECR 1979-00461, at para 91: “The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

In *Post Danmark*, the practice alleged was a loyalty rebate offered by the Danish Post to the clients of its competitor in order to gain their custom¹⁷⁰. The pricing practice was alleged to be an abuse of dominant position, because the targeted group of customers was offered selectively low prices which the usual customers of Post Danmark did not benefit from. An additional concern was that those prices resembled predation, as they were considered to be unusually low. There is a presumption that a price is predatory when it is below average variable cost¹⁷¹¹⁷². A price above average variable cost, but below average total costs¹⁷³ will be predatory when it is part of a pricing strategy aimed at eliminating a competitor from the market.¹⁷⁴

The reference by the Danish court to the CJEU asked whether a price lower than average total cost, but higher than average incremental cost¹⁷⁵ is considered an exclusionary abuse¹⁷⁶ in the absence of an exclusionary intent. The CJEU held that Article 102 TFEU

¹⁷⁰ A loyalty rebate takes the form of an extra discount if the customer purchases all of its requirements or a set percentage of its requirements from the same supplier.

¹⁷¹ Variable costs are those that vary depending on the quantity produced (e.g. labour, raw materials). Average variable costs are the variable costs for producing one unit of output.

¹⁷² C-62/86, *AKZO Chemie BV v Commission*, [1991] ECR I-03359 at para 71: “Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.” [AKZO]

¹⁷³ Total costs include variable costs and fixed costs (that do not vary with changes in production, like rent or property taxes). The average total cost is the total cost for producing one unit of output.

¹⁷⁴ *AKZO*, *supra* note 153, at para 72: “Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.”

¹⁷⁵ Average incremental cost is the total (long-run) average cost of supplying an extra unit of output.

¹⁷⁶ An exclusionary abuse aims to eliminate a competitor from the market. Predatory pricing is an example of exclusionary abuse.

prohibits a dominant undertaking from adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as itself. This “equally efficient test” accepts that as a result of intense price competition, from firms able to lower their production costs thanks to efficient production strategies, some firms may be driven out of the market. But this is a normal consequence of the competitive process. A practice by a dominant firm will amount to an exclusionary abuse if firms as efficient as the incumbent are eliminated as a result of it. In this case, the CJEU held that it was not established that Post Danmark had deliberately sought to drive out competitors through its loyalty rebates, even though the price was below average total cost. And given that its price was above average incremental cost, it was not unlawful.

The CJEU mentions consumer welfare when setting out the framework of analysis for any efficiencies that arise from the restriction of competition by the dominant firm: “it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.”¹⁷⁷ The conditions listed by the CJEU in relation to efficiencies are similar to those in Article 101(3). So, arguably, when referring to consumer “welfare”, the Court had in mind the understanding of consumer

¹⁷⁷ Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, at para 42.

“surplus”, given that the focus is on the redistribution of gains from producers to consumers through the pass-on of efficiencies.

It is important to note that the term “consumer” is not itself without confusion. While the most common understanding is that it refers to end users of a particular product, this might not always be the case. In European Union competition law,

“The concept of ‘consumers’ encompasses all users of the products covered by the agreement, including wholesalers, retailers and final consumers. In other words, consumers within the meaning of Article 101(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings, as in the case of buyers of industrial machinery or an input for further processing, or private individuals, as, for instance, is the case of buyers of impulse ice cream or bicycles.”¹⁷⁸

The European Commission, therefore, considers under the term “consumer” both end-users of products, as well as intermediary buyers. This creates uncertainty over the actual entity whose “welfare” is at stake. On a market where demand is inelastic¹⁷⁹ and all price increases are passed through from one level of the supply chain to the other, intermediate buyers would not consider a substantial price increase (e.g. due to a cartel, or to a predatory firm raising its prices following exclusion of competitor) damaging, since they can

¹⁷⁸ Guidelines on the application of Article 101(3) TFEU, *supra* note 144, at para 84.

¹⁷⁹ The demand of a product is inelastic when an increase in price does not result in a proportionate decrease in demand. For example, when the price of gasoline increases, demand for gasoline decreases to a very small extent, if at all, because there are very few products that drivers can turn to replace it.

pass that increase on to their customers. However, end-users will definitely be harmed, as they will bear the whole price increase that gets passed through to their level.

When the “consumers” are, for example, large retailers (like supermarkets), it may be assumed that they can benefit from quantity rebates and pass on those lower prices to end-users of the products they sell. The traditional argument in this case, is that powerful buyers exercise their countervailing buyer power on suppliers and that results in lower prices¹⁸⁰. If what is at stake is the welfare of those intermediary customers of the supplier, they indeed increase their surplus by being able to extract lower prices. However, their incentives to pass those benefits on to consumers may be absent. So, the large retailers end up enjoying lower prices from suppliers, to the detriment of final consumers, who continue to pay the high price. In this case, by focusing on intermediate customers as consumers, the wealth redistribution caused to final consumers¹⁸¹ is ignored. Therefore, final consumers, who are usually the weaker party, due to having little or no bargaining power, are not adequately protected by allowing intermediate customers to be compensated for upstream price increases. Intermediate customers are usually firms, whose actions are guided by profit maximization. Given intermediate customers’ profit motive, they are likely to retain the benefit of price reductions and pass on any price increases until they reach the final consumers. A system of private enforcement should focus strictly on the incentives of final

¹⁸⁰ John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (New Brunswick, USA and London, UK: Transaction Publishers, 2008).

¹⁸¹ Dennis Carlton, “Does Antitrust Need to Be Modernized?” (2007) 21:3 J Econ Perspect 158: “I know of no proponent of the consumer surplus standard who endorses buyers cartels, or who believes that monopsony is not harmful. Instead, proponents of a consumer surplus rule tend to argue that buyer cartels and monopsony are exceptions to the otherwise sensible rule of maximizing consumer surplus”.

consumers for bringing damages claims, as intermediate customers usually do not suffer any harm due to passing on.

In EU jurisprudence, the *Spanish Glaxo*¹⁸² case illustrates the tension between the divergent possible interpretations of the term “consumer”. Glaxo charged different prices to distributors depending on their country. As the price it charged in Spain was lower than the one charged in the UK, British distributors bought Glaxo drugs from the Spanish wholesalers and sold them in the UK. This practice was known as parallel trade. Glaxo tried to stop the practice by forbidding its Spanish distributors from selling outside of Spain. By doing so, Glaxo was in fact dividing the EU market by country. However, the General Court did not consider Glaxo’s discriminatory pricing strategy harmful to consumer welfare. Even if UK distributors were able to buy Glaxo drugs more cheaply from Spain, the price of medicines in the UK was regulated by the state, so consumers would not benefit from the price difference. Instead, UK distributors would be the ones better off, at the expense of final consumers. The General Court reasoned that if Glaxo was allowed to keep the profits it made from selling its drugs for a higher price in the UK, it would invest those profits in further research and development, with the result that consumers would, in the end, benefit from better quality, more innovative medicines. The problem with this reasoning was that there was no guarantee that Glaxo would, in fact, use those profits for R&D, and there was no way of forcing it to do so. The CJEU reversed the General Court’s decision and found the partitioning of markets resulting from discriminatory pricing restrictive of competition. It considered that the impact on the structure of the market was enough for

¹⁸² General Court judgment: T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-02969. CJEU judgment: Case C-501/06 *GlaxoSmithKline v Commission* [2009] ECR I-9291.

this finding. So, the CJEU did not examine the effect of Glaxo's pricing practice on the final consumers. It was sufficient that intermediate buyers were affected through the territorial price discrimination imposed by Glaxo. The effect of focusing on the surplus enjoyed by intermediate buyers, ignores, as mentioned above, the fact that any price reductions are not passed on to final consumers, who are in a vulnerable position financially, compared with the already deep-pocketed firms that get to keep the benefits of price differences.

4.5. CHAPTER CONCLUSION

In EU competition law, consumer welfare is used in the sense of consumer surplus. The term "consumer" covers both final consumers of a product and all intermediary purchasers that buy from a party infringing competition law, an approach that sometimes results in outcomes that reinforce the power imbalance between firms and final consumers. This thesis will assess the provisions of Directive 2014/104/EU using the "surplus" understanding of "welfare" and the broad concept of "consumer". This is because the focus is more on the maximization of surplus for any entity harmed by anticompetitive behaviour, by making violators return the artificially inflated portion of the price charged, and damages awards have the effect of achieving this maximization. Therefore, the analysis measures the incentives for both final consumers and of intermediate firms to bring private actions for damages under competition law.

5 PRIVATE ENFORCEMENT OF COMPETITION LAW

This chapter argues that since people respond to incentives, the state must, in order to fulfill its legitimating obligation of ensuring justice for its citizens, provide sufficient incentives for citizens to feel encouraged to ask that the harm they suffered be rectified. In the context of private damages actions for competition law infringements, therefore, the expected incentives are lower litigation costs. The following sections assess whether Directive 2014/104/EU sufficiently lowers litigation costs. The conclusion is that it does not, so consumers are not given sufficient incentives to bring private damages claims. To increase the legitimacy of their legal systems, Member States should supplement the minimal level of incentives provided by the Directive's framework.

5.1. INCENTIVES, HUMAN BEHAVIOUR AND PRIVATE ENFORCEMENT

One of the basic assumptions underlying law and economics is that human beings act rationally. They do so by ordering their preferences based on utility level, and choosing the option ranking highest in the utility hierarchy. The previous chapter applied this notion of rational theory to the behaviour of producers and consumers in the marketplace for goods and services. It showed that both categories of actors weigh the expected benefits of producing/buying goods and services against the potential costs associated with doing so. The calculation of utility for available alternatives is influenced by the existing incentives that make certain alternatives more attractive than others. For example, a low price will be

a powerful incentive for buyers to acquire a product, whereas a high price will be an incentive for producers to increase their output.

The anticompetitive conduct most likely to cause price increases above competitive levels is collusion. This behaviour covers actions like price fixing, market sharing, and bid rigging. These distort the efficient functioning of the market by influencing parameters of competition such as price and output. For producers, collusion reduces the incentives to compete, because it facilitates the exchange of information and provides more certainty as to the strategies adopted by each cartel participant¹⁸³. By removing information asymmetries between cartel participants, the risk of price cutting decreases, because departures from the collusive agreement are more readily detected and punished¹⁸⁴. The punishment associated with breaking the cartel by undercutting reflects a cost, because the firm that undercuts will likely make some short-term gain from the small price difference, but will lose long-term collusive profits, which are likely to be much higher than the immediate benefit from cheating on the cartel. Therefore, punishment represents a disincentive for firms to depart from the collusive arrangement.

The same rational choice reasoning applies to consumers' decisions about engaging in litigation once it is apparent that producers gained surplus by relying on anticompetitive strategies, such as collusion. When choosing among the two alternatives of suing or not suing a competition law infringer for an illegal increase in price, a consumer will weigh the cost of engaging in litigation against the likely damages he will be awarded. For a consumer

¹⁸³ On this point, see George J. Stigler, "A Theory of Oligopoly", (1964) 72:1 J Polit Econ 44.

¹⁸⁴ For a more detailed argument as to what promotes cartel stability, see Margaret C. Levenstein and Valerie Y. Suslow, "Breaking Up Is Hard to Do: Determinants of Cartel Duration", (2011) 54:2 J L & Econ 455.

to bring a claim against the infringer, the damages should outweigh the litigation costs. This is unlikely where the consumer did not purchase sufficient quantities to claim a significant harm caused by the price increase. For example, a person who only bought a chocolate bar whose price had been increased by a cartel by 50 cents will have suffered too small a harm to warrant spending thousands of dollars on legal fees to recover those 50 cents.

To increase the likelihood of private enforcement through damages claims, appropriate incentives must be offered to consumers, namely lower litigation costs. These could take the form of allowing claimants to rely on findings of infringement by public authorities, imposing extensive disclosure obligations on infringing firms and public enforcers who investigated the conduct, and facilitating access to information contained in leniency files. Notwithstanding the realization of all these conditions, claimants may still be in a position where the loss suffered is below the cost of bringing a legal claim for compensation. To reduce this possibility, claimants should be permitted to group numerous claims for trivial losses into one consolidated collective claim for a damages amount that exceeds litigation costs. Such a collective action scheme would be facilitated by the existence of a contingency fee system.

5.2. BALANCING INCENTIVES IN DIRECTIVE 2014/104/EU

5.2.1 Standing of indirect purchasers and the passing-on defence

Standing refers to the right to bring an action for a harm suffered. In damages claims for competition law infringements, that harm may have been suffered by parties dealing directly with the infringer or by parties who bought goods produced by the infringer from

another of that producer's customers. Direct purchasers are the ones who buy goods or services subject to inflated prices from the infringer himself. Indirect purchasers are those who buy goods or services subject to anticompetitive pricing from other buyers, not from the infringer. The distinction is important because it shows where harm is more likely to have occurred. A direct purchaser of anticompetitively overpriced products is unlikely to be a final consumer, but rather a distributor of those products or a producer of other products which use as input the goods or services supplied by the infringer. A direct purchaser who is not a final consumer will pass on to its own customers the price increase imposed by the original supplier. When this happens, the direct purchaser actually remedies the harm he suffered by dealing with a competition law infringer, because the overcharge is "recouped" from another buyer down the supply chain. Therefore, it is indirect purchasers who are more likely to bear the cost of the overcharge, depending on their own ability to pass it on to their customers. Of course, the pass on rate may be so complete that it is the final consumer who pays the whole of the overcharge. The infringer can argue that he is not liable to any party who was able to pass the overcharge on to other buyers. If the passing on defence is successful, the defendant will only have to pay damages to those victims who actually suffered the harm caused by the overcharge.

The distinction between direct and indirect purchasers can give rise to complications from the earliest stage of a damages action, because the right to sue may not rest with all buyers who acquire the products of an antitrust violator. The issue was of significant importance to the Commission from the early stages of the process leading up to directive 2014/104/EU.

The 2005 Green Paper¹⁸⁵, outlined four policy options for dealing with the distinction between direct and indirect purchasers and the problems it may cause. First, both direct and indirect purchasers could be allowed to sue, with the defendants able to rely on the passing on defence. This option could have led to two results: direct purchasers being denied compensation for the overcharge and indirect purchasers having too little evidence to support a claim for damages of the passed on overcharge. The second option was to only allow actions by direct purchasers and exclude the passing on defence. This was believed to increase the chances of recovery for direct purchasers. The third policy option was to allow both categories to sue, but deny the defendant the right to invoke the passing on defence. The main problem with this option was that it created a risk of holding the defendant liable for the same overcharge multiple times, with the result of allowing purchasers who actually passed on the overcharge to recover damages they did not deserve. The final option put forward by the Commission was to adopt a two-step procedure. Under this two-tiered law suit, the liability of the defendant would be established in the first stage, where any purchaser would have standing to sue. Once the infringer is found liable, the allocation of damages between claimants would follow in the second stage of the action.

The White Paper on damages actions¹⁸⁶, issued by the Commission in 2008, argued for the first policy option suggested by the Green Paper on the basis of the compensatory goal pursued by damages claims. The Commission's recommendation was that the law should

¹⁸⁵ Green Paper "Damages actions for breach of the EC antitrust rules", COM(2005) 672 final, Brussels, December 19, 2005. Available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52005DC0672>.

¹⁸⁶ White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, Brussels, April 2, 2008.

Available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

give standing to sue to direct and indirect purchasers and allow the passing on defence. This option could, in principle, maximize access to justice and avoid unfair outcomes such as multiple liability for the defendant and undeserved compensation for direct purchasers who passed on the overcharge. Nevertheless, economists have pointed out that this might not be the optimal solution. In the United States, Posner and Landes¹⁸⁷ argued that neither compensation of victims, nor deterrence of infringers, would be advanced by adopting the solution proposed by the Commission. They claim that the general level of compensation would not be higher if both categories of purchasers had standing. On the other hand, deterrence would definitely decrease, because direct purchasers, who are considered the more efficient enforcers, due to their proximity to the infringer, will have less incentive to enforce the law if their chances of recovering the full amount of the overcharge are lowered. Finally, the difficulties associated with apportioning damages among direct and indirect purchasers would reduce the possibility of either group receiving adequate compensation. Although these arguments could appear convincing in the US, they are unlikely to hold in a less individualistic and more welfare-focused society like the European one, which looks for a fair system of equal access to justice. Any decision as to the right to compensation and the amount of damages a party deserves should be left to the courts, not made the subject of *a priori* determination by policy-makers.

It is important to note here that the European Union has advocated compensation as the main goal of facilitating private damages claims, recognizing that increased deterrence

¹⁸⁷ Richard A. Posner and William M. Landes, “Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*”, (1979) U Chi L Rev 602.

would be a welcome by-product of stronger private enforcement¹⁸⁸. While acknowledging the potential risk of unmeritorious claims (a problem the US confronts), the EU's Competition Commissioners have reiterated the need to encourage private damages actions by victims.¹⁸⁹ Underlying this advocacy effort was the perceived need to develop a more vigorous competition culture among businesses and citizens of the European Union. Given that competition law is the engine of the EU's single market, the belief held by the Commission about the importance of strengthening the competition culture is not surprising. By allowing damages actions, the competition provisions would become "instantly relevant for citizens"¹⁹⁰. Indeed, developing the EU's competition culture was portrayed as necessary for broadening "the basis of support for the competition rules"¹⁹¹, thereby "creating a more competitive environment for business and industry, and thus growth and economic and social welfare"¹⁹².

In an attempt to foster this competition culture among all EU citizens, Directive 2014/104/EU allows actions by both direct and indirect purchasers and the passing on defence. Article 12(1) of the Directive states that "compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers". A necessary condition is that harm is suffered, so this provision eliminates the risk of a direct purchaser

¹⁸⁸ White Paper on damages actions, *supra* note 185, at p.3: "Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules".

¹⁸⁹ See, for example, the speech of former Competition Commissioner Neelie Kroes SPEECH/05/533 "Enhancing Actions for Damages for Breach of Competition Rules in Europe", delivered in New York, at the Harvard Club, on September 22, 2005. Available at http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm?locale=en.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, at p. 2.

¹⁹² Speech of former Competition Commissioner Neelie Kroes, *supra* note 192, at p. 2.

who passed on the overcharge being awarded damages. A further requirement to prove is that the harm was caused by an anticompetitive practice¹⁹³. Article 12(2) limits the level of damages to the amount of the overcharge incurred at a particular level in the supply chain. To facilitate compensation, Article 12(5) gives national courts the power to estimate the share of the overcharge that has been passed on, in order to avoid under-compensation resulting from difficulties in apportioning damages.

To ease the claimant's burden of proving the existence and extent of the overcharge, the Directive introduces a presumption that an indirect purchaser is deemed to have proved that the overcharge was passed on to his level when he proves that: (i) the defendant committed the infringement, (ii) the infringement resulted in an overcharge for the direct purchaser, and (iii) the indirect purchaser bought the goods that were the object of the violation¹⁹⁴. If these conditions are met, an indirect purchaser is presumed to have suffered compensable harm caused by the competition law infringement. To rebut the presumption, the defendant must show that the overcharge was not in fact passed on.

The Directive's approach to standing is commendable, because it represents an important first step towards overcoming the many obstacles faced by victims interested in bringing damages claims.

¹⁹³ Joined Cases C-296/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, at para 61.

¹⁹⁴ Article 14(2) of Directive 2014/104/EU.

5.2.2 Assessing harm and quantifying damages

The Directive fails to deliver on its promise of providing more certainty across the EU, because it lacks clear guidance on the assessment of harm and the quantification of damages, the core components of a damages action.

First, there is no definition of the concept of “damage” or “harm” in the text of the Directive. Some indication is to be found in the *Manfredi*¹⁹⁵ decision, where the CJEU stressed that victims are entitled to a minimum level of compensation comprising actual loss¹⁹⁶, loss of profits¹⁹⁷ and interest¹⁹⁸. Nevertheless, there is no definition provided for “actual loss” or “loss of profit” in any of the preparatory documents and the Directive is also silent on the point. Several proposals for the definition of damages appear in the 2005 Green Paper¹⁹⁹, which point to the Commission’s focus on compensation, instead of restitution. For example, the Green Paper distinguished between two possible forms of assessing damages resulting from anticompetitive behaviour, namely, based on the loss incurred by the victims (compensatory damages), or on the gain accrued to the defendant (recovery of illegal gain).²⁰⁰ As to interest, the Green Paper suggested that this could be

¹⁹⁵ *Supra* note 192.

¹⁹⁶ *Manfredi*, *supra* note 192, at para 95: “[...] it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.”

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, at para 97: “As to the payment of interest, the Court pointed out in paragraph 31 of Case C-271/91 *Marshall* [1993] ECR I-4367 that an award made in accordance with the applicable national rules constitutes an essential component of compensation.”

¹⁹⁹ *Supra* note 184.

²⁰⁰ The option of basing the calculation of damages on the gains of the defendant was not carried forward, as the final version of the Directive emphasizes, from the Recitals, the compensatory purpose of damages.

calculated from the date the infringement was committed, or from the date the injury was suffered as a result²⁰¹.

The Green Paper also proposed that where compensation is claimed for harm caused by a cartel – the most deleterious anticompetitive act – damages could be doubled, either automatically, conditionally or at the discretion of the court. This option was modelled after the US approach to damages: US competition law relies on private damages claims not so much so as to achieve fair outcomes for harmed victims, but to reinforce the deterrent potential of competition law sanctions. The focus on deterrence rather than compensation is strongly evidenced by the availability of treble damages. Claimants who are successful in proving that a defendant violated the competition provisions and caused harm by increasing prices can recover three times the value of the overcharge. In principle, assuming that the overcharge is accurately determined, treble damages over-compensate purchasers. But the US system does not seem concerned about this – overcompensation is preferred to the risk of recidivism due to insufficient sanction. In the EU, the Green Paper limited the possibility of double damages to instances where the prospect of single damages would not be sufficient to incentivize victims to bring damages actions. No further details were provided regarding the circumstances in which double damages would be available to claimants. The proposal for doubling the damage award was abandoned due to significant opposition from parties participating in the consultation process.²⁰² For example, the British

²⁰¹ 2005 Green Paper, *supra* note 184, at p. 7.

²⁰² Commission Staff Working Document Accompanying document to the White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, SEC(2008) 404, at p. 55.

Retail Consortium opposed double damages for any type of infringement on the basis that punitive sanctions are better left to the public enforcement agencies²⁰³.

The Directive specifically dismisses the possibility of double damages for any kind of competition law violation – a clear indication that the US model of treble damages was rejected by the Commission as an adequate mechanism applicable to the EU. The starting point in quantifying harm is the surplus that the victims were deprived of, not the gain which accrued to the defendant. Punitive or exemplary damages, in addition to compensatory ones, are specifically prohibited²⁰⁴.

The final text of the Directive suggests that simple damages that aim to compensate victims strictly for the losses they suffered should suffice, in principle, to achieve the goal of compensation of victims. Assuming the harm is correctly defined and measured, simple damages should satisfy the compensatory goal, and thereby increase the victim's consumer surplus. While the harm claimed is usually the overcharge imposed by the defendant above the competitive price, it has been pointed out that the overcharge may not be the sole harm suffered by victims of competition law violations. For example, Connor²⁰⁵ shows that even in the United States, which awards triple damages to cartel victims, this is insufficient to adequately compensate for the loss caused. He estimates that even when combined with the criminal sanctions (fines and imprisonment) imposed by the US Department of Justice,

²⁰³ European Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules: A comment from the British Retail Consortium (BRC), July 15th 2008, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/brc_en.pdf.

²⁰⁴ Article 3(3) of Directive 2014/104/EU. See also Recital 13 of Directive 2014/104/EU: “[...] full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages”.

²⁰⁵ John M. Connor and Robert H. Lande, “Cartels as 'Rational Business Strategy': Crime Pays”, (2012) 34 *Cardozo L Rev* 427.

the level of cartel penalties is only 9% to 21% as high as they should be in order to offer optimal protection to victims²⁰⁶.

This unsatisfactory result occurs because courts use the overcharge as the principal measure of harm. In Chapter 4 above, it was shown that the harm caused by a cartel is only not the part of consumer surplus converted into producer surplus (which is merely a redistribution of wealth), but also the deadweight loss.²⁰⁷ Deadweight loss, the net value of the quantities of goods no longer produced or consumed by society, is a social loss that affects both producers and consumers. To be accurate, damages awards should take into account not only the magnitude of the overcharge, but also the deadweight loss imposed on society as a whole²⁰⁸. Consumer welfare increases when harm and damages are assessed holistically. However, courts rarely, if ever, concern themselves with including the deadweight loss in the assessment of damages, because doing so makes the calculation of harm and damages very difficult. Indeed, taking account of the deadweight loss would increase the burden on judges, but would result in fairer and more accurate damage awards that adequately compensate victims.

²⁰⁶ *Ibid.*, at p. 428.

²⁰⁷ See Figure 4 *supra*, at p. 55.

²⁰⁸ See, for example, Leonardo J. Basso and Thomas W. Ross, “Measuring the True Harm From Price Fixing to Both Direct and Indirect Purchasers”, (2010) 58:4 *J Ind Econ* 895, although this point is not new to them.

In addition to lacking a definition of harm or damages, the Directive is also silent on the process for quantifying damages. Article 17²⁰⁹ is the only provision which addresses the issue of quantification and provides that national courts are allowed to estimate the amount of harm when precise quantification is excessively difficult or practically impossible. No further guidance is given on a uniform method applicable throughout the EU to assess harm and quantify damages. This decision is left to the national legal system of each Member State.

Article 17 covers situations where compensation would end up being unavailable because of the difficulty of calculating the amount of harm and the extent of damages payable. The intention behind this provision is laudable, because it tries to avoid unfair outcomes caused by insurmountable technicalities. This lowers the burden of the claimant in proving the extent of damages they are entitled to.

However, some general guidance for the MSs' courts on the issue of quantification of harm and the calculation of damages would have been helpful. Where methods for calculating damages are set out in the law, victims can more easily identify the losses they can claim

²⁰⁹ Article 17 of Directive 104/104/EU provides that:

“1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available”.

2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

3. 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.”

damages for and can adjust their expectations in regards to the amount they could realistically be awarded by the court. Clear guidance on quantification of harm and calculation of damages would help judges make fairer and more predictable decisions and would increase accuracy of the damages awards, especially in cases where the judge is not familiar with competition law and economics, as is the case in countries without specialized competition tribunals.

Despite the Directive's silence on the point, the Commission published a Study on quantification of damages in 2009²¹⁰. The document offers a possible conceptual framework for determining the quantum of damages, in which the starting point is to establish the counterfactual, i.e. the state of the market but for the antitrust infringement. At this stage, several factors are relevant, like, for example, the type of competition law infringement (e.g. cartel or exclusionary abuse), the type of harm caused by the infringement (e.g. overcharge or the creation of barriers to entry), and the characteristics of the market or the industry in which the anticompetitive conduct took place²¹¹. The second step is to calculate the difference between the factual and the counterfactual and convert it into a numerical value expressing the amount of damages recoverable. The study illustrates the process with a cartel which imposes an overcharge for five years. The counterfactual represents the market price that would have prevailed in the absence of the

²¹⁰ *Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission*, by Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos, with economic assistance from Dr Walter Beckert, Professor Eric van Damme, Professor Mathias Dewatripont, Professor Julian Franks, Dr Adriaan Ten Kate and Professor Patrick Legros, December 2009. Available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

²¹¹ *Ibid*, at p. 12.

cartel. In the second stage, damages are aggregated across the five years and interest is applied to that sum.

In 2013, the Commission further filled the gap and developed a Practical Guide²¹² that explains different economic models that can be used to calculate harm and damages for different types of competition law violations. The Practical Guide is neither binding, nor a “comprehensive or definitive account of the insights, methods and techniques available”²¹³. Therefore, Member States are given flexibility to choose the method most appropriate for their particular domestic legal context. When implementing the Directive, MS can decide whether to adopt a model applicable in all damages cases, or allow for flexibility in decision-making, depending on the facts of particular cases. A generally applicable method of calculation of damages may ignore important features of specific cases that could materially influence the damages award. This could result in unfairness, which would undermine the Directive’s declared goal of full compensation. On the other hand, giving courts the option to choose among possible quantification methods reduces certainty and predictability. To ensure uniformity across the EU and achieve fairness, a single method of assessment of damages should be employed throughout the Member States. The availability of multiple models would cause discrepancies in assessment among MSs, and

²¹² Commission Staff Working Document Practical Guide. Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, of 11 June 2013. Available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

²¹³ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, of June 2013, published in the OJ [2013] C 167/19.

would increase the risk of victims “shopping” for the forum with the most advantageous calculation method.

Despite the Directive’s underlying rhetoric to facilitate full compensation, its text misses the mark precisely in regards to the most important issues: quantification of harm and calculation of damages. How are consumers encouraged to bring more private actions for damages if there is no clarity and predictability as to what they are entitled to claim? The whole harmonization project that the Directive hoped for could be compromised if victims are not able to rely on the same standard for harm and damages throughout the Member States. While the Commission has made an effort to provide some guidance, its Study and Practical Guide are not binding on the MSs.

5.2.3 Access to evidence

If victims of anticompetitive acts are to have a fair opportunity to win in damages litigation against infringers, they should have adequate mechanisms for gathering evidence. This section will not deal with specific types of evidence, but rather with the sources of evidence that claimants can rely on and the process for accessing those sources.

The problem of evidence is not so acute when a lawsuit for damages follows on from a finding of guilt by a public enforcement agency. In principle, follow on actions should not pose high obstacles for claimants, since the infringement is already proven through the decision of the Commission or an NCA. So, their focus would be on proving the causal link between the infringement and the loss, and the extent of harm suffered. Claimants are in a more vulnerable position when they intend to bring standalone actions, based on their

suspicion that a competition law violation has been committed. In such circumstances, proof of the infringement is a necessary step to be overcome by the claimants. If no infringement is proved, it will be even more difficult, if not impossible, to establish harm and causation.

The Directive recognizes that crucial evidence may be held by the defendant or by third parties. When this is so, denying victims access to that evidence can “unduly impede the effective exercise of the right to compensation guaranteed by the TFEU”²¹⁴. In follow on actions brought in a MS whose NCA issued a final decision finding an infringement of competition law, that decision must be regarded as irrefutable proof of the infringement²¹⁵. When the action is brought in a MS different from the one where the NCA decision is rendered, the finding of infringement must be considered at least prima facie evidence of the violation²¹⁶. The provisions prevent defendants from re-litigating the existence of an anticompetitive practice, thereby avoiding delays and additional costs for both parties. While the provisions on the effect of NCA decisions seem helpful and straightforward, it is unclear what the claimants position is when an NCA decision is appealed. Limitation periods, under the Directive, should be of at least five years from the moment the infringement has ceased²¹⁷. Depending on the time it takes for appeals to be resolved in a particular MS, claimants may be unable to rely on the NCA finding of infringement because appeals could drag on for longer than the limitation period established by national law.

²¹⁴ Recital 14 of Directive 2014/104/EU.

²¹⁵ Article 9(1) of Directive 2014/104/EU.

²¹⁶ Article 9(2) of Directive 2014/104/EU.

²¹⁷ Article 10(3) of Directive 2014/104/EU.

To further ensure that claimants are able to remedy the information asymmetry and obtain evidence relevant to their claim, national courts should have powers to order disclosure. Chapter II of the Directive covers the powers of national courts to order disclosure by defendants, third parties and competition authorities. Claimants can request domestic courts to order disclosure of evidence, but the order will only be granted where disclosure is proportionate²¹⁸. In assessing proportionality, courts will have to consider in particular the following factors: (i) whether the request for disclosure is justified, taking into account the available facts and evidence; (ii) the scope and cost of disclosure, especially for third parties; and (iii) the need to protect confidential information found in the evidence requested. Moreover, when requesting disclosure, claimants must identify the categories of evidence sought as narrowly and precisely as possible²¹⁹. Recital 18 of the Directive lists appropriate measures for protecting business secrets or confidential information covered by a disclosure request. These include: redacting sensitive information, conducting hearings in camera, using experts to summarize the confidential information and present it in a non-confidential form.

While MS are given the freedom to decide on the exact scope of the powers of national courts to order disclosure from defendants or third parties, a common approach is sought with respect to disclosure of information in the file of competition authorities, including the Commission, as well as all NCAs²²⁰. The Directive allows domestic courts to order the disclosure of such information, subject to some restrictions. Again, the order for disclosure

²¹⁸ Article 5(1) and 5(3) of Directive 2014/104/EU.

²¹⁹ Article 5(2) of Directive 2014/104/EU.

²²⁰ See definition of “competition authority” in Article 2 of Directive 2014/104/EU.

must be proportionate and in assessing this requirement, courts will have to consider: (i) whether the request is sufficiently precise and narrow; (ii) whether disclosure is requested for the purpose of being used in an action for damages; and (iii) the need to safeguard the effectiveness of public enforcement of competition law. National courts should only order disclosure of evidence by the NCA when that evidence is cannot reasonably be obtained from another source²²¹. The Commission and interested NCAs have the right to submit written observation to aid the court's assessment of impact of disclosure on the effectiveness of public enforcement. National courts should be able to order the disclosure of evidence that exists independently of the proceedings of a NCA at any time²²², but they may only allow a request for disclosure of information prepared by the NCA in the course of its enforcement proceedings only after those proceedings have closed²²³.

There are two categories of evidence in the file of competition authorities that can never be the subject of an order for disclosure: leniency statements and settlement submissions.²²⁴ It is believed that, in the absence of such protection, leniency applicants would be exposed to greater civil or criminal liability than they would have, had they not collaborated with the Commission. The reasoning is that the leniency program eases the burden on both public enforcers and private victims, because in the absence of a leniency application, the cartel would not have been exposed. In addition to the protection in Article 6(6) of Directive

²²¹ Recital 29 of Directive 2014/104/EU.

²²² Recital 28 of Directive 2014/104/EU.

²²³ Recital 25 of Directive 2014/104/EU.

²²⁴ Article 6(6) of Directive 2014/104/EU.

2014/104/EU, the 2015 amendments²²⁵ to the 2006 Leniency Notice also impose a prohibition on the Commission from transmitting to national courts leniency corporate statements for use in private actions for damages. Evidence obtained solely through access to the file of a competition authority, i.e. leniency documents, will be deemed inadmissible in private actions for damages.

The rationale that leniency applicants would be exposed to higher sanctions in the absence of strict protections for leniency documents is not convincing. There is no injustice in holding infringers responsible both in public enforcement and in private lawsuits. In fact, follow-on actions were contemplated as a real possibility from the start of the discussion on private damages actions. Moreover, once the cartel is uncovered by the whistle-blower, the investigation that ensues is announced publicly by the Commission. Once the other members of the cartel are detected, there is no safeguard against their revealing information about each other's participation. So, victims will end up finding out anyway about the existence of the cartel and, possibly, about the applicant's involvement in it. Since sooner or later victims find out about the applicant's participation in the collusion, the applicant will likely be subject to private damages actions. In the end, leniency applicants are only immunized from the sanctions imposed by the public enforcement authority, not from private suits by victims, so absolute protection of leniency documents on this basis is not justified.

²²⁵ Communication from the Commission "Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases", OJ [2015] C 256/1.

EU law also provides alternative routes into the file of a competition authority investigating cartels. For example, the Transparency Regulation²²⁶ provides that

“[i]n principle, all documents of the [EU] institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks.”²²⁷

Under the Transparency Regulation, the public should have access to documents received by the EU institutions (the Commission, Parliament, Council and European Council), as long as this does not interfere with the institution’s decision-making process. Evidence held by NCAs is out of the scope of the Transparency Regulation.²²⁸ The Commission may deny access when disclosure would undermine the protection of: the public interest, the privacy and integrity of the individual, the commercial interests of a natural or legal person, court proceedings or legal advice, and the purpose of inspections, investigations and audits²²⁹.

Claimants have several routes at their disposal for accessing evidence necessary for proving their claims. Although the Transparency Regulation facilitates access to evidence held by EU institutions, its effect is similar to that of the Directive’s provisions on disclosure ordered by

²²⁶ Regulation (EC) No 1049/2001 of the European Parliament and of the Council, of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145/43.

²²⁷ Transparency Regulation, *supra* note 225, Recital 11.

²²⁸ *Supra* note 225.

²²⁹ These the limitations are set out in Articles 4(1) and 4(2) of the Transparency Regulation, *supra* note 225.

national courts, in that important information prepared by competition authorities will be unavailable if proceedings are still open.

5.3. BOOSTING INCENTIVES: COLLECTIVE REDRESS

Given the limited effectiveness of the Directive's provisions on assessment of damages and access to evidence, MSs should exercise their discretion and supplement their domestic legislation implementing the Directive. In particular, MSs should coordinate to adopt a similar approach to the assessment of damages, in order to avoid injustices caused by the use of divergent models of calculation. Moreover, MSs should facilitate the access of claimants to evidence held by NCAs, either in their files, or in leniency applications. These recommendations would help lower the litigation costs faced by potential claimants. Even so, the costs may still be unaffordable for individual victims to pursue infringers for damages. This is why the creation of a mechanism for grouping damages claims is imperative.

Although both the 2005 Green Paper and the 2007 White Paper contemplated the necessity of mechanisms that allow the aggregation of individual claims for damages, Directive 2014/104/EU does not contain any provisions regarding the availability of collective redress for victims wishing to sue competition law infringers. The absence of collective redress provisions is due to the fact that the European Parliament urged the Commission to create a harmonized framework for bringing such claims, which would be applicable to victims of mass harms in several areas, including competition law²³⁰. While the need for uniformity is

²³⁰ Class actions are usually used in negligent torts cases, e.g. where a factory releases poisonous substances into a river which causes the population of a village to become ill.

understandable, the process of harmonization could have started using the model of collective redress for antitrust violations and extending it to other types of harms.

The 2005 Green Paper²³¹ offered two policy options for facilitating aggregated claims by victims, depending on the entity bringing the claim. A cause of action was envisioned for consumer associations, on the one hand, and for groups of purchasers, other than final consumers, on the other. The need to formulate clear rules on standing, quantification of damages and the distribution of damages between members of the group was also identified. The White Paper refined the options to two types of collective actions: representative actions by “qualified entities”²³² and opt-in collective actions. By “qualified entities”, the White Paper referred to, for example, consumer associations, state bodies or trade associations. So, the representative action envisaged by the Green Paper was expanded to include other types of victims, in addition to final consumers. The opt-in collective action significantly departs from the US model, which allows class actions from which any member who wishes to pursue his claim individually has to explicitly withdraw. The reasons why the US opt-out class action was not adopted by the European Union were two-fold. First, the Commission was hesitant to introduce legal practices that did not align with traditional European legal culture, since in the majority of EU jurisdictions class actions do not exist. Opt-in class actions fit better into the European legal culture because they represent a smoother transition to collective redress, given the fact that at present the class action is a device largely unknown to the national legal systems of the Member States. Secondly, the US opt-out class prohibits members of the class who have not explicitly

²³¹ *Supra* note 184.

²³² White Paper on damages actions, *supra* note 185, at p. 4.

withdrawn from the class action suit to bring separate claims for the same harm. The Commission was concerned with not limiting the victims' right to pursue damages claims individually, if they so wished.

Although collective redress was excluded from the Directive, the Commission's 2013 Recommendation on collective redress favoured the introduction of representative actions and opt-in class actions. The requirements for representative actions are set out in paragraph 4 and include a "direct relationship between the main objectives of the identity and the rights granted under EU law that are claimed to have been violated"²³³. This requirement is sufficient to ensure that representative actions do not become nuisance suits. On the opt-in collective action, it is important to note that the Recommendation envisages a very strict definition of "claimant party": express consent of all victims claiming to have been harmed must be obtained²³⁴. Any member should be free to leave the class at any time before final judgment is handed down or the case settled, "without being deprived of the possibility to pursue its claims in another form"²³⁵. This narrow definition of "claimant party" excludes from the class action any victim who has not expressly signed up to be a part of the class, with the effect that victims unaware of the class action suit will not be compensated. A better solution would be to allow opt-out collective actions on behalf of identifiable victims, not necessarily identified. This would maximize the number of victims that will be compensated following an award of damages in the class action suit.

²³³ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, OJ [2013] L 201/60.

²³⁴ *Ibid.*, at para 21.

²³⁵ *Ibid.*, at para 22.

The availability of collective redress mechanisms is essential if European victims of anticompetitive acts are to effectively enforce their right to compensation. Even if class actions cases do not go to trial, the value of settlements is significant²³⁶. The pooling of claims by multiple victims would improve access to justice by victims whose damage is scattered and low-value and would reduce the burden on individual consumers or small firms of gathering evidence to support their small claims in court. Allowing collective actions would also eliminate procedural inefficiencies that arise in the administration of justice when courts are crowded with a multitude of small individual damages claims²³⁷.

Moreover, contingency fees should become available for collective redress actions, as that would offer victims further incentives to take infringing firms to court, since they would not be bearing the significantly high litigation costs. One argument advanced by opponents of contingency fees is that they encourage unnecessary litigation by greedy attorneys, who are not interested so much in protecting the rights of their clients, as in their own personal gain. This argument was adopted by the Commission in its 2013 Recommendation²³⁸ on collective redress. In paragraphs 29 and 30, the Commission recommends Member States to prohibit contingent forms of lawyer remuneration for competition law actions and to strictly regulate contingency fee arrangements in the Member States that currently allow them. Contingency fee arrangements are calculated as percentages of the gain that would accrue to the members of the class following a successful suit and in the United States the

²³⁶ One empirical study conducted in the US shows that in 30 antitrust class action settlement cases approved by the US federal courts in 2006 and 2007, the value of settlements amounted to \$1.7 billion dollars: Brian T. Fitzpatrick, “An Empirical Study of Class Action Settlements and Their Fee Awards”, *Journal of Empirical Legal Studies* 7, no. 4 (December 2010): 811-846, at p. 825.

²³⁷ White Paper on damages actions, *supra* note 185, at p. 4.

²³⁸ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms, *supra* note 232.

lawyer's share is often 33% of the damages award.²³⁹ The Commission believes that the prohibition of contingency fees would have the beneficial effect of not only eliminating unnecessary litigation, but also of reinforcing the victims' right to full compensation. If victims are required to give up part of their recovery to cover lawyers' fees, then their right to full compensation would be compromised. However persuasive this line of thought might sound, victims would have to cover their attorneys' fees anyway, if they engage in individual litigation. They might win the case and have their fees paid by the defendant. But, the prospect of having to incur any type of litigation costs is highly prohibitive, especially for individual victims whose damage does not justify the cost of going after the cartel to recover. So, making contingency fees available would provide victims a great incentive to more actively pursue damages claims. If Articles 101 and 102 TFEU are to become widely regarded by European consumers as giving rise to individual rights of compensation and enforced accordingly, collective redress and low litigation costs should be a priority.

5.4. CHAPTER CONCLUSION

This chapter assessed whether Directive 2014/104/EU provides sufficient incentives for victims of anticompetitive conduct to bring actions for damages. It was argued that the Directive's approach to quantification of harm and damages, access to evidence by claimants is insufficient for achieving the goal of full compensation for victims. This is especially so because the Directive fails to include any collective redress mechanisms for aggregating damages claim. To remedy these shortcomings, MSs should take measures

²³⁹ Eric McCarthy, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, "Litigation Culture Versus Enforcement Culture: A Comparison of US and EU Plaintiff Recovery Actions in Antitrust Cases", extract from *The Antitrust Review of the Americas 2007*, a *Global Competition Review* special report, at p. 39. Available at www.globalcompetitionreview.com.

supplementing the Directive's provisions. First, collective redress and contingency fees must be allowed in order to facilitate access to justice by victims with small damages claims and to lower the litigation costs. Second, the ambiguity surrounding the methods for calculating harm and damages should be eliminated through a harmonious, EU-wide, approach that would ensure that victims do not end up being discriminated depending on the forum where they choose to bring their claim.

6 CONCLUSION

What emerges from the analysis of Directive 2014/104/EU is that the Commission has gone to great lengths in trying to maintain a kind of supremacy of public enforcement of competition law. This is especially evidenced by the hurdles imposed on claimants for accessing the file of competition authorities, and the absolute confidentiality protection of leniency documents. The appropriate interaction between public enforcement and private damages actions has been of concern to the European Commission since the start of the consultations for Directive 2014/104/EU, as the Commission strived to find the optimum level of coordination between the two. By the time the White Paper was published in 2008, the Commission clarified that public enforcement would remain the dominant form of safeguarding competition on the internal market, with private enforcement playing a complementary role²⁴⁰.

The Green Paper proposed three policy options for balancing public and private enforcement: (i) making leniency applications non-disclosable, thereby protecting the confidentiality of any admissions of guilt; (ii) reducing the damages payable by a leniency applicant in successful private damages actions; and (iii) limiting the damages liability of the leniency applicant to its share of the cartelised market. The White Paper proposed that all

²⁴⁰ White Paper on damages actions, *supra* note 185, at p. 3: "Another important guiding principle of the Commission's policy is to preserve strong public enforcement of Articles 101 and 102 TFEU by the Commission and the competition authorities of the Member States. Accordingly, the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement."

corporate statements submitted by all leniency applicants should be protected from disclosure, irrespective of whether the Commission accepts, rejects or makes no decision regarding the application. It also carried forward the third option described in the Green Paper, regarding the exclusion of leniency applicants from joint and several liability and limiting their liability to claims by direct and indirect contractual partners²⁴¹. The Directive partly reflects the Commission's position in the 2008 White Paper, by making leniency documents confidential and limiting the liability of immunity recipients to their direct or indirect partners or providers. Article 11(1) contains a general provision on joint and several liability when the violation was committed through joint behaviour. Where one of the infringers benefits from the leniency program, it will be liable to parties other than the categories mentioned earlier only when those cannot obtain full compensation from the other firms involved in the infringement. This limitation on joint and several liability could even be an incentive for companies to use the leniency program in order to limit their exposure to payment of damages.

The Commission's efforts to protect the dominance of public enforcement were particularly visible in regards to leniency proceedings. The desire to protect the integrity and effectiveness of an ongoing investigation is a reasonable ground for refusing access to the file to claimants wishing to bring damages actions. But keeping documents containing crucial evidence out of the hands of claimants on the basis of a belief that disclosure of leniency documents will *a priori* discourage infringers from coming forward is going too far. First, violators resort to the leniency program to avoid sanctions associated with public

²⁴¹ White Paper on damages actions, *supra* note 185, at p. 10.

enforcement – there is no evidence that they are also motivated by the possibility of escaping private litigation. Secondly, the Commission continues to rely heavily on its leniency program for the detection of cartels instead of monitoring the markets through other economic tools. Its dependence on this method makes it blind to the benefits of having private parties act as policing devices. The Commission should become more proactive in its enforcement approach and allow private enforcement to develop fully alongside public enforcement. It should be aware that its reluctance to give up its control over enforcement might stifle the already timid ascendance of private enforcement.

It is important to emphasize that the Directive's goal of creating a uniform system of private enforcement will only be achieved if MSs implement its provisions in a timely manner. As I have already argued, the Directive is welcome in so far as it imposes the creation of the system itself, but its provisions are insufficient to adequately incentivize victims to resort to litigation against competition law infringers. To facilitate damages actions, MSs will have to go beyond the Directive's minimum standard and pass laws that contain clear guidelines about assessment of harm and quantification of damages, give access to leniency documents in circumstances where no other evidence is available to potential claimants, and allow class actions and contingency fee arrangements. If the Directive is not properly implemented, private parties will be unable to rely on its provisions, because directives do not have horizontal direct effect. Citizens are only able to rely on an unimplemented directive to claim damages against the state for its failure to comply with the EU requirements. For parties who have suffered considerable harm as a result of competition law infringements, recourse against the state is insufficient and unsatisfactory.

The deadline for implementation was December 27, 2016. At the time of writing (April 2017), less than half of the 28 MSs had completely transposed the Directive into national law²⁴². The Netherlands and the UK were among those countries that complied – not surprisingly, as they were also the ones with the highest level of private competition litigation even prior to the enactment of the Directive. In England and Wales, for example, the implementation Regulations²⁴³ are applicable only to claims where the infringement commenced on or after the date they were enacted (i.e. March 8, 2017). This means that it will take a few years for their effect to actually be perceived, because violating firms cannot be sued in claims related to infringements already detected on March 8, 2017. The changes to substantive law are limited to the Directive’s requirements for limitation periods, the presumption of harm by cartels, the presumption of passing on for indirect purchasers, and the limited liability of immunity recipients. No supplementary provisions were introduced. The definition and assessment of damages is also left to the courts to determine on a case-by-case basis.

Nevertheless, the UK did act on the need to facilitate class action lawsuits by passing the Consumer Rights Act 2015, which allows opt-out class actions brought by representatives of price fixing victims. This law represents a significant effort to lower litigation costs and thereby increase consumer welfare. The UK Consumer Rights Act 2015 suggests that the provisions of Directive 2014/104/EU can also be assessed in further research through the lens of consumer protection. Such an approach would focus on the actual rights of

²⁴² These were: Denmark, Finland, France, Hungary, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Slovakia, Sweden and the United Kingdom. Data available from the Commission, at http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

²⁴³ The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, S.I. 2017/385 of March 8, 2017.

consumers, rather than on their incentives, and could yield interesting results regarding the adequacy of the Directive's framework.

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