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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Note by the Secretariat --

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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

*By the Secretariat**

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1. Introduction

1. Public enforcement can be defined as the enforcement of antitrust laws by a government, for example by the competition authority or a prosecutor, to detect and sanction violators of competition rules. By contrast, private enforcement¹ can generally be defined as litigation initiated by an individual, a legal entity, an organisation or a public entity (such as local government and procurement agency in the bid-rigging case) to have a court establish an antitrust infringement and order the recovery of the damages suffered or impose injunctive reliefs.² Private enforcement can be triggered by a stand-alone action or by an action which follows on a public enforcement decision. In most jurisdictions, private enforcement is mostly represented by follow-on private actions.

2. There is a broad agreement in the literature and in policy documents that individuals and firms who suffer injury from anti-competitive conduct should be entitled to reasonable compensation. At the same time, governments must be very conscious of the importance of striking the right balance between public and private enforcement. Antitrust policy and antitrust law enforcement, including private enforcement, should be viewed as an integrated policy system in which numerous factors contribute to the complementary goals of deterrence and compensation. Obtaining the right balance between these tools and goals is key to ensuring that private enforcement (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and could discourage socially beneficial conduct.

3. This paper reviews developments with private enforcement in selected jurisdictions. Developments have occurred especially in Europe with recent legislative initiatives of the European Union to promote private enforcement at national level by way of a Directive.³ The paper will then discuss the main instruments used at national level to facilitate compensation for the harm incurred by victims of anti-competitive conduct, including presumptions of fault and presumptions of actual harm, discovery issues, collective redress schemes and limitation periods. The last part of the paper discusses some of the trade-offs between public and private enforcement, and how jurisdictions have balanced the need to protect effective public enforcement while at the same time creating a framework that would facilitate the dissemination of private actions for damages.

2. Development of antitrust private enforcement in selected jurisdictions

4. In few jurisdictions, and particularly in the United States, private enforcement has long played a central part in the competition law framework. These jurisdictions endorsed from the outset that private incentives for compensation through the judicial system can play a crucial complementary role to public enforcement. In most jurisdictions, however, competition law developed primarily as an administrative enforcement tool, a means for the state to intervene in the market to protect the interests of consumers against cartel practices as well as against abuses of market power by large companies. In jurisdictions with

¹ This note uses the term “Private enforcement” broadly to encompass claims of possible infringements of competition law brought by individual to courts, compared of the narrower concept of “private damage litigation” which is only referring to compensatory justice.

² Damage of claims action aims to seek for the victims to recover the damages and loss caused from the violation of competition law, while injunctive relief aims to seek for the victims to ask before court to have the antitrust practices to be stopped or prevented. Some jurisdiction, like U.S. and Japan allow both damage actions and injunctions in private proceedings before courts, while most other jurisdictions do not admit injunctive relief to prevent antitrust violations by court.

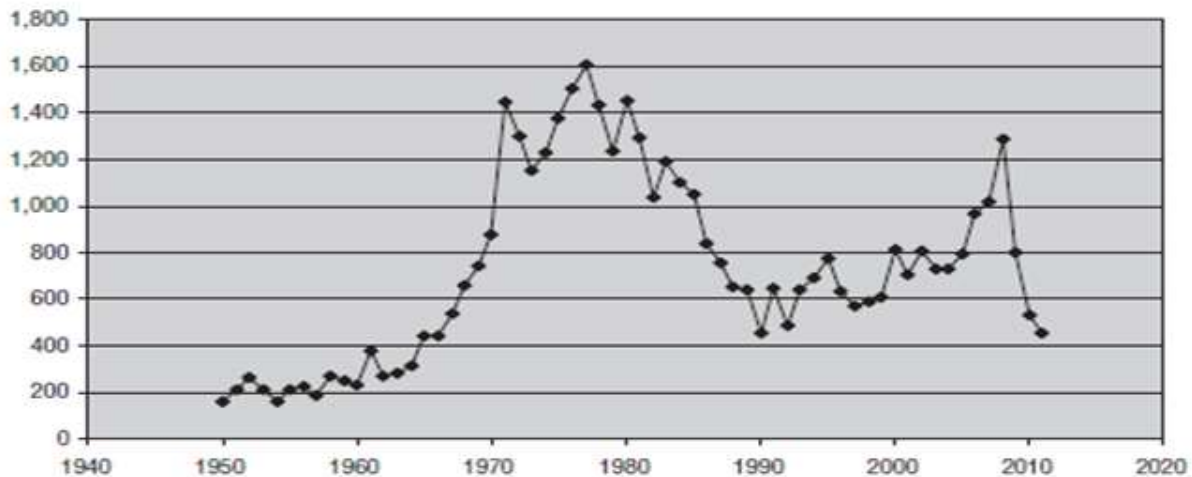
³ See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

such an administrative enforcement system, the competition authority plays a central role in enforcing competition law and effective competition enforcement relies almost exclusively on the capacity and abilities of competition authorities to detect, investigate, sanction and ultimately deter anti-competitive behaviours. In competition law systems based on strong public enforcement, private enforcement has to date played a minor role.

2.1. *Private Enforcement in the United States*

5. The United States is the OECD jurisdiction which has the longest and most extensive experience with private antitrust enforcement. The private antitrust enforcement system in the United States is solidly based on actions for treble damages,⁴ opt-out class actions, jury trials, contingency fee agreements, an extensive discovery system and the exclusion of the passing-on defence. Despite the common perception of excessive private antitrust litigation in the United States, the number of private claims has fluctuated over time and fluctuations were correlated with the attitude of the courts towards private antitrust claims and the level of government enforcement.⁵

Graph 1 – US private antitrust case (1950 to 2011)



Source: Kolasky (2012).

6. Until the 1950s, private antitrust cases were few. The number of private antitrust actions began to rise significantly in the 1960s and peaked in 1977, supported by the willingness of US courts to expand the *per se* doctrine well beyond naked horizontal price-fixing conspiracies to a wide variety of other horizontal and vertical restraints. This significantly facilitated the plaintiffs' task in private claims. In the eighties the volume of new private antitrust filings declined significantly. The endorsement by the Supreme Court of the so-called 'Chicago School' meant that the plaintiff's case had to rely more substantially on economic

⁴ Under Section 4 of the Clayton Act, the plaintiff was able to recover three times the loss she sustained plus costs and attorney's fees.

⁵ See Kolasky (2012). Some have argued that such the US-style antitrust litigation may lead to frivolous or unmeritorious actions, which could have had an important influence on the development of the antitrust doctrine. According to Prof. Kovacic, "[i]n roughly the past 30 years, the judicial fears that US style of private rights of action excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards. This is most evident in the progression toward more lenient treatment of dominant firm conduct." Kovacic (2008).

evidence of anti-competitive effects to show that ‘competition itself’ was harmed and not competitors. The case law moved resolutely toward narrowing the scope of the *per se* doctrine, forcing plaintiffs to prove their claims under a more demanding effects-based *rule of reason* standard. The success of the US Amnesty Programme and the increase of government enforcement activity (especially in terms of criminal fines imposed) have significantly contributed to a steady increase in the number of antitrust cases filed in the twenty years following years. More recently the Supreme Court’s decision in *Twombly*⁶ adopted a review standard of “plausibility” of antitrust violation, which required plaintiffs to plead sufficient facts to state a “plausible” claim for relief. This higher standard is viewed as the reason for the recent drop in private claims.⁷

2.2. *Private Enforcement in the European Union*

7. To date in Europe only few victims of an antitrust infringement have been able to obtain compensation.⁸ During the period 2006-2012, less than 25% of the EU Commission’s infringement decisions were followed by damages actions (see Graph 2). Cases are generally brought in very few Member States, and mostly in the United Kingdom, Germany⁹ and the Netherlands, while no follow-on actions to EU Commission decisions were reported in 20 out of 28 Member State.¹⁰ In the analysis accompanying the Draft Directive on Antitrust Damages Actions,¹¹ the EU Commission summarised the current trend of private enforcement in EU Member States as such: “*Out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012, only 15 were followed by one or more follow-on actions for damages in one or more Member States. In total, 52 actions for damages were brought in only 7 Member States. In the 20 out of 28 Member States, the Commission is not aware of any follow-on action for damages based on a Commission decision. Among those 7 Member States where actions were brought, the vast majority was brought in the United Kingdom, Germany and the Netherlands.*”

⁶ *Bell Atlantic, Inc v. Twombly*, 550 U.S. 544 (2007).

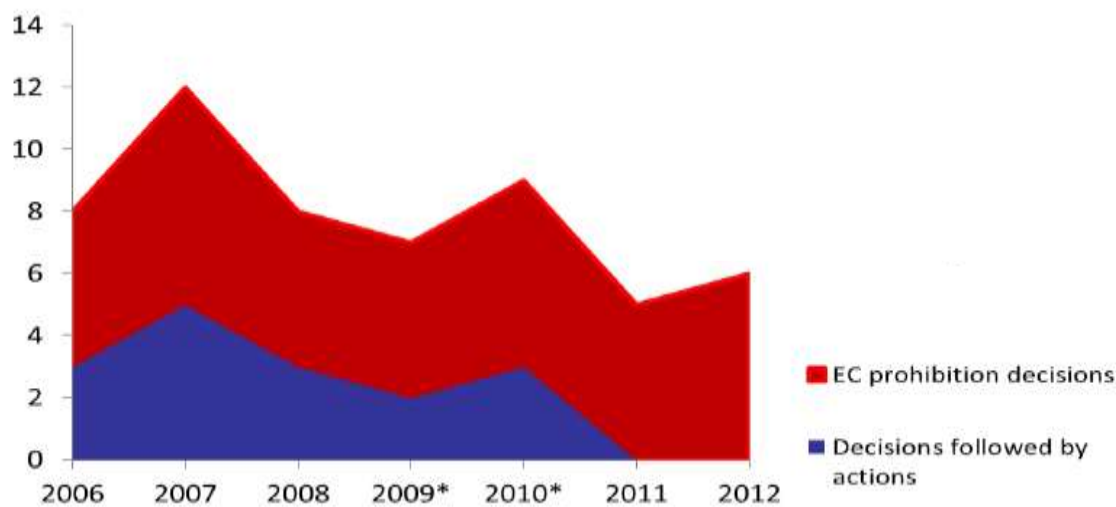
⁷ After the *Twombly*” decision the rate of dismissal of antitrust cases increased significantly. In 74% of 378 court decisions between 2007 and 2011 the plaintiff’s claims were dismissed at the pleading stage because they did not meet new “plausibility” standard.

⁸ Commission Staff Working Document, Impact Assessment Report accompanying the proposal for a Directive (2013).

⁹ Damages actions claims for unjust enrichment represent only about 20% of the competition cases brought before German courts or; most cases aim at secure the nullity of contract clauses or at obtain injunctions in a business-to-business context. See Marquis (2011), footnote 186.

¹⁰ Kortmann and Wesseling (2013), p 3.

¹¹ EU, the Commission Staff Working Document. Impact Assessment Report accompanying the proposal for a Directive (2013), at para 52.

Graph 2 – Decisions of the EU Commission followed by damage claims, 2006 to 2012

Source: presentation by Mr. De Smijter at the ABA (July 2013). (*) includes re-adoption decisions

8. Since 2004, the EU Commission has invested in establishing and encouraging a “culture” of private enforcement of EU competition law. In order to increase the incentives to seek compensation before courts, the EU Commission published a Green Paper in 2005¹² and a White Paper in 2008¹³ to promote a debated about how to remove the main obstacles to effective compensation and incentivise private damages actions in Europe. Following a decade-long policy debate, an EU Directive on Antitrust Damages Actions was finally adopted on 26 December 2014.¹⁴

9. The Directive established the right of victims to obtain full compensation for the harm caused by an anti-competitive conduct. Full compensation includes actual losses and loss of profit, plus interest from the time the harm occurred until compensation is paid. In order to ensure that the right to full compensation is effectively guaranteed, the Directive puts forward a number of measures which should facilitate antitrust damages claims in EU Member States, once the Directive is implemented at national level:

- *Disclosure of evidence.* Parties will have easier access to the evidence they need by asking the court to order other parties or third parties to produce this evidence. The courts will have to ensure that disclosure orders are proportionate and that confidential information is duly protected. There are two exceptions to the disclosure rules: leniency statements and settlement submissions in the competition authority’s file can never be disclosed. Certain information produced within public enforcement proceedings can only be disclosed after the investigation is closed to preserve the integrity of the administrative investigation.

¹² European Commission, Green paper on Damages actions for breach of the EC antitrust rules [COM(2005) 672 final].

¹³ White Paper on Damages actions for breach of the EC antitrust rules [COM(2008) 165 final].

¹⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1 The new Directive took effect on 26 November 2014, following final adoption by the Council on 10 November 2014. EU Member States will two years to implement the Directive into their national law system. The Directive concludes an almost 10 year effort by the European Commission to harmonize the laws of 28 Member States.

- *Effect of national decisions.* Decisions of national competition authorities will automatically constitute full proof of the infringement before the courts of the same Member State. Decisions of competition authorities of other Member States will also constitute a *prima facie* evidence of the infringement.
- *Limitation periods.* Clear limitation period rules are established so that victims will have more time to bring their action. A damage claim can be filed within 5 years from the moment when the harm from an infringement is discovered; the limitation period is suspended during the investigation of the competition authority, and actions can be brought until after 1 year after the agency's final decision.
- *Passing-on defence and standing of indirect purchasers.* If price increases caused by an infringement have been passed on along the distribution chain, those who ultimately suffered the harm will be the ones entitled to claim compensation. By establishing a rebuttable presumption that victims suffered a part of the price increase, the Directive makes it easier for indirect purchasers to prove that a passing-on occurred.
- *Quantification of harm.* The Directive establishes a rebuttable presumption that cartels cause harm and allows national courts to estimate such harm. This will help victims in the often difficult task of proving and quantifying the harm they have suffered.
- *Joint and several liability.* Any participant in an infringement should be responsible towards the victims for the whole harm caused by the infringement, with the possibility of obtaining a contribution from other infringers for their share of responsibility. The liability of the immunity recipient, however, is limited to its own customers only (i.e. it is excluded from the joint and several liability).
- *Consensual Dispute Resolution.* To achieve compensation faster and at lesser cost, it will be possible to settle damages claims out of court. The Directive provides for the suspension of limitation periods/pending court proceedings to allow parties sufficient time to try and reach a consensual settlement, without the risk of losing procedural rights in the meantime.

2.3. *Private Enforcement initiatives in the United Kingdom*

10. To facilitate private antitrust litigation, in June 2013 the United Kingdom government launched a project to reform private antitrust litigation¹⁵ and proposed a new follow-on damages regime to Parliament.¹⁶ The reform package includes four key elements:

- *Expansion of the role of the Competition Appeal Tribunal (CAT).* The CAT was authorized specifically to handle follow-on competition damages claims. The reform allows the CAT to also hear standalone cases. In addition, the CAT is empowered to certify the cases that qualify for opt-out lawsuits, fast-track simple procedures for SMEs, and to grant injunctions. The United Kingdom's fast-track system is mainly for SMEs and is not applicable to class action lawsuits.

¹⁵ Private actions in competition law; A consultation on options for reform (April 2012), UK Department for Business Innovation & Skills.

¹⁶ Consumer Rights Bill, Schedule 7, p. 85-104, for antitrust litigation, available at www.parliament.uk.

- *Encourage previously unwilling consumers to pursue claims collectively.* The new system extends the scope of damage actions to allow consumers' associations to bring claims for opt-in victims as well as introducing a limited opt-out collective actions regime, with safeguards, for competition law.
- *Promotion of Alternative Dispute Resolution (ADR) mechanisms.* Although they are not mandatory, ADR mechanisms are perceived as a way to ensure that courts are used by claimants as a last resort option. Proposed ADR mechanisms include the establishment of a new opt-out collective settlement regime within the CAT. This would allow businesses to settle cases quickly and easily on a voluntary basis. It is also proposed that the Competition and Markets Authority (CMA) be given a limited role in certifying voluntary redress schemes, when a company has been found to have infringed the competition law.¹⁷
- *Ensure that private actions complement the public enforcement regime by maintaining consistency between the CAT and the CMA.* The CAT is required to notify the CMA when private actions cases are initiated. The CAT rules will be amended to provide the CMA with the explicit authority to act as an intervener, where appropriate, in private actions cases. The CAT will also have the power to stay cases under investigation by a competition authority.

2.4. *Private Enforcement in Korea*

11. Competition law enforcement in Korea largely relies on the administrative enforcement of the competition law by the competition authority, the Korean Fair Trade Commission (KFTC). Since its establishment in 1980, the KFTC has been the primary enforcer of competition law rather than courts and the prosecutor's office. The period between 1998 and 2001, however, marked a turning point for Korea private enforcement. In 2001, the Ministry of Defence filed damage claims for approximately USD 200 billion against the five petroleum companies in Korea for damages incurred by its Department because of a bid rigging conspiracy in the procurement of oil.¹⁸ The private action followed the KFTC decision to impose fines for USD 120 billion on these same petroleum companies for rigging military tenders.

12. Since this landmark case, antitrust damage claims have steadily increased to at least 30 cases by 2013.¹⁹ Most of the cases are related to cartel conduct and are follow-on suits filed based on a KFTC decision establishing the existence of the cartel. Plaintiffs range from direct corporate purchasers to indirect purchasers. Examples of private claimants include consumers of school uniforms in a school uniform manufacturer price fixing cartel in 2001; taxi drivers in the LPG price fixing cases in 2010; food manufacturer in the wheat flour price fixing cases in 2006; and even the public procurement agency and local governments.

¹⁷ The United Kingdom's Competition and Markets Authority has released draft guidance on its new power to approve voluntary payments from lawbreakers to those harmed by their anti-competitive actions. (<https://www.gov.uk/government/consultations/redress-scheme-approval-in-competition-cases-draft-guidance>).

¹⁸ To date this is the largest antitrust damage claims in history of Korea private actions. The civil court for the first time relied on econometric methods to quantify damages which generated an intensive debate in the civil process on the more appropriate model to assess the overcharge caused from the cartel (i.e. before-and-after comparison method, yardstick or benchmark method, difference in difference method). In 2013, after thirteen years of litigation, the parties settled for USD 132 million to be paid to the Korean government.

¹⁹ Lee (2014).

13. There are several reasons for this increase in private actions. Many cases stemmed from large KFTC cartel investigations which attracted significant public attention due to the high monetary surcharges. In addition, the 2005 reform of the leniency program is viewed as a driving factor behind this trend. More cartels could be detected with the co-operation of leniency applicants²⁰ and as a result, potential plaintiffs could launch follow-on actions relying on the evidence in the KFTC decision. In addition, the 2004 competition law reform encouraged private enforcement in a variety of ways:

- The 3 year limitation period was extended to a maximum of 10 years starting from the moment the infringement occurred.
- The provision preventing the filing of an antitrust damage claim before the KFTC had issued a final decision was deleted. Therefore, victims of infringement do not have to wait for the outcome of pending KFTC proceedings in order to bring a private damage lawsuit.
- The burden of proof on the intention or negligence of infringement was shifted from the plaintiff to the defendant with the introduction of a rebuttable presumption of fault.²¹
- Courts can now request the KFTC to disclose relevant documents in private antitrust damage proceedings, and the KFTC is obliged to provide a copy of the requested documents and of the record of the hearing procedures.²²
- To alleviate the burden of proof on plaintiffs, when a claimant is faced with extreme difficulty in proving the precise amount of the harm suffered, the court can decide on the appropriate amount relying on the result of the discovery process and on the overall pleadings.

2.5. *Private enforcement in other jurisdictions*

14. Although private enforcement has not been actively used in **Japan**, there is a growing trend towards more antitrust private actions.²³ In Japan, many private antitrust lawsuits have actually been brought by public entities, such as local governments and government agencies, who frequently seek to recover damages suffered from bid-rigging cartels.²⁴ Antitrust damage claims in Japan are available to victims in two ways, i.e. claims can be brought either under the competition law itself (pursuant to Article 25 of the Japanese Antimonopoly Law, JAML) or under the general civil law provisions (pursuant to Article 709 of the Civil Code). Victims can file claims under both legal bases if the respective requirements are met. However, actions under an Article 25 require a final and binding decision by the Japan Fair Trade Commission (JFTC). Therefore, Article 25 claims can only be follow-on actions brought to the Tokyo High Court (which is the competent court to hear these cases). Stand-alone claims pursuant to the Article 709 claims will be heard by the district court jurisdictionally competent for the case under the general civil procedural rules. If a damage claim is made after the JFTC's decision becomes final and

²⁰ Between 2010 and 2013, 72.6% of all cartels against which fines were imposed were uncovered by leniency applications. In particular, 32 cases out of 34 cartel cases in 2011 were started thanks to a leniency application.

²¹ Article 56 of the Monopoly Regulation and Fair Trade Act (MRFTA).

²² Article 56-2, MRFTA.

²³ Van de Walle (2013).

²⁴ Van de Walle (2013), pp 30.

binding and based on the competition law, the standard of review of case will be “liability without fault”. In other words, the plaintiff is not required to prove the defendant’s intent or negligence.²⁵

15. Hungary first introduced the Prohibition of Unfair and Restrictive Market Practices (HCA) in 1996 to comply with the EU membership criteria. Since then, the competition law was amended in 2005 to promote private enforcement in line with EU principles. The most important amendment of the HCA introduced the possibility of both stand-alone and follow-on private actions for damages.²⁶ Before the reform of the HCA, it was not clear whether it was possible to initiate stand-alone actions based on the HCA. Because of this uncertainty, plaintiffs were reluctant to file claims and the courts were reluctant to deal with private actions. The second important amendment allowed the possibility to file injunctions. Until the reform, the HCA only referred to nullity as an available remedy. Today, a plaintiff can seek the following remedies: recovery of loss suffered (compensatory damages), interim measures, seize and desist orders, and modifications of contractual provisions by the court.²⁷ In addition, to ensure consistency between public and private enforcement the HCA now includes provisions for co-operation between the competition authority (the GVH) and the courts.²⁸ Two important amendments to the HCA were further introduced in 2009. The first reform aimed at protecting leniency applicants to ensure that they are not put in a worst position than non-leniency applicants in follow-on suits. According to article 88.D HCA the successful immunity applicant can be sued for damages only if the plaintiff has not succeeded in obtaining full compensation from the other defendants.²⁹ The second reform introduced a rebuttable presumption that a hard-core cartel causes a 10% price increase in the market.³⁰ Despite these amendments, however, private actions in Hungary are practically non-existent, and only four pending actions for damages were recorded in 2013, all of which involve bid-rigging in public tenders in the construction industry.³¹

²⁵ Article 26 of the Japan Anti-Monopoly Law.

²⁶ In 2005 a new Section 88/A was introduced in the HCA, which virtually empowers Hungarian courts to adjudicate standalone claims, providing that “*the power of the Hungarian Competition Authority to proceed (...) and used to safeguard (...) the public interest, shall not prevent civil law claims, arising out of the infringement of the provisions (...) [on unfair manipulation of business decisions, cartels and abuse of dominant position], from being enforced directly in court.*”

²⁷ Szilágyi (2013).

²⁸ Section 88/B(6) of the HCA provides that the GVH must notify a court which is already hearing a competition case that it has decided to start an investigation. In such case, the court shall stay its proceeding. If a competition claim is lodged before court, that court shall notify the GVH without delay, and has to stay its proceeding and await the final decision of the GVH. The GVH final decision on the existence of an infringement is binding on the court.

²⁹ This provision is similar to Article 11.4(b) of the EU Antitrust Damages Action Directive concerning joint and several liability.

³⁰ Article 88/C states “*In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article [101 TFEU], when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent*”.

³¹ Tóth and Pázmány (2013).

16. In **Mexico**, there has not been any successful damage claims for infringements of competition laws since the Federal Law of Economic Competition (FLEC) became effective in 1993. The main reason for the low level of private damage claims is that, as was the case in Hungary, until 2011, victims could claim damages only after a final decision of the competition authority had determined the existence of an infringement of the competition law. However, the 2011 amendments of the Federal Code of Civil Proceeding and the of the Mexican Competition Law (FLEC) allow the victims to file class actions in competition matters and to claim damages for competition law infringement without the need to wait for a prior definitive decision of the competition authority.³²

17. In 2003, **Brazil**'s antitrust agency, CADE, decided to promote antitrust enforcement by prioritising hard-core cartel prosecutions.³³ As a result, private antitrust enforcement in Brazil increased due to the growing number of infringement decisions issued by CADE. Brazil has a collective redress system and a double damages system to ensure the right for compensation of consumers who have suffered from a competition infringement. While only governmental and publicly held entities are allowed to file a claim, local state and federal prosecutor's offices can represent alleged victims and seek collective redress to anti-competitive conduct. Most of the cases brought related to consumer's rights complaints (i.e., fixing fuel price cartel). Although Brazil normally only allows the award of single damage, victims of antitrust misconduct may seek the payment of double damages on the basis of Article 42 of Brazil's Consumer Protection Code.³⁴ In an effort to promote follow-on antitrust damage actions, in 2010 CADE included for the first time in a cartel decision an order that a copy of the decision be sent to potential injured parties to allow them to recover their losses. As a consequence, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country.³⁵

18. In **China**, the Anti-Monopoly Law (AML) entered into force in 2008,³⁶ and the level of public enforcement is still relatively low. However, there is a comparatively higher level of private enforcement. According to published statistics, the total number of civil antitrust litigation cases filed from the third quarter of 2008 to the first half of 2012 reached 107 cases.³⁷ Victims can claim antitrust damage on the basis of Article 50 of the AML and the right to pursue claims were expressly affirmed by the Supreme People's Court ("SPC") in 2011. The SPC took an important step toward enhancing private enforcement by publishing general guidelines for courts on how to deal with competition related lawsuits (the 'Judicial Interpretation').³⁸ These guidelines took effect in June 2012 and confirmed that a plaintiff can bring an antitrust claim either in a stand-alone or in a follow-on action. A competition authority's decision, therefore, is not a prerequisite to bring an antitrust lawsuit.³⁹ Different jurisdictional rules apply for

³² Article 38 of FLEC. See Guerrero Rodríguez and Ramírez Casazza Barrera (2013).

³³ In Brazil, plaintiffs can seek compensation of damages under either Article 47 of Brazil's antitrust law or on Article 927 of the Brazil Civil Code.

³⁴ Martinez and Tavares de Araujo (2013).

³⁵ Proceedings No. 08012.009888/2003-70 (industrial gases cartel case), adjudicated by CADE on September 1, 2010.

³⁶ Modrall, Bachrack and Huang (2012).

³⁷ Wang and Hughes (2012) based on a speech by Mr. Jin Kesheng (Vice President of the Intellectual Property Tribunal under the Supreme People's Court), International Seminar on Antitrust Law in the Internet Industry. According to the SPC, many of the cases concern abuse of dominance rather than cartels, but successful private actions for plaintiffs are still rare.

³⁸ Provisions on Several Issues concerning the Application of Law in the Trial of Civil Cases arising from Monopolistic Conducts (the "Judicial Interpretation").

³⁹ Judicial Interpretation, Article 2.

antitrust cases compared to those for other civil lawsuits due to the complexity of antitrust cases and the need for specialised judges to handle these cases.⁴⁰

19. A rebuttable presumption of anti-competitive effects is established for anti-competitive horizontal agreements, but not for vertical agreements.⁴¹ Plaintiffs have an alleviated burden of proof as they only need to prove the existence of the cartel; it is for the defendant to show the absence of anti-competitive effects.⁴² On discovery and access to evidence, any information or data publicly released by the defendant concerning its market position may be used by the plaintiff as *prima facie* evidence of defendant dominant position.⁴³ Injunctive reliefs by the court are also available and antitrust victims can ask the court to order the defendant to stop the infringement and declare void a contract or the articles of trade association that violate the AML. However, a number of important aspects of Chinese private enforcement remain unclear. They include the standing in court of indirect purchaser, the binding effect of final decision of the China's anti-monopoly enforcement authorities, the rights of the plaintiff to access to leniency documents, and what are the limitation periods for antitrust damage actions.⁴⁴

3. Instruments to ensure effective private enforcement

20. In order to ensure that victims of antitrust infringement can effectively exercise their right to compensation, jurisdictions have introduced better measures and a more effective framework to facilitate private enforcement of competition law compared to general civil litigation. The next section will discuss some of these instruments.

3.1 No fault requirement or fault rebuttable presumption

21. The general rules on liability for damages under tort or civil law require the presence four elements in order for injured parties to be awarded compensation for the harm suffered: (i) the existence of fault (intention or negligence) of the defendant; (ii) the existence of an infringement of the law (illegality); (iii) the presence of damages (which must be quantified); and (iv) a causal link between the breach and the damages.⁴⁵

22. In civil litigation, all four elements must be proved by the plaintiff in order to have a successful claim. Some jurisdictions have decided to alleviate the burden on the plaintiff to prove fault in an antitrust private litigation so as not to make it excessively difficult or practically impossible to exercise the right to compensation. The rationale for alleviating (or exempting) the requirement of proving fault comes from the objective difficulty in proving the subjective circumstances around an antitrust infringement. It can be very

⁴⁰ According to the Judicial Interpretation, the intermediate People's Courts of the capital cities of provinces and autonomous regions are competent to hear anti-monopoly related lawsuits in first instance and not the primary (or basic) People's Courts. However, the SPC retains discretion to grant jurisdiction to the primary People's Courts (Article 3).

⁴¹ Judicial Interpretation, Article 7.

⁴² This alleviated burden of proof on the anti-competitive effects of cartels is similar to the EU Directive presumption that cartel infringements causes harm (Article 17.2).

⁴³ Judicial Interpretation, Article 10.

⁴⁴ Although the Judicial Interpretation does not include the explicit provision that the statute of limitations for AML cases is two years, it limits damages to two years (Article 16), aligning the timing to the general statute of limitations in civil cases (Article 135 of the General Principles of the Civil Law).

⁴⁵ In Europe, according to the case-law of the EU Court of Justice, any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of the competition law (case C-294/04 *Manfredi* [2006] ECR I-6619, and recital 11 of EU Directive on Antitrust Damages Actions).

hard for the plaintiff to show that the defendant committed the anti-competitive conduct intentionally or negligently.⁴⁶ Usually, the subjective element is not part of the competition authorities' analysis in an antitrust case, which does not facilitate follow-on actions either as plaintiff cannot rely on the existing evidence collected by the competition authority to prove the subjective element of his case. Even though the violation of competition law has been demonstrated in a decision by the competition authority, the plaintiff in a follow-on action might not be in a position to overcome an additional hurdle of proving that the misconduct by the defendant was intentional or negligent.

23. A 2004 study on the status of private litigation in Europe has shown that European jurisdictions take different approaches to the burden and standard of proof for fault.⁴⁷ The study identified four categories of jurisdictions which have made the plaintiff task of proving fault easier:⁴⁸

- In some countries, the plaintiff is not required to prove the defendant's intent or negligence. This was the case in Czech Republic, Ireland, Slovakia, and the United Kingdom.
- In other countries, the violation of competition rules will automatically imply that the fault element is fulfilled. This was the case in Belgium, France, Luxembourg, Malta, and the Netherlands.
- In Finland, Germany, Greece, Hungary, Poland, Portugal, Austria, and Denmark the fault must be shown in relation to the violation of competition law i.e. the infringement is not in itself sufficient but it must have been committed negligently or intentionally.
- Finally, in countries like Austria, Estonia, Germany, Hungary, Slovenia and Spain, the proof of fault is required as a condition for a successful antitrust damage claim, but fault is presumed once the plaintiff has proven an infringement of the competition law. Such a presumption is generally rebuttable, i.e. the burden of proof is reversed from the plaintiff to the defendant.

24. Considering the different approaches of the Member States on the proof of fault, the EU Directive on Antitrust Damages Actions allows Member States to maintain conditions such as culpability "*insofar as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive*".⁴⁹ The EU Commission's working paper stressed that allowing the defendants to invoke excusable errors (factual or legal) as a defence should be applied narrowly. Therefore, errors should be excusable only where the infringer, despite applying a high standard of care, could not reasonably have been aware that his conduct restricted competition.⁵⁰

⁴⁶ The European Court of Justice clarified in its *Brasserie du Pecheur* judgement that there is only very limited scope for national law to make the reparation of damages conditional upon the existence of fault (see Joined cases C-46/93 and C-48/93 *Brasserie du Pecheur* [1996] ECR I-1029).

⁴⁷ The Study on the Condition on Claim for Damages in Case of Infringements of EC Competition Rules (or Ashurst Study 2004) was commissioned by the EU Commission to identify and analyse the obstacles to successful action for damages existing in the Member States of European Union on the basis of the answers from 25 Member States. It is available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

⁴⁸ In the other jurisdictions (Denmark, Finland, Greece, Poland and Portugal) the plaintiff has to show the defendant's fault to obtain antitrust damage as in general civil claims.

⁴⁹ Recital 11 of the Directive and Article 4 (Principle of Effectiveness and Equivalence).

⁵⁰ The mere ignorance of the law clearly cannot render an error excusable. Reliance on wrong legal advice, as such, equally cannot be a legitimate justification. Errors based on incorrect official statement by competent entities, such as competition authorities and court, should only be excusable where undertakings applying a

25. Outside Europe, Korea and Japan have also introduced similar provisions into their law. In Korea, Article 56 MRFTA (Liability for Damages) states that “*Any company or companies’ organization violating the provisions of this Act and consequently causing damage to a person shall be liable for compensating such person for damage. Note, however, that if the company or the companies’ organization is able to prove that there was neither intention nor any fault, this provision shall not apply.*” In Japan, the plaintiff is required to prove that the defendant’s intentional misconduct or negligence for a claim under Article 709 of the Civil Code (stand-alone action). However, if the damage claim is made after a final JFTC’s decision based on Article 25 of the Competition Law, the plaintiff is not required to prove the defendant’s intent or negligence.⁵¹

3.2 *Better (easier) access to evidences*

26. Competition cases are particularly “fact-intensive” due to the economic nature of antitrust law infringements compared to ordinary civil litigation cases. For example, (i) to establish an *infringement* of the competition law, it will be necessary to show negative effects on prices, output or innovation in the relevant market; (ii) to establish the extent of the *damages*, the plaintiffs would have to compare the anti-competitive situation to a situation which would have existed in the absence of the infringement; (iii) to establish *causation*, the plaintiffs would have to identify the precise elements of anti-competitive conduct by an infringer that have caused the plaintiffs damage. It can be extremely complex for potential claimants, and especially if final consumers, to obtain the underlying factual elements in order to demonstrate that they are entitled to claim antitrust damages. Furthermore, “structural information asymmetry” typically exists in competition cases. Much of the key evidence necessary for proving a case for antitrust damages is often concealed. Many of the relevant facts and information required to bring a substantiated case are not known to claimants in sufficient detail since these are held by the defendant or by third parties. Therefore, it can often be very difficult for claimants to produce the required evidence.

27. It is clear that the plaintiffs’ ability to bring a successful damages claim rests essentially on its ability to access the necessary evidence that is in the hands of the defendant, of a third party or of the competition authority. The difficulties encountered by a claimant in obtaining all of the necessary evidence to demonstrate his case is viewed as a major obstacle to antitrust damage actions. Allowing a claimant an easier access to public enforcement files can be a useful way to facilitate private antitrust litigation, especially in follow-on damage actions. The file of the competition authority can include useful information not only on the antitrust violation itself but also on the amount of damages and the causation link between the infringement and the damage.⁵²

28. To address this structural information asymmetry and to improve the claimants’ ability to access to relevant evidence, there should be clear discovery rules on access to evidence. These rules should address how to access the evidence required by the claimant, the definition of a minimum level of disclosure, and the conditions for obtaining a discovery order by the court and its scope. Mandatory pre-trial discovery is regulated in some jurisdictions such as the United States, Sweden, the United Kingdom, and Ireland. Discovery during trial is generally subject to the requesting party being able to identify specifically the documents he wishes to request. This is the case in jurisdictions like Germany, France,

high standard of care could reasonably rely on such statements. See European Commission Staff Working Paper on damage claims of EU, 2008.

⁵¹ Matsushita and Furuya (2013).

⁵² Wills (2009): “*For some types of antitrust infringements, other than hard-core cartels, an assessment of the (likely) effects may be necessary for the finding of an infringement. Even if this is not a necessary element for establishing the infringement, competition authorities may be interested in establishing the extent of the harm, either because they use this as a criterion for selecting which cases to prosecute or because the extent of the harm is taken into account in setting the amount of the penalty.*”

Spain, Korea and Japan. These jurisdictions fear that very broad discovery powers could possibly result in excessive private antitrust litigation.

Box 1. Discovery rules in the EU Directive on Antitrust Damages Actions

The EU Directive on Antitrust Damages Actions provides a claimant can request national courts to order the defendant, a third party or a competition authority to disclose relevant evidence which lies under their control.⁵³

To avoid the effects in terms of an overly broad and burdensome disclosure obligation, the Directive stipulates that access to evidence should be based on fact-based pleading, combined with strict judicial control of the plausibility of the claim and the proportionality of the disclosure request. That is, claimants should meet several conditions before obtaining a disclosure order from the court and in particular they should (i) present all the facts and means of evidence that are reasonably available to them, provided that this shows plausible grounds to suspect that they suffered harm as a result of an infringement of competition rules by the defendant; (ii) show to the satisfaction of the court that they are unable, applying all efforts that can reasonably be expected otherwise, to produce the requested evidence; (iii) sufficiently specify categories of evidence to be disclosed as precisely and as narrowly as possible; (iv) and the judge will have to ensure that disclosure orders are proportionate, and that confidential information is duly protected.⁵⁴

To preserve the integrity of the public enforcement proceeding, the Directive provides that certain information produced within public enforcement proceedings can only be disclosed after the investigation is closed.⁵⁵ This information includes: (i) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (ii) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (iii) settlement submissions that have been withdrawn.

3.3 *Alleviating the burden of proof on the existence and the quantification of the damage*

29. Even if the plaintiff is able to establish a competition law infringement, he still needs to prove the existence of the damage suffered and calculate its amount for purposes of compensation. The appropriate scope of the damages that can be recovered varies depending on the private enforcement system of each jurisdiction. Most jurisdictions allow a successful claimant to be entitled at least to single damages. The EU Directive on Antitrust Damages Actions establishes the right to “full compensation” for the harm suffered as a result of a breach of EU competition law. Full compensation covers the “actual loss” and the “loss for profit”, plus “payment of interest” from the time the damage occurred until compensation is paid.⁵⁶ Some jurisdictions allow the plaintiff to claim punitive damages equal, for example, to three times the damage suffered (e.g. treble damages in the United States) or twice the damages suffered (e.g. Brazil).

⁵³ Articles 5 and 6.

⁵⁴ Article 5.2 and 5.3. In 1999, Korea also introduced the possibility for courts to order the disclosure of documents in possession of the competition authority. If a court requests the disclosure of relevant documents in the context of a private antitrust damage claims, the KFTC is under the obligation to provide a copy of such documents and of the record of hearing procedures (Article 56-2 MRFTA Records). In case a lawsuit for liability for damage is instituted as per Article 56 MRFTA (Liability for Damages), the court may request the KFTC to submit records of the case in question (including protocols and stenographic records of examination of the persons concerned and reference witnesses and expert witnesses as well as all judicial evidences).

⁵⁵ Article 6.5.

⁵⁶ In its 2006 *Manfredi* judgment, the European Court of Justice confirmed 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.

30. Calculating damages can be extremely complex,⁵⁷ especially because most of the required data and information will be primarily in the hands of the defendant. The existence of a plurality of accepted methodology to estimate the damage can result in divergent awards and disputes on damage amounts.⁵⁸ Some jurisdictions recognise that the victims often have difficulty in quantifying the damage suffered and have introduced specific rules to alleviate the standard of proof on the plaintiff required for the quantification of the harm from a competition infringement.

31. One solution that has been adopted entails the widening of the power of courts to estimate the amount of damages, as long as the plaintiff has made sufficient efforts to prove its claim despite some objective impediment to quantify it precisely. This is based on the general principle of effectiveness of the judicial action, which requires that damages actions should not be rendered practically impossible or excessively difficult. Under this principle, once it is established that the claimant has suffered harm from the defendant's competition infringement, a court cannot exempt itself from awarding some damages simply because the claimant cannot prove in a sufficiently precise manner the amount of the actual harm suffered.⁵⁹ In order to help awards of full compensation, Korea has also introduced a similar provision in 2004.⁶⁰ Japan's system also includes a provision that alleviates the burden of proof on the plaintiff.⁶¹ In bid-rigging cases, Japanese courts usually determine the amount of damage ranging between 5% and 8% of the contract value.⁶² In Germany, although the burden of proof lies with the claimant, if the infringement is proven and if the claimant has a plausible story about the damage suffered, German courts do not hesitate to award damages.⁶³

32. Other jurisdictions have introduced a rebuttable presumption of losses in cartel cases, such as a presumption that a cartel had affected prices by a fixed amount. For example, a presumption that the cartel had increased prices by a certain percentage can significantly help establishing damages.⁶⁴ In 2008, Hungary introduced a rebuttable presumption that hard-core cartels cause a 10% price increase on the market.⁶⁵ Of course, the amount of damages caused by individual cartels varies on a case-by-case basis

⁵⁷ Among the various methods used there are the 'before, during, and after approach' which compares the price before and during, or during and after the alleged cartel period; the 'Yardstick approach' which compares prices in the geographic area where the cartel operated and in regions where the cartel was absent; and the 'cost-based approach' which compares costs, not prices. See OECD (2011).

⁵⁸ For example, in the Korean petroleum bid rigging case it took 13 years for courts to decide the amount of damage.

⁵⁹ Such a principle, for example, is included in the EU Directives on Antitrust Damages Actions. See Article 17.1.

⁶⁰ Article 57 MRFTA (Determining Damages).

⁶¹ Article 248 of the Code of Civil Procedure: "*Where it is found that any damage has occurred and if it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage*".

⁶² Matsushita and Furuya (2013). However, the practice varies widely and sometimes courts have determined this amount as 20% of the contract value.

⁶³ Foer and Cuneo (2012).

⁶⁴ Although it does not specify any amount, the EU Directive on Antitrust Damages Actions establishes a rebuttable presumption that cartel infringements cause harm (Article 17.2). The presumption is based on the finding that more than 90% of cartels cause a price increase. In the very rare cases where a cartel does not cause price increases, infringers can still prove that their cartel did not cause harm.

⁶⁵ Szilagyi (2014) according to which Article 88/C HCA states that "[i]n the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or

and any given presumption is unlikely to be correct for all cases. However, if a given figure can be rebutted by either the plaintiff or the defendant and they can show that damages were either higher or lower than the presumption, this can increase the disincentive for the injured parties to initiate damages actions.⁶⁶

Box 2. Korea's predetermination of the amount of damage provision to be compensated

Considering the difficulties of calculating the amount of antitrust damages and the efforts of the Korean government to prevent bid-rigging, in 2010 the KFTC implemented a system to predetermine the amount of damages from collusive tendering. The system requires public procurement agents to add provisions predetermining the amount of damages (usually 10% of the contract amount) as an annex to contracts related to public tenders. This amount would be the compensation paid by the bid-riggers in case the KFTC establishes that the tender was rigged.

In order to discourage cartel conduct, procurement agencies in Korea require bidders to submit a statement or attestation signed by each bidder, a 'Certificate of Independent Bid Determination' (or CIBD), which includes the bidder's certification that it has not and will not engage in any communication with other bidders. The CIBD also includes a warning of the possibility of sanctions and of related damage claims for bid rigging. The predetermined amount of damages is normally included in the CIBD, which generally say that "*once bid-rigging among bidders is established, a bidder agrees to compensate 10% of the amount of the contract for damages caused by bid-rigging to the procurement agency unless a specific and fixed amount of damages is proved and verified.*"

The system was designed to prevent bid-rigging by informing bidders that if they engage in bid rigging, they will face the risk of paying significant compensation for damages as well as being subject to administrative sanctions. The KFTC has undertaken efforts to introduce the system by holding consultation meetings with other relevant government bodies and public procurement agencies. Thanks to these efforts, two public corporations including the Korea Electric Power Corporation and the Korea Water Resources Corporation, implemented the system in 2011 and as of now almost all public corporations such as the Korea Railroad Corporation, the Korea Expressway Corporation and the Korea Land and Housing Corporation have also introduced the system. When fully implemented, the system is expected to increase the number of claims for damages and also to prevent bid-rigging beforehand.

33. Finally, national courts may request the competition authority to assist on the determination of the quantity of damages in a damages action. The EU Directive on Antitrust Damages Actions, for example, provides that if a national competition authority deems it appropriate, it can assist on the determination of the quantity of damages upon request of a national court.⁶⁷

indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article [101 TFEU], when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent."

⁶⁶ In the BIS's report of the United Kingdom on April 2012, a rebuttable presumption of a 20% overcharge in cartel was considered in order to help the claimants to estimate the likely benefits of seeking redress and shift the burden of proof to defendant. After doubts regarding the merits for a one-size-fits-all approach were raised in the response to consultation, the United Kingdom abandoned the idea to pursue a rebuttable presumption of loss for cartel cases.

⁶⁷ Article 17.3.

3.4 *Binding effect of final infringement decisions adopted by competition authority*

34. Decisions of the competition authority usually include extensive and detailed explanations of the infringement of the competition law investigated by the agency. In a cartel case, for example, this will include a description of the companies involved in the cartel, the mechanisms of the cartel arrangement, the duration of the cartel activity, its geographic scope, and so forth. Plaintiffs in follow-on damages actions must establish the existence of an antitrust infringement as a pre-condition for claiming damages. In other words, absent any specific provision, plaintiffs should re-establish the same facts and circumstances on which the competition authority relied for its infringement decision. Allowing to rely on the findings of a competition authority will simplify the task of the plaintiff who will only need to focus on showing that it suffered actual damages from the anti-competitive conduct and on their quantification. This is the so-called legally binding effect of competition authorities' decisions in follow-on private actions.

35. The Study on the Condition on Claim for Damages in Case of Infringements of EC Competition Rules⁶⁸ found marked differences between EU Member States' legal systems regarding the binding effects on courts of a competition authority's decision. In 10 EU Member States only the final decision of the domestic National Competition Authority (NCA) is binding on national courts. In the remaining 16 Member states, NCA decisions have no binding effect. The United Kingdom, Hungary, Greece, and Bulgaria, are among the jurisdictions whose national law provides that the findings of a violation of the competition law by the competition authority (or a competition decision of the European Commission) bind the courts deciding on follow-on civil claims for damages.⁶⁹ Germany's national law also provides for such a binding effect and extends the binding effect beyond the findings of an infringement in decisions adopted by the German Federal Cartel Office and by the European Commission, to decisions of the competition authorities of all the other EU Member states.⁷⁰

36. Depending on the jurisdictions, the evidentiary value of the competition authority's decision ranges from being considered a firm or a rebuttable presumption of infringement, to just having normal evidentiary value to being regarded as a fact that plaintiffs can use to support their civil claim.⁷¹ Even when the competition authority's decision on the infringement is considered as a firm presumption, the legally binding effect of the decision only extends to the subsequent damage actions against the same defendants and for the same antitrust violation as found in the decision (i.e. same geographic scope, duration, etc.).⁷² The binding effect is usually limited to final decisions, i.e. decisions which are no longer subject to appeals. On the other hand, a competition authority's decision that is not final can still constitute at least a *prima facie* evidence of an infringement but it would treating as a rebuttable presumption. Courts are

⁶⁸ Ashurst Study 2004.

⁶⁹ Section 47A and 58A of the United Kingdom competition Act 1998, Article 88/B of the Hungarian Competition Act 2005, and Article 35(1) of the Greek Competition Act (Law 3959/2011). Bulgaria amended the Protection of Competition in 2008, making final infringement decisions by national competition authority binding on national courts in private actions.

⁷⁰ Section 33(4) of the German Act against Restraints on Competition.

⁷¹ According to the EU Directive on Antitrust Damages Actions, a final decision of a national competition authority will automatically constitute proof before courts of the same Member State in which the infringement occurred, and it will constitute at least *prima facie* evidence of such infringement before courts of other Member States (Article 9).

⁷² A firm presumption also contributes to the consistent application of competition law by avoiding conflicting administrative and judicial pronouncements.

bound by the competition authority's decision only if the decision includes clear statements of its findings.⁷³ That is, if there is some uncertainty courts would still allow those facts to be debated in court.

3.5 *Collective redress*

37. According to OECD (2006), “[c]lass actions, collective actions, or other forms of actions that allow the aggregation of a large number of small claims for damages can be an important element in a competition regime that seeks to effectively deter anticompetitive conduct. They can be a useful form of deterrence in particular with respect to hard core cartels, class/collective actions could be the only effective mechanism to ensure that consumers with small claims can be compensated as well. Without such a system recovery of damages, would be limited to plaintiffs that are wealthy and have sufficiently large claims to justify litigation for damages.”

38. The harm suffered from competition law infringements can be scattered among many potential claimants especially if consumer products are at stake. In these cases the amounts of the damage suffered by each potential claimant can be very low and if claimants can only bring antitrust suits individually, the costs and efforts of filing an individual claim will most likely outweigh the potential gains from a successful claim. Consequently, there will be little incentives to take actions for compensation of “atomised” damages. In order to encourage damage actions by indirect purchasers, jurisdictions have introduced collective redress mechanisms that allow claimants to share both the costs and the risks of a legal action.

39. There are two models for collective redress: an opt-in model and an opt-out model. In an ‘opt-in’ collective action, victims expressly have to elect to join the action as members of the represented group, and outcome of the court decision is legally effective only the victims who opted-in while an individual who did not opt-in would not benefit from the outcome of the collective action. In an ‘opt-out’ collective action, all parties who fall within the definition of the represented group are bound by the outcome of the case unless they actively opted-out of the action. ‘Representative’ actions can be brought only by qualified entities, such as consumer associations, public bodies such as an ombudsman, or trade association, on behalf of defined group of injured parties. US model allow individuals to aggregate their claims with opt-out. Opt-out systems have a stronger effective redress for consumers and SMEs than an opt-in systems.⁷⁴ Opt-out systems however are more exposed to the criticisms that they can fuel an excessive litigation culture, especially if accompanied by other features such as the asymmetric shifting of legal costs in favour of the plaintiff, punitive damages, broad rights of discovery, and contingency fee agreements.⁷⁵

⁷³ Komninos (2011). In the case of *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd*, [2011] EWCA Civ 2, the United Kingdom Competition Appeal Tribunal, in a follow-on action, held that there was no liability in damages for lack of causation, notwithstanding the existence of an infringement decision by the sector regulator, which acted as antitrust agency. On appeal, the English Court of Appeal ruled that tribunals overseeing damage claims are bound by the facts contained in an antitrust decision, but stressed that these have to be clear statements and not ‘stray phrases’.

⁷⁴ EU Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, April 2008, pp 28: “*An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism.*”

⁷⁵ Marquis (2011).

40. Very few countries outside the United States and Canada have developed extensive experience with class action or collective redress in competition cases. Many countries, however, have shown an interest in developing rules and incentives to establish collective redress mechanisms as part of their private enforcement regimes. Between 2004 and 2011 only three European countries (Portugal, the United Kingdom, and Sweden) had introduced mechanisms for collective redress. Since 2011, more than half of EU countries have introduced new legislation on collective redress. Some EU jurisdictions (Bulgaria, Denmark and Portugal) have established opt-out collective redress regimes, while many other EU jurisdictions (Austria, Finland, France, Hungary, Italy, Poland, Spain, Sweden amongst others) have opted for an opt-in system of one form or another.⁷⁶ The recently adopted EU Directive on Antitrust Damages Actions does not include a collective redress provision thus reflecting the view that collective action should not be dealt with through a competition specific instrument, but should be dealt horizontally across the legal system of each country.⁷⁷

41. The United Kingdom proposed a new follow-on damages regime to Parliament in June 2013 to extend the scope of damage actions. The new regime allows consumer associations to bring claims for opt-in victims and introduces a limited opt-out collective actions regime, creating a so called ‘two-track opt-out/opt-in model’. That is, claimants domiciled within the United Kingdom have the opportunity to opt-out, but those outside the United Kingdom can be invited to opt-in. Limiting the opt-out principle to within the United Kingdom is intended to lessen the incidence of forum-shopping. Actions can be brought by claimants (consumers or business or a combination of the two) or by genuine representatives of the claimants only, such as trade associations or consumer associations, but not by a law firm, third party funders or special purpose vehicles.

Box 3. The United Kingdom Consumer’s association (Which?)’s first experience

In 2003, the Office of Fair Trading (OFT) fined (£19 million) JJB Sports price fixing the retail price of replica football shirts. In June 2006, the Competition Appeal Tribunal (CAT) issued its final judgment on the OFT decision. In 2005, a consumer’s association (called Which?) became a “designated body” allowed to bring a damages claim on behalf of two or more named individuals for proven breaches of the prohibition in Chapters I and II of Competition Act 1998 and Articles 81 and 82 (now 101 and 102) of the EC Treaty. In 2007, Which? brought a collective action against the companies that had been found guilty of breaking competition law in the JJB Sport case.

This was the first consumer representative collective action on the opt-in basis in United Kingdom but it was only able to name 130 claimants (0.1%) out of an estimated several hundred thousand of those potentially harmed by the cartel. The case resulted in a settlement approved by the CAT almost a year later in January 2008, a full 7 years after the OFT decision. Each of these 130 individuals, plus several hundred of those who did not opt-in but could prove purchases of a shirt sold at the overcharged prices, received a £10 or £20 refund – the total amount recovered being therefore a small fraction of the fines imposed on the parties involved (amounting to approximately £19 million).

⁷⁶ Marquis (2011), footnote 17. However, collective redress schemes in most European jurisdictions are representative actions thus differing from the US system.

⁷⁷ The EU issued a Recommendation encouraging EU Member States to set up a national system of collective redress, but recommended that the collective redress should be based on the opt-in principle. See Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under the European Union Law, V. 21. “*The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (‘opt-in’ principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.*”

Which? concluded that, “[...] as we had to operate under an opt-in system, the number of consumers opting in was very low considering the degree of publicity, the amount of resources we spent and the external legal costs. Had the collective redress system been based on “opt out” and “cy pres”, the case would have made a greater financial impact thereby ensuring that affected consumers were properly compensated, either directly or indirectly, and tangentially this would have had the effect of acting as a stronger deterrent to companies from engaging in activities that cause consumer detriment.” Which? also noted in its response to an OFT discussion document ‘Private Actions in competition law: effective redress for consumers and business’, that “the single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form.”⁷⁸

3.6 Establishing clear and sufficient limitation periods

42. Rules limiting the time period in which a potential claimant can bring an action for damages provide legal certainty to potential defendants. However such limitation periods can also constitute a considerable obstacle to the recovery of damages depending on their duration, when they start and whether or not the duration period can be suspended. In particular, ‘short’ limitation periods that begin to run from ‘the moment the infringement started’ and which ‘cannot be suspended’ may render the right to seek compensation practically impossible or excessively difficult. With a view to ensuring effective antitrust damage claims, the rules on limitation periods need to be designed appropriately and to take into consideration a number of factors.

43. The start date of the limitation period varies among countries. According to the Ashurst Study,⁷⁹ some European countries use subjective periods which start running from the day the potential plaintiff discovered or should have discovered the damage (Finland, France, Italy, Latvia, Lithuania, Portugal, and the United Kingdom). Other countries have a more objective period which starts running from the date of infringement, regardless of the plaintiff’s awareness of infringement (Hungary, Ireland, Luxembourg, Malta, and Sweden). However, the vast majority of countries apply both types of limitation periods, i.e. there is a subjectively fixed time limit, but also an objective long stop date after which no action can be brought irrespective of the knowledge of the plaintiff (Austria, Belgium, Czech Republic, Denmark, Estonia, Germany, Greece, Netherlands, Poland, Slovakia, Slovenia, Japan and Korea). In Canada, the limitation period for bringing a claim under the Competition Act is two years from the latter of the day on which the conduct was engaged in and the date on which any criminal proceedings relating thereto were finally disposed of (objective period). Under US federal antitrust law, the limitation period starts from when the cause of action accrued. The running of that limitation period can be deferred or “tolled” based on different types of equitable or statutory tolling.⁸⁰

⁷⁸ UK Department for Business Innovation & Skills, ‘Private actions in competition law; A consultation on options for reform -government response’, BIS/13/501(29 January 2013), p. 31.

⁷⁹ Ashurst Study 2004, pp 87-88.

⁸⁰ The most common type of equitable tolling is fraudulent concealment, which provides that the limitation period will be stayed until the claimant discovers the violation, provided that the claimant can prove that (i) the defendants fraudulently concealed their illegal conduct, and (ii) the claimant exercised reasonable due diligence in trying to discover the violation, given the circumstances. Under (ii), the claimant cannot turn a blind eye or otherwise ignore facts which would cause it to inquire further into defendants’ conduct.

44. Objective limitation periods may raise concerns in cases where there is a continuous or repeated infringement and the injured party cannot reasonably have been aware of the infringement and/or the harm it caused.⁸¹ In light of this concern, the EU Directive on Antitrust Damages Actions provides that “*Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to him; and (c) the identity of the infringer.*”⁸²

45. The Ashurst Study observed a considerable diversity among countries also with regard to the duration of limitation periods. The length of limitation periods oscillates between 1 year (Spain) and 30 years (Germany⁸³ and Luxembourg). 7 out of 25 countries set the subjective limitation period at 3 years.⁸⁴ Korea eliminated the short duration (3 years) of the limitation period by amending the MRTC law (Art 57-2) in 2004 and now applies the same rule used in civil law (3 years from knowledge of the plaintiffs and 10 years from the infringement). In Japan, when the plaintiff files a damage claim pursuant to article 709 of the Civil Code (not under article 25 of the Japanese Antimonopoly Law), the limitation period is 3 years from the moment when the claimant becomes aware of the damages and 20 years from infringement.⁸⁵ In Canada, the limitation period for bring a claim under the common law is generally two years.⁸⁶ In the United States, the limitation periods for private causes of action are governed by both federal and state antitrust laws and under federal antitrust law, the limitation period is four years from when the cause of action accrued. Under the EU Directive on Antitrust Damages Actions, the minimum duration of the limitation period is at least 5 years starting from the moment when it became possible for the victim to discover that they had suffered harm from a competition infringement.⁸⁷

⁸¹ EU, Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, April 2008, pp. 71-72, “*where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.*” [...] “*Since consumers and businesses harmed by these infringements should have a realistic possibility to gather the required evidence and effectively bring an antitrust damages claim, it appears inappropriate that the limitation period, the duration of which in itself may be reasonable, would start to run before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.*”

⁸² Article 10.2.

⁸³ In Germany, the limitation period is three years from knowledge of infringement and has two split objective periods, ten years from the arising of damage or 30 years from infringement.

⁸⁴ Ashurst Study 2004, p. 89.

⁸⁵ Article 709 claim “*shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator or if twenty years have elapsed from the time of the tortious act*”, Article 709 of Civil Code.

⁸⁶ In Canada, limitation periods are based on discoverability principles. This means that the two-year limitation period does not begin running until the earlier of the day the person first knew that she or he has a cause of action against the defendant or the day that a reasonable person under the circumstances would first know that she or he has a cause of action against the defendant. See Foer and Jonathan and Cuneo (2012).

⁸⁷ Article 10.3.

46. Concerning the suspension and the restart of limitation periods, most of jurisdictions have no specific rules for follow-on cases. In these jurisdictions, the expiry of the ordinary limitation period before a competition authority has rendered a final decision can form an important obstacle to follow-on actions. For this reason, the EU Directive on Antitrust Damages Actions allows a new limitation period to start after a final infringement decision is issued. Once a competition authority's infringement decision becomes final, victims will have at least 1 year to bring damages actions. The main reason for this rule is that *“the opening of proceeding by competition authorities is rarely known by the public so that potential claimants would have some difficulties to precisely calculate the period that remains once the competition authority has dealt with the case.”*⁸⁸

4. Balancing interests between public and private enforcement

47. Public and private enforcement are essentially mutually reinforcing and inter-related. Private antitrust damage actions can complement public enforcement regimes by strengthening the deterrence effect by empowering victims to tackle anti-competitive behaviour. Public antitrust enforcement has a strong facilitating effect on private actions for damages by helping the claimants to meet more easily the required standard of proof of an antitrust violation (and potentially providing useful evidence as to causation and as to the harm suffered) in follow-on actions.

48. However, focusing primarily on how to ensure the best opportunities for the victims to obtain compensation could undermine public enforcement, especially if the measures to foster private claims diminish the incentives to enter into leniency programmes. Considerable attention should be made to fostering a private enforcement regime that reinforces a strong and effective public enforcement system and in no way undermines it.

4.1 Access to leniency documents

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

50. Leniency programmes have radically changed the ability of competition authorities to detect and investigate cartel activity. The rationale for offering immunity to a cartel member who decides to break ranks, report the cartel to the authorities and co-operate by providing help to convict the other cartel members, is that the benefits for society derived from such co-operation outweigh the public interest in punishing the participants to the cartel activity. These benefits include, increased detection rate, destabilising effects on other cartels, cost savings in investigations and prosecutions as a result of the applicant providing evidence directly from within the cartel, litigation savings and so on. Combined, these benefits result in greater deterrence of cartel conduct by the competition authority without the need for corresponding resource investment.⁸⁹ For this reason, it is extremely important that the design of the private enforcement system takes into account the fundamental need to preserve the effectiveness of these programmes.

⁸⁸ EU, Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, April 2008, p. 72.

⁸⁹ OECD (2014).

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

4.1.1 *Recent European judgements on access to competition authority's files*

52. The *Pfleiderer* judgement of the European Court of Justice (ECJ)⁹⁰ represents a landmark judgement with regard to access to European competition authorities' files. The ECJ did not articulate a general principle prohibiting access to documents provided by an applicant under a leniency programme, but noted that in the absence of a binding EU regulation on the issue, it was for the Member States to enact and apply national rules on access to leniency documents, leaving national judges to decide whether to disclose leniency materials 'on a case-by-case basis', balancing the interest pursued by public and private enforcement in each specific instance.

53. However, the ECJ ruling included some important guiding principles:

- It is for courts to assess whether disclosure of a leniency document is necessary and proportionate to protect a plaintiff's right to damages according to the national rules. However, the Member States must ensure that the rules which they establish or apply do not render the implementation of EU law impossible or excessively difficult.
- While acknowledging that leniency programmes are useful tools to uncover and bring cartels to an end and that access to leniency documents could deter cartelists from seeking leniency, the Court said that it is for the national court to balance the principle of effective justice in damages claims and the need to protect the effectiveness of leniency programmes.
- The existence of an individual's right to damages for loss caused by anti-competitive conduct can also contribute to strengthening the implementation of EU competition rules and has a deterrent effect on potential infringers. The Court noted that it is necessary to weigh on a case-by-case basis the opposing interests of facilitating disclosure of information in order to exercise the right to compensation *versus* the public interest of uncovering cartels and preserving the attractiveness of leniency programmes.

⁹⁰ Judgement of 14 June 2011, *Pfleiderer AG v Bundeskartellamt*, C-360/09, ECR(2011) I-5161.

Box 4. Pfeiderer vs Bundeskartellamt on the disclosure of leniency documents

On 21 January 2008, the Bundeskartellamt (Federal Cartel Office, FCO) imposed fines (EUR 62 million) on three major European producers of décor paper (which is special paper for the surface treatment of engineered wood) and on five individuals responsible for the cartel (price-fixing agreements on prices and an agreement on capacity closure). On 26 February 2008, Pfeiderer (a building material company who asserted purchased décor paper worth more than 60 million euros from the companies concerned) submitted an application seeking full access to the FCO file relating to the imposition of fines in the decor paper sector, with a view to preparing follow-on action of damages against the cartelists. The FCO replied to the application for access to the file by sending a version of three decisions imposing fines, from which identifying information had been removed, and a list indicating the evidence collected during the search. Pfeiderer then further requested to the FCO, by a way of a second application, to access all the material in the file, including the documents relating to the leniency applications which had been voluntarily submitted by the applicants for leniency and the evidence seized.

On 14 October 2008, the FCO partly rejected that application and limited access to the file to a version from which confidential business information, internal documents, the corporate statement themselves, and documents provided by the applicants (which is covered by point 22 of the FCO's notice on leniency) had been removed, and again refused access to the evidence which had been seized. Pfeiderer appealed the decision of partial rejection.

In February 2009, the Administrative Appeal Court in Bonn ordered the FCO to grant Pfeiderer access to the file, but the FCO objected. The court referred the question to the EU Court of Justice. The referral touches on a set of core issues relating to the grant of access to leniency-related documents by claimants in follow-on civil proceedings. In June 2011, the ECJ recalled first of all that neither the EU Leniency Notice, nor the ECN Notice, nor the ECN Model Leniency Programme bind the authorities and courts of the Member States, due to their soft law nature. The Court preferred to give a judgment of principle and not to offer a list of discoverable and non-discoverable evidence, as Advocate General Mazák had proposed in his Opinion in 16 December 2010. The Court then ruled that a balancing exercise is necessary and that it must be conducted by the national court only on a case-by-case basis, taking into account the above principles and the relevant factors in the case.

Following the ECJ's decision in June 2011, the Bonn court in January 2012 rejected Pfeiderer request for access to the leniency documents in the FCO file. The national court held that such disclosure could undermine the effectiveness of the BKA's leniency programme.⁹¹

54. The *Pfeiderer* ruling created a certain degree of legal uncertainty concerning the possibility to disclose leniency documents in follow-on actions for damages. In addition, in the *CDC Hydrogen peroxide* judgement in December 2011,⁹² the European General Court annulled a Commission's decision refusing the request of a damages claimant to access the list of the content of the Commission's file in the hydrogen peroxide cartel. The Court said that leniency programmes are not the sole way of ensuring compliance with EU competition law, and that damages actions before the courts of Member States can make a significant contribution to that objective.

55. Even though Germany has does not have any pre-trial discovery proceeding, Germany's Court have denied access to the FCO's file in following two cases: one before Bonn's District Court in the decorating paper *Pfeiderer* case⁹³ in January 2012, and the other at Düsseldorf's Higher Regional Court in the coffee roasters cartel investigation in August 2012.⁹⁴ In weighing the relevant interests in the *Pfeiderer*

⁹¹ For comments on the Pfeiderer case see Ratliff (2011) and Morais (2011).

⁹² Case T-437/08, *CDC Hydrogene Peroxide*, [2011]ECR II-8251. For a commentary see Campbell and Feunteun (2011).

⁹³ Amtsgericht Bonn (Local Court Bonn), decision of 18 January 2012, case No 51 Gs 53/09 (Pfeiderer).

⁹⁴ Oberlandesgericht Düsseldorf (Düsseldorf Appeal Court), decision of 22 August 2012, case No B-4. Kart 5/11(OWi) (roasted coffee).

case, the German court ruled that the refusal to provide access to the leniency application would not make it ‘practically impossible or excessively difficult’ for Pfleiderer to obtain compensation for the damages suffered.⁹⁵ In the United Kingdom, on the other hand, in the *National Grid* case,⁹⁶ the High Court ordered the limited disclosure of the confidential version of the European Commission’s decision with certain passages redacted. In assessing the proportionality of the disclosure requested, the court considered whether the information concerned was available from other sources and the relevance of the leniency materials to the issues in this case.⁹⁷

4.1.2 *Reconciling the need to protect confidentiality of leniency material and the power of courts to order disclosure of competition authority’s files*

56. Most jurisdictions have rules in place to protect the identity of leniency applicants and the confidentiality of materials associated to the leniency application in order to ensure the effectiveness of the leniency programme. The rules are often so broad that sometimes all of the documents and information submitted by a leniency applicant are protected and cannot be made subject to disclosure, not just information of a confidential nature. Most jurisdictions also have rules that require the competition authority to disclose relevant evidence upon the request of a claimant in a civil antitrust case.

57. Korea introduced rules on safeguarding the confidentiality of leniency materials and the criteria for the disclosure of such materials in 2007. However, there is still some uncertainty on the application of these rules. In principle, the identity of the leniency applicant and any information and materials submitted under the leniency programme should not be disclosed to third parties.⁹⁸ Exceptionally, however, the KFTC may disclose the identity and/or material submitted by the leniency applicant to other persons if either the leniency applicant agrees or if the information is necessary to file or carry-out a lawsuit in relation to the case concerned.⁹⁹ As a general rule, courts can request to the KFTC to disclose documents in relation to private antitrust damage claims, and the KFTC must provide all relevant documents, including a copy of the documents, a transcript of the hearing procedures, and so forth.¹⁰⁰ However, it is not clear if this general disclosure rule applies also to leniency information or it only applies when the KFTC is the defendant in an administrative appeal against one of its decisions; or if the rule can also be applied when civil lawsuit for damages where one of the parties requires the disclosure of leniency materials to obtain

⁹⁵ The rationale for the refusal of the court to grant access to the leniency file was that, firstly, Pfleiderer would receive access to the non-confidential versions of all other document seized during dawn-raids (which took place before the leniency applications were filed), and secondly, that it would not need the leniency document to show that a competition law infringement had occurred thanks to the binding effect of the FCO’s finding decision.

⁹⁶ High Court of Justice judgment of 04 April 2012, case No HC08C03243 (*National Grid v ABB Limited*). The National Grid case concerned a long-running cartel in the gas-insulated switchgear market. In 2007, the European Commission fined Siemens, ABB, Alstom, Areva and others €750 million, although some of the fines were later reduced by the General Court. National Grid brought a damages claim at the High Court in November 2008, seeking over £108 million in overcharges plus interest. Although the case came closer to a decision than perhaps any other UK competition damages litigation, the parties ultimately decided to settle rather than take their chances at the hands of the court, and the litigation dissolved in June 2014.

⁹⁷ Ratliff (2011).

⁹⁸ Article 22-2(2) MRFTA, according to which the KFTC and its staff cannot provide nor disclose the identity and reported information of the person who cooperated in the case or whistle-blowers excluding exceptional cases specified in a Presidential Decree, e.g., when necessary for lawsuits.

⁹⁹ Article 35 Enforcement Decree of MRFTA.

¹⁰⁰ Article 56-2 MRFTA.

evidence that can be used in court. It is also unclear whether before releasing to the courts leniency material the KFTC must nevertheless seek the leniency applicant's consent.

58. A similar question has been put to the attention of the European Court of Justice. On a referral from an Austrian court the ECJ was asked to pronounce on the compatibility with EU law of an Austrian law that prohibits access to documents without the prior consent of all the cartelists.¹⁰¹ The ECJ held that a national rule requiring the consent of all parties for the disclosure of material relating to judicial proceedings before the Austrian cartel courts breached the EU law insofar as it precluded the case-by-case balancing exercise mandated by *Pfleiderer*. Whilst acknowledging the practical importance of leniency programmes for the detection and prosecution of cartels, the Court maintained that an absolute bar on disclosure “*renders nugatory the right to compensation*”, where plaintiffs have no other means of obtaining evidence.¹⁰²

59. There are two possible approaches to increasing legal certainty in an effort to balance interests of both leniency applicants and injured parties claiming antitrust damages.

- One is the ‘legislative’ way where guidance is provided in hard or soft rules delineating the circumstances and the scope of the disclosure, and including a clear definition of what evidence is considered discoverable. The legislative approach provides legal certainty to leniency applicants and enhances the efficiency of the leniency system.
- The second possible approach is based on ‘a case-by-case assessment’ where the court takes into account the overall circumstances of each case individually. For example, a court would have to weigh the relevant interests and assess the circumstances on whether i) the plaintiff has any other means to obtain the evidence or if limiting access to leniency documents risks to render it impossible or excessively difficult to exercise the right to full compensation for harm caused, or ii) the right to civil damages is not unduly restricted considering the binding effects of the decision of competition authority and whether all other non-confidential documents can support the plaintiff's case making leniency materials no longer required.

4.1.3 *Clarifying the scope of protection against disclosure of evidence included in the file of a competition authority*

60. The degree of legal protection against disclosure may differ depending on the types and nature of the information and the documents. Appropriate access rules may favour private actions as they allow access to documents important for the plaintiff's case but they should differ depending on whether the document is a confidential document (but not necessarily submitted as part of a leniency application), or a non-confidential document (but submitted as part of a leniency application) or the document was a pre-existing document submitted again by a leniency applicant.

61. The EU Directive on Antitrust Damages Actions is a good example of how disclosure rules can vary for categories of documents to balance the interest of leniency applicants and those of potential follow-on claimants for damages. The Directive carefully identifies leniency statements and settlement submissions as categories of document which are exempted from the general disclosure rules. Pre-existing information, however, is excluded from this exception to the general principle of disclosure. The Directive classifies all leniency documents (which often has been addressed in a specific judgement as ‘documents made available under a leniency program’; ‘documents relating to a leniency procedure’ without any differentiation) into three groups:

¹⁰¹ Case C-536/11 *Donau Chemie* [2013].

¹⁰² Dunne (2014).

- leniency statements and settlement submissions which are exempted from disclosure (absolute protection), so-called ‘Black list’;
- documents prepared for the purpose of the investigation, which are temporarily exempted from disclosure, so-called ‘Grey list’ (temporary protection); and
- pre-existing materials which are subject to the disclosure rules, so-called ‘White list’ (no protection necessary).

Table 1 - Access rules under EU Antitrust Damages Directive

Degree of protection	Types of documents	Degree of protection and earliest moment of possible disclosure
Black list Art.6.6 Art.7.1	Documents whose disclosure could jeopardize public enforcement efforts, specifically: - Leniency statements; - Settlement submissions	<u>‘Absolute’ protection</u> : they are never disclosable by court order
Grey list Art.6.5 Art.7.2	Documents prepared for the purpose of the investigation, such as: - Replies to requests for information; - Statements of Objections; - Preliminary assessments (under Article 9 of Regulation 1/2003)	<u>Temporary protection</u> : Disclosable by court order only after the authority in question has taken a decision in the case or closes the proceeding
White list Art.6.9 Art. 7.3	Pre-existing materials not prepared in connection with the investigation, such as: - Written agreements; - Texts of e-mails; - Minutes of meetings	<u>No protection</u> : Disclosable by court order at any time

62. According to the EU Directive on Antitrust Damages Actions, leniency statements and settlement submissions can never be disclosed to a party or a third party who has requested the court to order their disclosure for the purpose of an action for damages.¹⁰³ According to the Directive itself the reason for excluding these documents from compulsory disclosure is that “[u]ndertakings may be deterred from co-operating in this context if self-incriminating statements such as leniency statements and settlement submissions, which are solely produced for the purpose of such cooperation, were disclosed. Such disclosure poses a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under worse conditions than the co-infringers that do not co-operate with competition authorities.”¹⁰⁴

¹⁰³ Corporate leniency statement is a voluntary self-incriminating statement in which a leniency applicant effectively admits and describes its knowledge of a cartel and its role therein, and which the applicant voluntarily submits to the competition authority as part of an application for leniency with a view to obtaining immunity or a reduction of fines under a leniency programme. Settlement submission means a voluntary submission by a company to a competition authority describing its acknowledgement of the infringement and the renunciation to dispute its participation in an infringement of the competition law and its responsibility for that infringement. This document is drawn up specifically to enable the authority to apply a simplified or expedited procedure.

¹⁰⁴ Recital 26.

63. According to Wils the rationale for the absolute bar on disclosure of these statements is that “[t]he corporate statement would not have existed (and could thus never have been obtained by the competition authority, either through the use of its compulsory investigation powers or from an informer or any other source, nor ever have been obtained by the damages claimant, through discovery or any other means), but for the cartel participant’s voluntary act of making a leniency application, thereby facilitating the discovery and punishment of the cartel by the competition authority, as well as subsequent follow-on actions for damages. In such a situation, it does not appear unfair to deny damages claimants the right to obtain the corporate statement, whereas the protection against disclosure of corporate statements in private actions for damages may make leniency programmes more attractive, thus facilitating public enforcement for the purpose of deterrence and punishment.”¹⁰⁵

64. The EU legislator took a different approach for pre-existing documents. Pre-existing materials refers to documents which exist irrespective of the proceeding of the competition authority and they include written agreements/contracts, texts of e-mails, minutes of meetings and so forth. In theory, this evidence could be discovered elsewhere. Therefore, the Directive states that court can order the disclosure of pre-existing materials at any time in actions for damages, even if the pre-existing documents are subsequently included in the materials submitted to the agency by a leniency applicant.

65. Other documents produced in the context of a public enforcement proceeding can only be disclosed at the end of the proceeding or when a decision has been taken. This category of documents includes replies to requests for information or subsequent and complementary submissions in connection with the investigation, or the Statement of Objections.¹⁰⁶ The purpose for postponing the disclosure is to prevent any undue interference in the ongoing investigation of the competition authority. Of course, nothing prevents voluntary evidence disclosure by leniency applicants and other defendants after the completion of the competition authority’s investigation, if they wish to do so in the context of settlement discussions with private claimants.

4.2 Limiting the scope of the civil liability of the successful immunity applicant

66. To preserve the attractiveness of leniency programmes some jurisdictions have considered necessary to reduce the civil liability of the successful immunity applicant in subsequent damages actions.

67. As a general principle, the right to full compensation would imply that the immunity recipient should not be shielded from damages actions or from any reduction of its liability in follow-on actions.¹⁰⁷ However, leniency applicants which co-operate with competition authorities under a leniency programme are more exposed to risks of private actions than companies which have not applied for leniency, despite the key role it plays in detecting the cartel, prosecuting it and bringing the infringement to a halt. There are different reasons for this increased exposure. Generally, the decision against the immunity recipient will become final much earlier than the decision against the other participant to the cartel. The successful leniency applicant would normally have no legitimate interest in appealing against the decision of the competition authority which would become final right away. The combined effect of the decision becoming final earlier and binding effect of the decision on courts will make the leniency recipient an especially ‘easy target to sue’ in follow-on antitrust actions. Additionally, because of the joint and several

¹⁰⁵ Wils (2009), p. 19.

¹⁰⁶ Article 6.5.

¹⁰⁷ The European Commission’s 2006 Leniency Notice explicitly recalls that ‘the fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC’. See Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17, para. 39.

liability principle the plaintiff might claim substantial damages well in excess of the amount of the damage caused by the immunity applicant alone.

68. If the exposure to “easy/easier” damage claims is the direct consequence of entering the leniency programme this will affect the incentives of potential leniency applicants in the first place. In other words, potential applicants might refrain from applying for leniency because of the subsequent increased risk of private enforcement. This ultimately might undermine the attractiveness and effectiveness of leniency programmes. To temperate this risk, in the United States the successful corporate amnesty applicant is only exposed to single damages, rather than to treble damages, on condition that he also co-operates with private claimants in their damage actions against the remaining cartel infringers.¹⁰⁸ The specific US rule thus does not sacrifice the claimants’ interest for private damage claims, but rather aims at protecting the effectiveness of both the US leniency program and private enforcement. Under the Hungarian Competition Act, an applicant receiving full immunity is only liable for damages if the follow-on cartel claimants have not obtained full compensation from other cartel members.¹⁰⁹ A successful immunity recipient, therefore, is still subject to civil liability, the claimants would have to sue first the other cartel members.

69. The EU Directive on Antitrust Damages Actions limits the civil liability of the immunity recipient only to the damages caused to its direct or indirect purchasers or providers.¹¹⁰ The other injured parties can only claim damages from the successful immunity applicant when they show that they cannot obtain full compensation from the other undertakings that were involved in the same infringement.¹¹¹ The amount of the contribution of the successful immunity applicant must not exceed the amount of harm caused to his own direct or indirect purchasers or providers.¹¹² To the extent that a cartel has caused harm to injured parties other than the customers/providers of the immunity recipient, the Directive states that the amount of the contribution of the immunity recipient shall be determined in the light of his relative responsibility for that harm.¹¹³

4.3 Voluntary compensation schemes and consensual dispute resolution mechanisms

70. An emerging issue in the interplay between public and private enforcement is how and to what extent should courts or competition authorities pro-actively support and encourage out-of-court settlements with the victims (or opt-in/opt-out collective settlements) and voluntary redress/compensations of the antitrust victims within the administrative proceeding. The rationale for encouraging a voluntary redress scheme or consensual dispute resolution systems is related to the costs and uncertainty of litigation. Competition-related damage claims can be particularly costly, time-consuming and more complex than other civil actions. Alternative dispute resolution (or consensual dispute resolution) mechanisms allow victims to settle cases quickly and easily on a voluntary basis.

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

¹⁰⁹ Section 88/D of the Hungarian Competition Act, as amended in 1998.

¹¹⁰ Article 11.4(a).

¹¹¹ Article 11.4(b).

¹¹² Article 11.5.

¹¹³ Article 11.6.

4.3.1 Collective settlement regimes

71. Netherlands's 'opt-out' collective settlement, so called 'Alternative Dispute Resolution on Mass Damage Claims', is considered as a very successful system. With the enactment of the Collective Settlement of Mass Damage Claims Act (WCAM) in 2005, the Netherlands was among the first EU countries to take a significant step toward a more efficient resolution of mass damage claims using an opt-out regime. The main features of this systems are: i) private litigation is settled out of court; ii) the agreement on the compensation payments must be approved by the court; iii) no mass claim can be forced upon a defendant without his consent; iv) the settlement approved by the court is binding on all persons to whom damages were caused on an opt-out basis.¹¹⁴

Box 5. General features of the Netherland's Collective Settlement

If and when the parties (defendant and representative organizations) agree to settle their disputes out of court, they can jointly petition the Amsterdam Court of Appeals to approve it. The settlement agreement should include information on (i) the number of class members (by estimation), (ii) the amounts of the compensation, (iii) the eligibility criteria for compensation, (iv) the method of determining the compensation amount, (v) the method for obtaining payment. The collective settlement must be published in a newspaper and a notice must be sent to known injured parties by ordinary mail. Everyone who falls within one of the categories of the settlement is given the opportunity to opt-out of the settlement within a certain period of time (at least three months).

The Amsterdam Court hears arguments of all interested parties. It can even allow amendment of the settlement by the original parties. The court will consider several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g. amount of compensation, adequate representation of interested parties, sufficiently guarantee of the defendant's performance).

If a settlement is approved, the court will declare the settlement binding upon all persons to whom damage was caused. The settlement will be filed with the court registry, where it will be available for inspection and where copies may be obtained by interested parties. All known injured parties will be sent a copy of the decision by ordinary mail. The decision will be published in at least on national newspaper, to be determined by the Court. Every person who is included in one of the categories of the settlement and does not opt out on time is bound by that settlement, even if he or she does not know about it. Nullification of the settlement for misrepresentation is not allowed.

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

¹¹⁴

Thus, the claimant concerned who does not opt-out on time is bound by that settlement and will have to be content with the terms of the settlement. According to Marquis: *"This legislation represents a hybrid model of dispute resolution in the sense that no mass claim can be forced upon a defendant without his consent, which is by definition a part of the settlement; but at the same time, the claimants are bundled together on an opt-out basis. This inspired solution defuses or at least attenuates the perceived dangers of opt-out approaches while overcoming the collective action problem that makes opt-in approaches likely to fail or to deliver poor results"* See Marquis (2011).

72. In 2015, the United Kingdom introduced a ‘voluntary redress scheme’ before the competition authority (Competition and Markets Authority, CMA) and an ‘opt-out collective settlement regime’ for competition law before the Competition Appeal Tribunal (CAT).

- Under the *voluntary redress scheme*, when a company has been found to have infringed competition law, the CMA will be able to certify a ‘voluntary redress scheme’. The effect of this certification will be that the redress scheme will be legally binding on the company. The beneficiaries who choose to receive compensation under the scheme will be able to take statutory enforcement actions against the business if it fails to comply with the terms of the voluntary redress scheme. Setting up such a scheme is voluntary and the CMA cannot order a company found guilty of a competition infringement to implement a redress scheme.
- The *opt-out collective settlement regime* will enter into force in October 2015 and differs from the Netherlands’ collective mass damage claims settlement in relation to the scope of the opt-out. In the UK procedure, the opt-out element will apply to class members domiciled in the United Kingdom, while claimants from outside the United Kingdom will have the opportunity to opt-in if desired. Under this system, a representative of those who believe they have suffered a loss as a result of an antitrust infringement and a potential defendant would jointly apply to the CAT to approve on an opt-out based on a mutually agreed settlement agreement. If the CAT certifies that the case is suitable for such a settlement and considers the terms of the settlement ‘just and reasonable’, the CAT will then approve the settlement.¹¹⁵

73. The EU Directive on Antitrust Damages Actions contains rules to facilitate out-of-court dispute resolutions of damages claims. The so called ‘once-and-for all’ settlement can often achieve compensation faster and at a lower cost. In order to allow the parties sufficient time to negotiate a consensual settlement without the risk that they damage claims becomes time-barred in the meantime, the limitation period for bringing an action for damages is suspended for the duration of the consensual dispute resolution process.¹¹⁶ Where parties involved in consensual dispute resolution bring an action before the national courts concerning the same claim, national courts may suspend proceedings for a maximum duration of two years.¹¹⁷ The Directive also clarifies the effect of partial consensual settlements (e.g. where a claimant settles with only one of the co-infringers) on subsequent actions for damages.¹¹⁸

¹¹⁵ The UK BIS’s report addressed the benefits of this system “*From the perspective underlying claimants/potential underlying claimants, an opt-out collective settlement mechanism would clearly facilitate the granting of compensation without the additional costs, risk and time consumed in lengthy court cases. It will help to ensure that those who have suffered loss are able to get redress as quickly, will minimise the costs to business and help to ensure that litigation is the option of last resort.*” UK Department for Business Innovation & Skills, ‘Private actions in competition law; A consultation on options for reform -government response’, BIS/13/501(29 January 2013), pp. 51.

¹¹⁶ Article 18.1.

¹¹⁷ Articles 18.2 and 18.3.

¹¹⁸ Where an infringer and a victim reach a settlement, the victim’s claim is reduced by the settling co-infringer’s share of the harm that the infringement caused to the victim. Its remaining claim can only be exercised against non-settling co-infringers, and the non-settling co-infringers cannot recover contribution for it from the settling co-infringer. However, when the non-settling co-infringers cannot pay the damages corresponding to the victim’s remaining claim, the settling injured party can exercise the remaining claim against the settling co-infringer unless this is expressly excluded under the terms of the consensual settlement (Article 19).

4.3.2 Reduction of fines to encourage voluntary compensations

74. It has been suggested that the competition authority should have the possibility to grant a small reduction in the fine when the companies agree to voluntarily compensated the victims prior to the decision of the competition authority. While the idea is supported by a number of competition authorities, part of the literature¹¹⁹ has emphasised that helping to obtain compensation at lower cost must not undermine the objective of deterrence and must not use significant public enforcement resources: first, competition authorities should certainly not facilitate compensation at the expense of deterrence and punishment. Thus, any fine reduction should certainly be lower than the amount of the compensation paid. Second, competition authorities should not invest significant resources in assessing the adequacy of compensation offered because that could be burdensome and possibly too difficult.

75. In order to promote private compensation schemes, some agencies consider voluntary payments as mitigating circumstance when setting the administrative. The United Kingdom for example offers to reduce the fine by 5-10% should a business make voluntary redress in the processing of imposing penalty. The Dutch competition authority takes into account voluntary compensation as one of the mitigating circumstances in setting the amount of fines imposed on undertakings: mitigating circumstances include *'the circumstance that the offender of his own accord provided compensation to the injured party/injured parties'*.¹²⁰ In Spain, *'the performance of actions that terminate the infringement'*, *'the effective non-application of the prohibited conduct'*, and *'the performance of actions intended to repair the damage caused'* shall be taken into account as mitigating circumstances to partially offset the penalty.¹²¹ The 2008 European Competition Authorities' Principles for Convergence on Pecuniary Sanctions imposed on undertakings for infringements of antitrust law also lists among the mitigating circumstances: *'the applicable fine may be reduced if the offender takes active steps to mitigate the adverse consequences of the infringement, in particular by providing voluntary, timely and adequate compensation to those who have suffered damage as a result of it.'*¹²² Also the EU Directive on Antitrust Damages Actions states that where an infringer has paid compensation as a result of a consensual settlement, a competition authority may consider this as a mitigating factor in the setting the fine for that infringer.¹²³

76. Other competition authorities provide incentives for voluntary redress schemes within the leniency programme. The US Department of Justice (DOJ), for example, encourages voluntary compensation which is one of the conditions for obtaining immunity from prosecution under the DOJ Leniency Policy.¹²⁴

¹¹⁹ Wils (2009), p. 21.

¹²⁰ Point 49 (c) of the NMA Fining Code 2007.

¹²¹ Article 64.3 of the competition law. OECD (2013).

¹²² At paragraph 18 of the ECA Principles for convergence on Pecuniary sanctions imposed on undertakings for infringements of antitrust law (adopted in May 2008 by the European Competition Authorities).

¹²³ Article 18.3.

¹²⁴ US Department of Justice, Corporate Leniency Policy: "**A. Leniency Before an Investigation Has Begun**; Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met: 1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source; 2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; 3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; 4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; **5. Where possible, the corporation makes restitution to injured**

4.4 *Information in decisions of competition authorities and the effect on private enforcement*

77. Depending on the procedural rules in force in each jurisdiction, competition authorities can and do make their decisions public in a variety of ways: by publishing them on the official journal or on their website or by sending the decision to the parties concerned. Decisions generally state the names of the parties concerned, the elements of fact and law on which the decision has been taken and the considerations which led the agency to adopt the decision, including the rationale for any penalties imposed.¹²⁵ Decisions can be quite rich with information that can potentially be very useful for a private plaintiff who is planning to bring a damage claim. However, the public version of competition authorities' decisions is often heavily 'redacted' to ensure confidentiality rights of the parties involved in the proceeding. Therefore, the content of a decision may often be shorter and be heavily 'redacted' than a potential plaintiff would want it to be. Recognising that ensuring the effective right to antitrust damages can make a significant contribution to an effective competition enforcement system, some competition authorities are considering ways in which decisions could be published more quickly and include more details about the infringement and the grounds for adopting the decision so that the victims can more easily use it in follow-on claims.

4.4.1 *Publication of more detailed non-confidential versions of decisions*

78. An element related to the interplay between public and private enforcement is what information is included in the decision of the competition authority when it is published. There are public interest reasons in support of competition authorities disseminating widely decisions establishing an infringement of competition law. First, the publication informs the general public of the competition authority's action and of the reasons behind this action. Secondly, it sends a message to economic operators promoting general deterrence. Finally, publicising the decision provides more information to parties who may have been harmed by the anti-competitive conduct. Victims of the infringement have the opportunity to assert their rights against the companies involved in the case and seek redress. Such public interest consideration should be taken into consideration when assessing whether the degree of disclosure of information through the publication of the competition authorities' decisions would be appropriate versus the right of the involved parties to confidentiality.

79. In a recent judgement related to the disclosure of cartel information provided by a leniency applicant, the EU General Court dismissed an application from three chemical companies implicated in a hydrogen peroxide cartel seeking to keep information provided in a leniency application confidential and has backed the EU Commission's desire to make information contained in a corporate leniency application public when releasing the findings of the cartel investigations.

parties; and 6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.”

¹²⁵

Under Article 30(1) of EU Regulation No 1/2003, the Commission is to publish, inter alia, the decisions by which it imposes fines on undertakings or associations of undertakings that it finds liable for an infringement of the EU law on cartels. In accordance with Article 30(2) of that regulation, that publication is to state the names of the parties concerned and the main content of the decision, including any penalties imposed, but must have regard to the legitimate interest of undertakings in the protection of their business secrets. And also, under Article 43 (Disclosure of Trial and Resolutions and Confidentiality of Agreement) of Competition Law(MRFTA) of Korea; ① All trials and resolutions made by the Fair Trade Commission shall be disclosed. Note, however, that when protection of trade secrets of an enterpriser or enterprisers' organization is deemed necessary this provision shall not apply. Article 45 (Drafting and Correction of the Written Resolution) ① Any and all resolutions by the Fair Trade Commission on matters in violation of the provisions of this Act shall be made in a written resolution with the reasons specified.

Box 6. EU Judgement on disclosure of cartel information provided

In May 2006, the EU Commission decided that nine producers of hydrogen peroxide had participated in a cartel between 1994 and 2000. The EU Commission fined seven companies, including subsequent leniency applicants, a total of €388 million. The decision spawned damages claims against some of the companies who participated in the cartel before a national court in Dortmund, Germany.

In 2007 a year after the fines were imposed, a non-confidential version of the decision was published on the Commission's website. The decision did not include confidential information as requested by the leniency applicants. However, in November 2011, in light of a request for access to the confidential version of the decision, the Commission informed the leniency applicants of the intention to publish a new, more detailed version of the decision. The Commission notified the parties that it intended to include therein leniency information with the exception of any confidential information which the applicants could claim as confidential. On that occasion, the Commission asked the applicants to identify the information that they wished to be treated as confidential.

In January 2012, the applicants (Akzo Nobel and Eka Chemicals) opposed the Commission's proposal on the ground that the publication would harm their company's interests, asking that *all information* which the applicants had provided under the EU leniency programme be excluded from the publication. In May 2012, the Hearing Officer acting on behalf of the Commission rejected the applicants' requests with the exception of all information which would allow direct or indirect tracing of the sources of the information. The applicants argued that the Commission's approach infringed their fundamental right to the protection of professional secrecy.¹²⁶

In upholding the decision of the Hearing Officer, the General Court said that disclosing information concerning an infringement of EU competition law through the publication of a decision penalizing an infringement "*cannot be conflated with allowing third parties access to documents contained in the Commission's investigation file relating to such infringement.*" According to the Court, the applicants had also failed to establish that the information should be considered professional secrets, which (if they had) would have prevented the public disclosure. The Court pointed out that the interest of a company in keeping details of the offending conduct private did not merit any particular protection because it did not outweigh the public interest in knowing the reasons for the Commission's action. The Court concluded that the applicants' interests did not outweigh the interests of those harmed by the infringement who should have the opportunity to assert their rights against the cartelists.

According to the Court: "*[i]t follows that the applicants cannot legitimately oppose the publication, by the Commission, of information revealing the details of their participation in the infringement penalized in the decision on the ground that such publication would expose them to an increased risk of having to bear the consequences, in terms of civil liability, of their participation in that infringement.*"¹²⁷ That is to say that in actions for civil damages under EU competition law, defendants cannot claim a legitimate interest in being protected against the risk of having such actions brought against them simply because they had benefitted of the EC leniency programme.

¹²⁶

The court identifies three conditions for information to be considered within the ambit of the obligation of professional secrecy and thus to enjoy protection against disclosure to the public: i) that it is known only to a limited number of persons; ii) that its disclosure is liable to cause serious harm to the person who has provided it or to third parties; and, iii) that the interests liable to be harmed by disclosure are objectively worthy of protection. And as regards the third condition, the court noted that when the confidentiality of a piece of information is assessed, the individual legitimate interests opposing disclosure of the information must be weighed against the public interest that the activities of the institutions take place as openly as possible.

¹²⁷

Case T-345/12, paragraph 81.

4.4.2 *Dissemination of competition decision to potential injured parties through remedy orders*

80. Competition authorities' efforts to publish more detailed decisions can be accompanied by efforts to inform pro-actively potential injured parties about the infringement so that they may, where appropriate, assert their rights against the companies involved in the infringement. In 2010, Brazil's antitrust agency, CADE, included for the first time in the industrial gases cartel decision an order that a copy of the decision to be sent to potential injured parties for them to recover losses. Following this initiative,¹²⁸ a number of parties allegedly affected by the cartel sued for damages in courts throughout the country.¹²⁹ Korea also has similar provision in its competition law according to which the KFTC can order infringers of the competition law to announce in public or notify known victims of their anti-competitive behaviour of their violation of the competition law. In practice, the KFTC often has imposed this remedial order in decision on the anti-competitive conduct.¹²⁹

5. Conclusions

81. In recent years, private enforcement has significantly increased in size in many OECD jurisdictions. This trend is the result of more active enforcement of competition law by competition authorities, in particular regarding cartels, resulting in a growing number of infringement decisions. In addition, consumers as well as small and medium-sized enterprises (SME) as well as direct purchasers are better informed about competition laws and what possibilities it offers to companies and individual who have suffered a loss because of an anti-competitive conduct.

82. Both public enforcement and private enforcement are fundamental pillars of an effective competition system, and both can contribute to pursuing the fundamental goals of an antitrust enforcement: 1) bringing an infringement of law to an end (injunctive objective); 2) remedying the injury caused by the specific anti-competitive conduct (corrective justice or compensatory objective); and 3) punishing the infringer and also deter him and others from engaging further in anti-competitive conduct (punitive objective).¹³⁰ In general, there is a broad agreement that public enforcement and private enforcement concur to pursue all these three objectives.

83. While public and private enforcement concur to achieving a common set of objectives, their respective primary objectives differ. Private enforcement pursues the individual interest of victims of an antitrust infringement to see that infringement formally declared and to obtain compensation for any damage suffered because of it; whereas public enforcement primarily pursues the public interest to competitive markets through deterrence and overall compliance with competition rules by entrusting a public entity (the competition authority) with the tools and powers to detect, investigate and ultimately punish infringements of the competition law.

¹²⁸ Martinez and Tavares de Araujo Levy (2013).

¹²⁹ Under Article 5 of MRFTA (Remedial Measures) in case of any act violating the provisions of Article 3-2 (Prohibition on the Abuse of Market Dominance), the KFTC may order the market-dominating company involved to reduce prices, to discontinue the violation, to announce its receipt of a remedial order to the public, and to take other necessary remedial actions.

¹³⁰ Komninos (2011). Enforcement should also clarify and develop the content of the antitrust law through judgments and decisions in individual cases as well as general guidelines by competition authorities. See also Wils (2009).

84. Private actions for damages are inevitably driven by private gains and the interests of private claimants focus ultimately on compensation and on the financial benefits from the lawsuit. There might be circumstances where these private interests may diverge from public interests, e.g. there may be cases that are brought by private claimants that a competition authority would not pursue. However, even though plaintiffs bring claims for private interests based on the harm he believes to have suffered, they are still contributing to public interest objectives as they allow courts to stamp out anti-competitive conduct. In that respect, both private and public enforcement contribute to safeguarding of public interest to competitive markets.¹³¹

85. It is very important to ensure an optimal design of a competition law enforcement system which facilitates private enforcement while preserving strong and effective public enforcement. Concerns may be stronger in some enforcement areas, such as leniency programmes, where the need to preserve the effectiveness of public enforcement may result in limiting the ability of plaintiffs to bring private actions relying on information in the agency's file but submitted by a leniency applicant.

86. Most jurisdictions recognise private enforcement as an important pillar of an effective competition enforcement system. Private enforcement acts as an additional deterrent on companies and ensures a key objective of competition policy, i.e. compensation for those who have suffered from anti-competitive behaviour. Many jurisdictions have implemented reforms to encourage private antitrust damage actions and remove impediments for victims to file antitrust claims. In Europe, a recent Directive on Antitrust Damages Actions is expected to trigger reforms at national level in many EU member states.

¹³¹ Wils (2009), pp 4-5.

MAIN REFERENCES

- Burrichter Jochen and Ahlenstiel Enno, Integrating Public and Private Enforcement in Europe: Legal and Jurisdictional Issues – The German Perspective, 16th edition of the Annual EU Competition Law and Policy Workshop (June 2011)
- Conner J.M. and Lande R.H., The size of cartel overcharges: Implications for U.S. and EU fining policies, the Antitrust Bulletin, vol.51, No.4/winter 2006
- Dunne Niamh, The role of Private enforcement within EU competition law (2014-37). The Dickson Poon School of Law, King's collage London.
- EU, Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, April 2008
- EU, Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
- EU, European Commission, Green paper on Damages actions for breach of the EC antitrust rules COM (2005) 672 final
- EU, the Commission Staff Working Document, Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final
- EU, White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final)
- Foer Alber A. and Cuneo Jonathan W., The International Handbook on Private Enforcement of Competition Law, 2012 Ed.
- Gide Loyrette Nouel, Further steps toward enhanced private enforcement of China's Anti-Monopoly Law, Client Alert” published in July 2012.
- Guerrero Rodríguez Omar and Ramírez Casazza Barrera Alan, Siqueiros y Torres Landa, S.C., Private Competition Actions for Damages Under Mexican Law, CPI Antitrust Chronicle, April 2013.
- Kersting Christian, Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants, Journal of European Competition Law & Practice, 2014, Vol. 5, No. 1
- Kolasky William, Antitrust Litigation: What's Changed in Twenty-Five Years?, 27 ANTITRUST 9 (Fall 2012)
- Kominos Assimakis, The relationship between public and private enforcement: *Quod Dei Deo, Quod Caesaris Caesari*, presented for the 16th edition of the Annual EU competition Law and Policy Workshop on June 2011

- Kortmann Jeroen and Wesseling Rein, Two Concerns Regarding the European Draft Directive On Antitrust Damage Actions, CPI Antitrust Chronicle, August 2013
- Lee Hwang, Overview of current antitrust enforcement in Korea, Competition Policy International Antitrust Chronicle, September 2014
- Marquis Mel, Perchance to Dream: Well Integrated Public and Private Antitrust Enforcement in the European Union, 16th edition of the Annual EU Competition Law and Policy Workshop(June 2011)
- Martinez Ana Paula and Tavares de Araujo Levy Mariana, Private Antitrust Enforcement in Brazil: New Perspectives and Interplay with Leniency, CPI chronicle on 16 Apr 2013
- Matsushita Mitsuo and Furuya Kazunori, Private Antitrust Actions in Japan, CPI Antitrust Chronicle on 16 April 2013 <https://www.competitionpolicyinternational.com/file/view/6914>
- Modrall James, Bachrack Matthew and Huang Cunzhen, Antitrust Litigation in China –A Step Forward, CPI Antitrust Chronicle, June 2012
- Morais Luis Silva, Integrating Public and Private Enforcement of Competition Law in Europe: Legal Issues, 16th edition of the Annual EU Competition Law and Policy Workshop (June 2011)
- OECD, Competition and the use of markers in leniency programmes, 2013
- OECD, Criteria for Setting Fines for Competition Law, Latin American Competition Forum August 2013
- OECD, Private Remedies, 2006
- OECD, Quantification of Harm to competition by National Courts and Competition Agencies, 2011
- Ottervanger Tom, Designing a Balanced System: Damages, Deterrence, Leniency and Litigation's Rights, 16th edition of the Annual EU competition Law and Policy Workshop, held on 17-18 June 2011
- Ratliff John, Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies, 16th edition of the Annual EU Competition Law and Policy Workshop (June 2011)
- Szilágyi Pál, Private Enforcement of Competition Law and Stand-alone Actions in Hungary, Global Competition Litigation Review 2014, 2
- Tóth and Pázmány, Law Working Papers(2013/7), The reception and application of EU competition rules in Hungary: an organic evolution, Pázmány Péter Katolikus Egyetem / Pázmány Péter Catholic University Budapest
- United Kingdom, Department for Business Innovation & Skills, 'Private actions in competition law; A consultation on options for reform -government response', BIS/13/501(29January 2013)
- Van Boom Willem H., Collective Settlement of Mass Claims in the Netherlands, Rotterdam Institute of Private Law, published in Matthias Casper, André Janssen, Petra Pohlmann, Reiner Schulze (eds.), Auf dem Weg zu einer europäischen Sammelklage?, Munich, Sellier 2009, p.171-192
- Van de Walle, Simon, Private Antitrust Litigation in the European Union and Japan; A Comparative Perspective, Antwerpen-Apeldoorn, Maklu 2013

Waelbroeck Dennis, Slater Donald and Even-Shoshan Gil, Comparative Report ‘Study on the Condition of Claims for damages in case of infringement of EC Competition rules’, August 2004

Wang Margaret and Hughes Richard, Recent developments in civil litigation under China’s Anti-monopoly Law, CPI chronicle 2012

Wils Wouter. P.J., The Relationship between Public Antitrust Enforcement and Private Actions for Damages, *World Competition* 32.no 1(2009)