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UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

Law School

Volume 1 of 1

**Private Enforcement of Art 101 and 102 of the Treaty on the Functioning of the European
Union**

by

Daniel Simon Reed

Thesis for the degree of Doctor of Philosophy

2nd February 2015

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ABSTRACT

FACULTY OF BUSINESS AND LAW – European Union Competition Law

Doctor of Philosophy

**PRIVATE ENFORCEMENT OF ART 101 AND 102 OF THE TREATY ON THE FUNCTIONING OF THE
EUROPEAN UNION**

Daniel Simon Reed

Traditionally, the enforcement of competition rules in Europe has been predominantly via public enforcement. Following the European Court of Justice's ruling in 2001 in which was established the right for compensation of harms suffered by any victim of antitrust infringements, the European Commission has made proposals to create a private antitrust enforcement regime. While compensation of victims is the first and foremost guiding principle, the regime thus created, should, according to the Commission, also deliver overall better compliance with competition rules whilst creating and sustaining a competitive European economy.

In designing the system the Commission contends that it should not be grounded on similar features to that of the United States private enforcement mechanism as it has resulted in abuses of the system by private parties for private interests. A deconstructive reading of the Commission proposals, however, reveals that the envisaged regime contains more characteristics of the United States system than is explicitly presented. Furthermore, a direct comparison of common prohibitions in both systems exposes a significant lack of safeguards against misuse of the rules by private parties in the European system. This thesis also compares the envisaged European regime with the Canadian public enforcement regime. Despite the restricted cause of action accorded to private parties, the Canadian system is not immune from exploitation of the rules by private parties for self-interest. These findings call into question whether the proposed system will deliver the stated aims.

This thesis concludes that considering the costs of private enforcement, European competition law should be solely the competence of public officials. It is argued that although not formally recognised either in the literature nor in the case law of the EU courts, the Commission is already legally empowered to award compensation to victims of antitrust violations. This thesis presents suggestions for an enhancement of the current public enforcement framework.

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DECLARATION OF AUTHORSHIP

I, Daniel Simon Reed

declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research:

Private Enforcement of Art 101 and 102 of the Treaty on the Functioning of the European Union.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. None of this work has been published before submission.

Signed: _____

Date: _____

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To Lewis and Jason

Abbreviations and Short Names

Advocate General (AG)

Alternative Dispute Resolution (ADR)

Average total costs (ATC)

Average variable costs (AVC)

Canadian Competition Bureau (Bureau)

Council Regulation (EC) 1049/2001 of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents (Regulation 1049/2001)

Court of First Instance (CFI)

Court of Justice (*Instance*)¹ - Court

Court of Justice of the European Union (*institution*)² - Court of Justice

European Coal and Steel Community (ECSC)

European Commission / Directorate General for Competition (Commission)

European Community (EC)

European Community Treaty (EC Treaty)

European Competition Network (ECN)

European Convention on Human Rights (ECHR)

European Court of Human Rights (ECtHR)

European Union (EU)

General Court - Court³

Gross domestic product (GDP)

National Competition Authorities (NCAs)

Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (Regulation 1/2003)

Treaty establishing the European Economic Community (EEC Treaty)

Treaty on European Union (TEU)

Treaty on the Functioning of the European Union (TFEU)

United Kingdom (UK)

United States of America (US)

US Antitrust Modernisation Commission (AMC)

US Department of Justice (DOJ)

¹ As suggested by the: Publication Office, 'Administrative Structure of the European Union: Official Titles and Listing Order' (9.5.1. *Institutions and bodies*) <<http://publications.europa.eu/code/en/en-390500.htm>> accessed 26 January 2014

² As suggested by: *ibid*

³ As suggested by: *ibid*

Definitions and Terminology

Private Enforcement

Private enforcement of the European Union (EU) competition rules can take different forms such as actions for damages, actions for injunctive relief, as well as the use of the competition rules as a defence.⁴ The phrase ‘private enforcement’ in this thesis is used to indicate all the courses of action available to a private party under the EU competition rules. Moreover, enforcement by the Commission and by National Competition Authorities (NCAs) are considered part of the same enforcement pillar, i.e. public enforcement. Private litigation is the second enforcement pillar of EU competition law.⁵ Reference will be made according to these definitions.

Commission Proposals

The Commission’s support for a system of private enforcement in the EU antitrust proceedings is expressly promoted in the 2005 Green Paper and in the 2008 White Paper on damages action for breaches of the EC antitrust rules.⁶ However its position in relation to private enforcement is evidenced on numerous occasions, spanning over several decades, and in a range of formal and informal documents. The phrase ‘Commission proposals’ in this thesis is used to indicate the body of sources analysed in which the Commission directly and indirectly has expressed its support for a private enforcement regime.

Compensation via Public Enforcement

Having identified numerous pitfalls in the proposed private enforcement regime, in particular those related to compensation, this thesis suggests a possible alternative. As actions for damages by private parties appear to be a significant threat to the efficacy of competition policy, this thesis suggests that compensation should be awarded via public enforcement, i.e. via the Commission and NCAs. Chapter 10 presents the legal framework of such suggestion. The phrase ‘compensation via public enforcement’ is used throughout the thesis to indicate the framework proposed in chapter 10.

⁴ Commission, ‘Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM(2008) 165 final, 3

⁵ Commission, ‘Staff Working Paper (Annex to the Green Paper, Damages Actions for Breaches of the EC Antitrust Rules)’ COM (2005) 672 final, 1 - 3

⁶ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

Numeration of Treaty Articles - EC / EU - Courts

The Treaty of Lisbon⁷ renumbered Art 81 of the European Community (EC) Treaty⁸ as Art 101 of the Treaty on the Functioning of the European Union (TFEU), and Art 82 becomes Art 102 of the TFEU.⁹ Moreover, some cases and literature used in this thesis pre-date the re-numeration of the EC Treaty, by the Treaty of Amsterdam in 1999,¹⁰ and they contain reference to Art 85 and 86 of the European Economic Community Treaty.¹¹ Although preference will be given to the current numeration, reference to Art 85 EEC and 86 EEC, to 81 EC and 82 EC, must be read interchangeably with Articles 101 TFEU and 102 TFEU. Unless otherwise stated, Art 101 and 102 are reference to Articles 101 and 102 of the TFEU.

The European Union replaces and succeeds the European Community.¹² However, sources used contain reference to both 'Community' and 'Union'. These terms will be used interchangeably.

Following the entry into force of the Lisbon Treaty in 2009,¹³ the whole court system of the EU is known as the Court of Justice of the European Union (CJEU), comprising three courts: the Court of Justice (formerly known as the European Court of Justice (ECJ)), the General Court (formerly known as the Court of First Instance (CFI)), and the Civil Service Tribunal.¹⁴ Reference to 'Court' and to 'Court of Justice' are both references to the European Court of Justice.¹⁵

Although priority will be given to the institutions' current name, in some instance to preserve the authenticity of the source analysed, it is necessary to use the court's name and Treaty articles numbers used in that source. Consequently, previous and current courts' names and articles numbers will be used interchangeably.

Legal Terms

As this thesis uses material from other jurisdictions, mainly the United States (US) and Canada, legal terms can be different to those in use in the EU. For instance, competition – antitrust, lawyer –

⁷ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

⁸ Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33

⁹ Consolidated Version of the Treaty on the Functioning of the European Union [2010] C 83/01

¹⁰ The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (Amsterdam October 1997)

¹¹ Treaty Establishing the European Economic Community (Rome, March 1957)

¹² Consolidated Version of the Treaty on European Union [2010] OJ C 83/01, art 1

¹³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

¹⁴ Consolidated Version of the Treaty on European Union [2010] OJ C 83/01, art 19

¹⁵ As suggested by the: Publication Office, 'Administrative Structure of the European Union: Official Titles and Listing Order' (9.5.1. *Institutions and bodies*) <<http://publications.europa.eu/code/en/en-390500.htm>> accessed 26 January 2014

attorney, collective redress – class action, etc. Although preference will be given to the EU and England and Wales legal terminology, terms are used interchangeably.

Referencing Style

References are made as per footnote style: ‘Oxford Standard for Citation of Legal Authority’ (OSCOLA) 4th Edition.¹⁶ However, no short forms are used in footnotes, and regardless of the type of source being cited, pinpoints are always at the end of the citation separated by a comma.¹⁷

¹⁶ Faculty of Law, ‘OSCOLA - Oxford University Standard for the Citation of Legal Authorities, Fourth Edition’ (*University of Oxford*) <www.law.ox.ac.uk/oscola> accessed 5 January 2014

¹⁷ As the software (EndNote/RefTypeTable) considers as ‘duplicate reference’ sources with the same title, despite different citations, parties name in case law and sources having identical titles, are modified by adding an underscore (_) between words. Accordingly underscores in footnotes/bibliography should not be deemed typing errors.

Chapter 1: PRIVATE ANTITRUST ENFORCEMENT: THESIS

INTRODUCTION

1.1.1 Introduction

*In general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so.*¹⁸

*Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.*¹⁹

Adam Smith in 1776 presented a conceptualisation of competition essentially based on the absence of legal restraints on trade.²⁰ In the twenty-first century a European market based solely on economic freedom and without legal restraint is unthinkable. Economic freedom is the right not to suffer any limitation of market opportunities resulting from anti-competitive behaviour and develop one's own potential in a free market environment.²¹ Free market however, is not synonymous with competitive market, consequently policy makers have the difficult task of containing violations while creating and sustaining a competitive economy.²²

In the European Union (EU)²³ over the last 50 years, the enforcement of competition law has been predominantly via public enforcement. Private actions for damages are deemed to be in a state of total underdevelopment lagging behind other jurisdictions.²⁴ Consequently the European Commission (Commission) is promoting a system of private enforcement to complement public

¹⁸ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (First published 1776, A Penn State Electronic Classics Series Publication 2005), 269

¹⁹ Ibid, 537 - 538

²⁰ The term 'antitrust' and 'competition' will be used interchangeably throughout this thesis. Antitrust is an American term originating in the nineteenth century movement against 'trusts' or large companies. Competition, arguably, has a wider meaning in that it also encompasses all types of regulations that affect competition such as tax policies, intellectual property rights or sector specific regulations such as those related to energy and telecommunication. The European Commission defines competition as the act by 'Independent companies selling similar products or services compete with each other on, for example, price, quality and service to attract customers'. In the context, antitrust is 'Competition rules governing agreements and business practices which restrict competition and prohibiting abuses of dominant positions', see: European Commission, *EU Competition Policy and the Consumer* (Office for Official Publications of the European Communities 2004), 27

²¹ Stephen F Copp, *The Legal Foundations of Free Markets* (The Institute of Economic Affairs 2008), ch 1 / 8

²² Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final); Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report)

²³ Following the entry into force of the Lisbon Treaty in 2009 the 'European Union' replaces and succeeds the 'European Community': Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

²⁴ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 9; Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.2

enforcement.²⁵ This thesis examines the effectiveness of such a system in the EU antitrust proceedings.

From the outset it must be stressed that private enforcement is more than a specific way of enforcing competition law. It engenders, and is interwoven with patterns of thought, negative institutional relationships, distribution of power and economic structures.²⁶ Competition policy can affect the structure of an industry,²⁷ its ability to compete with other industries both nationally and internationally, the nation's employment patterns²⁸ and the economy as a whole.²⁹ Considering the utmost importance of an adequate antitrust enforcement regime, the primary objective of this research is to analyse in detail whether a system of private enforcement in the EU is in effect 'an important tool to create and sustain a competitive economy,'³⁰ and whether such a system 'contributes to better allocation of resources, greater economic efficiency, increased innovation and lower prices'³¹ as the Commission contends.

This thesis first scrutinises the reasons behind the Commission's historical support for the involvement of private parties in the enforcement process. Arguably, the Commission's motive for the promotion of a private enforcement regime is not grounded in the validity of the system being promoted, but in the alleviation of its enforcement burden. Subsequently the analysis focusses on potential implications of the proposed system.

This thesis critically considers the Commission's proposals so as to evaluate the effectiveness of the proposed measures against the backdrop of the stated aims. In order to assess the implications of a private enforcement regime in the EU a comparison is made with the United States (US) private antitrust enforcement system. In the US the use of private enforcement is far more extensive than that of any other country,³² thus a comparative perspective can provide a sound basis for making a reasoned conclusion about implications to competition as result of private enforcement in the EU. A further comparison is made between the EU and the Canadian public enforcement regime, and where appropriate, features common to all three systems are compared.

²⁵ Antitrust, 'Commission Presents Policy Paper on Compensating Consumer and Business Victims of Competition Breaches' (IP/08/515, 3 April 2008) <<http://ec.europa.eu/competition/antitrust/IP/08/515/index.html>> accessed 29 January 2010

²⁶ David J Gerber, 'Private Enforcement of Competition Law: A Comparative Perspective' in Thomas M J Mollers and Andreas Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007)

²⁷ Undeniably to some sectors, such as the insurance and banking industry, it is doubtful whether the application of antitrust rules is at all appropriate, see: Andrea Lista, *EU Competition Law and the Financial Services Sector* (Informa Law from Routledge 2013), ch 9. See also: Andrea Lista, 'Stairway to Competition Heaven or Highway to Hell: What Next for Insurance Competition Regulation' (2011) 1 *The Journal of Business Law* 1

²⁸ Albert A Foer and Jonathan W Cuneo, *The International Handbook of Private Enforcement of Competition Law* (Edward Elgar Publishing Limited 2010), 596

²⁹ Robert H Lande and Joshua P Davis, 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies' (*Interim Report*, 8 November 2006) <<http://newaai.com/files/550b.pdf>> accessed 31 March 2014, 1-2

³⁰ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

³¹ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

³² For an analysis of this point see: David J Gerber, 'Private Enforcement of Competition Law: A Comparative Perspective' in Mollers and Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007)

In order for such comparative analysis to be of value, the research goes beyond the operational differences between the systems and scrutinises the legal principles underpinning the three legal regimes. The comparison has two components. The first focusses on the similarity of private actors empowered to enforce antitrust law, their incentives and their propensity to use the power given for private interests. For instance, despite the strict statutory limitation on the operation of private actions under the Canadian regime, evidence shows that resourceful private parties have exploited the rules to the detriment of businesses.³³ Likewise, to curtail abusive litigation, US courts have limited the operation of private parties.³⁴ The analysis queries whether the US and Canadian scenario of over enforcement by private actors could become a reality in the EU.

Subsequently, the analysis moves to the difference between the approach taken in the EU, US and Canada towards private enforcement and how this difference affects its operation. Due to a trend to facilitate private actions,³⁵ arguably the EU envisaged regime lacks appropriate safeguards against abusive litigation. Consequently, considering the impossibility of adequately controlling private actions in the first place, the detrimental side effects of private enforcement are more pertinent to the EU than to the other jurisdictions.

A central claim of this thesis is that private enforcement is not the answer to an effective enforcement system nor to the issue of compensation of harm resulting from violation of antitrust rules. In the antitrust field the challenge is that it is difficult to distinguish between aggressive competition and anti-competitive conduct. As a result, there is a significant risk of deterring hard, yet legitimate competition. Enforcement is further complicated because, even if it is possible to conclude that certain conduct is anti-competitive, it may be more difficult to implement workable remedies that will restore any lost competition.³⁶

Society benefits from private suits only if the public enforcement is sufficiently poor and the legitimate private suits outweigh the strategic suits. This requires poor public enforcement since otherwise most of the legitimate suits are brought by the government.³⁷ In the EU the fact remains

³³ For details on how this is possible under the Canadian law see: Norton Rose Fulbright, 'Yes, it Must be Unlawful and Actionable - Supreme Court of Canada Considers the Tort of Unlawful Interference with Economic Relations' (*Norton Rose Fulbright Canada LLP 2014*, February 2014) <<http://www.nortonrosefulbright.com/knowledge/publications/112402/yes-it-must-be-unlawful-and-actionablesupreme-court-of-canada-considers-the-tort-of-unlawful-interference-with-economic-relations>> accessed 6 April 2014

³⁴ For a detailed analysis of the measures taken by US court, see: William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] *Columbia Business Law Review*, 19

³⁵ Case C-195/98 *Osterreichischer Gewerkschaftsbund v Austria* [2000] ECR I-10497, Opinion of AG Jacobs, 47

³⁶ Makan Delrahim, 'Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice' (*U.S. Department Of Justice*, 15 November 2004)

<<http://www.usdoj.gov/atr/public/speeches/208479.htm%3e>" <http://www.usdoj.gov/atr/public/speeches/208479.htm>>> accessed 1 February 2014, 6

³⁷ Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014, 2

that the Commission and National Competition Authorities (NCAs) do deal with all kind of violations of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and there are no signs that they would not intend to continue doing so.³⁸ Moreover, there is no evidence that EU citizens are seriously disturbed by the current absence of compensation for antitrust offences.³⁹ Consequently the issue is whether private enforcement as a complement to public enforcement in the EU is needed in the first place.

Due to a different motive of private parties when compared to that of public officials to use the legal system, antitrust law, this thesis argues, should be enforced only via a public enforcement regime. Although such a system might not be perfect, in order to overcome the use of rules by private parties for private interests, in the EU private actors should not be involved in the enforcement process. Accordingly, this thesis concludes by presenting the legal and procedural bases from which an enhancement of the current system of public enforcement could be achieved and the Commission could be formally empowered to award compensation.

To achieve its objectives this research poses a set of issues and questions forming a platform for the analysis.

1.1.2 Issues and Questions – The Research Topic

In 1897 Oliver Holmes said that in a very real sense, the law is what is enforced when he wrote: ‘the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law’.⁴⁰ This research starts from the proposition that a legal system is effective if it is achieving or likely to achieve its objectives. This means, it is submitted, that competition policy should stimulate competition or at the very least not hinder market developments.⁴¹

An important but largely negative justification for private enforcement is the public authorities’ failure to prosecute all antitrust violations. If public enforcers cannot be relied upon to enforce laws vigorously against regulated sectors, then it is necessary to replace or supplement their efforts with private enforcers. According to the Commission although private enforcement in the EU is primarily about victim’s compensation, a greater numbers of private enforcers would contribute to the enforcement process and thus the overall compliance with the law will be increased.⁴² Moreover,

³⁸ Wouter P J Wils, ‘Should Private Antitrust Enforcement be Encouraged in Europe?’ (2003) 26 (3) World Competition 473, fn 71

³⁹ Ibid, 19

⁴⁰ Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, 461

⁴¹ As to the approach taken in thesis regarding the purpose of antitrust see chapter 3.1.2 - 3.1.3

⁴² Commission, ‘Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM(2008) 165 final, 15

private enforcers are needed when the public enforcement fails to provide an appropriate redress to victims of violations.

Against this background the case for private enforcement in the EU appears strong. The laudable aim of compensation appears at first almost indisputable as the need to facilitate private actions to achieve it. The problem with compensation in antitrust, however, is that it is not costs-free. To be effective a remedy must be adequate so as to compensate the victim of the violation and at the same time be meaningful so as to create a credible threat for would-be violator. It follows that a compensatory award need be large enough to deprive an antitrust violator of reasonably anticipated improperly obtained gains plus a little more, adjusted by the probability of detection and prosecution.⁴³ The US antitrust system is an example of such an approach. The US's treble damages award is rooted into the rationale that damages equivalent to the actual loss are not sufficiently effective. However, the award of compensation for actual loss, for loss of profit, and interest as it is envisaged in the EU⁴⁴ results in multiple damages that deters competitive behaviour that promotes efficiencies, encourages frivolous lawsuits and forces unduly large settlements.⁴⁵ Indeed treble damages have induced US courts to design and apply liability standards in a manner that limits private actions.⁴⁶ Furthermore, the Canadian competition regime shows that resourceful private parties have exploited gaps in the legislation for private interests despite the statutory restrictions. For instance, private parties have combined economic torts with antitrust breaches to claim damages otherwise unavailable under the Canadian competition rules.⁴⁷

The Commission contends that the creation of an effective private antitrust enforcement system⁴⁸ is an important tool to create and sustain a competitive EU economy.⁴⁹ The Commission policy

⁴³ Herbert Hovenkamp, 'Quantification of Harm in Private Antitrust Actions in the United States' (2011) University of Iowa Legal Studies Research Paper <<http://ssrn.com/abstract=1758751>> accessed 29 March 2014, 2

⁴⁴ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95

⁴⁵ Leon B Greenfield and David F Olsky, 'Treble Damages: to What Purpose and to What Effect?' (*British Institute of International and Comparative Law*, 2 February 2007) <<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014, 1; William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) *Journal of Law and Economics* 405

⁴⁶ William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (*British Institution of International & Comparative Law*, 15 May 2003) <<http://www.ftc.gov/speeches/other/030514biicl.shtm>> accessed 3 April 2014; Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107; William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] *Columbia Business Law Review*; Leon B Greenfield and David F Olsky, 'Treble Damages: to What Purpose and to What Effect?' (*British Institute of International and Comparative Law*, 2 February 2007) <<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014

⁴⁷ Subrata Bhattacharjee and Gregory Sullivan, 'Private Enforcement of Canadian Competition Laws' in Philip Marsden and Michael Hutchings (eds), *Current Competition Law*, vol IV (The British Institute of International and Comparative Law 2005)

⁴⁸ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

⁴⁹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

initiative has the objective of stimulating economic growth and innovation.⁵⁰ However, a number of issues pertinent to the enforcement process remain unaddressed. Accordingly, the principal research question is whether a system of private enforcement in the EU would ultimately deliver the Commission's stated aims. In turn, this poses a number of sub-questions, including:

- Is there in the EU a lack of public antitrust enforcement so as to justify its supplementation with private enforcement?
- What are the implications for society when public laws are enforced by private parties?
- Is private enforcement compatible with the goals of the EU competition policy?
- Is compensation an unquestionable right when it stems from competition infringements?
- Is it realistic to design a compensation award that, at the same time, would adequately compensate victims without incentivising a race to damages?
- Are there safeguards to prevent or at least limit abusive litigation such as those aimed at financial awards, or retaliation against competitors? What is the effect on competition?
- What lesson can be drawn from the US experience in relation to private enforcement and damages awards?
- What lesson can be drawn from the Canadian public enforcement regime?
- Would a system of private enforcement be effective in civil law jurisdictions like those of the EU? Is this issue addressed in the Commission's proposals?
- Is private enforcement the best option in providing compensation to victims of competition infringements, or can the same objective be achieved via public enforcement?
- How can the current public enforcement regime be improved?

Although in principle private enforcement could deliver benefits, for instance by enabling victims of violations to claim compensation without public intervention, this study endeavours to answer the question of whether in the EU private enforcement would contribute to the creation of a competitive economy or whether it would be detrimental to competition instead.

It is not the scope of this thesis to present a balanced argument in favour and against private enforcement of competition law. The critical nature of this thesis emerges from the discovery of significant pitfalls in the private enforcement regime proposed by the Commission. This thesis contributes to the literature in the antitrust enforcement policy by highlighting the detrimental side effects for businesses, and for competition, that such a system could bring in the EU.

In the next part the methodology used in the research is explained.

⁵⁰ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

1.2 Methodology

1.2.1 Justification for the Choice and Scope of Methodology

The terms 'study' and 'research' here are used to mean a careful and systematic process of inquiry to find answers to problems of interest. As Tan emphasises, to do research is to investigate a problem systematically, carefully and thoroughly.⁵¹ Morris observes that methodology provides the structure and underpinning to both, the research and to the arguments based on the research as a completed project might employ a number of different approaches and methods.⁵² The methodology employed in this thesis encompasses a teleological approach and discourse analysis as a research method, in addition to a comparative analysis with two other jurisdictions (US and Canada) so as to evaluate the potential implications of private enforcement.

The primary research question posed in this thesis is whether a system of private enforcement in the EU would ultimately deliver the stated aims of creation and sustainment of a competitive EU economy while proving a redress mechanism to victims of antitrust violations.⁵³ This thesis applies a teleological analysis to the Commission proposals related to the envisaged private enforcement regime. Discourse analysis, as a deconstructive reading, is employed to reveal the motivations behind the Commission's approach to private enforcement. These findings are further supported by a comparison between the EU and the US, as the latter is mainly a private enforcement regime, and the Canadian antitrust systems as it is mainly a public enforcement regime. A literature review, comprised of the legal and economic theories related to private enforcement, the US practical experience in private enforcement and the Canadian experience in public enforcement are used as methods for forecasting the effectiveness of private actions for damages in the EU.

1.2.2 Teleological Analysis

Referring to the importance of objectives of a competition policy system, Bork contended that:

[A]ntitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.⁵⁴

As a teleological approach focuses on the consequences of an action, it is employed here to evaluate the effect on competition and businesses (hence on the EU economy) of the creation and development of a private enforcement regime against the backdrop of the EU antitrust policy.⁵⁵

⁵¹ Willie Tan, *Practical Research Methods* (2 edn, Prentice Hall 2004), 3

⁵² Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing Ltd 2011), 3-5

⁵³ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1; Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

⁵⁴ Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books 1978), 50

According to the Oxford English Dictionary teleology is ‘the explanation of phenomena by the purpose they serve rather than by postulated causes’.⁵⁶ Teleological interpretation can be defined as the method of interpretation used by courts, when they interpret legislative provisions in the light of the purpose, values, legal, social and economic goals that such provisions aim to achieve.⁵⁷ Specifically in relation to competition law, Schwartz defines the EU Court’s teleological approach as interpreting ‘the intent of the Treaty’s drafters in light of some perceived “spirit” of the Treaty, thereby giving an integrationist meaning to the text’.⁵⁸ Indeed, a teleological approach is chosen as it appears to be the method of interpretation mostly utilised by the Court of Justice in defining the Treaty’s provisions.⁵⁹

Former Advocate General (AG) Maduro emphasises that legal interpretation at the Court of Justice has long been governed by text, context and purpose of the legal provisions which the Court has to interpret.⁶⁰ Likewise, Gerber comments that:

Reflecting the centrality of the goal of integration, the Court made teleology the cornerstone of its interpretative strategy ... the Court interpreted the treaty’s competition law provisions in light of its own conception of what was necessary to achieve the integrationist goals of the treaty. It conveyed a clear message that this goal-driven methodology was not merely to be one of many principles to be used in interpreting the treaty, but rather the dominant interpretative method.⁶¹

Such a method was applied by the Court in *Van Gend & Loos* when in considering whether provisions of the EU Treaty had direct application in national law, the Court stated:

[I]t appears from the wording of the questions referred that they relate to the interpretation of the Treaty ... to ascertain whether the provisions of an international treaty

⁵⁵ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

⁵⁶ Oxford Dictionary, ‘Definition of Teleology in English’ ([Oxforddictionaries.com](http://oxforddictionaries.com)) <<http://oxforddictionaries.com/definition/english/teleology>> accessed 28 February 2014

⁵⁷ Ashken Mirzoyan, Anna Meuthen and Konstantinos Flegkas, ‘On Comment: Teleological Interpretation’ (*Wikis der Freien Universität Berlin*, 2012) <<http://wikis.fuberlin.de/display/oncomment/Teleological+Interpretation>> accessed 28 January 2014

⁵⁸ Ethan Schwartz, ‘Politics as Usual: The History of European Community Merger Control’ (1993) 18 *Yale Journal of International Law* 607, 619

⁵⁹ Oreste Pollicino, ‘Legal Reasoning of the Court of Justice’ (2004) 05 (3) *German Law Journal* <<http://www.germanlawjournal.com/index.php?pageID=11&artID=402>> accessed 1 March 2014; Miguel P Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1 (2) *European Journal of Legal Studies* <<http://www.ejls.eu/2/25UK.pdf>> accessed 1 March 2014; Pinar Akman, ‘Searching for the Long-Lost Soul of Article 82 EC’ (2009) 29 (2) *Oxford Journal of Legal Studies* 267, 272

⁶⁰ Miguel P Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1 (2) *European Journal of Legal Studies* <<http://www.ejls.eu/2/25UK.pdf>> accessed 1 March 2014, 4

⁶¹ David J Gerber, ‘The Transformation of European Community Competition Law’ (1994) 35 (1) *Harvard International Law Journal* 97, 117

extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.⁶²

Likewise, in *Continental Can*, in defining the prohibitions contained in Art 86 of the Treaty establishing the European Economic (EEC Treaty),⁶³ the Court held that ‘the spirit, general scheme and wording of article 86 as well as the system and objectives of the treaty must all be taken into account’.⁶⁴ As Schwartz put it ‘Continental Can is the “best known” example of the European Court of Justice’s use of a “teleological approach” to analysing the Treaty of Rome’.⁶⁵

Following a teleological reasoning in the interpretation of EU law means that the Court of Justice has been able to look beyond the wording and literal interpretation of different provisions in the law towards considering the policies and objectives underlining these provisions. In the field of antitrust this has meant giving relevance to competition policy objectives such as market integration and consumer welfare. Consequently, the efficacy of private enforcement of competition law must be assessed against the backdrop of the EU competition policy.

Teleological interpretation in EU law does not refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules.⁶⁶ In other words, the Court of Justice is not simply concerned with ascertaining the aim of a particular legal provision. It also interprets that rule in the light of the broader context provided by the EU legal order and its purpose. The same approach is taken in this thesis to evaluate private enforcement in the context of EU competition policy since according to the Court of Justice:

[E]very provision of [EU] law must be placed in its context and interpreted in the light of the provisions of the [EU] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.⁶⁷

In line with the Court of Justice reasoning, an effective evaluation of private enforcement in the EU antitrust proceedings is best achieved by applying the same methodology used by the Court, namely by carrying out a teleological analysis. In order to scrutinise in detail the provisions

⁶² Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1993] ECR 1, 2

⁶³ Treaty Establishing the European Economic Community (Rome, March 1957)

⁶⁴ Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215, 10

⁶⁵ Ethan Schwartz, ‘Politics as Usual: The History of European Community Merger Control’ (1993) 18 *Yale Journal of International Law* 607, 619. See also: David J Gerber, ‘The Transformation of European Community Competition Law’ (1994) 35 (1) *Harvard International Law Journal* 97, 116

⁶⁶ Miguel P Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1 (2) *European Journal of Legal Studies* <<http://www.ejls.eu/2/25UK.pdf>> accessed 1 March 2014, 5

⁶⁷ Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 03415, 20

contained in the Commission proposals related to private enforcement, this thesis applies the method of discourse analysis.

1.2.3 Discourse Analysis and the Commission Proposals

Discourse analysis, as Gill put it, is the name given to a variety of different approaches to the study of texts, which have developed from different theoretical traditions and diverse disciplinary locations.⁶⁸ The term 'discourse' in this thesis is used to refer to all forms of talk and texts, both naturally occurring and, as Bryman describe them, 'contrived forms of talk and texts',⁶⁹ contained in the Commission proposals and relevant to private enforcement of competition law. As discourse analysis here is employed as an interpretative and deconstructive reading,⁷⁰ no specific guidelines are followed.⁷¹ Discourse analysis here aims at revealing the motivation and politics involved in arguing for and against a specific statement or value.

There are probably 57 varieties of discourse analysis⁷² or, as Gill refer to them: 'different styles of analysis that all lay claim to the name'.⁷³ However, what these perspectives share is a rejection of the realist notion that language is simply a neutral means of reflecting or describing the world, and a conviction in the central importance of discourse in constructing social life.⁷⁴ Gill suggests four prominent themes in discourse analysis: 1) a concern with discourse itself, i.e. discourse is a topic; 2) a view of language as constructive and constructed; 3) an emphasis upon discourse as a form of action; and 4) a conviction in the rhetorical organisation of discourse.⁷⁵ These four themes are briefly explained here as they represent the approach taken in analysing the different type of sources throughout the research.

Gill explains that discourse is a topic. This means that discourse is a focus of enquiry itself and not just a mean of gaining access to aspects of social reality that lie behind it, for instance what an individual's attitude to X, Y and Z really is.⁷⁶ Bryman argues that this view contrasts with a traditional research interview in which language is a way of revealing what interviewees think about

⁶⁸ Rosalind Gill, 'Discourse Analysis' in Martin W Bauer and George Gaskell (eds), *Researching with Text, Image and Sound* (3rd edn, Sage Publications 2005)

⁶⁹ Alan Bryman, *Social Research Methods* (3 edn, Oxford University Press 2008), 500

⁷⁰ For an example of a Foucaultian version of discourse analysis see: Caroline Jones, 'Figuring 'the Family': Late Twentieth-Century Accounts of Lived Experience and Legal Discourse Around Licensed Donor Insemination in Britain' (PhD Thesis, Lancaster University 2003)

⁷¹ For examples of various types of discourse analysis see: Alan Bryman, *Social Research Methods* (3 edn, Oxford University Press 2008); Rosalind Gill, 'Discourse Analysis' in Bauer and Gaskell (eds), *Researching with Text, Image and Sound* (3rd edn, Sage Publications 2005); Ischool Utxas, 'Discourse Analysis' (ischool.utexas.edu) <<https://www.ischool.utexas.edu/~palmquis/courses/discourse.htm>> accessed 23 February 2014

⁷² Rosalind Gill, 'Discourse Analysis' in Bauer and Gaskell (eds), *Researching with Text, Image and Sound* (3rd edn, Sage Publications 2005), 173

⁷³ *Ibid*, 172

⁷⁴ *Ibid*

⁷⁵ *Ibid*, 174

⁷⁶ *Ibid*

a topic or their behaviour and the reasons for that behaviour.⁷⁷ Gill accentuates, that discourse analysts are interested in the content and organisation of texts and they do not see discourse merely as a pathway to some other reality.⁷⁸

Language is constructive. According to Gill discourse is a way of constituting a particular view of social reality. As discourse is built or manufactured out of pre-existing linguistic resources, in rendering that view choices are made regarding the most appropriate way of presenting it and these will reflect the disposition of the person responsible for devising it. This means that the 'assembly' of an account involves choice or selection from a different possibilities, thus in a very real sense, texts of various kinds construct our world.⁷⁹

Discourse is a form of action. Gill stresses that discourse does not occur in a social vacuum; rather language is viewed as a practice in its own right. Language is a way of accomplishing acts. For instance, people use discourse to do things: to attribute blame, to make excuses, to present oneself in a particular way, or to get an argument across. As social actors, we are continuously orienting to the interpretative context in which we find ourselves, and constructing our discourse to fit that context. Gill remarks that discourse analysts argue that all discourse is occasioned.⁸⁰

Discourse is rhetorically organised. Gill emphasises that discourse analysis practitioners recognised that discourse is concerned with 'establishing one version of the world in the face of competing versions'.⁸¹ As Bryman explains, there is a recognition that we want to persuade others when we present a particular version of events, to establish that version in the context in question.⁸²

These four themes summarise the reason why discourse analysis represents an appropriate method in assessing the efficacy of private enforcement. In the EU, there appear to be a trend towards private enforcement and that trend includes antitrust.⁸³ However, it seems that the Commission want to persuade others by presenting potential benefits of such a system with little or no relevance accorded to detrimental side effects. This research has revealed several fallacies in the envisaged private enforcement regime, from the lack of safeguards in relation to abusive litigation, to the undermining of the leniency programme which has proved an effective tool in discovering cartels. Such exposure resulted from an interpretative and deconstructive reading of the Commission proposals.

⁷⁷ Alan Bryman, *Social Research Methods* (3 edn, Oxford University Press 2008), 501

⁷⁸ Rosalind Gill, 'Discourse Analysis' in Bauer and Gaskell (eds), *Researching with Text, Image and Sound* (3rd edn, Sage Publications 2005), 175

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Ibid, 176

⁸² Alan Bryman, *Social Research Methods* (3 edn, Oxford University Press 2008), 501

⁸³ Case C-195/98 *Osterreichischer Gewerkschaftsbund v Austria* [2000] ECR I-10497, Opinion of AG Jacobs, 47

The use of discourse analysis in this research is not intended to provide an absolute answer as to the perfect enforcement regime in competition law, as the validity of one's research/findings depends on the force and logic of one's arguments,⁸⁴ but to enable the understanding of the conditions behind the system of the private enforcement proposed by the Commission. Stated differently, this critical analysis reveals what is going on behind the Commission proposals which determine the Commission position towards private enforcement and its consequent actions. As Hewitt put it:

The term 'discourse' is used in day-to-day language interchangeably with discussion or dialogue. The story of a discussion or dialogue is the object of discourse analysis. Such analysis aims to expose patterns and hidden rules of how language is used and narratives are created. Thus, discourse analysis is a research method which involves examining communication in order to gain new insights.⁸⁵

Based on the findings this thesis argues that, in order to gain general consensus from consumers, from associations of consumers and the like, and especially from Member States so as to obtain support for antitrust action in their civil courts, the Commission has presented a series of discourses⁸⁶ in support of private enforcement grounded on victim's compensation. Discourse analysis here exposes the Commission's imperative need to act as the Court of Justice ruled that victims must be able to claim compensation.⁸⁷ Consequently, the need emerges for a redistribution of the enforcement burden among the Commission, NCAs, and civil courts. As dominant discourses define what is seen as the truth within a given context, in relation to private enforcement the Commission appear to support its argument, thus persuade others for a reform, by invoking socially dominant discourses such as that of victim's compensation.

A key aspect of the Commission proposals, which forms a central issue of this thesis, is the empowerments of private party to enforce competition law by facilitating action for damages. Among other things, an argument used by the Commission in support of a private enforcement regime is the need to provide an effective mechanism for the compensation of losses suffered by victims of antitrust violations.⁸⁸ Recalling the authority of the Court of Justice's ruling in *Courage* and *Manfredi*⁸⁹ in which the Court established the right to reparation from the party in breach of antitrust rules, the Commission has advanced discourses emphasising the need to compensate

⁸⁴ Sally Hewitt, 'Discourse Analysis and Public Policy Research' (*Centre for Rural Economy Discussion Paper Series No. 24*, 2009) <<http://www.ncl.ac.uk/cre/publish/discussionpapers/pdfs/dp24Hewitt.pdf>> accessed 9 April 2010

⁸⁵ *Ibid*, 2

⁸⁶ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

⁸⁷ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

⁸⁸ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

⁸⁹ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

victims. One example is the 2008 White Paper on damages actions for breaches of the EU antitrust rules.⁹⁰ In explaining the purpose and scope of the White Paper the Commission stated that:

Any citizen or business who suffers harm as a result of a breach of [EU] antitrust rules must be able to claim reparation from the party who caused the damage ... Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility ... to date in practice victims of [EU] antitrust infringements only rarely obtain reparation of the harm suffered... The current ineffectiveness of antitrust damages actions is best addressed by a combination of measures at both [EU] and national levels...⁹¹

Five years later in 2013, the Commission, in making a proposal for a new directive governing damages action,⁹² is still relying on compensation as the main grounds for its proposals. Indeed in a summary directed to citizens the Commission stated: 'Action by the EU can help ensure that you have a fair chance of obtaining compensation for losses caused by anti-competitive behaviour wherever you are in the EU'.⁹³

Apparently, in the examples above, the Commission has put forward proposals for policy choices and specific measures that would ensure that all victims of infringements of EU competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered.⁹⁴ By employing discourse analysis as interpretative and deconstructive reading, however, this research found that the discourses presented by the Commission are stressing the potential benefits of private enforcement with little or no relevance accorded to detrimental side effects of such a system. Indeed this research reveals that despite apparent benefits, such as that of victim's compensation, the costs of a private enforcement regime in the EU, arguably, outweigh its benefits. As Bryman emphasises:

[D]iscourse is not simply a neutral device for imparting meaning. People seek to accomplish things when they talk or when they write; DA is concerned with the strategies they employ to create different kinds of effect.⁹⁵

The use of discourse analysis in this thesis reveals the Commission's 'strategy', i.e. the invoking of the authority of the Court's ruling that compensation must be awarded, and the resulting 'effect'

⁹⁰ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

⁹¹ *Ibid*, 1.1

⁹² Commission, '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' COM(2013) 404 final

⁹³ Commission, 'Citizens' Summary, EU Proposal on Ground Rules for Competition Damages Claims' (*European Commission, Antitrust*) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 9 April 2014

⁹⁴ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 1.2

⁹⁵ Alan Bryman, *Social Research Methods* (3 edn, Oxford University Press 2008), 500

that the only way to award compensation is by resorting to civil courts. The use of discourse analysis here uncovers hidden politics within the Commission's proposed enforcement strategies. The proposed private enforcement regime, it is submitted, has the potential of resulting not in the creation and sustainment of a competitive EU economy as the Commission contends,⁹⁶ but in detrimental effects for competition, hence for businesses, and in turn for the EU economy in general.

To evaluate the potential impact that private enforcement could have in the EU, a comparison is made with the enforcement policy of two other jurisdictions, namely the US and Canada. Such a comparative method exposes the advantages and disadvantages of private and public enforcement of competition law.

1.2.4 Comparative Analysis

A comparative approach is taken as it appears to be an appropriate method in assessing the effectiveness of a legal regime. Underdal correctly explains:

From a methodological perspective, evaluating effectiveness ... means *comparing* something – let us provisionally refer to this object simply as *the regime* – against some standard of success or accomplishment. Any attempt at designing a conceptual framework for the study of regime effectiveness must, then, cope with at least three (sets of) questions: (1) what precisely constitutes the *object* to be evaluated? (2) against which *standard* is this object to be evaluated? and (3) *how* do we go about comparing the object to this standard – in other words, what kind of measurement operations do we have to perform to attribute a certain score of effectiveness to a certain regime?⁹⁷

For the purpose of this study, the 'object' to be evaluated is the effectiveness of private enforcement with a particular focus on the negative side effects. The 'standard' against which this object is to be evaluated are the goals of creating and sustaining a competitive EU's economy as advocated by the Commission. The literature review, the US experience of private enforcement and the Canadian experience of public enforcement will determine 'how' this study attributes score to private enforcement in the EU.

While this study incorporates an examination of the effect of private enforcement in the US and Canada and the legal and economic principles underpinning the approach taken by the US and

⁹⁶ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 1.1

⁹⁷ Aril Underdal, 'One Question, Two Answers' in E Miles (ed), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (The MIT Press 2002), 4 -5

Canadian antitrust institutions, it is not a comparative study in the traditional sense of the term.⁹⁸ This work is not an organisation of studies which will permit the location of each particular issue being compared in a context which will reveal the degrees of its equivalence or non-equivalence between the EU, the US and Canada antitrust systems.⁹⁹ Rather, the overall aim is to evaluate the effectiveness of private enforcement in the EU. The purpose of the comparison is to look across jurisdictions for common threads of development or patterns in the enforcement of competition rules. This study draws upon US and Canadian data to present the implications for competition, if a system of private enforcement is developed in the EU following the approach taken by the Commission.

The US system is chosen for comparison as it appears to be one of the most prominent mechanisms of private actions stemming from violation of antitrust laws therefore most of the insights concerning the effects and efficiency of issues regarding private actions have been developed in the US. The Commission is keen to stress that it wishes to encourage a competition, rather than a litigation culture and the US system is deemed a 'toxic cocktail'.¹⁰⁰ Nevertheless, the highly developed US system represents one model for the EU institutions for the promotion of private antitrust enforcement. Advocate General Van Gerven emphasises that individual actions for damages have for some time proved useful for the enforcement of federal anti-trust rules in the US.¹⁰¹ With regards to collective action, the US is deemed a natural point of reference.¹⁰² Consequently, the likelihood of success of private enforcement in the EU is best assessed in the light of the US experience of private enforcement.

Conversely, a comparison with the Canadian antitrust system reveals advantages and disadvantages of a system mainly based on public enforcement. The comparison with the Canadian system poses the question whether in the EU a private enforcement regime is needed or whether an appropriate level of enforcement can be achieved via public enforcement. While the Canadian system allows a private party to bring an action for damages, the circumstances in which such action can be brought are significantly limited when compared to both the US system and the envisaged EU regime. Nevertheless, the Canadian experience of private enforcement shows that private parties can abuse the power given despite the severe statutory restrictions.

⁹⁸ For examples of comparative studies see: Harold C Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (First Published 1971, 2 edn, Cambridge University Press 1971)

⁹⁹ For comparative studies in relation to policy see: Myres S McDougal, 'The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order' (*Yale Law School Faculty Scholarship*) <<http://digitalcommons.law.yale.edu/fss-papers/2475>> accessed 9 April 2014

¹⁰⁰ Commission, 'Green Paper on Consumer Collective Redress - Questions and Answers' (*MEMO/08/741*, 27 November 2008) <<http://europa.eu/rapid/pressReleasesAction.do?format=HTML&aged=0&language=EN>> accessed 14 February 2014, 4

¹⁰¹ Case C-195/98 *Osterreichischer Gewerkschaftsbund v Austria* [2000] ECR I-10497, Opinion of AG Jacobs, 44

¹⁰² Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 36

A key aspect of the research methodologies employed in this thesis is what Morris calls 'syllogistic reasoning' or the technique of deductive reasoning.¹⁰³ Considering the stated aims of creation and sustainment of a competitive EU economy contained in the Commission proposals,¹⁰⁴ this thesis assesses the proposed private enforcement regime for compliance with the stated aims.

Of course, not every possible issue concerning private enforcement can be analysed in this study since the research is inevitably affected by limitations.

1.2.5 Limitations

The focus of this thesis is not on the determination of a breach of antitrust rule rather, once the breach has been ascertained, on the role of a private party on the overall enforcement of competition law. This study focusses on some of the core prohibitions contained in Article 101 TFEU (anti-competitive practices) and 102 TFEU (abuse of dominance) that could be particularly affected by the operation of private actions. The focus is restricted to those feature that are comparable to the US and Canadian provisions.

While the analysis and the comparison presented in this study has a significant value in assessing the impact on competition of private actions, it cannot expect to draw firm predictions or prescription about an indisputable antitrust enforcement system. Differences between the EU, the US and Canada competition law, economic policy, market development, political influences and the like, are too great for such an outcome. This study however, presents valuable insight into both the likely consequences of a system of private enforcement in the EU, and the kind of measures that would facilitate the achievement of the Commission's aims while significantly reducing detrimental effects on legitimate competition.

The study evaluates the effectiveness of private enforcement as matter of EU policy. The approach taken at national level is beyond the scope of this thesis. Whether under the domestic rules of EU Member States the effect of private enforcement would be different and the position of private parties when the infringement is prosecuted in other jurisdictions, cannot be dealt in this study.¹⁰⁵

This research is limited to the law and economic approach related to private enforcement, therefore other important and currently discussed issues are not included. For instance, the correct way to calculate damages, whether or not to allow for a passing-on defence, whether third parties should or should not allow to claim damages, or the issue of decentralisation, cannot be dealt with

¹⁰³ Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing Ltd 2011), 3-5

¹⁰⁴ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹⁰⁵ For a discussion on this points see: Margaret Bloom, 'Despite Its Great Success, the EC Leniency Program Faces Great Challenges' (*European University Institute*, 2006) <[http://www.eui.eu/RSCAS/Competition/2006\(pdf\)/200610-COMPed-Bloom.pdf](http://www.eui.eu/RSCAS/Competition/2006(pdf)/200610-COMPed-Bloom.pdf)> accessed 1 April 2014

in depth in this research.¹⁰⁶ Moreover, issues related to State aid, merges and the desirability of criminal sanction in antitrust, already in force in some Member States, is not covered by the analysis.¹⁰⁷

This study will not, of course, measure economic losses caused to businesses as result of private actions that are not directly reported. There is no way to quantify the number of abuses of dominance or cartels that are deterred before they are ever formed. For this reason this study might understate the harm to consumers, businesses and to the EU economy as result of private antitrust enforcements. For instance on the issue of settlements, as it is generally admitted whilst there have been more cases involving private claims for damages in various Member States than the cases reported in some of the literature,¹⁰⁸ these have typically been settled out of court and therefore little information is available in the public domain.¹⁰⁹ This thesis, however, uses economic data, such as the stock-market reaction to the filing of an antitrust action to evaluate the impact on defendants of the litigation.

Notwithstanding these limitations, the research is intended to make a significant contribution to the current public and policy debate on the desirability and effectiveness of a system of private antitrust enforcement in the EU. These points highlight the significance of this research and lead to the questions of how the thesis is structured and how the research is developed.

1.2.6 Thesis Outline

The thesis is structured in 11 chapters. There are five main functional parts: preliminary; the antitrust goals of compensation and deterrence; private enforcement in abuse of dominance and cartels cases; private enforcement in collective actions; suggestions for an ideal enforcement regime and conclusions.

¹⁰⁶ For an analysis of these points see: Philip Marsden and Michael Hutchings, *Current Competition Law*, vol 4 (The British Institute of International and Comparative Law 2005)

¹⁰⁷ For an analysis of these issues see: Wouter P J Wils, 'Is Criminalization of EU Competition Law the Answer ?' (2005) 28 *World Competition* 117; Scott D Hammond, 'Detecting and Deterring Cartel Activity Through an Effective Leniency Program' (*International Workshop on Cartels, Brighton, England* November 2000) <<http://www.justice.gov/atr/public/speeches/9928.pdf>> accessed 15 March 2014

¹⁰⁸ Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Analysis of Economic Models for the Calculation of Damage, Ashurst*, 31 August 2004) <<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 9 January 2014, text to fn 2

¹⁰⁹ Barry J Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005' [2008] *European Competition Law Review* 96. See also: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 39; Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Analysis of Economic Models for the Calculation of Damage, Ashurst*, 31 August 2004) <<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 9 January 2014, fn 2

Preliminary

Chapter 1 to 3 deal with preliminary issues. Chapter 1 introduces the research topic, its significance and the conceptual framework for the thesis; the methodology used followed by limitations affecting the study. Chapter 2 sets the scene by presenting the background of competition enforcement policy in the EU and an overview of the Commission proposals for a private enforcement regime. Chapter 2 introduces a comparison between the EU and US (mainly private) antitrust enforcement systems with focus on implications deriving from the private enforcement of public laws against the backdrop of antitrust objectives. Chapter 3 presents an historical background and an overview of the underpinning principles of the EU, US and Canada competition regimes.

Compensation - Deterrence

Chapter 4 and 5 are concerned with the issues of compensation and deterrence as potential benefits of private enforcement and the level of compensation. Chapter 4 calls into question the compensation component in antitrust proceedings and leads to the issue of an ideal level of damages awards. Chapter 5 introduces the comparison between the EU and the Canadian (mainly public) enforcement regimes. Chapter 5 deals with the level of damages award and the impossibility to design an ideal level of award that will adequately compensate victims without triggering a race to damages, which in turn results in abuses of private enforcement provisions.

Dominance - Cartels

In chapter 6 and 7 specific elements of the prohibitions contained in Art 101 and 102 TFEU are scrutinised. Chapter 6 deals with the approach taken towards abuse of dominance in the EU and how such an approach compares with that of the US and Canadian equivalents. Chapter 6 concludes that due to a fundamentally different approach, the issue of abuse of the power given to private parties could have a more significant effect in the EU than it has in both the US and Canada. Chapter 7 evaluates the steps taken by all three jurisdictions towards the detection and prosecutions of cartels. Considering the absence of criminal punishments under the EU rules, chapter 7 questions whether the leniency programme, that has proved to be an efficient tool in the detection and prosecution of cartels, is compatible with private enforcement.

Collective Redress

Chapter 8 and 9 deal with the situation in which antitrust claims are aggregated under a collective action mechanism. Chapter 8 presents the state of play of collective redress in the EU and analyses whether, in an effort to facilitate collective actions, essential safeguards against the proliferation of abusive litigations such as those contained in the US system, have been overlooked. Chapter 9 emphasises the robust approach taken by the US and Canadian antitrust authorities in preventing the formation of unmeritorious class litigation. Chapter 9 highlights severe detrimental side effects that could result from the bundling of private interests under a collective redress mechanism if safeguards such as those adopted in the US and Canada are not applied in the EU. Chapter 9 concludes by reiterating the superiority of public enforcement over private enforcement.

Suggestions -Conclusions

Chapter 10 and 11 conclude the thesis and make recommendations for an ideal and workable enforcement regime based exclusively on public enforcement. Having identified several pitfalls in the Commission's proposed private enforcement regime, chapter 10 presents the rationale, the legal basis and a procedural framework for an exclusively public enforcement regime. Chapter 11 concludes the thesis.

Chapter 2: PRIVATE ANTITRUST ENFORCEMENT IN THE EU

2.1.1 Introduction

Private enforcement of competition law in the EU is not a new concept. However since 2005, following the Commission initiatives for the development of it,¹¹⁰ private enforcement appears to have become the focus of enforcement policy strategies. This chapter sets the background for an evaluation of the likelihood of success of private enforcement in delivering the Commission's stated aims of creation and sustainment of a competitive economy.¹¹¹ First an overview is presented of the background of competition enforcement policy followed by a synopsis of the Commission proposals. Successively, the 'motive' behind the proposals is explored as, arguably, the Commission's reasons for its support for a private enforcement regime are not grounded in the validity of the system being promoted, but in the alleviation of its enforcement burden. This chapter highlights issues resulting from the involvement of private actors in the enforcement of public laws.

2.1.2 Background of Competition Enforcement in the European Union

The EU's main goal is the progressive integration of Member States' economic and political systems and the establishment of a single market based on the free movement of goods, people, money and services. To this end, Member States surrender part of their sovereignty under the Treaty which empowers the EU institutions to adopt laws, regulations, directives and decisions that take precedence over national law and are binding on national authorities.¹¹²

In the EEC Treaty,¹¹³ and later in the EC Treaty¹¹⁴ the primary objective was market integration.¹¹⁵ Subsequently, other objectives have come to the fore in the European Community,¹¹⁶ such as the promotion of efficiency and innovation, leading to consumer welfare and economic growth. A major theme in the European Community competition law has been the development of appropriate antitrust procedures. In many respects, as Slot put it,¹¹⁷ the first Regulation¹¹⁸ implementing Articles

¹¹⁰ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

¹¹¹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹¹² Hans Vedder, 'Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law' (2004) 1 (1) *The Competition Law Review*

<<http://www.clasf.org/CompLRev/downloads/Vol1Issue1.htm>> accessed 5 January 2014

¹¹³ Treaty Establishing the European Economic Community (Rome, March 1957)

¹¹⁴ Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33

¹¹⁵ For a discussion on this point see: Rosa Greaves, 'Collecting Societies and EC law' [2005] *Irish Jurist* 42, 43. See also: David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97

¹¹⁶ Following the entry into force of the Lisbon Treaty in 2009 the 'European Union' replaces and succeeds the 'European Community': Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

¹¹⁷ Piet Jan Slot, 'A View from the Mountain: 40 Years of Developments in EC Competition Law' (2004) 41 *Common Market Law Review* 443, 5

85 and 86 of the Treaty laid down only a rudimentary procedural framework for the implementation of 85 and 86 of the then EEC Treaty. In comparison, the enforcement of US antitrust law is embedded in the Federal Rules of Civil Procedure.¹¹⁹ Therefore the EU courts had to develop a sort of 'do-it-yourself' kit. The absence of detailed rules of procedure has led to numerous judgments, of the Court of Justice and the then Court of First Instance (CFI)¹²⁰, to fleshing out many important procedural rules.¹²¹

Changes in the EU legal landscape have also affected competition policy. The core competition provisions are now contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). In essence, Art 101 is concerned with concerted or consensual behaviour between economically independent undertakings and is potentially applicable to all markets, including those where normal conditions of competition exist. Article 102 is concerned only with those markets where conditions of competition are abnormal by reason of a dominant position enjoyed by one or more undertakings. The activity prohibited by Art 102 under the name of abuse is predominantly unilateral. Article 102 is fundamentally different from Art 101 in that there is no requirement for there to be an agreement or concerted practice between participants in the market. Conduct by a single undertaking will suffice. The Commission is tasked to ensure the development and enforcement of competition policy and to 'act as the referee to ensure that all companies play by the same rules'.¹²²

In the EU the enforcement of competition law is undergoing an important evolution. A significant variation is that of encouragement of private enforcement. Under the Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (Regulation 1/2003)¹²³ national courts have the role of complementing that of the NCAs¹²⁴ of the Member States in protecting subjective rights and awarding damages to victims of competition infringements. The Court of Justice in *Courage* and *Manfredi* held that there is an obligation to provide for effective means to exercise the right to compensation of damages suffered as a result of an antitrust infringement.¹²⁵

¹¹⁸ Council Regulation (EEC) 17 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204

¹¹⁹ US Federal Rules of Civil Procedure, December 2010

¹²⁰ Following the entry into force of the Lisbon Treaty in 2009, the CFI is now known as the General Court: Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

¹²¹ Piet Jan Slot, 'A View from the Mountain: 40 Years of Developments in EC Competition Law' (2004) 41 Common Market Law Review 443, 5

¹²² European Commission, *EU Competition Policy and the Consumer* (Office for Official Publications of the European Communities 2010), 2

¹²³ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, also called the Modernisation Regulation, in force since May 2004

¹²⁴ *Ibid*, article 35 allows Member States to choose the body or bodies which will be designated as NCA and to allocate functions between them

¹²⁵ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

Although private enforcement of antitrust rules has been possible in the EU since the 1957 Treaty of Rome (EEC Treaty),¹²⁶ in the 28 EU Member States public enforcement is by far the most common remedy for antitrust infringement, and statistics show that at most 10% of antitrust litigation is initiated by a private claim before a national court.¹²⁷ To the contrary, in the US the ratio of public to private enforcement is completely reversed: at least 90% of legal actions for antitrust violations are initiated by private parties.¹²⁸

A study conducted for the Commission in 2004 concluded that ‘the picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment’.¹²⁹ Against this background, the Commission has made proposals aimed at enhancing the role of private parties in the enforcement of antitrust rules in the EU, by focusing on antitrust damages actions.¹³⁰

In order to conduct a comprehensive analysis of private action for damages in the EU, first, the concept of private enforcement should be defined.

2.1.3 The Notion of Private Enforcement

The term ‘private enforcement’ may have different meanings ascribed to it. Generally speaking, it denotes legal action by private actors as opposed to that of public authorities. In the Green Paper¹³¹ the Commission stated that, in the context of enforcement of Articles 101 and 102 private enforcement means the application of antitrust law in civil disputes before national courts. In the Commission Staff Working Paper the Commission acknowledged that private enforcement of EU competition rules can take different forms, actions for damages being one of them. Private enforcement also covers actions for injunctive relief (i.e. stopping behaviour contrary to the competition rules), actions for nullity, as well as the use of the competition rules as a defence, in particular against actions for the enforcement of a contract or against actions for the enforcement

¹²⁶ Andrea Renda and others, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’ (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 9

¹²⁷ *Ibid*, 9

¹²⁸ Private actions from 1992 to 2012 range from 84.9% to 96.6%: ‘Sourcebook of Criminal Justice Statistics Online’ (*Antitrust Cases Filed in U.S. District Courts*, 2012) <http://www.albany.edu/sourcebook/tost_5.html> accessed 16 September 2014, table 5.41

¹²⁹ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules’ (*Ashurst, Comparative Report* 31 August 2004)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 15 April 2014, 1

¹³⁰ Such as: Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

¹³¹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

of other rights, for example intellectual property rights where such enforcement constitutes an abuse of a dominant position.¹³²

The notion of 'private enforcement' as referred in this thesis is enforcement by means of legal action brought by the victim of anti-competitive behaviour before a domestic court or by arbitration. Conversely, public enforcement refers to actions conducted by NCAs and by the Commission regardless as to whether they have commenced proceedings at their own motion or after been notified of infringements by private parties.

It must be noted, however, that enforcement of competition rules in the EU has three separate elements. The Commission has the power to apply Articles 101 and 102 without reference to the courts. In addition to the Commission, each Member State has its own competition authority which has also power to apply Articles 101 and 102. The Commission and the competition authorities of the Member States are to form together a network of public authorities applying the Union competition rules in close cooperation.¹³³

The third element of enforcement is by private litigation in the national courts as Articles 101 and 102 confers rights and obligations on individuals which can be enforced in a court of law.

Private enforcement and public enforcement are the two pillars of enforcement of EU antitrust rules.¹³⁴ Enforcements by the Commission and by NCAs are part of the same enforcement pillar¹³⁵ and are referred to in this thesis as 'public enforcement'. Accordingly private litigation is the second enforcement pillar¹³⁶ of EU competition law and it is referred to in this thesis as 'private enforcement'. This terminology is used in the Commission proposals and will be used throughout this thesis.

2.1.4 Concerns and Overview of the Commission Proposals

The EU has multiple objectives and the aim of competition policy is to use them in furtherance of those objectives. As part of the modernisation package which went into effect in May 2004 with the

¹³² Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 1-2

¹³³ Commission, 'Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation implementing Articles 81 and 82 of the Treaty)' [2000] OJ C 365E/284, 14

¹³⁴ Commission, 'Staff Working Paper (Annex to the Green Paper, Damages Actions for Breaches of the EC Antitrust Rules)' COM (2005) 672 final, 3

¹³⁵ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, recital 15

¹³⁶ Commission, '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' COM(2013) 404 final, 1.1

entry into force of Regulation 1/2003,¹³⁷ the Commission seeks to reduce reliance on administrative authorities by encouraging those harmed by violations of competition rules to bring private law suits in national courts. Such an approach however, presents the risk that public laws are enforced by private parties for privately advantageous strategic purposes that are adverse to the aims of effective competition enforcement while creating and sustaining a competitive economy as the Commission contend.¹³⁸ These issues will be discussed in details in the context of both the objectives of competition enforcement policy, and in the comparison with the US and Canadian antitrust systems. Here an overview of the Commission's initiatives is presented so as to form a platform for analysis of the effectiveness of the proposed system of private enforcement in the EU. Considering that in the EU private enforcement is deemed to be in a state of total underdevelopment lagging behind other jurisdictions,¹³⁹ the Commission has taken steps, notably the White Paper in 2008¹⁴⁰ preceded by the Green Paper in 2005,¹⁴¹ for providing an efficient redress to victims of EU competition infringements so that they can be fully compensated for the harm they have suffered.¹⁴² The Commission's primary objective, as stated in the White Paper, is for victims to receive full compensation for the loss they have suffered as a result of a breach of the EU antitrust rules. Having noted the 'current ineffectiveness of antitrust damages actions'¹⁴³ the Commission decided 'to adopt a White Paper in order to foster and further focus the on-going discussions by setting out concrete measures aimed at creating an effective private enforcement system in Europe'.¹⁴⁴ Prior to the adoption of the Green Paper the Commission took a position as to why the greater use of private enforcement might be beneficial. The lack of private enforcement in Europe has been identified as a principal weakness in the EU competition enforcement system. An effective private enforcement system would not only increase compliance with the law, but would act as an additional deterrent to anti-competitive behaviour, as well as compensating the victim for

¹³⁷ Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* ([1999] OJ C 132/1); Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final); Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

¹³⁸ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹³⁹ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 9; Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.2

¹⁴⁰ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

¹⁴¹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final)

¹⁴² Full compensation is still a priority and a ground for a new Directive, see: Commission, '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' COM(2013) 404 final, 1.2

¹⁴³ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 1.1

¹⁴⁴ Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 4

losses suffered.¹⁴⁵ In essence, the rationale for the encouragement of private enforcement is that it could enhance compliance with competition rules by increasing the level of enforcement. The concern is whether in fostering private enforcement, the Commission is taking a step too far that has the potential of undermining the very objective that it is called to protect. The Commission's objective to create an effective system of private enforcement through damages actions as a complement (not a substitute)¹⁴⁶ to public enforcement emerges from the standpoint that the notion of 'complement', according to the Commission, covers two categories of cases.

First, it covers those cases where the public authorities, for reasons of limited resources and public priorities, do not take any enforcement action, or limit their enforcement activities to specific aspects of a particular behaviour. According to the Commission, in such a case 'private actions for damages can extend the enforcement of competition law through what are known as stand-alone actions'.¹⁴⁷ Second, according to the Commission private enforcement covers cases where a private party claims damages for harm arising from an infringement established by a public authority, known as follow-on actions.¹⁴⁸ This approach, however, seems to assume that private suits would be limited to those cases that the Commission, for whatever reason, has not pursued and therefore, private actions for damages would fill the gap. Moreover, there is an assumption that private enforcers act legitimately, that is, that they never seek to enforce the law against individuals who have not engaged in illegal activities. In reality as McAfee emphasises, potential private enforcers may have incentive to behave strategically, that is, to use the law to win in the courts what they were unable to win in honest competition with their rivals.¹⁴⁹ The US's experience of private antitrust enforcement is a clear example. Furthermore, the notion of 'complement' advocated by the Commission appears to be untenable. Data collected in the US, in the 1980s, shows a ratio of private to public cases exceeded 20 to 1.¹⁵⁰ More recent figures show that the ratio has fallen to the 10 to 1 range.¹⁵¹ Arguably, despite the Commission's best intention in considering private enforcement as a complement and not a substitute to public enforcement, this reversal could be replicated in the EU.

¹⁴⁵ Donncaadh Woods, Ailsa Sinclair and David Ashton, 'Private Enforcement of Community Competition Law: Modernisation and the Road Ahead' (*Directorate-General Competition, unit A-1, Competition Policy Newsletter n. 2, Summer 2004*) <<http://europa.eu.int/comm/competition/publications/cpn/>> accessed 6 February 2014, 31. These points, almost verbatim, were later reiterated in the Commission Notice on the Handling of Complaints by the Commission Under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/65, 12 - 18

¹⁴⁶ Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 21

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid*

¹⁴⁹ Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014

¹⁵⁰ Lawrence J White, *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), ch 1

¹⁵¹ Private actions from 1992 to 2012 range from 84.9% to 96.6%: 'Sourcebook of Criminal Justice Statistics Online' (*Antitrust Cases Filed in U.S. District Courts, 2012*) <http://www.albany.edu/sourcebook/tost_5.html> accessed 16 September 2014, table 5.41

Like the Commission in its proposals, the creators of the modern US private antitrust enforcement system were motivated by the best of intentions. The proponents of the Sherman and Clayton Acts¹⁵² were concerned about ineffectiveness in public antitrust enforcement and were attempting to ensure that anti-competitive conduct was fully deterred. But it was unforeseen that those procedures would create extraordinary opportunities for abuse that would ultimately overwhelm the benefits that their reforms were supposed to bring.¹⁵³ Miller comments that although it was expected that the revision of the rules would operate to assist small claimants, the draftsmen conceived the procedure's primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies. In the main, the rule-makers apparently believed that they were simply making a more effective procedural tool, but the class action onslaught caught everyone, including the draftsmen, by surprise.¹⁵⁴

Trebilcock presents an appraisal of the US private antitrust enforcement and the good intention behind its promotion that seems to mirror the Commission's proposals in the EU today:

Whether Congress, in enacting these provisions of the Sherman and Clayton Acts, intended private actions to be the primary tool for deterring anti-competitive activity or, instead, meant them merely to be a device enabling the compensation of injured parties has been the subject of some debate. Lack of any initial budgetary appropriation by Congress for Sherman Act enforcement provides some support for the former view... More recent American experience reflects a sharply different and larger role for private antitrust suits.¹⁵⁵

Like the US Congress in passing these legislations, the Commission appears keen to enhance the efficacy of antitrust enforcement. Indeed deterrence and compensation are the driving force behind the Commission's proposal.¹⁵⁶ The concern is that the negative implications could also become a reality in the EU. The US experience shows a significant and wider role for private antitrust enforcement than that previously anticipated.

As emphasised by Landes and Posner private enforcement is less coordinated than public enforcement. Even if policymakers can shape the incentives for private enforcement, they cannot confidently predict the level of private enforcement.¹⁵⁷ Elzinga and Breit posed the question of the

¹⁵² Sherman Antitrust Act, 15 U.S.C; Clayton Act (2006) 15 U.S.C.

¹⁵³ John H Beisner and Charles E Borden, 'Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience' (*Washington D.C. Office of O'Melveny & Myers LLP*)

<www.litigationfairness.com/get_ilr_doc.php?fn=Expanding%20priva> accessed 18 January 2014

¹⁵⁴ Arthur R Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"' (1979) 92 (3) *Harvard Law Review* 664, 669 - 670

¹⁵⁵ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 465

¹⁵⁶ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1;

Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

¹⁵⁷ William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 *Journal of Legal Studies* 1, 15.

optimal enforcement of antitrust laws. They argued that in theory, the social benefits of enforcement decline as more cases are brought with respect to less serious or more debatable practices, while the social costs of enforcement rise with increasing levels of enforcement. In an ideal world public and private resources would be invested in enforcement activity up to the point where the cost of enforcement is equated with the benefits of enforcement, not less and not more.¹⁵⁸ In other words, this implies a perfect enforcement of antitrust laws. In turn, this would require detailed information on the underlying incidence of antitrust violations, and not merely those that have attracted formal enforcement activity. However, this information is unknown, and almost by definition unknowable.¹⁵⁹ Therefore, as we live in a real world, a perfect antitrust enforcement could not be expected and in the EU consideration should be given to unwanted side effects deriving from private enforcement.

The fostering of private enforcement in the EU, it is submitted, has the potential to culminate in a sharply different and large role for private parties than the notion of complement envisaged by the Commission in its proposals.

The next part of the analysis focusses on the Commission's historical support for a private enforcement regime.

2.1.5 The Commission Support for a Private Enforcement Regime

The Commission has long expressed its view that private enforcement can provide a useful support for its enforcement actions. An overview of the Commission's historical approach to private actions for damages is necessary to understand the rationale behind the current Commission's proposals for a system of private enforcement and to appreciate the motive behind the Commission proposals.

Private enforcement is not a new concept in the EU, indeed, probably the oldest field within which private enforcement is prominently present is competition law.¹⁶⁰ Private enforcement of competition rules has been possible in the European Community/Union since the 1957 Treaty of

See also: Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 485

¹⁵⁸ Kenneth G Elzinga and William Breit, *The Antitrust Penalties: A Study in Law and Economics* (Yale University Press 1976). See also: Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 489

¹⁵⁹ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 490

¹⁶⁰ Gerrit Betlem, 'Cross-Border Private Enforcement of Community Law' (*eprints.soton.ac.uk*, 1999) <<http://www.eulaw.soton.ac.uk/elpub/gb99.pdf>> accessed 4 November 2013, 5

Rome.¹⁶¹ The power of national courts to deal with civil matter can be traced back to the '1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters'¹⁶² and in 1993 the Commission emphatically stated that in its view 'competition judgements are already governed by this Convention where they are handed down in cases of civil and commercial nature'.¹⁶³

Back in 1973 the Commission, in response to parliamentary questions on the issue of whether consumers should be able to claim compensation for losses suffered as a result of the contravention by undertakings of the then Articles 85 and 86 of the EEC Treaty, stated:

The Commission considers that actions for damages brought by injured consumers against firms that have violated Articles 85 and 86 of the EEC Treaty could provide useful support for its own measures to combat such infringements.¹⁶⁴

The Commission took the opportunity to emphasise that the rules of competition laid down by the Treaty entitled injured parties to take legal action in their own countries to obtain the various remedies available to them under national law, as civil consequences, other than nullity, resulting from an infringement of Articles 85 and 86 of the EEC Treaty were generally considered as being governed by the national law of the Member States.¹⁶⁵

At the time (in 1973), the Commission commented that it had no knowledge of any legal actions brought with a view to recovering damages as a result of an infringement of Articles 85 and 86 of the EEC Treaty.¹⁶⁶ In fact, in answering a posed parliamentary question, the Commission said that action for damages should have been promoted:

From the point of view of consumer protection, which in the Commission's Opinion is the standpoint from which the problem raised by the Honourable Member should be considered, the first thing to be done is to make consumers aware of the means of redress already available to them under national law.¹⁶⁷

The Commission explained that the effectiveness of its approach to compensation partly depended on whether or not consumer associations are allowed to bring an action on behalf of their

¹⁶¹ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 9

¹⁶² 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Consolidated Version) [1998] O J C 027/1

¹⁶³ Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty [1993] O J C 39/6, 44

¹⁶⁴ 'Commission's answer of 10 April 1973 to Written Question No 519/72 by Mr Vredeling' [1973] O J C 67/55, 1. For a list of statements in which the Commission has expressed the same view see: Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-01209, Opinion of AG Van Gerven, fn 112

¹⁶⁵ 'Commission's answer of 10 April 1973 to Written Question No 519/72 by Mr Vredeling' [1973] O J C 67/55, 1

¹⁶⁶ *Ibid*, 2

¹⁶⁷ *Ibid*, 3

members, then, proposed to give greater publicity to the means of redress available to injured consumers under the national laws of the Member States.¹⁶⁸

In 1984 the Commission was specifically asked whether it intended to propose legislation to harmonise the conditions under which proceedings for compensation for the harmful consequences of an infringement of the then Community's competition rules may be brought before the national courts.¹⁶⁹ Mr Andriessen on behalf of the Commission replied:

In the context of its continued efforts to ensure the most effective and rapid possible enforcement of the Community competition rules, the Commission is at present examining what steps could be taken to encourage more frequent recourse to national courts for the application of Articles 85 (1) and 86 of the EEC Treaty.

Enforcement through national courts is of great importance for the proper functioning of the rules in a system ensuring that competition in the common market is not distorted. For various reasons it has not yet gained the importance of, for example, treble damage actions under US antitrust law. The possibility of being awarded damages would be an incentive to turn to national courts, and the Commission is therefore in particular studying the possibility of further legislative action to strengthen enforcement by private damage actions.¹⁷⁰

It is worth noting that while in 2008 the Commission considered the US damages award as a 'toxic cocktail',¹⁷¹ Mr Andriessen in 1984 presented the Commission as a proponent of treble damages awards of the US style¹⁷² as the incentive thus created would involve national courts in the enforcement process, thereby alleviating the Commission of part of the burden. Arguably, this explains the Commission's support for private enforcement which is presented under the umbrellas of creation and sustainment of competitive EU economy and victims compensation.¹⁷³

In 1984, in its Thirteenth Report on Competition Policy, the Commission eloquently contended that there was a misunderstanding about who can enforce competition rules when it stated: 'There is a widespread misconception among members of the public in Europe that only the Commission can enforce Articles 85 and 86 of EEC Treaty. This is not the case'.¹⁷⁴ Moreover the Commission went on

¹⁶⁸ Ibid

¹⁶⁹ 'Written Question No 1935/83 by Mr Robert Moreland to the Commission of the European Communities, 7 February 1984' [1984] OJ C 144/21, 1

¹⁷⁰ 'Commission's answer of 27 March 1984 to Written Question No 1935/83 by Mr Robert Moreland' [1984] OJ C 144/21

¹⁷¹ Commission, 'Green Paper on Consumer Collective Redress - Questions and Answers' (*MEMO/08/741*, 27 November 2008) <<http://europa.eu/rapid/pressReleasesAction.do?format=HTML&aged=0&language=EN>> accessed 14 February 2014, 4

¹⁷² 'Commission's answer of 27 March 1984 to Written Question No 1935/83 by Mr Robert Moreland' [1984] OJ C 144/21

¹⁷³ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

¹⁷⁴ Commission of the European Communities, *Thirteenth Report on Competition Policy* (Office for Official Publications of the European Communities 1984), 217

in reminding the legal basis for its approach as to the application of the then Community competition law by national courts. Recalling the Court of Justice's ruling in *BRT v SABAM*,¹⁷⁵ the Commission emphasised:

The Court has ... established that 'as the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard'. This has confirmed the direct effect of the prohibitions of Articles 85 and 86 and the responsibility of national courts for the enforcement of Community competition law.¹⁷⁶

It appears clear that back in 1984 the Commission was already 'studying how to encourage actions before national courts for enforcement of the prohibitions contained in Article 85 and 86'.¹⁷⁷ In particular, it was looking what steps could be taken to facilitate damages actions. In 1993, a Commission Notice¹⁷⁸ spells out how the Commission intended to assist the national courts in the application of the then Articles 85 and 86 EC Treaty. National courts have the task of ensuring that competition rules will be respected for the benefit of private individuals, having the power to do so by virtue of the direct effect of the relevant EU provisions.¹⁷⁹

In 2000 the Commission made a proposal¹⁸⁰ for what later became Regulation 1/2003. This proposal shows a difference in the Commission's approach to the way in which national courts could support the enforcement process. While in 1973 the Commission was inviting injured parties to take legal action in their own countries to obtain the various remedies available to them under national law, as it was considered that in general consequences of competition infringement were governed by the national law of the Member States,¹⁸¹ in the proposal for Regulation 1/2003 the Commission plainly stated that the EU competition law must have priority:

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within

¹⁷⁵ Case C-127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR I-0051, 16-19

¹⁷⁶ Commission of the European Communities, *Thirteenth Report on Competition Policy* (Office for Official Publications of the European Communities 1984), 217

¹⁷⁷ *Ibid*, 218

¹⁷⁸ Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty [1993] OJ C 39/6

¹⁷⁹ *Ibid*, 4-5. See also: Case C-127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR I-0051, 16

¹⁸⁰ Commission, 'Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation implementing Articles 81 and 82 of the Treaty)' [2000] OJ C 365E/284

¹⁸¹ 'Commission's answer of 10 April 1973 to Written Question No 519/72 by Mr Vredeling' [1973] OJ C 67/55, 1

the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.¹⁸²

The Commission clarified that in order to ensure that the EU competition rules are applied effectively, the competition authorities of the Member States must be associated more closely with their application. Consequently they must be empowered to apply EU law.¹⁸³ The Commission also emphasised that:

National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They must therefore be allowed to apply Articles 81 and 82 of the Treaty in full.¹⁸⁴

As stressed in the Opinion of the Economic and Social Committee, adopted as result of a consultation by the Council for the subsequently Regulation 1/2003, the Commission:

[W]ill retain a guiding and monitoring role, not least through its notices, regulations, and decisions on specific cases, and will have responsibility for coordinating the national competition authorities, with the understanding that all parties (authorities and courts) will have to cooperate.¹⁸⁵

This approach, almost verbatim, was formally enacted in the Regulation 1/2003. Article 3 defines the role of national courts in the application of EU competition law and Recital 7 gives the justification for it.¹⁸⁶ NCAs and national courts have the duty of cooperation with the Commission.¹⁸⁷ Following the entry into force of Regulation 1/2003 in May 2004, Articles 101 and 102 can be applied by national courts¹⁸⁸ as well as by NCAs¹⁸⁹ and by the Commission. Article 5 allows national authorities to take a number of decisions in relation to infringements of Article 101 and 102, such as requiring that an infringement be brought to an end or ordering interim measures. NCAs, however, cannot take a decision stating that there has been no breach of Art 101 and/or

¹⁸² Commission, 'Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation implementing Articles 81 and 82 of the Treaty)' [2000] OJ C 365E/284, art 3

¹⁸³ Ibid, 6

¹⁸⁴ Ibid, 7

¹⁸⁵ 'Opinion of the Economic and Social Committee on the Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty")' [2001] OJ C 155/73, 1.2.4

¹⁸⁶ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

¹⁸⁷ Ibid, art 11

¹⁸⁸ Ibid, art 6

¹⁸⁹ Ibid, art 5

102.¹⁹⁰ National courts and NCAs, are obliged to follow the Commission's approach to issues already decided, as they cannot take decisions running counter to decisions adopted by the Commission.¹⁹¹ However, any decision taken by the Commission may be challenged under Art 263 TFEU, and a failure to act can be challenged under Art 265 TFEU.

With regard to private enforcement, the concern with Regulation 1/2003 is that it is down to the NCA at first to determine if the complained behaviour is in effect anti-competitive.¹⁹² Therefore, as Foer put it, under such a system, decisions to initiate lawsuits involving competition are decentralised to any person who deems himself to be injured by a competition law violation, with decisions as to what constitutes a violation in the hand of various courts and NCAs rather than a single antitrust authority.¹⁹³

Unsurprisingly however, the Commission's first review of Regulation 1/2003 suggests that, while there is scope for improvement, decentralising enforcement has been a success. The report states that 'Work sharing between the enforcers in the network has generally been unproblematic'¹⁹⁴ and that 'Enforcement of the EC competition rules has vastly increased since the entry into application of Regulation 1/2003'.¹⁹⁵ Whether such decentralisation and in particular the encouragement of private action in addition to public enforcement has in effect the potential, in the long run, to contribute to the protection and promotion of a competitive market economy in the EU, remains to be seen.

Although Articles 101 and 102 TFEU are directly applicable and produce direct effects¹⁹⁶ until 2001 there had not been a judgment of the EU courts dealing specifically with the question of whether Member States have an obligation, as a matter of Community law, to provide a remedy in damages where harm has been inflicted as a result of an infringement of the competition rules. In 2001 the Court of Justice in *Courage* clarified this situation and established a right to damages holding that:

The full effectiveness of Article 85 and, in particular, the practical effect of the prohibition laid down in Article 81(1) would be put at risk if it were not open to any individual to claim

¹⁹⁰ C-375/09 *Prezes Urzdu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECR 00, 15

¹⁹¹ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 16. See also: Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, 48, where the Court of Justice emphasised that the Commission cannot be bound by a decision of a national court

¹⁹² The issue of decentralisation is beyond the scope of this thesis. For additional information see: Giorgio Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network' (2014) EUI Working Paper LAW 2014/01 <<http://ssrn.com/abstract=2379320>> accessed 25 March 2014

¹⁹³ Albert A Foer and Jonathan W Cuneo, *The International Handbook of Private Enforcement of Competition Law* (Edward Elgar Publishing Limited 2010), 596

¹⁹⁴ Commission, 'Communication from the Commission to the European Parliament and the Council - Report on the Functioning of Regulation 1/2003' COM(2009) 206 final, 25

¹⁹⁵ *Ibid*, 24

¹⁹⁶ Case C-127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR I-0051, 16

damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.¹⁹⁷

Subsequently, in 2004 the Court of Justice in *Manfredi*¹⁹⁸ reiterated the principle established in *Courage* by stating that in order to achieve the full effectiveness of Art 101 'any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC'.¹⁹⁹ Furthermore, it appears that the full effectiveness of directly applicable EU law requires national courts to have jurisdiction also to grant interim relief as well as damages. In *Bundesverband*, AG Jacobs declared that the reasoning of the Court of Justice in *Courage* is applicable to injunctive relief as well:

As the Court has held, the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition of Article 81(1) would be put at risk if it were not open to any individual in proceedings before a national court to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. The same analysis would in my view apply equally to injunctive relief.²⁰⁰

Therefore, as the Commission emphasises,²⁰¹ Articles 101 and 102 are a matter of public policy²⁰² and are central to the functioning of the internal market, which includes a system to ensure that competition is not distorted.²⁰³ These Treaty provisions create rights and obligations for individuals, be they undertakings or consumers. Such rights become part of the legal assets of these individuals²⁰⁴ and are protected under the Charter of Fundamental Rights of the European Union.²⁰⁵ National courts have a duty under EU law to enforce such rights and obligations fully and effectively in any proceedings brought before them.

Consequently, in the presence of a legal right to reparation, the notion of private enforcement in the EU has become pertinent to competition policy and in turn to the EU's economy. As Giudici comments, in the EU the possibility has opened up for prospective claimants to avail themselves of the Union nature of their rights to damages and to urge national courts to offer adequate

¹⁹⁷ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26

¹⁹⁸ Although both *Courage* and *Manfredi* cases refer to Art 101 because of the facts underlining the case, the reasoning of the Court clearly applies also to Art 102 cases. On this point see: Commission, 'Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, para 36

¹⁹⁹ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

²⁰⁰ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *Bundesverband der Betriebskrankenkassen* [2004] ECR I-2493, 104

²⁰¹ Communication from the Commission on Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C 167/19

²⁰² Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 31

²⁰³ Protocol No 27 on Internal Market and Competition (Annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union) [2010] OJ C 83/309

²⁰⁴ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 19 / 23; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 39

²⁰⁵ Article 17 = protection of individual's assets. Article 47 = right to an effective remedy for breaches of rights guaranteed by EU law: Charter of Fundamental Rights of the European Union [2010] OJ C 83/389

protection to their Union rights, as they are bound to do by EU law.²⁰⁶ Arguably, with the support of the Commission, such a development has resulted in the encouragement of private enforcement. But, there are implications when private parties are called to enforce public laws. The analysis now turns to these issues.

2.1.6 Private Enforcement of Public Laws

As the Court of Justice explained in *Eco Swiss*²⁰⁷ and in *Manfredi*,²⁰⁸ both Article 101 and 102 TFEU are a matter of public policy. According to the Commission, the right of victims of a competition law infringement to bring an action for damages must be seen as being also in the public interest and guaranteeing that right should therefore be considered of the utmost importance.²⁰⁹ Such an approach, however, means that private parties are involved in the enforcement of public laws. In turn this raises concern, as the motive of a private party to enforce public law is fundamentally different to that of public enforcers and this difference can result in, arguably unaccounted, detrimental side effects to the effectiveness of EU antitrust enforcement policy.

The involvement of private parties in the enforcement of public law can be traced back to the UK Statute of Monopolies in 1623²¹⁰ which provided that an individual financially injured in his business or property by a restraint of trade, could bring a lawsuit and, if successful, collect treble the amount of his damage from the perpetrator of the anti-competitive activity. As Trebilcock explains, more generally, the common law of restraint of trade, which predates even the Statute of Monopolies, has long recognised the right of private parties to challenge unreasonable restraints of trade in contracts to which they are parties (e.g. employment contracts, contracts for the sale of a business) and restrictions on trade contained in by-laws or rules of guilds and other trade associations with regulatory powers.²¹¹

In principle, the Commission's objective to create a system of private enforcement as a complement to public enforcement presents some benefits in that private parties can supplement public resources with private initiative and information.²¹² A private party may be in a better position to detect and thus to prosecute some violations than a public enforcer with a more general mandate

²⁰⁶ Paolo Giudici, 'Private Antitrust Law Enforcement in Italy' (2004) 1 (1) 61-85, *The Competition Law Review* <<http://www.clarf.org/CompLRev/downloads/Vol1Issue1.htm>> accessed 14 February 2014

²⁰⁷ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-03055, 36-39

²⁰⁸ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 31

²⁰⁹ Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 313

²¹⁰ Statute of Monopolies 1623, An Act Concerning Monopolies and Dispensations with Penall Lawes and the Forfeiture Thereof, CHAPTER 3 21 Ja 1

²¹¹ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 464

²¹² Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 21

and less specialised expertise. As the Commission has no power to award damages, private actions can allow claimants to achieve corrective justice and seek remedies for both past and future harms. Also, private enforcement can be an effective and efficient way of holding public enforcers accountable for decisions not to prosecute in that a successfully litigated private action raises the question as to why public officials have not prosecuted the breach.

However, when public laws are enforced by private actors there is a risk of disruption of public enforcement policies. For instance, private enforcement can disrupt decisions not to prosecute that may be based on a coherent and defensible enforcement policy. If the public prosecutor is an expert with a mandate to regulate a particular field of endeavour, then his decision not to prosecute may be based on a reasoned decision that it is in the public interest not to prosecute. Consequently as Trebilcock and Roach argue, the use of private parties to enforce public laws can be criticised as a privatisation of law enforcement which should be the exclusive preserve of democratically accountable officials.²¹³ In considering private enforcement, it is important to stress that, if antitrust rules could discriminate perfectly between efficient and inefficient behaviour, and courts and tribunals could apply these rules perfectly (i.e. error cost zero), there would be little need to worry about enforcement actors. As Easterbrook remarks, those whose conduct is beneficial would be left alone while others could be hanged.²¹⁴ Because those conditions are unattainable,²¹⁵ prosecutorial discretion, if properly exercised, can temper these costs, while private parties have no incentive to take account of the social consequences of error costs.²¹⁶ Variation in enforcement strategies provides desirable flexibility in public policy.²¹⁷

In *Automec Srl*²¹⁸ the Commission was called to defend its decision to reject a complaint submitted to it without carrying out a prior investigation as to whether BMW Italia's distribution system was compatible with the then Article 85(1) of the EC Treaty. The Commission stated that it is under a duty to ensure that regard is given to the public interest to proceed primarily against conduct which, by reason of its extent, seriousness and duration, constitutes very serious interference with unrestrained competition. The Commission contended that:

[I]f it always had to initiate an investigation following every complaint, the choice of cases in which an investigation was carried out would fall to the complainant undertakings rather

²¹³ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 486

²¹⁴ Frank H Easterbrook, 'Detrebling Antitrust Damages' (1985) 28 Journal of Law and Economics 445, 449

²¹⁵ Richard A Posner, *Antitrust Law* (The University of Chicago Press 2001), 275

²¹⁶ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 494

²¹⁷ George J Stigler, 'The Optimum Enforcement of Laws' (1970) 78 (3) Journal of Political Economy 526, 536

²¹⁸ Case T-24/90 *Automec Srl v Commission of the European Communities* [1992] ECR II-02223

than to the Commission itself and would therefore be determined by criteria of private interest rather than the public interest.²¹⁹

In *Automec Srl* the Commission seems to acknowledge that a major task in the determination of effective law enforcement strategies is the delineation of the appropriate roles of public and private law enforcement mechanisms. As a general rule, the relationships and duties of private citizens are regulated through private enforcement. For example, the State's role in the enforcement of contract, tort and property law has traditionally been limited essentially to providing a court system.²²⁰ On the other hand, the public law system is designed to establish rules of conduct to protect the general social welfare and has traditionally been enforced primarily by public officials who are charged with furthering the public interest in the prevention of breaches of these rules.²²¹ Such approach seems to apply to private damages actions in antitrust law since the CFI in *Automec Srl* emphatically stated that:

[I]t should be borne in mind that, unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations inter se, an administrative authority must act in the public interest. Consequently, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied to the various cases brought to its notice.²²²

When exercising prosecutorial discretion the factors that are considered are open to abuse but they are equally open to considerations that are in the public interest. In competition law context, exclusive public enforcement allows public officials to make marginal adjustments in policy. Such adjustments in enforcement strategy can therefore allow efficient and desirable flexibility in the development of public policy. Many competition offences are defined in general terms partly because much of business behaviour involves concurrently both anti-competitive and efficiency producing aspects. The trade-off of the two is not a simple judgment and, might in some cases, be as much a question of economic policy as one of law enforcement.²²³ Therefore as Blomquist explains, enforcement should be a monopoly of public officials because the only intrinsic constraint on a private suitor seeking to use public laws for private ends is whether the costs of litigation outweigh its potential benefit to him. In contrast, government prosecutors, when deciding to enforce a particular law are presumed to be substantially motivated by public interest considerations. Public prosecutors, therefore, are expected to select and pursue cases on the basis

²¹⁹ Ibid, 67

²²⁰ Robert J S Prichard and Michael J Trebilcock, 'Class Actions and Private Law Enforcement' (1978) 27 UNB Law Journal 5

²²¹ William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 Journal of Legal Studies 1; Robert J S Prichard and Michael J Trebilcock, 'Class Actions and Private Law Enforcement' (1978) 27 UNB Law Journal 5

²²² Case T-24/90 *Automec Srl v Commission of the European Communities* [1992] ECR II-02223, 85

²²³ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 486

of informed, dispassionate judgment about the harmful social significance of the conduct being challenged.²²⁴

Furthermore, private enforcement involves costs, such as the drain of judicial resources, which are not internalised by the claimant.²²⁵ When a person brings suit, he bears only his own legal expenses and does not take into account that his suit will cause the defendant and possibly the court to incur expenses as well. Once the claim has been brought, when either litigant considers making a particular expenditure on litigation, he will not count as a cost to himself the expense that the opposing side and the court may be forced to bear as a consequence. As Shavell comments, this leads to an excessive level of litigation expenditures.²²⁶ Private claimants may be insufficiently sensitive to the litigation costs. As Greve observes:

Private citizens are generally competent judges of their own rights and interests. Therefore, they can be relied upon to right the wrongs that are done to them, such as breaches of contract, torts, or trespass. But, private citizens are terrible at judging the interests of others, including (and especially) 'public' interests. Private enforcers do not simply make wrong guesses about interests other than their own. They hunt for bounties and do not care about the societal consequences of their actions.²²⁷

Shavell remarks that there are fundamental differences between private and social incentive to use the legal system that permeate litigation, affecting decisions about the bringing of claims, settlements versus trial and level of legal expenditures. Consequently, the privately determined level of litigation can either be socially excessive or inadequate.²²⁸

Polinsky, based on principles of economic theory of enforcement stresses that under private enforcement, individuals or firms are willing to invest in enforcement only if they at least break even; that is, only if their revenue is at least as great as their enforcement costs. Under public enforcement, however, the optimal probability/fine combination may result in fine revenue which is less than enforcement costs. Consequently:

If the same fine is used as under optimal public enforcement, the resulting probability of detection (generated by the self-interested choices of private enforcers) may be too high or

²²⁴ Robert F Blomquist, 'Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under The Clean Water Act: Some Overlooked Problems of Outcome-Independent Values' (1988) 22 Georgia Law Review 337

²²⁵ Matthew C Stephenson, 'Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies' (2005) 91 Virginia Law Review 93, 114-115

²²⁶ Steven Shavell, 'The Fundamental Divergence Between the Private and the Social Motive to Use The Legal System' (1997) 26 The Journal of Legal Studies 575, 578 +

²²⁷ Michael S Greve, 'The Private Enforcement of Environmental Law' (1990) 65 Tulane Law Review 339, 343

²²⁸ Steven Shavell, 'The Fundamental Divergence Between the Private and the Social Motive to Use The Legal System' (1997) 26 The Journal of Legal Studies 575, 611

too low. In other words, if the enforcing is done privately, there may be too much enforcement or too little enforcement.²²⁹

Litigants in antitrust cases, like other economic actors, seek to benefit themselves, not to promote social welfare. No litigant's personal objective will correspond fully with the public objective. In the US citizens have long sued to enforce public laws, such as the Sherman Act of 1890 and Clayton Act of 1914.²³⁰ In these instances, citizens employed a private right of action to recover private damages suffered by the plaintiffs. However, private plaintiffs address only private harms, and the Department of Justice or Federal Trade Commission must act to vindicate the overall public interest in the antitrust laws.²³¹ Indeed, economics suggest that an effective enforcement of public law cannot be achieved by delegating the task to a private party. While the action by public enforcers is not linked to the amount of the fine collected, the same cannot be said for a private enforcer. The fine revenue collected by the public enforcement authority may well be less than the cost of enforcement. In such a case, private enforcers would not be willing to invest enough in enforcement to achieve the same level of effectiveness as under public enforcement since they would not be able to break even.²³²

In empowering private parties to enforce antitrust law, there is a risk that the power thus given is used strategically, that is, to sue even if they know that their competitors did not violate the antitrust laws.²³³ As Posner put it:

[I]f antitrust doctrine were pellucid and courts unerring in applying it to particular disputes, there would be no problem; cases that had a merely colourable, and not real, merit would fail and the extortion problem ... would disappear. But these conditions do not obtain.²³⁴

Furthermore, as Delrahim emphasises, the challenge is that it is extremely difficult to distinguish between aggressive competition and anti-competitive conduct.²³⁵ As a result, there is a significant risk of deterring hard, yet legitimate, competition. Enforcement is further complicated because,

²²⁹ Mitchell A Polinsky, 'Detrebling Versus Decoupling Antitrust Damages: Lessons From the Theory of Enforcement' (1986) 74 *Georgetown Law Journal* 4, 6

²³⁰ Sherman Act (1890) An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209; Clayton Act (1914) An Act to Supplement existing laws against unlawful Restraints and Monopolies, and for other purposes, ch. 323, 38 Stat. 730

²³¹ Frank B Cross, 'Rethinking Environmental Citizen Suits' (1989) 8 *Temp Envtl L & Tech J* 55, 71

²³² Mitchell A Polinsky, 'Detrebling Versus Decoupling Antitrust Damages: Lessons From the Theory of Enforcement' (1986) 74 *Georgetown Law Journal* 4, 5-6

²³³ Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014, 4

²³⁴ Richard A Posner, *Antitrust Law* (The University of Chicago Press 2001), 275

²³⁵ Makan Delrahim, 'Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice' (*U.S. Department Of Justice*, 15 November 2004) <<http://www.usdoj.gov/atr/public/speeches/208479.htm%3e>> <http://www.usdoj.gov/atr/public/speeches/208479.htm>> accessed 1 February 2014, 5. For an example in which the CFI misconstrued the concept of abuse of dominant position see: Rosa Greaves, 'Magill est arrive...RTE and ITP v Commission of the European Communities' [1995] *European Competition Law Review* 244

even if it is possible to conclude that certain conduct is anti-competitive, it may be more difficult to implement workable remedies that will restore any lost competition.²³⁶

This leads to the conclusion that, arguably, insufficient thought is given to the implications of an antitrust private enforcement regime in the EU. Private interests of private party are running counter to the aims of public policy. Despite the laudable aim of victim's compensation presented by the Commission,²³⁷ due to self-interests, the empowerment of private party to enforce competition law, it is submitted, could result in significant harmful effects to competition.

2.1.7 Conclusion

In the EU the aim of competition policy is that of ensuring a system in which competition in the common market is not distorted. Although private enforcement is not a new concept in the EU, the approach now taken by the Commission and by the EU courts, indicates that it will have a more prominent role particularly in relation to victims' compensation. The need to foster private enforcement actions stems from the Court of Justice ruling in the *Courage* and *Manfredi*²³⁸ cases in which the right to damages was established and from Regulation 1/2003. The measures put forward in the Commission proposals are designed to create an effective system of private enforcement by means of damages actions that complements public enforcement.²³⁹ However, the path towards achieving the goal of effective antitrust damages actions in the EU must be approached with caution. Because of fundamental differences, between private and public incentives to enforce antitrust law, there is a risk that a system of private enforcement would be used for private interests to the detriment of the EU economy.

The next part of the analysis focuses on the underpinning principles of the EU, the US and Canadian competition policy and objectives.

²³⁶ Makan Delrahim, 'Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice' (*U.S. Department Of Justice*, 15 November 2004) <<http://www.usdoj.gov/atr/public/speeches/208479.htm%3e>" <http://www.usdoj.gov/atr/public/speeches/208479.htm>>> accessed 1 February 2014, 6

²³⁷ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 1.2

²³⁸ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

²³⁹ Antitrust, 'Commission Presents Policy Paper on Compensating Consumer and Business Victims of Competition Breaches' (*IP/08/515*, 3 April 2008) <<http://ec.europa.eu/competition/antitrust/IP/08/515/index.html>> accessed 29 January 2010

Chapter 3: THE GOALS OF COMPETITION POLICY

3.1.1 Introduction

This chapter begins with a brief description of the purpose of competition rules as understood and applied in all three jurisdictions analysed in this thesis, namely the EU, the US and Canada.

Subsequently the analysis moves to an assessment of whether competition law is only used to protect the process of competition in order to maximise consumer welfare, hence providing consumers with a variety of products/services at reasonable prices or, whether competition policy is also implied to achieve other different objectives such as that of economic integration of different economies.

An analysis of the historical background of the EU competition policies since their inception back in 1951 at the time of the European Coal and Steel Community (ECSC)²⁴⁰ reveals that the Community/Union competition law has/is playing a role far more significant than the general notion of consumer welfare. Indeed from the interpretation given to the competition provisions, it appears that integration, both economic and political, of the European Member States was the driving force behind competition rules. Conversely, an analysis of the historical background of the US antitrust rules shows that the key objective of the US antitrust provisions was to curb business practices that constituted restraints of trade, in other words, to protect the market from abuses. Unlike in Europe, in the US market integration does not appear to be a goal of antitrust law.

On the other hand, the Canadian competition provision were enacted to provide an economic environment that stimulates innovation in technology and expands opportunities relating to both domestic and export markets. These goals appear to resemble the EU competition policy, but unlike the EU proposed private enforcement regime, the Canadian system relies on public enforcement.

This chapter concludes by comparing the history and development of these three antitrust legal systems and emphasises that while a system of private enforcement might be considered successful within the US antitrust landscape, due to a significant difference in objectives in the EU competition policy, public enforcement is more suitable for the delivery of such objectives.

3.1.2 The Goals of Competition Law

According to Whish and Bailey competition law, as a general proposition, consists of rules that are intended to protect the process of competition in order to maximise consumer welfare.²⁴¹

²⁴⁰ Treaty Constituting the European Coal and Steel Community (Created by the Treaty of Paris, 18 April 1951)

²⁴¹ Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012), 3

According to Fox 'consumer welfare' is the production of variety of products and services at reasonable prices.²⁴²

In essence, competition means a struggle or contention for superiority, and in the commercial world this means a striving for the custom and business of people in the market place.²⁴³ The UK Competition Commission sees competition as a process of rivalry between businesses seeking to win customers' business over time.²⁴⁴ This rivalry may occur in a variety of ways. In some cases the emphasis will be on achieving the lowest level of costs and prices in order to undercut competitors. In other cases, firms may go well beyond this, using entrepreneurial and innovative skills to develop new products and services, exploit particular strengths, abilities or other advantages held by a firm and, by these means, meet consumer needs more effectively than competitors.²⁴⁵ Arguably, rivalry has numerous beneficial effects. For instance prices and costs are driven down, and innovation and productivity increase, so improving the quality and the diversity of choice available to customers. Further, competitive markets generate feedback from customers to businesses who, in consequence, direct their resources to customers' priorities.²⁴⁶ In addition firms are encouraged to meet the existing and future needs of customers as effectively and efficiently as possible. Where this process is reduced or otherwise hindered, for instance by a collusive agreement as to output prices or by the dominance of a market player in a particular sector,²⁴⁷ competition may be substantially lessened.

The counter argument, however, is that in some industries or in some markets conditions, there may be significant economies of scale, meaning that the average cost per unit of output decreases with the increase in the scale of the outputs produced. Such economies of scale occur where it is cheaper to produce two products together than to produce them separately.²⁴⁸ There can be circumstances in which the cost of production is lowest when one firm serves the entire market.²⁴⁹ As Whish and Bailey stress, this type of 'natural monopoly' is an economic phenomenon, to be contrasted with 'statutory monopoly', where the right to exclude rivals from the market is derived from law.²⁵⁰ In principle, where natural monopoly exists, it is inappropriate to attempt to achieve a level of competition by imposing on undertakings antitrust rules, such as the dominance provisions

²⁴² Eleonor M Fox, 'US and EU Competition Law: A Comparison' (*Global Competition Policy*) <http://iie.com/publications/chapters_prview/10/ie16654.pdf> accessed 18 April 2014, 340

²⁴³ Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012), 4

²⁴⁴ Competition Commission (UK), 'Merger Reference: Competition Commission Guidelines' (*Competition Commission*, 2003) <http://www.competition.commission.org.uk/rep_pub/rules_and_guide/pdf/cc2.pdf> accessed 18.2.2014, 1.20

²⁴⁵ *Ibid*, 1.20

²⁴⁶ *Ibid*, 1.21

²⁴⁷ Prohibitions under Art 101 and 102 TFEU respectively

²⁴⁸ Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012), 11

²⁴⁹ For an analysis of these issues see: Lipsey Richard and Chrystal Alec, *Economics* (12 edn, Oxford University Press 2011)

²⁵⁰ Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012), 11

contained in Art 102 TFEU. Such imposition might destroy the existent market efficiency. In reality however, this is often not the case. Indeed as Whish and Bailey emphasise:

A central concern of competition policy is that a firm or firms with market power are able, in various ways, to harm consumer welfare, for example by reducing output, raising prices, degrading the quality of products on the market, suppressing innovation and depriving consumers of choice²⁵¹

Hence, as Whish and Bailey correctly emphasise, it is sensible, in considering competition law and policy, not to lose sight of a simple proposition: the benefits of competition are lower prices, better products, wider choice and greater efficiency.²⁵² Consequently, consumers' welfare appears to be a central task of competition policy.

In the EU the Commission has stressed the central importance of consumers' welfare in formulating competition rules. Speaking in London in 2005, Neelie Kroes, made a very clear statement to this effect: 'Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources'.²⁵³ However, although consumer welfare might be on the EU policy maker's agenda, many different objectives can be pursued in the name of competition law and, as Whish and Bailey argue, some of these are not rooted in notions of consumer welfare (as a direct objective) at all.²⁵⁴

Competition policy does not exist in the abstract. Indeed it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally.²⁵⁵ Because views and insights shift over a period of time, the focus of competition policy is bound to shift, for instance from the protection of consumers to that of competitors. As Akman points out, protecting the economic freedom of market actors and enhancing consumer welfare are fundamentally different objectives for competition policy.²⁵⁶ Protecting the competitive process to achieve individual economic freedom can result in protecting inefficient competitors which would conflict with the objective of enhancing welfare.²⁵⁷

According to Whish and Bailey, one essential purpose of antitrust rules should be to protect the interests of consumers, not by protecting the competitive process itself, but by taking direct action against offending undertakings, for example by requiring dominant firms to reduce their prices.²⁵⁸

²⁵¹ Ibid, 3

²⁵² Ibid, 5

²⁵³ Neelie Kroes, 'European Competition Policy – Delivering Better Markets and Better Choices' (*European Consumer and Competition Day*, 15 September 2005) <europa.eu/rapid/press-release_SPEECH-05-512_en.doc> accessed 21 July 2014

²⁵⁴ Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012), 20

²⁵⁵ Ibid, 20

²⁵⁶ Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 (2) *Oxford Journal of Legal Studies* 267, 268

²⁵⁷ Ibid, 269

²⁵⁸ Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012), 21

Likewise, the consumer might be harmed (at least in principle) where a producer insists that all his goods should be sold by dealers at maintained prices, or that dealers should provide a combined package of goods plus after-sales service.²⁵⁹ Clearly, in such a case, the consumer's choice is restricted by the producer's business strategy. For this reason, competition law bans resale price maintenance or tie-in sales. However, the objective of directly protecting the consumer, it is submitted, can be deemed short-sighted. In the longer run, the producer might choose to abandon the market altogether rather than comply with an unreasonable competition rule. Hence, a deceptive short-term benefit will then be outweighed by long-term harm to consumers resulting from the disappearance of large market player/s.

Of course, it appears correct in principle that competition rules should be regarded as having a 'consumer welfare' objective, as ultimately, the process of competition itself is intended to deliver benefits to consumers. However, it can also be argued that competition rules should be applied in such a way as to protect small firms against more powerful rivals. In a free market, business is a competitive game, thus companies may be tempted to avoid competing with each other and try to set rules for the game that best serve their own interests. For instance, a major player in the game may try to squeeze its competitors out of the market and then enjoy the monopolistic position. Or, as result of 'natural monopoly', the most efficient market player succeeds and the weak disappear. The view that competition law should protect competitors however, it is submitted, appears inimical to competition. The purpose of protecting small business can run directly counter to the idea of consumer welfare in the economic sense. In this way, competition law is used to preserve the inefficient market player perhaps unable to deliver innovation and effectively to defeat the performance of the efficient. In such a case consumers end up paying more for less quality.

In formulating competition policy, the essential question should be whether the conduct under investigation could lead to consumers paying higher prices, and whether those prices could be sustained against the forces of competition.²⁶⁰ Even businesses with high market shares are subject to competitive constraints, so that intervention on the part of antitrust authorities is not necessarily warranted. As Whish and Bailey put it: 'states and international regulatory authorities are capable of harming the competitive process at least as seriously as private economic operators on the market itself'.²⁶¹ Antitrust intervention, it is submitted, to protect competitors from their more efficient rivals is harmful to consumer welfare. An efficient undertaking will inevitably be able to defeat less efficient competitors. The latter's position in the market should not to be underwritten by competition rules.

²⁵⁹ Ibid, 21

²⁶⁰ Ibid, 22

²⁶¹ Ibid, 26

However, a further issue pertinent to the goals of antitrust rules in the EU is that competition policy fulfils an additional but quite different function from that of protecting consumers and/or competitors.²⁶² Indeed an issue of particular significance is that competition law in the EU plays an important part in the overriding goal of achieving single market integration within the EU Member States.²⁶³ Arguably, linked to the function of competition rules in the EU is the very idea of a single market in which internal barriers to trade within the EU should be dismantled and that goods, services, workers and capital should have complete freedom of movement.

In the EU, competition law seems to have two main roles. One is that it can prevent measures which attempt to maintain the isolation of one domestic market from another. For example national cartels, export bans and market-sharing are seriously punished. The other is that competition law can be moulded in such a way as to encourage trade between Member States, hence levelling the playing fields of the European markets by facilitating cross-border transactions, hence, integration.²⁶⁴

Consequently, the single market imperative appears to be the driving force behind the aims of competition law in the EU. The next part of the analysis focuses on the objectives of competition law, as understood in the EU, the US and Canada and the corresponding enforcement policies.

3.1.3 Purpose of the EU – US – Canada Competition Rules

The task of defining the purpose of antitrust is a rather challenging one as the literature presents different or even counter, but equally valid, arguments as to what are or should be the aims of antitrust law. Moreover, as this thesis compares aspects of the enforcement process of three different jurisdictions, namely the EU, US and Canada, the challenge is even more accentuated because of the differences in the legal principles underpinning each legal regime. However, despite the difference of approach in these three countries and despite the difference in opinions presented in the literature, a common denominator appears to be present and it is in tune with the line of reasoning taken in this thesis, that is, that competition policy should stimulate competition or at the very least not hinder market development.²⁶⁵ This general statement is further discussed in the context of the specific issues being analysed, but it summarises the underlying principles against which the EU private enforcement regime is assessed in this thesis.

²⁶² David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97, 98. See also: David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 1998)

²⁶³ For an analysis of these issues see: Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012), ch 1

²⁶⁴ *Ibid*, 24

²⁶⁵ See chapter 1.1.2

According to Kovacic, the US antitrust system is designed to protect competition, while the EU protects competitors.²⁶⁶ According to Fox, the US antitrust policy is primarily designed to protect consumer welfare. Consumers' welfare is defined as the production of a variety of products at reasonable prices.²⁶⁷ This approach seems to be in line with the US Court of Appeal, as it states: 'antitrust law is designed to enhance the welfare of consumers and the efficiency of the economy as a whole'.²⁶⁸ Kovacic argues that EU officials have grown accustomed to hearing, by direct quotation or paraphrase, the US Supreme Court's admonition that the proper aim of antitrust law is 'the protection of competition, not competitors'.²⁶⁹ Indeed this approach seems to have become also the EU approach,²⁷⁰ although it originated in the US when the US' Supreme Court first stated it in 1962 in *Brown Shoe*.²⁷¹

According to Kirkwood and Lande 'Neither the sole nor even the primary purpose of the US antitrust laws is, or has ever been, to enhance efficiency, instead ... the fundamental goal of antitrust law is to protect consumers'.²⁷² To the contrary, according to Bork, the only permissible objective of antitrust laws is to enhance efficiency.²⁷³

With regard to the Canadian competition provisions, Section 1.1 of the Competition Act contains a comprehensive statement of purpose.²⁷⁴ According to the Canadian Competition Bureau (Bureau) although not formally defined, the overall aim of the Act is to maintain and encourage competition.²⁷⁵ The Act describes several benefits that would flow from encouraging competition. Efficiency and adaptability of the Canadian economy leads the list, followed by reassurance for small businesses by providing them with an 'equitable opportunity' to participate in the Canadian economy. The Section concludes by reiterating that such approach is taken 'in order to provide consumers with competitive prices and products choices'.²⁷⁶ As the Bureau emphasises 'although consumer issues comes at the end of the statute's list, history shows that consumers interests were

²⁶⁶ William E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (*Bates White Fifth Annual Antitrust Conference Washington, D.C.*, 2 June 2008) <www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> accessed 2 January 2014, 4

²⁶⁷ Eleanor M Fox, 'US and EU Competition Law: A Comparison' (*Global Competition Policy*) <http://iie.com/publications/chapters_prview/10/ie16654.pdf> accessed 18 April 2014

²⁶⁸ *Fishman v. Estate of Wirtz* 807 F2d 520, 55 USLW 2317, 585

²⁶⁹ William E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (*Bates White Fifth Annual Antitrust Conference Washington, D.C.*, 2 June 2008) <www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> accessed 2 January 2014, 9

²⁷⁰ Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (*SPEECH/05/537, Speech at the Fordham Corporate Law Institute*, 23 September 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 January 2014

²⁷¹ *Brown Shoe Co. v. United States* 370 US 294, 332-33, 320

²⁷² John Kirkwood and Robert H Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, not Increasing Efficiency' (2008) 84 *Notre Dame Law Review* 191, 192

²⁷³ Robert H Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 *Journal of Law and Economics* 7, 26

²⁷⁴ Competition Act R.S.C., 1985, c. C-34

²⁷⁵ Competition Bureau, 'Competition Law in a Global and Innovative Economy - A Canadian Perspective' (3rd Brics International Competition Conference, New Delhi, India, November 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>> accessed 27 January 2014

²⁷⁶ Competition Act R.S.C., 1985, c. C-34, section 1.1

considered important from the outset'.²⁷⁷ The Canadian Competition Tribunal in an application by the Commissioner for Competition regarding the abuse of dominance provisions explained: 'the objective of the abuse provisions is to promote effective competition and not the interests of any one competitor or group of competitors'.²⁷⁸ Consequently, as Szentesi comments, while Canadian courts have held that none of the purposes in Section 1 is paramount, and the relevant purpose (or purposes) can vary according to the type of conduct at issue, the Competition Act is in general consumer protection oriented legislation enacted to ensure that consumers benefit from competitive and undistorted markets.²⁷⁹

In relation to the EU a predominant view as to competition policy objectives arguably can be found in the speech, by the then Commissioner for Competition Policy Neelie Kroes, regarding antitrust policy review as she stated:

My own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm. I like aggressive competition – including by dominant companies - and I don't care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 82 is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market.²⁸⁰

This approach seems to reflect the AG approach in the *Oscar Bronner* case when he stated that:

[T]he primary purpose of the Article 86 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors.²⁸¹

In order to promote a private enforcement regime, in its proposals, the Commission contends that the creation of an effective private antitrust enforcement system²⁸² is an important tool to create and sustain a competitive EU economy,²⁸³ as the Commission policy initiative has the objective of

²⁷⁷ Competition Bureau, 'Competition Law in a Global and Innovative Economy - A Canadian Perspective' (3rd Brics International Competition Conference, New Delhi, India, November 2013)

<<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>> accessed 27 January 2014, 2

²⁷⁸ *Commissioner of Competition v Canada Pipe Company LTD* CT-2002-006, 0076a, 92

²⁷⁹ Steve Szentesi, 'Competition Law' (*Canadian Competition Law & Regulatory Law*)

<<http://www.ipvancouverblog.com/>> accessed 22 March 2014, 6

²⁸⁰ Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (*SPEECH/05/537, Speech at the Fordham Corporate Law Institute*, 23 September 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 January 2014. See also: Commission, 'Delivering for Consumers, What is Competition Policy?' (*European Commission Competition*) <http://ec.europa.eu/competition/consumers/what_en.html> accessed 9 April 2014

²⁸¹ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* [1988] ECR I-07791, Opinion of AG Jacobs, 58

²⁸² Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

²⁸³ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

stimulating economic growth and innovation.²⁸⁴ This approach seems to be endorsed by the Court of Justice as it states that the right to take private action strengthens the working of the EU competition rules by deterring anti-competitive conduct as well as fully compensating those who have suffered harm as a result of the conduct.²⁸⁵

Therefore, although the three systems (EU, US and Canada) have developed out of different histories and concerns,²⁸⁶ each jurisdiction appears to accept the broad proposition that the central aim of competition law is 'the objective of benefitting consumers'. Consistent with the aim of this thesis of ascertaining if ultimately the Commission proposals will deliver the stated aim of a competitive economy, hence benefitting consumers, the approach taken in this thesis as to the goals of antitrust is that competition policy should stimulate competition or at the very least not hinder market developments.²⁸⁷

With regard to enforcement policy, however, a significant difference can be noted between all three legal systems. The EU has an administrative system for antitrust enforcement in which, essentially, violators (that is the company, not persons) of competition rules are penalised with fines. To the contrary, US antitrust enforcement is grounded on criminal law. In addition to financial penalties for the company, the US regime also contains financial and custodial penalties against individuals.²⁸⁸ Moreover, the US relies mainly on private enforcement while the EU historically has predominately relied on public enforcement. The Canadian regime is also mainly founded on criminal law, but unlike the US, it mainly relies on public officials for the enforcement activities.

This difference in enforcement policies is better understood by scrutinising the underpinning principles of each regime and the goals that each system is set to deliver. By analysing the historical background of all three systems and the reasons why the enforcement regime has evolved in the way that it has, this part of the research aims at forming a background to explain both, the current rules on competition resulting from the objectives to be achieved and whether private enforcement in the EU is likely to succeed as in the US.

The next part of the analysis focusses on the underpinning principles of the EU competition rules.

²⁸⁴ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

²⁸⁵ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 23-24

²⁸⁶ For an historical account see: Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014 See also: David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97

²⁸⁷ See chapter 1.1.2

²⁸⁸ Gregor Erbach, 'EU and US Competition Policies Similar Objectives, Different Approaches' (*European Parliamentary Research Service*, 27 March 2014) <<http://www.eprs.ep.parl.union.eu>> accessed 1 August 2014

3.1.4 The Underpinning Principles of the EU Competition Policy

In order to assess the modern European Union competition policy provisions, it is helpful to look at its predecessor, the European Community and in turn at the European Coal and Steel Community (ECSC). As Martin empathetically put it 'Although it is no longer with us, the ECSC's heritage lives on, among other places, in EC competition policy'.²⁸⁹

The competition policy provisions of the ECSC are fundamental predecessors of those contained in Articles 101 and 102 of the TFEU. For instance, Art 60 of the ECSC Treaty prohibited unfair competitive practices, including what would now be called predatory pricing even purely temporary or purely local price reductions and price and sales condition discrimination, particularly discrimination based on nationality.²⁹⁰ Article 65(1) prohibited agreements among firms and all concerted practices, which would tend, directly or indirectly, to prevent, restrict or impede the normal operation of competition within the common market.²⁹¹ As Martin reports, this basic prohibition of agreements that distort competition contained in the ECSC is without effective precedent in Europe.²⁹² The ECSC in 1951, represents the first significant step of the integration process of what later became the European Economic Community in 1957, and subsequently the European Community in 1992.

The European Community competition policy was adopted in the immediate aftermath of World War II, by independent nations with existent industrialised economies, as one component in a project of economic integration. As Martin empathises, the immediate goal of that project, promoting economic prosperity, was ancillary to its fundamental political purpose,²⁹³ which, as clearly stated in the founding document of the immediate predecessor of the European Community (the European Coal and Steel Community Treaty), was:

[T]o substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny.²⁹⁴

The subsequent Treaty Establishing the European Economic Community stated that:

²⁸⁹ Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University, July 2007*) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 48

²⁹⁰ Treaty Constituting the European Coal and Steel Community (Created by the Treaty of Paris, 18 April 1951)

²⁹¹ *Ibid*

²⁹² Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University, July 2007*) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 48

²⁹³ *Ibid*, 5

²⁹⁴ Preamble to the: Treaty Constituting the European Coal and Steel Community (Created by the Treaty of Paris, 18 April 1951)

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities ... raising of the standard of living and closer relations between its Member States.²⁹⁵

As Gerber stresses, since its incarnation, the Community's competition law system has had a specific purpose.²⁹⁶ While it has been used to protect competition, its primary goal has not been the achievement of generic benefits associated with competition such as lower prices to consumers and technological innovation.²⁹⁷ Rather, competition law has been a significant element in a program designed to achieve the specific goal of unifying the European markets,²⁹⁸ i.e. to ensure '...the working of the Common Market, a specific Community objective'.²⁹⁹

According to Van den Bergh and Camesasca, the goal of market integration can be understood as the elimination of economic frontiers between two or more economies.³⁰⁰ In the Community/EU this means that neither Member States nor private enterprises may engage in practices that are in conflict with or undermine the establishing of a Common Market. The former should not maintain or issue rules that hinder the free movement of goods, services, persons and capital. The latter should not agree to restrictive business practices that could have the effect of maintaining/forming barriers against competition originated in other (or within) Member States.³⁰¹

The notion of 'Common Market' encompasses three different institutions: the European Coal and Steel Community created by the Treaty of Paris in 1951;³⁰² the European Economic Community created by the Treaty of Rome in 1957³⁰³ and the European Atomic Energy Community (Euratom) created in 1957 by the Treaty establishing the Euratom.³⁰⁴ The Common Market originally consisted of six countries: Belgium, France, Italy, Luxembourg, Netherlands and West Germany. Subsequently, on 1st January 1973, Denmark, Ireland and the United Kingdom also became members.³⁰⁵

²⁹⁵ Treaty Establishing the European Economic Community (Rome, March 1957), art 2

²⁹⁶ David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97, 98. See also: David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 1998)

²⁹⁷ David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97, 102

²⁹⁸ Guliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 2

²⁹⁹ Commission, 'Second Report on Competition Policy' (*Office for Official Publications of The European Communities*, April 1973) <http://ec.europa.eu/competition/publications/annual_report/ar_1972_en.pdf> accessed 28 June 2014, 11

³⁰⁰ Roger J Van den Bergh and Camesasca Peter D, *European Competition Law and Economics: A Comparative Perspective* (Intersentia 2006), 2

³⁰¹ *Ibid*, 2 - 3

³⁰² Treaty Constituting the European Coal and Steel Community (Created by the Treaty of Paris, 18 April 1951)

³⁰³ Treaty Establishing the European Economic Community (Rome, March 1957)

³⁰⁴ Treaty Establishing The European Atomic Energy Community [2010] OJ C 84/01

³⁰⁵ For addition information on the development of the Community's competition law see: Barry E Hawk, 'Antitrust in the EEC - The First Decade' (1972) 41 (2) *Fordham Law Review* 229. See also: David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97

Inevitably, this single market imperative/integration has shaped the Community's competition policy and has generated the conceptual framework for the development and application of antitrust substantive norms.³⁰⁶ As Hawk stresses:

Single market integration, and the elimination of restrictive practices which interfere with that integration, is the first principle of EEC antitrust law, and is basic to the treaty objective of a 'common market'.³⁰⁷

Indeed, as argued by Amato, the Community competition law was not invented by 'technicians of commercial law' nor by economists:

It was instead desired by politicians and (in Europe) by scholars attentive to the pillars of the democratic systems, who saw it as an answer (if not indeed 'the' answer) to a crucial problem for democracy.³⁰⁸

According to Amato, on the basis of the principles of liberal democracy, the emergence of a firm was seen as an expression of the fundamental freedom of individuals. Such phenomenon however, presented a dilemma: citizens have the right to have their freedom acknowledged and to exercise it, but just because they have freedom they must never exercise coercion, an imposition on others.³⁰⁹

Concerning that Community policy in the first place must prevent the substitution of State restrictions and obstacles to trade which have been abolished by private measures with similar consequences, both the Commission and the Court of Justice have been severe in their condemnation of private arrangements, such as territorial restrictions equivalent to national boundaries, which create obstacles to trade between Member States or which operate to isolate national markets.³¹⁰ Back in 1966, the Court of Justice in invalidating the restrictions in an exclusive distribution agreement between a German (Grundig-Verkaufs-GmbH) and a French company (Établissements Consten) in which the latter was appointed as a 'sole representative' of the former for the territory of France, the Saar and Corsica, held:

[F]or the purpose of applying Article 85 (1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.³¹¹

³⁰⁶ David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) Harvard International Law Journal 97, 98

³⁰⁷ Barry E Hawk, 'Antitrust in the EEC - The First Decade' (1972) 41 (2) Fordham Law Review 229, 231

³⁰⁸ Guliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 2

³⁰⁹ *Ibid*, 2 - 3

³¹⁰ Barry E Hawk, 'Antitrust in the EEC - The First Decade' (1972) 41 (2) Fordham Law Review 229, 231

³¹¹ Joined Cases 56 and 58/64 *Établissements Consten SARL v EEC Commission* [1966] ECR 299, 342. This principle was reiterated by the Court of Justice in: Case C-272/09 P *KME Germany AG and others v European Commission* [2013] All ER (EC) 981, 65

As Amato comments, on this basis, the absolute territorial protection by which the exclusivity for France was guaranteed by the agreement between the two firms, was deemed illegitimate.³¹² The territorial protection coincided with that of the French State, and both the Commission and the Court of Justice saw this protection as persistence of the separation of economic activities along national frontiers, violating the foundation of the whole Community system.³¹³

As Akman comments, the Court of Justice has favoured the 'teleological' method of interpretation of what was necessary to achieve the integrationist goals of the Treaty.³¹⁴ Indeed, the Court has confirmed that it is not sufficient for it to adopt the literal interpretation of the provision in question, as the Court considers it necessary to examine the question whether this interpretation is confirmed by other criteria concerning in particular the common intention of the 'High Contracting Parties' to the Treaty.³¹⁵

On its side, the Commission back in 1973, commenting on fines imposed on undertakings for restricting competition in the European sugar market, stated:

[S]ince the measures taken by those concerned were obviously in conflict with the aim of market integration, the Commission decided to impose on a number of the undertakings fines related to the seriousness and the length of time during which the infringements are committed and to the size of their shares in the market.³¹⁶

As Hawk comments, the Community/Union policy approach is two-edged: on one hand, the Commission and the Courts have not hesitated to strike down obstacles to integration.³¹⁷ At the same time, the Commission has adopted affirmative policies the effect of which is to encourage firms to expand throughout the Common Market or to help them to carry out reorganisation operations.³¹⁸ The Commission, as part of its policy with regard to enterprises, stated that it will:

[C]ontinue to give priority to action against restrictive or improper practices which hamper the creation of a single market and the maintenance of effective competition within this uniform market.³¹⁹

However, the same body (i.e. the Commission) which strongly emphasises the priority in enforcement given to restrictions which interfere with single market integration, for example market divisions and territorial restrictions, has also proposed measures (i.e. temporary relaxation

³¹² Guliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 48

³¹³ *Ibid*, 49

³¹⁴ Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 (2) *Oxford Journal of Legal Studies* 267, 272

³¹⁵ Case 6/60 *Jean-E. Humblet v Belgian State* [1960] ECR 559, 575

³¹⁶ Commission, 'Second Report on Competition Policy' (*Office for Official Publications of The European Communities*, April 1973) <http://ec.europa.eu/competition/publications/annual_report/ar_1972_en.pdf> accessed 28 June 2014, 36

³¹⁷ Barry E Hawk, 'Antitrust in the EEC - The First Decade' (1972) 41 (2) *Fordham Law Review* 229, 231

³¹⁸ *Ibid*, 231

³¹⁹ Commission, 'Second Report on Competition Policy' (*Office for Official Publications of The European Communities*, April 1973) <http://ec.europa.eu/competition/publications/annual_report/ar_1972_en.pdf> accessed 28 June 2014, 15

of antitrust rules) to remedy disturbance in the economy of a Member State.³²⁰ Inevitably, this flexibility adopted by the Commission since the inception of competition law in the EU, raises a fundamental question: under the private enforcement regime proposed by the Commission, would it be possible to maintain the same flexibility? Would a private party considering himself harmed by a breach of antitrust rules abandon a claim for damages because of adverse effects on the economy of a Member State or a particular market? The Commission has done it.

Commenting on an Italian Law providing for Government intervention to encourage the restructuring and the conversion of certain industrial undertakings,³²¹ the Commission stated:

These are ... general aids, and the Commission ought to have considered them incompatible with the Common Market Nevertheless, the Commission felt that it should take account of the general context of the Italian economy underlying the Government's decisions.³²²

At the time, small and medium-sized Italian undertakings, were receiving credits on a priority basis as they were facing structural difficulties which had become harder to cope with since the business slowdown at the end of 1970 and an increase in wage costs which in some cases has proved hard to finance. Without assistance from the central authorities to help them carry out reorganisation operations, the firms concerned might have been forced to scale down operations or even, in some cases, to close down altogether. Inevitably, this would have worsened further an economic and social climate which was already in difficulty, hence:

In view of this situation, the Commission ruled ... that the measures in question could be considered as designed 'to remedy a serious disturbance in the economy of a Member State' and that it could therefore rule them compatible with the Common Market.³²³

Relaying on the provisions contained in Article 92 (3) (b) of the EEC Treaty, the Commission deemed the measure taken by the Italian Government as compatible with the Common Market for a period of one year (expiring in April 1973) since the aim was to enable Italian small and medium-sized businesses to cope with essentially transitional difficulties which should disappear once the expected economic recovery materialised.³²⁴ Therefore, as Hawk comments, the Commission approach³²⁵ is that it is pursuing an active competition policy: 'that is, it intends to use antitrust

³²⁰ Ibid, 107

³²¹ Law No 184 of 22 March 1971 (Italy), article 107 (3)(b) application (ex Art 92 (3)(b))

³²² Commission, 'Second Report on Competition Policy' (*Office for Official Publications of The European Communities*, April 1973) <http://ec.europa.eu/competition/publications/annual_report/ar_1972_en.pdf> accessed 28 June 2014, 107

³²³ Ibid, 107

³²⁴ Ibid, 107

³²⁵ Ibid

enforcement as a positive tool to promote competition, and not merely as a weapon against anticompetitive conduct'.³²⁶

As Martin emphasises, it appears clear that the economic goal of the European Community competition policy, undistorted competition, was established not for its own sake but as a means toward the ultimate goal of economic integration among the Member States.³²⁷ Whether enough progress on market integration has been made is an open question. The joining of additional Member States, such as the accession of Croatia in July 2013 and the different States' economies, makes dubious the conclusion that the EU market integration is complete.

It is worth noting that the principle established by the Court of Justice back in 1964³²⁸ of direct condemnation of agreements having the objective of prevention, restriction or simply distortion of competition without taking into account the concrete effects of these agreement, was recently re-applied.³²⁹ In *KME Germany AG*, three linked undertakings participated, together with other undertakings, in price-fixing and market-sharing agreements and concerted practices on the market for copper industrial tubes, contrary to Art 101 TFEU. Recalling its 1964 ruling, the Court of Justice verbatim reiterated that once it is ascertained that an agreement has as its object the prevention, restriction or distortion of competition, is it immediately unlawful without the need to ascertain any particular negative effect on the market/s.³³⁰ This shows, it is submitted, that economic integration and the development of that integration was, and still is, a fundamental goal of the EU competition policy. The question is whether it is possible to achieve this goal under a private enforcement regime. Arguably, public enforcement is more suitable to deliver the EU antitrust policy objectives.³³¹

The analysis now turns to amendments made to the EU competition provisions and focuses on whether such changes have altered the legal status of the provisions.

3.1.5 The Lisbon Treaty and Competition Rules

The EU's competition provisions are designed to facilitate the development of the market economy as rivalry between businesses can contribute to the process of growth by inspiring innovations. To this end, Art 3 (1)(g) of the EC Treaty stated: 'a system ensuring that competition in the internal

³²⁶ Barry E Hawk, 'Antitrust in the EEC - The First Decade' (1972) 41 (2) Fordham Law Review 229, 232

³²⁷ Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014

³²⁸ Joined Cases 56 and 58/64 *Établissements Consten SARL v EEC Commission* [1966] ECR 299, 342

³²⁹ Case C-272/09 P *KME Germany AG and others v European Commission* [2013] All ER (EC) 981

³³⁰ *Ibid*, 65

³³¹ See chapter 2.1.4 and 2.1.6

market is not distorted'.³³² The Treaty of Lisbon³³³ does not make any amendments to the main Treaty Articles dealing with competition, i.e. Articles 101 and 102 but, with the introduction of the TFEU, Art 3(1)(g) of the EC Treaty³³⁴ has been removed from the main body of the Treaty and now equivalent provisions are set in the Protocol (N° 27) on Internal Market and Competition which states:

THE HIGH CONTRACTING PARTIES, CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, HAVE AGREED that: to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.³³⁵

On the initiative of France, the European Council agreed to remove references to free and undistorted competition as a goal of the Union.³³⁶ Following the negotiations leading to the Lisbon Treaty, the then French President Nicolas Sarkozy declared: 'We have obtained a major reorientation of the objectives of the Union. Competition is no longer an objective of the Union, or an end in itself, but a means to serve the internal market'.³³⁷

The removal of the reference to undistorted competition from the body of the Treaty, however, does not appear to downgrade the status of the competition rules within the EU legal order. Article 51 of the TEU provides that 'The Protocols and Annexes to the Treaties shall form an integral part thereof'.³³⁸ Accordingly, the legal status of the Protocol appears therefore unquestionable. Nevertheless some commentators have argued that the replacement Art 3(1)(g) EC by a Protocol might send to the EU courts a signal to depart from the pre-Lisbon case law, which frequently relied on Art 3(1)(g) EC as an interpretative guidance for the application of the Treaty competition rules.³³⁹ Or, whether a Protocol attached to the back of the Treaty would still maintain the status of Article 82 EC (and 81 EC) as a 'fundamental provision'.³⁴⁰ These concerns however, it is submitted, appear

³³² Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33

³³³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

³³⁴ Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33

³³⁵ Protocol No 27 on Internal Market and Competition (Annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union) [2010] OJ C 83/309

³³⁶ Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 66

³³⁷ Ben Van Rompuy, 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' (2011) 1) *CPI Antitrust Chronicle* <<http://ssrn.com/abstract=1970081>> accessed 2 August 2014, 2

³³⁸ Consolidated Version of the Treaty on European Union [2010] OJ C 83/01

³³⁹ Andreas Weitbrecht, 'From Freiburg to Chicago and Beyond - the First 50 Years of European Competition Law' (2008) 2 *European Competition Law Review* 81, 88

³⁴⁰ Alan Riley, 'The EU Reform Treaty & the Competition Protocol: Undermining EC Competition Law' (*Centre for European Policy Studies*, September 2007) <<http://ssrn.com/abstract=1334104>> accessed 1 August 2014, 3

unfounded.³⁴¹ Despite the suppression of the reference to undistorted competition from the main body of the Treaty, EU enforcers are still having the duties to ensure that competition in the internal market is not distorted.

In the words of the then Commissioner for Competition Neelie Kroes:

An Internal Market without competition rules would be an empty shell - nice words, but no concrete results.

The Protocol on Internal Market and Competition agreed at the European Council clearly repeats that competition policy is fundamental to the Internal Market. It retains the existing competition rules which have served us so well for 50 years.³⁴²

Furthermore, two rulings of the Court of Justice made soon after the Lisbon Treaty,³⁴³ appear to confirm the Protocol as an essential constituent of the Treaty. In *Konkurrensverket* the Court of Justice for the first time since the amendment held:

[I]t must be observed at the outset that Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon ... is to include a system ensuring that competition is not distorted.³⁴⁴

As commented by Van Rompuy by reading the substantive content of the Protocol, together with the objective of establishing an internal market, the Court of Justice made clear that the Protocol forms a constitutive part of Article 3(3) TEU.³⁴⁵ Indeed AG Kokott in *Solvay SA*, in relation to infringements that might overlap the amendment, reiterated that the purpose of the competition rules laid down in the Treaties, prohibition of cartels (Article 85 of the EEC Treaty, Article 81 EC or Article 101 TFEU) and the abuse of dominance provisions (Article 86 of the EEC Treaty, Article 82 EC or Article 102 TFEU), is to protect competition in the internal market from distortion.³⁴⁶ He plainly explained:

³⁴¹ For a detailed discussion on this point, see: Ben Van Rompuy, 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' (2011) (1) CPI Antitrust Chronicle <<http://ssrn.com/abstract=1970081>> accessed 2 August 2014

³⁴² Neelie Kroes, 'Statement by European Commissioner for Competition Neelie Kroes on results of June 21-22 European Council - Protocol on Internal Market and Competition' (MEMO/07/250, 23 June 2007) <http://europa.eu/rapid/press-release_MEMO-07-250_en.htm?locale=en>

³⁴³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

³⁴⁴ Case C - 52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, 20

³⁴⁵ Ben Van Rompuy, 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' (2011) (1) CPI Antitrust Chronicle <<http://ssrn.com/abstract=1970081>> accessed 2 August 2014, 5

³⁴⁶ Case C 109/10 P *Solvay SA v Commission* [2011] ECR I-10329, Opinion of AG Kokott, 140 - 141

On the legal position at the time when the contested decision was adopted, see Article 3(1)(g) EC. The same position can now be inferred from Protocol No 27 on the Internal Market and Competition annexed to the Treaties.³⁴⁷

In *Commission v Italian Republic*, the Court of Justice emphasised once more the vital nature of the Treaty provisions on competition as it held:

As to the seriousness of the infringement, the vital nature of the Treaty rules on competition must be recalled ... At the time of the Court's assessment of the appropriateness and the amount of the present penalty payment, that vital nature is apparent from Article 3(3) TEU, namely the establishment of an internal market, and from Protocol No 27 on the internal market and competition, which forms an integral part of the Treaties in accordance with Article 51 TEU, and states that the internal market includes a system ensuring that competition is not distorted.³⁴⁸

Consequently, any concerns that the Protocol would not have the same interpretative value as the Article 3(1)(g) of the EC Treaty appear unfounded for two main reasons. First, the Court of Justice seems to consider the Protocol to be an essential constituent of Article 3(3) TEU. This means that the fact of moving the principle of undistorted competition to a Protocol annexed to the Treaties does not appear to have affected its legal value in the application of the competition rules. Second, the Court has expressly relied on its combined reading of Article 3(3) TEU and the Protocol to emphasise the gravity of the infringement in question.³⁴⁹ Therefore, the Court of Justice has reaffirmed the status of Treaty rules on competition as fundamental provisions. Regardless of the movement from the Treaty to the Protocol, the principle of undistorted competition remains a fundamental principle of the EU competition law.

The next part of the analysis explores the specific objectives that Art 101 and 102 are set to achieve.

3.1.6 The Objectives of Art 101 and 102 TFEU

The words of the competition provisions contained in the Treaties, which reflect the Community/Union underlying visions, have remained relatively unchanged through a series of incarnations.³⁵⁰ But the Commission enforcement policy, originally centred on the enforcement by the Commission itself, is moving toward a private enforcement regime. While such a system might

³⁴⁷ Ibid, FN 115

³⁴⁸ Case C - 496/09 *Commission v Italian Republic* [2011] ECR I-11483, 60

³⁴⁹ Ben Van Rompuy, 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' (2011) (1) CPI Antitrust Chronicle <<http://ssrn.com/abstract=1970081>> accessed 2 August 2014, 6

³⁵⁰ For a chronology and description of Treaties' changes see: Europa, 'Summaries of EU Legislation - Institutional Affairs' <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm> accessed 20 May 2014

be considered effective in other antitrust legal systems, for instance the US, due to different objectives to be achieved, it would not necessarily be effective in the EU.

Back in 1961 the then EC Competition Commissioner Hans von der Groeben highlighted three purposes of EC competition provisions: competition, integration, and freedom.³⁵¹ The aims were to prevent firms or Member States from erecting barriers to trade to replace those dismantled by the institution of the Community, to promote integration, and to safeguard an economic and social order based on freedom for businessmen, consumers, and workers.³⁵² Indeed, Groeben clearly pointed out:

It is however beyond dispute - and the authors of the Treaty were fully aware of this - that it would be useless to bring down the trade barriers between Member States if the Governments or private industry were to remain free through economic or fiscal legislation, through subsidies or cartel-like restrictions on competition, virtually to undo the opening of markets and to prevent, or at least unduly delay, the action needed to adapt them to the Common Market.³⁵³

Similarly, the Commission in its First Report of Competition policy emphasised the importance for the Community of an economic integration by condemning barriers between Member States:

Agreements on quotas as well as agreements for the purpose of dividing the Common Market into regions, or of dividing up or fragmenting markets by other means are in flagrant contradiction to the provisions of the Treaties.³⁵⁴

The Commission also commented that the sought-after economic integration could never be fully achieved if agreements and concerted practices were not 'resolutely opposed'.³⁵⁵ The importance accorded by the Commission and its officials to the goal of economic integration reflects the provisions contained in Art 85 EEC Treaty,³⁵⁶ subsequently in Art 81 of the EC Treaty³⁵⁷ and those now contained in Art 101 of the TFEU.

With regard to Art 102 TFEU (formerly Art 86 EEC Treaty – Art 82 EC Treaty), the Court of Justice in *United Brands* clarified that this provision serves the Community goal of instituting a system ensuring that competition in the Common Market is not distorted.³⁵⁸ One of the reasons why *United Brands* found itself in breach of competition rules, was that it charged different wholesale

³⁵¹ Hans von der Groeben, 'Competition in the Common Market' (*Commission of the European Community*, 19 October 1961) <<http://aei.pitt.edu/14786/1/S49-50.pdf>> accessed 30 July 2014

³⁵² *Ibid*, 3 - 4

³⁵³ *Ibid*, 4

³⁵⁴ Commission, 'First Report on Competition Policy' (*Office for Official Publications of The European Communities*, April 1972) <[http://aei.pitt.edu/31201/1/Comp_1971-\(1st\).pdf](http://aei.pitt.edu/31201/1/Comp_1971-(1st).pdf)> accessed 30 July 2014, 13

³⁵⁵ *Ibid*, 13

³⁵⁶ Treaty Establishing the European Economic Community (Rome, March 1957)

³⁵⁷ Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33

³⁵⁸ Case 27/76 *United Brands Co. v Commission* [1978] ECR 207, 63

prices to distributors located in different Member States. Although United Brands argued that it was simply acting as a profit-maximizing business in distinct local markets,³⁵⁹ for the Commission and in turn for the Court, these price differences were themselves an abuse of a dominant position. The Court of Justice explained that: ‘the interplay of supply and demand should, owing to its nature, only be applied to each stage where it is really manifest’.³⁶⁰ According to Martin, one possible interpretation of the Court of Justice ruling is that United Brand was, in effect, obliged to act as if it operated in a single market.³⁶¹ Another possible interpretation is that it was obliged to act as if United Brand were supplying a market competitive enough so that it could not engage in price discrimination.³⁶² Stated differently, the interplay of supply and demand should have taken place at each vertical level in the distribution chain: at a lower level between United Brands and distributors, at a higher level between distributors and final consumers. As a dominant firm, United Brand committed an abuse by imposing terms that gave it most of the possible profit at the expenses of distributors.

Arguably, this shows the extent to which the Commission and the Court of Justice have condemned practices that are or have the potential to distort competition, hence the economic integration of the EC/EU Member States. It is worth noting that a dominant firm may be in violation of the dominance provisions, even absent price discrimination or exclusionary behaviour if, for instance, it charged a price which is deemed excessive in relation to the economic value of the service or product provided. General Motors, was found in breach of Art 86 EC for imposing on Opel cars dealers: ‘a charge which was excessive in relation to the economic value of the service provided by way of the approval procedure’.³⁶³ Again, the Court of Justice explained that General Motors’ behaviour had ‘the effect of curbing parallel imports by neutralising the possibly more favourable level of prices applying in other sales areas in the Community’.³⁶⁴ Hence, once more can be seen the strong condemnation of practices that could interfere with the Community/Union economic integration.

The entry into force of Regulation 1/2003 in May 2004,³⁶⁵ has provided the Commission with an opportunity to update policy statements on the content and administration of the Treaty provisions. For instance, in the Guidelines on the Application of Article 81 EC is contained a ‘general remark’ which states:

³⁵⁹ Ibid, 61-62

³⁶⁰ Ibid, 229

³⁶¹ Stephen Martin, ‘The Goals of Antitrust and Competition Policy’ (*Department of Economics Purdue University, July 2007*) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 55

³⁶² Ibid, 55

³⁶³ Case C-26/75 *General Motors Continental NV v Commission* [1976] ECR 1367, 15

³⁶⁴ Ibid, 12

³⁶⁵ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.³⁶⁶

As Martin points out, here is found (as expected from provisions based on the Treaty itself) protection of competition, consumer welfare, and promotion of market integration.³⁶⁷ The same Guidelines also contain a note on the exemptions contained in Art 81(3), which clearly shows a reluctance in intervention if the agreement in question brings economic benefits despite being unlawful in principle. Considering the overriding objective of economic integration embedded into the EU competition provisions coupled with this non-intervention policy, the question is: can these objectives be maintained under a private enforcement regime? The Guidelines states:

Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains ... When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals ... Article 81(3) ... expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition.³⁶⁸

It is worth noting that this note is based on the 1964 Court of Justice ruling in *Consten and Grundig* in which the Court held that 'it must be accepted' that agreements between market players can promote technical or economic progress to the advantage of the Community.³⁶⁹

Therefore, it appears safe to conclude that despite various reincarnation of the Treaty, the underpinning principles of the EU competition rules in force today (Art 101 and 102 TFEU) are equivalent, taking into account technological and economic changes, to those established in the European Coal and Steel Community back in 1951.³⁷⁰ Article 65(1) ECSC that prohibited agreements among firms and all concerted practices can be considered broadly equivalent to the provisions contained in Art 101 TFEU, and Art 60 ECSC that prohibited unfair competitive practices, can be considered equivalent to the dominance provisions contained in Art 102 TFEU. The maximization of

³⁶⁶ Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/27, 13

³⁶⁷ Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 57

³⁶⁸ Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/27, 33

³⁶⁹ Joined Cases 56 and 58/64 *Établissements Consten SARL v EEC Commission* [1966] ECR 299, 313

³⁷⁰ Treaty Constituting the European Coal and Steel Community (Created by the Treaty of Paris, 18 April 1951)

consumer welfare and the pursuit of market integration are both served by a policy of promoting competition. The two goals appear broadly consistent and the Commission has made explicit that it viewed consumer welfare and market integration as mutually consistent goals as it intends to pursue two objectives:

- the protection of competition, which is the primary objective of Community competition policy, as it enhances consumer welfare and creates an efficient allocation of resources;
- market integration, in the light of enlargement, which remains a second important objective when assessing competition issues.³⁷¹

The question is: as the objectives of Art 101 and 102 have historically been achieved via a public enforcement system, would a private regime now proposed by the Commission achieve the same goals? If market integration is a key objective, is private enforcement suitable for delivering this purpose?

The next part of the analysis explores the US historical background and the reason why private enforcement has been used as a tool to deliver the antitrust legislation's aims.

3.1.7 The Goals of the US Antitrust Policy

As Fox puts it, on the surface there appears to be much in common between the competition law of the EU and the antitrust law of the US.³⁷² Article 101 TFEU, which prohibits agreements that distort competition and, accordingly, agreements that fix prices, is roughly comparable to Section 1 of the US Sherman Act,³⁷³ which prohibits agreements in restraint of trade. Article 102 TFEU prohibits abuses of dominant position and appears roughly comparable to Section 2 of the Sherman Act,³⁷⁴ which prohibits monopolisation and attempts (or combination of both) to monopolise. Moreover, the EU and US antitrust systems, at least in principle, have common objectives:

³⁷¹ Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints (Follow up to the Green Paper on Vertical Restraints) [1998] OJ C 365/3, 1.2. See also: Jordi Gual and others, 'An Economic Approach to Article 82' (*Report by the Economic Advisory Group for Competition Policy*, July 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.htm>> accessed 29 November 2013, 8 - 9; European Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (*Directorate-General for Competition*, December 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 October 2013

³⁷² Eleonor M Fox, 'US and EU Competition Law: A Comparison' (*Global Competition Policy*) <http://iie.com/publications/chapters_prview/10/ie16654.pdf> accessed 18 April 2014, 339

³⁷³ Sherman Antitrust Act, 15 U.S.C., § 1

³⁷⁴ *Ibid*, § 2

Both seek to advance the interests of consumers and protect the free flow of goods in a competitive economy. Both seek to protect competitors' access to markets and protect to some extent consumer freedom of choice and seller freedom from coercion.³⁷⁵

Speaking in 2007 the then Commissioner for Competition, Neelie Kroes, stated: 'US and EU antitrust law agree on most things, not least the objective of benefiting consumers'.³⁷⁶

The two systems, however, have developed out of different histories and concerns. Consequently a closer examination reveals significant variations in law, policy and consequently in enforcement strategies.

The US Congress passed the first antitrust law, the Sherman Act, in 1890 as a:

[C]omprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade, and it rests on premise (sic) that unrestrained interaction of competitive forces will yield the best allocation of economic resources of the country.³⁷⁷

In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act and the Clayton Act.³⁷⁸ With some revisions, these are the three core antitrust laws still in effect today.³⁷⁹

Section 7 of the Sherman Act of 1890 provided that any person who shall be injured in his business or property by reason of anything forbidden by the Act may sue thereof and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.³⁸⁰

Section 7 of the 1890 Sherman Act was superseded by section 4 of the Clayton Act of 1914,³⁸¹ which enables private persons to bring antitrust suits for treble damages for damage suffered as a result of any antitrust violation.³⁸²

As Amato emphasises the Sherman Act declared 'any' contract in restraint of trade illegal and in the most severe cases a breach of the provision attracted criminal penalties.³⁸³ However, this rule was not entirely innovative in condemning restraints of trade. It was adapting, amending and

³⁷⁵ Eleanor M Fox, 'US and EU Competition Law: A Comparison' (*Global Competition Policy*)

<http://iie.com/publications/chapters_prview/10/ie16654.pdf> accessed 18 April 2014, 339

³⁷⁶ Neelie Kroes, 'Antitrust in the EU and the US – Our Common Objectives' (2007)

<http://ec.europa.eu/archives/commission_2004-2009/kroes/antitrust_eu_us.pdf> accessed 23 April 2014

³⁷⁷ *Northern Pacific Railway Company v United States of America* 356 US 1, 78 S Ct 514, 2

³⁷⁸ Federal Trade Commission Act of 1914 ; Clayton Act (1914) An Act to Supplement existing laws against unlawful Restraints and Monopolies, and for other purposes, ch. 323, 38 Stat. 730

³⁷⁹ For an overview of the history and application see: Federal Trade Commission, 'The Antitrust Laws' (*FTC*) <<http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>> accessed 1 August 2014. For analysis see: Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014; Guliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997)

³⁸⁰ Sherman Act (1890) An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209

³⁸¹ Clayton Act (1914) An Act to Supplement existing laws against unlawful Restraints and Monopolies, and for other purposes, ch. 323, 38 Stat. 730

³⁸² Current version: Clayton Act (2006) 15 U.S.C.

³⁸³ Guliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 8

disciplining those restraints that had already given rise at common law. Therefore, the question is: what were precisely these 'restraints on trade'? Amato argues that:

[I]n common law the good protected was not competition as we understand it today (since classical economics has explained to us the effects of non-competition on the relation between supply and demand), but freedom of contract in the case of 'contracts in restraint of trade', and third parties' freedom (protected against exclusionary practices) in the case of 'conspiracies in restraint of trade'.³⁸⁴

In the former case an agreement was restrictive not because it limited competition, but because it limited unreasonably the freedom of contract of one of the parties, for instance, by imposing a non-competition clause unconnected to a sale or to a contract of employment. In the latter case a practice was restrictive when it was so coercive upon a third party that it could no longer have the freedom to stay in the market (a form of boycott) or to buy goods or services at the best price (a form of cartel agreement excluding retailers not complying with a fixed price).³⁸⁵

The effect of this approach means that in order to conclude that there is a breach in the freedom of contract an agreement had to impose on the contracting parties obligations that hampered their future contractual freedom. A price-fixing agreement, even among potential competitors, was not unlawful whenever the consumer could 'walk out of the shop' and buy the same item from another retailer not bound by the agreement.³⁸⁶ Only agreement that restricted contractual freedom and/or coercive combinations were considered 'restraints on trade'. On this basis, only 'unreasonable' agreements and combinations were unlawful, whereas 'reasonable' agreements and combinations, even if partially restrictive, were legally irrelevant.³⁸⁷

By the 1914, the Federal Trade Commission Act was passed.³⁸⁸ Section 5 of the Act introduced a detailed set of rules against unfair competition that could also be used to challenge attempts, including unilateral and collusions. In the same year, the Clayton Act was enacted, which was intended to protect small firms against certain coercive and exclusionary practices whenever they could lead to a substantial restriction of competition. Section 2 outlawed price discrimination, and Section 3 exclusive contracts (i.e. tying).

As Martin emphasises, the philosophy of the Clayton Act was to ensure maximum effectiveness for potential competition, thereby undercut any justification for government control of businesses and

³⁸⁴ Ibid, 8 - 9

³⁸⁵ Ibid, 9

³⁸⁶ Ibid, 9

³⁸⁷ Ibid, 10

³⁸⁸ Federal Trade Commission Act of 1914 . Current version at: 15 U.S.C §§ 41 - 58

market structures.³⁸⁹ This approach fitted well with early interpretations of the Sherman Act as relying on competition to obtain good market performance was 'the principle of competition that became the lynchpin of antitrust policy'.³⁹⁰ Martin reports that during the Senate debate preceding the passage of the 1914 Sherman Act the concern was that trusts were formed to raise prices, which in modern terms can be understood as a concern with the welfare of consumers.³⁹¹ Another concern was that a trust could engage in anticompetitive local price-cutting. Hence, controlling the market, raising or lowering prices, as it will best promote the trusts' selfish interests. For instance, reducing prices in a particular locality and break down competition and rise/lower prices as if there was no competition.³⁹² In essence, the main proponent of the legislation, Senator Sherman, argued that efficiency gains as occurred under trusts were not passed on to consumers in the form of lower prices. He claimed that in theory, trusts could reduce prices to the consumer by better methods of production, but he stated that all experience shows that this saving of cost goes to the pockets of the producer.³⁹³

Possibly, a concise summary of the reasons why the US Congress enacted the Sherman Act is given by Fiss, which explains that:

While the Sherman Act enlarged the role of the state, the purpose of state intervention was not to promote efficiency but rather, by curbing business practices that constituted restraints of trade and monopolization, to protect the market from itself.³⁹⁴

Unlike in the EU, in which the formation and development of a common market,³⁹⁵ the economic and political integration³⁹⁶ of the Community/Union Member States were the driving force behind competition law, in the US there was no basis in economic science for any antitrust policy beyond a prohibition of collusion as in general, most industries were treated as if they were perfectly competitive.³⁹⁷ In the US the promotion of competition was not an objective. The aim was to 'curb' business practices that constituted restraints on competition.

As Amato correctly argues, in historical terms, it seems undoubtedly to be going too far to say that the Sherman Act was inspired by grounds of efficiency.³⁹⁸ A more accurate claim seems to be the notion that the Sherman 'Antitrust' (as it was immediately called) Act was enacted to fight against

³⁸⁹ Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 3

³⁹⁰ *Ibid*, 3

³⁹¹ *Ibid*, 8 - 9

³⁹² *Ibid*, 9

³⁹³ *Ibid*, 9

³⁹⁴ Owen M Fiss, *The Troubled Beginnings of the Modern State, 1888–1910* (Macmillan 1993), 109

³⁹⁵ Treaty Establishing the European Economic Community (Rome, March 1957), art 2

³⁹⁶ Preamble to the: Treaty Constituting the European Coal and Steel Community (Created by the Treaty of Paris, 18 April 1951)

³⁹⁷ Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 4

³⁹⁸ Galiano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 96

trusts, or against economic power, in defence of small producers and small traders who risked being crushed by an overwhelmingly economic power.³⁹⁹ Therefore, in sharp contrast to the EU competition policy in which the key objective was economic integration by developing a common market in which businesses of Member States were encouraged to participate, in the US the key goal of antitrust provisions was, in effect, the limitation of those businesses (trust) who had market power to the extent of implementing practices that constituted restraints of trade. This difference is the next topic of the analysis.

3.1.8 EU – US Similar Objectives but Different Approaches/Principles

As Van den Bergh and Camesasca point out 'It must be acknowledged that, particularly in Europe, non-economic goals do play an important role in current competition policy'.⁴⁰⁰ In the EU a peculiar feature is the interferences from outside and inside of policies other than those on competition, which sometimes squeeze its rules and sometimes make them more flexible.⁴⁰¹

The EU competition policy encompasses multiple political goals. From the reconciliation of peoples long divided by bloody conflicts to the foundation of institutions capable of giving direction to their future common destiny,⁴⁰² to the establishment of the Common Market as a tool to achieve economic integration between Member States and rising of the standard of living of EU citizens.⁴⁰³ However, as correctly argued by Van den Bergh and Camesasca, the most prominent of these goals is the achievement of market integration which eventually may come at the expenses of inefficiencies, for instance in the organisation of products and distribution.⁴⁰⁴

Economic efficiency can be said to consist of three features.⁴⁰⁵ First, productive or technical efficiency implies that output is maximised by using the most effective combination of inputs. In other words, the goal of productive efficiency implies that more efficient companies should not be prevented from taking business away from less efficient ones. Second, allocative efficiency implies that companies produce what people want and are willing to pay for. It occurs when powerful companies restrict output and market prices are persistently held above the level of costs. The third feature is dynamic efficiency. Progressive or dynamic efficiency refers to the rate of technological

³⁹⁹ Ibid, 96

⁴⁰⁰ Roger J Van den Bergh and Camesasca Peter D, *European Competition Law and Economics: A Comparative Perspective* (Intersentia 2006), 1

⁴⁰¹ Giuliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 95

⁴⁰² Preamble to the: Treaty Constituting the European Coal and Steel Community (Created by the Treaty of Paris, 18 April 1951)

⁴⁰³ Treaty Establishing the European Economic Community (Rome, March 1957), art 2

⁴⁰⁴ Roger J Van den Bergh and Camesasca Peter D, *European Competition Law and Economics: A Comparative Perspective* (Intersentia 2006), 1 - 2

⁴⁰⁵ Ibid, 5

progress achieved through invention, development and diffusion of new products and production processes.⁴⁰⁶

It should be noted that efficiency goals are not necessarily consistent with the notion of competition in the sense that rivalry between firms deliver lower prices and better products. For instance, a joint venture might enable firms to achieve an important scale of economy by, for example, combining research with production and distribution (hence achieving productive efficiency), but at the same time it might open the possibility for previously independent companies to collude and increase prices above competitive levels thus causing allocative inefficiency. This efficiency analysis helps in assessing a fundamental difference between the underpinning principles of the EU competition law and the US antitrust law which among other things results from two main factors.⁴⁰⁷

First, the Community/Union goals of political integration and economic integration amongst Member States and the establishment of the Common Market, does not exist in the US. Second, different economic and social values and premises which underplay the goal of promotion of competition. For instance, fighting cartels is a common objective of EU and US competition policies, but the instruments to achieve this objective are different. The EU has an administrative enforcement system, which relies on financial sanctions (i.e. fines) against undertakings. In contrast, the US system considers participation in a cartel as a property crime (similar to theft or burglary), therefore the person found in breach of the rules is subject to criminal sanctions including imprisonment.⁴⁰⁸

While in the EU, Mario Monti the then European commissioner for competition, plainly stated: 'Preserving competition is not, however, an end in itself. The ultimate policy goal is the protection of consumer welfare',⁴⁰⁹ in the US the opposite approach seems to be taken by the courts. In *Fishman* the US Court of Appeal eloquently stated:

While antitrust law may be moving in the direction of being construed as a 'pure' consumer protection measure ... in the natural monopoly area, at least, the Supreme Court has not

⁴⁰⁶ Ibid, 5

⁴⁰⁷ For an analysis of other factors see: Barry E Hawk, 'Antitrust in the EEC - The First Decade' (1972) 41 (2) Fordham Law Review 229; Eleonor M Fox, 'US and EU Competition Law: A Comparison' (*Global Competition Policy*) <http://iie.com/publications/chapters_prview/10/ie16654.pdf> accessed 18 April 2014; Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014

⁴⁰⁸ Gregor Erbach, 'EU and US Competition Policies Similar Objectives, Different Approaches' (*European Parliamentary Research Service*, 27 March 2014) <<http://www.eprs.ep.parl.union.eu>> accessed 1 August 2014, 3

⁴⁰⁹ Mario Monti, 'Europe's Merger Monitor' (*The Economist*, 7 November 2002) <<http://www.economist.com/node/1429439/print>> accessed 1 August 2014

embraced this approach. The Court has instead stressed that the antitrust laws seek to protect competition.⁴¹⁰

The court explained that the issue is not whether ultimate consumers were affected by the challenged conduct but whether there was injury to competition at any level. The Court reiterated that the:

Relevant question is whether restraint promotes or suppresses competition. The antitrust laws are concerned with the competitive process, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest.⁴¹¹

Although in principle both the EU and the US have developed competition policies aimed at the prevention and penalisation of anti-competitive behaviour, due to difference in objectives, there are a number of significant differences in the resulting enforcement policies:

The EU has an administrative system for antitrust enforcement, in which companies are penalised with fines. In contrast, US antitrust enforcement is based on criminal law, with financial and custodial penalties against individuals. Private enforcement plays a greater role in the US system, where victims of anticompetitive behaviour are awarded damages treble the amount of the actual damage suffered.⁴¹²

Moreover, while the European Parliament is only consulted on matters of competition policy, the US Congress plays a more active role. For instance, high-profile merger cases in the US are subject to close scrutiny from Congress, including Congressional hearings.⁴¹³

Consequently, as the goals of the US antitrust regime differ from that of the EU (the former having the restriction of businesses practices as main objective, while the latter having integration as main objective), it appears questionable that an equal enforcement system will deliver the respective objectives of competition policy. For example, as in the US the aim was/still is to curb business practices that constitute restraints on trade (i.e. lessen competition), the argument that a victim/competitor injured by illegal anti-competitive practices, conversant in the technical jargon might be well informed of the details and consequences of the violator's practices,⁴¹⁴ is in a better position when compared to public officials to 'prosecute' an antitrust breach appears to be valid. In

⁴¹⁰ *Fishman v. Estate of Wirtz* 807 F2d 520, 55 USLW 2317, 536

⁴¹¹ *Ibid*, 536

⁴¹² Gregor Erbach, 'EU and US Competition Policies Similar Objectives, Different Approaches' (*European Parliamentary Research Service*, 27 March 2014) <<http://www.eprs.ep.parl.union.eu>> accessed 1 August 2014, 1

⁴¹³ The point however is beyond the scope of this research. For additional information see: *ibid*

⁴¹⁴ Irwin Stelzer, 'Implications for Productivity Growth in the Economy (Notes for Talk at Workshop on Private Enforcement of Competition Law, sponsored by Office of Fair Trading)' (*Hudson Institute*, 19 October 2006) <<http://www.stelzerassoc.com/Speeches/Implications%20for%20Productivity%20Growth%20in%20the%20Economy%20OFT%20Oct%2019,%202006.pdf>> accessed 8 January 2014, 5-6

such a case, providing incentive for private parties to bring lawsuits (in the sense of prosecuting a violation) can be seen as an appropriate tool in punishing the violator and at the same time provide a means of redress to victims of the breach.

Conversely, if the aim is an economic and political integration as it appears to be even in the 21st century in the EU,⁴¹⁵ then, the flexibility of public enforcement (unlinked to damages) and the discretion of public officials (free from personal gains) appear a preferable enforcement regime.⁴¹⁶

In the next part of the analysis is presented an overview of the Canadian historical competition context and how its enforcement policy compares to that of the US and the EU.

3.1.9 The Goals of the Canadian Competition Policy

The historical background of the Canadian competition provisions is sharply different to that of the US. In Canada competition legislation can be traced back to the Combines Investigation Act⁴¹⁷ enacted in 1889, one year before the US Sherman Act in 1890. However, unlike the US equivalent, the Canadian Act did not contain private rights of action and recognition of such right did not come until the Act was amended in 1976 to become what is now the Competition Act.⁴¹⁸ Until 1976 the Canadian competition provisions were exclusively criminal in nature. The Competition Act now includes criminal offences and civil provisions.⁴¹⁹ Much of the 20th century history of Canadian competition law involved expanding and fine-tuning the original vision.⁴²⁰

According to some commentators, Canadian courts from an early date have recognised that an agreement in violation of the Act was invalid and unenforceable as between the parties.⁴²¹ For instance, in 1912 the Canadian Supreme Court held that:

A contract between dealers fixing prices to be paid by them for specified articles and commodities which may be subject of trade and commerce with the object of restricting

⁴¹⁵ Case C-272/09 P *KME Germany AG and others v European Commission* [2013] All ER (EC) 981, 65; Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints (Follow up to the Green Paper on Vertical Restraints) [1998] OJ C 365/3, 1.2. See also: Jordi Gual and others, 'An Economic Approach to Article 82' (*Report by the Economic Advisory Group for Competition Policy*, July 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.htm>> accessed 29 November 2013, 8 - 9; European Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (*Directorate-General for Competition*, December 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 October 2013

⁴¹⁶ See chapter 2.1.6

⁴¹⁷ Combines Investigation Act. An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, S.C. 1889, c. 41

⁴¹⁸ Competition Act R.S.C., 1985, c. C-34

⁴¹⁹ See chapter 5.2.2

⁴²⁰ Competition Bureau, 'Competition Law in a Global and Innovative Economy - A Canadian Perspective' (3rd Brics International Competition Conference, New Delhi, India, November 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>> accessed 27 January 2014

⁴²¹ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 467 - 468

competition and establishing a monopoly therein, constitutes an agreement unduly to prevent or lessen competition ... and is not enforceable between the parties.⁴²²

However while the common law might recognise limited private rights of action in various contexts for anti-competitive practices, the process of reforming Canada's competition laws began in 1969 with the publication, by the Economic Council of Canada, of an Interim Report on Competition Policy having the objective of evaluating the existing law and proposing changes.⁴²³

The Report emphasised that since the main underlying objectives of the Combines Investigation Act were economic in nature,⁴²⁴ the Economic Council had:

[P]ut forward ... the view that the encouragement of economic efficiency should be the objective of Canadian competition policy, and it is accordingly in relation to this objective that the present legislation should be assessed.⁴²⁵

The Economic Council also stressed that the current provisions had been particularly effective in restraining three kinds of business conduct deemed to be detrimental to the public: collusive price-fixing, resale price maintenance, and misleading price advertising.⁴²⁶ However, of particular significance is a point made by the Canadian Economic Council which appears to reflect the motives behind the Commission proposal for a private enforcement regime in the EU (lack of resources and inability to prosecute all breaches).⁴²⁷ In evaluating the existing competition provisions contained in the Combines Investigation Act,⁴²⁸ particularly whether a more prominent role should have been assigned to the private enforcement of competition laws,⁴²⁹ the Economic Council eloquently stated:

It should be carefully noted that the economic impact of the Combines Investigation Act is not solely a function of the terms of the law itself and the way in which it has been interpreted by the courts. The resources available for its enforcement, including notably resources consisting of persons skilled in economic analysis, have also been a very important factor. Had these resources been greater, so too would have been the economic effects of the legislation. Still another factor has been the size of fines imposed upon

⁴²² *Weidman v. Shragge* (1912) 46 S.c.R. 1

⁴²³ Economic Council of Canada, 'Interim Report on Competition Policy' (1969) 14 The Antitrust Bulletin 933

⁴²⁴ *Ibid*, 938

⁴²⁵ *Ibid*, 935

⁴²⁶ *Ibid*, 935

⁴²⁷ See chapter 2.1.4 and 2.1.5

⁴²⁸ Combines Investigation Act. An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, S.C. 1889, c. 41

⁴²⁹ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 468

offenders. In general, these have not been such as to contribute greatly to the total deterrent effect of the Act.⁴³⁰

Stated differently, it was neither the legislation in itself nor the enforcement regime to blame for ineffectiveness. The Economic Council demonstrated the Act's effectiveness in price related violations and pointed out that had there been more resources available to enforcers the impact of the Act would have been greater. Moreover, another deficiency was the inadequate fines level which, if correctly adjusted, could have delivered the level of deterrent effect envisaged in the Act. The Commission stresses that in the EU the need to create a system of private enforcement emerges because:

[I]t covers those cases where the public authorities, for reasons of limited resources and public priorities, do not take any enforcement action, or limit their enforcement activities to specific aspects of a particular behaviour.⁴³¹

According to the Commission, private parties can supplement public resources with private initiative and information.⁴³²

Likewise, as the Canadian Economic Council in 1969 pointed out the inadequacy of the fines level, the Commission in 2005 proposed the introduction of double damages,⁴³³ which in essence increases the financial exposure (hence penalty) of violators.⁴³⁴

Roach and Trebilcock reports that the Canadian Economic Council supported the view of a large role for private enforcement, and in 1971, its views were adopted in Bill C-256⁴³⁵ in the form of a double damages provision modelled after the US Clayton Act.⁴³⁶ However, due to intense business and political opposition, Bill C-256 was withdrawn and in the amendments to the Combines

⁴³⁰ Economic Council of Canada, 'Interim Report on Competition Policy' (1969) 14 *The Antitrust Bulletin* 933, 936

⁴³¹ Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 21

⁴³² *Ibid*, 21

⁴³³ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 2.3

⁴³⁴ However, having noted the disproportionate costs of such feature in terms of potential overcompensation of victims and over-deterrence the Commission retracted from that position in 2013, see: Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' (Executive Summary of the Impact Assessment Report) SWD(2013) 204 final, 13; Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 80. See chapter 3.1.9 and 5.1.4

⁴³⁵ Bill C-256, An Act to Promote Competition, to Provide for the General Regulation of Trade of Commerce, to Promote Honest and Fair Dealing, to Establish a Competitive Practices Tribunal and the Office of Commissioner, to Repeal the Combines Investigation Act and to Make Consequential Amendments to the Bank Act, 3rd Sess., 28th Parl., 1970-71. See: Al Gourley and others, 'A Report on Canada's Conspiracy Law: 1889 - 2001 and Beyond' (*Macleod Dixon, Toronto, August 2001*) <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/gourleyrep.pdf/\\$FILE/gourleyrep.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/gourleyrep.pdf/$FILE/gourleyrep.pdf)> accessed 2 August 2014

⁴³⁶ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 468

Investigation Act (enacted in 1976) a single damages remedy for breach of the criminal provisions of the Act was adopted instead.⁴³⁷ This provision is now found in Section 36 of the Competition Act.⁴³⁸

Despite this provision however, private actions in Canada are rare.⁴³⁹ This indicates that in sharp contrast to the US approach in which at least 90% of legal actions for antitrust violations are initiated by private parties,⁴⁴⁰ in Canada public enforcement vastly outnumber private actions with respect to alleged violations of equivalent provisions.⁴⁴¹

Possibly, the Canadian reliance on public enforcement can be explained by the objective that the competition law aim to deliver, that is the encouragement of economic efficiency, which appears to be the key objective of Canadian competition policy.⁴⁴² Arguably, the Canadian underpinning principles that have shaped the history of its competition rules and the related enforcement regime have similarities with that of the European Community/Union. The analysis now turns to these similarities.

3.1.10 Comparing the History and Principles

In considering the goals of EU, the US and the Canadian antitrust regimes, a general trend seems to emerge. Despite differences in history and approach, the ultimate end appears that of ensuring that consumers are enjoying low prices, better quality, more choice, and innovation. However, the question is: how is this goal achieved in these three jurisdictions? Or, to look at the issue from a different angle, what do consumers have to be protected from, to ensure that they are enjoying these benefits? The answer to these questions is linked to enforcement policy.

From the enactment of European Coal and Steel Community Treaty in 1951, the Community/Union competition policy of undistorted competition, was established not for its own sake but as a means toward the ultimate goal of economic integration among the Member States.⁴⁴³ In the 21st century, the Commission contends that the creation of an effective private antitrust enforcement system⁴⁴⁴

⁴³⁷ Ibid, 469

⁴³⁸ Competition Act R.S.C., 1985, c. C-34. See chapter 5.2.3

⁴³⁹ Stephen Krebs, 'Top Ten Things to Know about the Canadian Competition Act' (*Association of Corporate Counsel*, 1 October 2010) <<http://www.acc.com/legalresources/publications/topten/canadian-competition-act.cfm?makepdf=1>> accessed 31 January 2014, 4; Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 469

⁴⁴⁰ Private actions from 1992 to 2012 range from 84.9% to 96.6%: 'Sourcebook of Criminal Justice Statistics Online' (*Antitrust Cases Filed in U.S. District Courts*, 2012) <http://www.albany.edu/sourcebook/tost_5.html> accessed 16 September 2014, table 5.41

⁴⁴¹ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 470

⁴⁴² Economic Council of Canada, 'Interim Report on Competition Policy' (1969) 14 *The Antitrust Bulletin* 933, 935

⁴⁴³ Stephen Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014

⁴⁴⁴ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

is an important tool to create and sustain a competitive EU economy,⁴⁴⁵ and that its policy initiative has the objective of stimulating economic growth and innovation.⁴⁴⁶

Correspondingly to the European Community/Union goals, the Canadian competition provisions contained in the Combines Investigation Act were economic in nature.⁴⁴⁷ Indeed subsequent amendments, have led to the current provisions contained in the Competition Act, which states:

[T]he goals of the Act are to provide an economic environment that is conducive to the efficient allocation and utilization of society's resources, stimulates innovation in technology and organization, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner.⁴⁴⁸

As argued by Rochweg, to achieve these goals, Canada was in need of:

[A]flexible, adaptable and dynamic economy that will (i) assist talents and materials to move in response to market incentives; (ii) reduce or remove barriers to such mobility, except where such barriers are inherent in the achievement of economies of scale or other savings of resources; and (iii) discourage unnecessary economic concentration. Competition is stated to be the means of ensuring the creation of such a dynamic Canadian economy.⁴⁴⁹

The Canadian approach to competition policy, and in particular the issues discussed by Rochweg, appears to reflect the needs in the EU. The primary goal⁴⁵⁰ of competition policy in the EU has not been the achievement of generic benefits associated with competition such as lower prices for consumers and technological innovation,⁴⁵¹ but the unification of the European markets,⁴⁵² to ensure '...the working of the Common Market, a specific Community objective'.⁴⁵³ This indicates that a peculiar feature of the EU competition policy is the interferences from outside and inside of policies other than those on competition.⁴⁵⁴

⁴⁴⁵ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

⁴⁴⁶ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

⁴⁴⁷ Economic Council of Canada, 'Interim Report on Competition Policy' (1969) 14 *The Antitrust Bulletin* 933, 938

⁴⁴⁸ Martin J Rochweg, 'Proposed Stage II Amendments to Canadian Combines Legislation--Bill C-42' (1977) 15 (1) *Osgoode Hall Law Journal* 51, 52. For the full version of the purposes of the Act, see section 1.1 of the Competition Act R.S.C., 1985, c. C-34

⁴⁴⁹ Martin J Rochweg, 'Proposed Stage II Amendments to Canadian Combines Legislation--Bill C-42' (1977) 15 (1) *Osgoode Hall Law Journal* 51, 52

⁴⁵⁰ David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97, 98. See also: David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 1998)

⁴⁵¹ David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97, 102

⁴⁵² Guliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 2

⁴⁵³ Commission, 'Second Report on Competition Policy' (*Office for Official Publications of The European Communities*, April 1973) <http://ec.europa.eu/competition/publications/annual_report/ar_1972_en.pdf> accessed 28 June 2014, 11

⁴⁵⁴ Guliano Amato, *Antitrust and The Bounds of Power* (Hart Publishing 1997), 95

In an International Competition Conference (New Delhi, India, 2013) the Canadian Competition Bureau, in identifying developments in Canadian competition law and policy that can be informative for countries with nascent competition regimes, stressed:

Beyond competition legislation, it is necessary to enhance the quality of the business environment with the purpose of promoting competition and market efficiency through a diverse set of policies that helped create a competitive environment.⁴⁵⁵

Like in the EU, in Canada, competition policy is also affected by policies outside those focused on competition and the Bureau recommends this approach to countries considering the institution of competition regimes. However, in sharp contrast to the promotion of private enforcement in the EU, the Canadian regime does not depend on private parties carrying out enforcement activities, and hence for delivering competition policy objectives. In Canada private parties have a very limited cause of action as the prosecution of violations of competition rules is the remit of public enforcers.⁴⁵⁶ By contrast in the US private parties have a significant role in the enforcement process, but the objectives are different to both those of Canada and those of the EU.

Unlike in the EU, in the US 'integration' is not an issue and thus it is neither an objective nor a concern to antitrust legislators. For instance, while Art 107 TFEU prohibits state aid that distorts competition in the internal market as this is seen as the re-erection of barriers between Member States and the Commission has the sole competence to decide on the legality of state aid, the US antitrust law contains no rules on state aid.⁴⁵⁷

Differences in competition policy objectives have resulted, it is submitted, in shaping the nature of different enforcement policies. For instance, in the EU, under the abuse of dominance provisions, a plan or intention to eliminate a competitor is condemned.⁴⁵⁸ Under the US antitrust rules an act of 'pure malice' by one business against its competitor does not warrant a claim under antitrust laws as those laws are not seen as purporting to afford remedies for all torts committed by or against persons engaged in commercial activities.⁴⁵⁹

It appears that in the EU competition policy has been overshadowed by more important goals of market, economic and political integration. Consequently, if the key goal of competition rules is

⁴⁵⁵ Competition Bureau, 'Competition Law in a Global and Innovative Economy - A Canadian Perspective' (3rd Brics International Competition Conference, New Delhi, India, November 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>> accessed 27 January 2014, 1

⁴⁵⁶ See chapter 5.2.2 and 5.2.3

⁴⁵⁷ An analysis of state aids, however, is beyond the scope of this research. For additional information see: Gregor Erbach, 'EU and US Competition Policies Similar Objectives, Different Approaches' (*European Parliamentary Research Service*, 27 March 2014) <<http://www.eprs.ep.parl.union.eu>> accessed 1 August 2014, 5

⁴⁵⁸ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 73

⁴⁵⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 Sct 2578, 6. See chapter 6.1.6

integration, as appears to be even in the 21st century in the EU,⁴⁶⁰ then, the flexibility of public enforcement (i.e. enforcement unlinked to the amount of damages award) and discretion of public officials (i.e. free from personal gains and retaliation against competitors) appear a preferable enforcement regime.⁴⁶¹

3.1.11 Conclusion

In sum, the US and the EU competition laws have many similarities, but also significant differences. The Community/Union competition law is grounded in the economic/market integration objectives of the Member States and consequently condemns practices that are, or could have, the effect of restoring trade barriers abolished by the creation of the Community first and by the Union after.

EU competition law derives from the need to substitute for age old rivalries and therefore to provide the basis for a broader and deeper cooperation (hence the establishment of a 'community') among peoples long divided by bloody conflicts. Arguably, this objective indicates the reason why although possible since the 1957 Treaty of Rome (EEC Treaty),⁴⁶² private enforcement has only recently been encouraged in the EU. Indeed, it is questionable whether private enforcement is suitable to deliver the overriding objectives of economic and market integration of the EU Member States.

The US antitrust story appears radically different in its foundation and development. Arguably, its course may even seem to have been an opposite one to that of the EU. The US antitrust provisions are based on economic liberty aimed at preserving free competition as the rule of trade, and they rest on premises such as that unrestrained interaction of competitive forces will deliver the best allocation of economic resources for the country.⁴⁶³ Unlike in the EU, economic or political integration are not of concern of the US antitrust laws.

Arguably, the Canadian competition policies have similarities in objectives to that of the EU.

However, while the Canadian regime relies mainly on enforcement by public officials, the

⁴⁶⁰ Case C-272/09 P *KME Germany AG and others v European Commission* [2013] All ER (EC) 981, 65; Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints (Follow up to the Green Paper on Vertical Restraints) [1998] OJ C 365/3, 1.2. See also: Jordi Gual and others, 'An Economic Approach to Article 82' (*Report by the Economic Advisory Group for Competition Policy*, July 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.htm>> accessed 29 November 2013, 8 - 9; European Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (*Directorate-General for Competition*, December 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 October 2013

⁴⁶¹ See chapter 2.1.6

⁴⁶² Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 9

⁴⁶³ *Northern Pacific Railway Company v United States of America* 356 US 1, 78 S Ct 514, 2

Commission in the EU is promoting a system of private enforcement. This approach raises some doubts about the suitability of such a system in delivering the EU competition goals.

The analysis now moves to the evaluation of private enforcement against the backdrop of compensation and deterrence as objectives of a private enforcement regime in the EU.⁴⁶⁴

⁴⁶⁴ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3
Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

Chapter 4: COMPENSATION AND DETERRENCE IN ANTITRUST

4.1.1 Introduction

An effective system of enforcement in the competition field is necessary for two main reasons. First, it provides corrective justice through compensation to victims, i.e. the 'compensation effect' and second, it ensures that prohibitions in the law are not violated, i.e. the 'deterrent effect'. Compensation to victims of antitrust infringements appears to be the first and foremost guiding principle behind the Commission proposals.⁴⁶⁵ According to the Commission, as a by-product deterrence is also increased and, by penalising infringements, an overall compliance with the rules could be achieved.⁴⁶⁶ The question is whether it is possible to provide compensation to antitrust victims while achieving an optimal level of deterrence under a private enforcement regime. Under a public enforcement system it is possible to set a level of punishment that could adequately compensate victims without incentivising a race to damages. As private enforcement is less coordinated, setting an ideal amount of punishment that would compensate victims while delivering an optimal level of deterrence appears to be impossible. This chapter analyses these issues, and concludes on the superiority of public enforcement over private enforcement.

4.1.2 The Commission Approach to Compensation

The Commission approach to compensation and deterrence is that the main objective of damages actions is different from that of public enforcement, the former primarily pursuing compensation of a loss (even though it also increases deterrence), whereas the latter is primarily pursuing deterrence and overall compliance with the rules by penalising infringements of Articles 101 and 102.⁴⁶⁷ Furthermore, according to the Commission, actions for damages and enforcement by public authorities necessarily interrelate to some extent. Greater enforcement by both public authorities and through private actions will increase deterrence and will increase the probability that infringers bear the costs for the harm caused. This will normally lead to a decrease, in the long run, of the number of infringements.⁴⁶⁸ Specifically to the issue of compensation, the Commission contends that public enforcement is not there to serve this goal. It is there to punish and deter illegal behaviour. Even if public intervention mirrors the concerns of consumers and fines imposed punish

⁴⁶⁵ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

⁴⁶⁶ Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 17

⁴⁶⁷ Ibid

⁴⁶⁸ Ibid, 20

and deter unlawful behaviour, the victims of breaches will still not be compensated for their losses. Consequently, consumers should be empowered to enforce their rights.⁴⁶⁹

According to the Commission, therefore, private enforcement is beneficial to both the goal of compensation and that of deterrence. The fallacy of this approach is that implementing such a policy objective does not come without costs. To be effective the punishment of violations must create a credible threat of penalties which weigh sufficiently in the balance of expected costs and benefits, so that calculating companies and individuals can be deterred from committing antitrust violations. Arguably, if reparation of antitrust harm is the goal this should be done via public enforcements. The complexity of issues under scrutiny coupled with lengthy investigations can raise proceeding costs above reward costs. Unlikely private enforcement, public enforcement financed by public resources, is not necessarily tied to this equation and thus better equipped to provide redress irrespective of the financial cost involved in achieving it. It should be noted that as Becker and Stigler pointing out:

There is a powerful temptation in a society with established values to view any violation of a duly established law as a partial failure of that law Yet it surely follows from basic economic principle that when some people wish to behave in a certain way very much, as measured by amount they gain from it or would be willing to pay rather than forgo it, they will pursue that wish until it becomes too expensive for their purse and tastes.⁴⁷⁰

In examining the Commission approach to compensation it emerges that the US's experience of excessive private enforcement could be replicated in the EU. In the EU the approach taken towards private enforcement seems to be similar to that taken in the US, in that private enforcement is employed to correct deficiencies in the enforcement system, although compensation (and deterrence) is a by-product in an effort to increase overall compliance with competition law. The US private antitrust enforcement system, and in particular the treble damages award, was created to overcome ineffectiveness in the public antitrust enforcement.⁴⁷¹ However, treble damages have induced US courts to design and apply liability standards in a manner that limits private actions.⁴⁷²

⁴⁶⁹ Neelie Kroes, 'Making Consumers' Right to Damages a Reality: The Case for Collective Redress Mechanisms in Antitrust Claims' (*Speech/07/698*, 9 November 2007)

<<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/698&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 21 February 2014

⁴⁷⁰ Gary S Beker and George J Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 *Journal of Legal Studies* 1, 2

⁴⁷¹ John H Beisner and Charles E Borden, 'Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience' (*Washington D.C. Office of O'Melveny & Myers LLP*)

<www.litigationfairness.com/get_illr_doc.php?fn=Expanding%20priva> accessed 18 January 2014, 2

⁴⁷² William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (*British Institution of International & Comparative Law*, 15 May 2003) <<http://www.ftc.gov/speeches/other/030514biicl.shtm>> accessed 3 April 2014; Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107

An evaluation of two EU cases, that concerning Microsoft⁴⁷³ and the case involving 11 air cargo carriers⁴⁷⁴ in the light of the US experience of private enforcement,⁴⁷⁵ shows the danger posed by private enforcement when it is used as a tool to correct ineffectiveness in the public enforcement regime.

The Microsoft case originated with a complaint in December 1998 from Sun Microsystems, which alleged that Microsoft, with its Windows product, enjoyed a dominant position in PC operating systems, and that it had abused this dominant position by reserving to itself information that certain software products for network computing, called work group server operating systems, needed to interoperate fully with Windows.⁴⁷⁶ Following a series of investigations the Commission concluded that Microsoft's abuse, essentially, originated from its overwhelmingly dominant position in personal computer operating systems. Microsoft's share in this market, with its Windows product, was between 90 and 95%, and it has enjoyed the same high market share for many years. Such a position infringed the then Art 82 EC in that according to the Commission:

Due to the ubiquity that Microsoft has achieved on the PC operating system market, virtually all commercial applications are written first and foremost to the Windows platform. There is therefore a very strong network effect which protects Microsoft's position. This is called the 'applications barrier to entry'.⁴⁷⁷

In view of this abuse (or abuses: dominance, refusal to supply and tying) the Commission imposed a fine of €497.196 million.⁴⁷⁸ The way in which this final figure was calculated is of significance in assessing the impact of private actions in addition to the fine imposed by the Commission. The initial starting amount of the fine was set at €165.732 million. However, because of Microsoft's size and resources and, in order to ensure a sufficient deterrent effect, this was multiplied by a factor of two which therefore became €331.464 million. Microsoft's infringement was considered very serious on the grounds of the nature of the infringement, its impact on the market, and the size of the relevant geographic market. Consequently the amount initially set was increased by 50% in

⁴⁷³ *Microsoft Corporation* (Case COMP/C-3/37792) Commission Decision 2007/53/EC [2007] OJ L 32/23

⁴⁷⁴ *Airfreight* (Case COMP/39258) Commission Decision of 9/11/2010 (unpublished); Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

⁴⁷⁵ See chapter 2.1.4

⁴⁷⁶ Nicholas Banasevic and others, 'Commission Adopts Decision in the Microsoft Case' (*Directorate-General Competition, Competition Policy Newsletter n. 2, Summer 2004*) <<http://europa.eu.int/comm/competition/publications/cpn/>> accessed 6 February 2014, 44

⁴⁷⁷ *Ibid*

⁴⁷⁸ *Microsoft Corporation* (Case COMP/C-3/37792) Commission Decision 2007/53/EC [2007] OJ L 32/23

order to take into account the five years and five months duration of the infringement. The final amount of the fine was therefore €497.196 million.⁴⁷⁹

It is worth recalling that although the Commission decision was essentially upheld by the then CFI Microsoft exposure to financial penalties, like other companies found in breach of antitrust rules, does not end with the action by the antitrust authorities. There is still the possibility of additional compensation claims made by private parties. Potentially, Microsoft is still exposed to 65,125 million of claims for damages as these are the estimated computer users in the EU.⁴⁸⁰

In 2010, the Commission fined 11 air cargo carriers a total of €799.445.000 for cartel behaviour.⁴⁸¹ The cartel arrangements consisted of numerous contacts between airlines, at both bilateral and multilateral level, covering flights from, to and within the European Economic Area.⁴⁸² The contact between the airlines on prices initially started with a view to discuss fuel surcharges. The carriers contacted each other so as to ensure that worldwide airfreight carriers imposed a flat rate surcharge per kilo for all shipments. The cartel members extended their cooperation by introducing a security surcharge and refusing to pay a commission on surcharges to their clients (freight forwarders). The aim of these contacts was to ensure that these surcharges were introduced by all the carriers involved and that increases (or decreases) of the surcharge levels were applied in full without exception.⁴⁸³ By refusing to pay a commission, the airlines ensured that surcharges did not become subject to competition through the granting of discounts to customers. Such practices are deemed in breach of competition rules and in particular in breach of Art 101.⁴⁸⁴ The Commission took the opportunity to emphasise its support for compensation via private actions. The Commission stated that it considered that claims for damages should be aimed at compensating the victims of an infringement for the harm suffered and eloquently invited anyone to seek damages:

Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was

⁴⁷⁹ Nicholas Banasevic and others, 'Commission Adopts Decision in the Microsoft Case' (*Directorate-General Competition, Competition Policy Newsletter n. 2, Summer 2004*) <<http://europa.eu.int/comm/competition/publications/cpn/>> accessed 6 February 2014, 48

⁴⁸⁰ 'World Map - Top Ten Countries with Highest number of PCs' (*Computer Industry Almanac Inc.*) <<http://www.mapsofworld.com/world-top-ten/world-top-ten-personal-computers-users>> accessed 12 April 2014

⁴⁸¹ Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

⁴⁸² The European Economic Area comprises the countries of the European Union, plus Iceland, Liechtenstein and Norway. Those States are allowed to participate in the EU's Internal Market without being members of the EU.

⁴⁸³ Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

⁴⁸⁴ *Airfreight* (Case COMP/39258) Commission Decision of 9/11/2010 (unpublished). For additional information see: Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine.⁴⁸⁵

In this case the cartel spread over six years period, from 1999 to 2006. Consequently, like in the Microsoft's case, these airfreight carriers are exposed to thousands if not millions of private actions for damages from, or on behalf of, private entities. Considering that in both examples the breach of competition rule is already established at the EU level, a claim for damages in a national court has a very good prospect of success.⁴⁸⁶ The concern is what would be the effect of such claims to both the computers and the air cargo industry and in turn for the EU economy. Despite the fines imposed by the Commission, the defendants' liability is not extinguished. This uncoordinated compensatory feature of the enforcement process could be lethal to businesses by exposing them to millions of claims worth an unlimited amount. Arguably, in order to punish violators without destroying them, compensation in antitrust should be awarded by public officials as part of the same process in imposing the fines.⁴⁸⁷

Considering the US experience, in which private enforcement and treble damages were implemented to overcome deficiencies in the enforcement system but resulted in over-enforcement,⁴⁸⁸ it is submitted, that private enforcement in the EU should not be used to ensure compensation. Rather, victims of competition infringements should be compensated via public enforcement.

4.1.3 Compensation and Corrective Justice

An important goal of antitrust enforcement is considered to be that of preventing wealthy transfers from victims of violation to firms with market power. A concept considered consistent with and complementary to the goal of compensating victims of antitrust violations, for instance of overcharges.⁴⁸⁹ It must be stressed, though, that whether antitrust contributes to social welfare is debatable in the first place,⁴⁹⁰ let alone whether it should be used for corrective justice via private enforcement.

⁴⁸⁵ Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

⁴⁸⁶ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012)

⁴⁸⁷ See chapter: 10.1.2

⁴⁸⁸ See chapter 2.1.4

⁴⁸⁹ Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879, 882. See also: Robert H Lande and Joshua P Davis, 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies' (*Interim Report*, 8 November 2006) <<http://newaai.com/files/550b.pdf>> accessed 31 March 2014, 1-2

⁴⁹⁰ Lista argues that in some sectors, such as the financial service, it is questionable whether antitrust is beneficial at all: Andrea Lista, *EU Competition Law and the Financial Services Sector* (Informa Law from Routledge 2013), 17. See also: Andrea Lista, 'Stairway to Competition Heaven or Highway to Hell: What Next for Insurance Competition Regulation' (2011) 1 *The Journal of Business Law* 1

Compensation, in the competition law field, has two main applications. First, victims of antitrust violations can be reimbursed, for example for overcharging suffered. Second, by creating a credible threat of penalties which weigh sufficiently in the balance of expected costs and benefits, calculating companies and individuals can be deterred from committing antitrust violations.⁴⁹¹ The need for compensation in the context of antitrust enforcement arises because while an injunction can stop future anti-competitive behaviour, it puts violators in a no-lose situation. Even if defendants lose their case and have to stop the practice in question, an injunction alone would permit them to keep the fruits of their past anti-competitive behaviour.⁴⁹²

A Report for the Commission evaluates the potential for private enforcement to contribute to social welfare by improving the detection and deterrence of anti-competitive conducts.⁴⁹³ However findings are underpinned by taking 'as reference a theoretically effective system of private enforcement, regardless of the means through which such effective system has been reached'.⁴⁹⁴ Undeniably the assessment of a system of private enforcement in the EU appears almost entirely based on simulations and potential scenarios.

Unlike in the EU, in the US an empirical study conducted by Crandall and Winston in three main areas of antitrust enforcement, monopolisation, collusion, and mergers showed little support for the proposition that competition enforcement has provided direct benefits to consumers or deterred anti-competitive conduct.⁴⁹⁵ In each area, it was concluded that the empirical evidence does not demonstrate that enforcement has benefited consumers by lowering prices or increasing output, most often because of the length of the investigation and litigation, during which whatever monopoly power may have existed was dissipated by marketplace evolution.⁴⁹⁶

With respect to monopoly, Crandall and Winston observed that a major problem occurs when a monopolisation case simply fails to benefit consumers because the remedy turns out to have a negligible practical impact. For instance a monopoly case, or a number of monopoly cases, can be brought in an attempt to stop the replacement of small grocery stores by large national food chains,

⁴⁹¹ Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) *World Competition* 3, 9

⁴⁹² Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879, 907

⁴⁹³ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014

⁴⁹⁴ *Ibid*, 65

⁴⁹⁵ Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) *Journal of Economic Perspectives* 3

⁴⁹⁶ Comments on Crandall and Winston findings also can be found in the Report for the Commission, see: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 53 -54

but these cases have little effect on market concentration because they could not prevent more efficient chains from replacing less efficient small retailers.⁴⁹⁷

In relation to collusion the authors concluded that researchers have not shown that government prosecution of alleged collusion has systematically led to significant non-transitory declines in consumer prices.⁴⁹⁸ With respect to Mergers they observed:

We can only conclude that efforts by antitrust authorities to block particular mergers or affect a merger's outcome by allowing it only if certain conditions are met under a consent decree have not been found to increase consumer welfare in any systematic way, and in some instances the intervention may even have reduced consumer welfare.⁴⁹⁹

From an economic perspective Crandall and Winston correctly stressed:

The overall conclusions from our review of these cases is that the antitrust authorities (DOJ) often fail to understand the determinants of market structure, but are nonetheless able to prevail in court or to induce defendants to sign a consent decree, constraining their future conduct. Without a firm grasp of the economic forces that are driving changes in market structure, the DOJ cannot be expected to design 'relief' that will result in increased competition, lower prices, and consumer benefits. In the best of circumstances, the behavioural relief obtained is simply irrelevant and has no economic consequence other than the cost of the litigation and any costs of compliance.⁵⁰⁰

In the US, antitrust law spread over centuries, from the Sherman Act in 1890 to the present day.⁵⁰¹ During this time amendments have been made to suit both the society and markets, including the suspension of antitrust provisions. Triggered by the stock-market crash that occurred on 'Black Tuesday' (29 October 1929) the US entered what is known as the 'Great Depression', a combination of domestic and worldwide conditions that led to the worst economic depression in US history.⁵⁰² During that time antitrust laws were suspended for designated industries for a time as a by-product of the 1933 National Industrial Recovery Act. Studies conducted on the phenomenon revealed an intriguing finding: prices did not rise.⁵⁰³ Of course in this instance it can be argued that such

⁴⁹⁷ Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) *Journal of Economic Perspectives* 3, 13-14

⁴⁹⁸ *Ibid*, 15

⁴⁹⁹ *Ibid*, 20

⁵⁰⁰ Robert W Crandall and Kenneth G Elzinga, 'Injunctive Relief in Sherman Act Monopolization Cases' [2002] *Journal of Research in Law and Economics* 1, 99

⁵⁰¹ Sherman Act (1890) An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209

⁵⁰² For additional information see: Martin Kelly, 'Great Depression - Top Five Causes of the Great Depression' (*American History*) <<http://americanhistory.about.com/od/greatdepression/tp/greatdepression.htm>> accessed 16 March 2014

⁵⁰³ George Bittlingmayer, 'The Output and Stock Price Effects of Loose Antitrust: Experience Under the NRA' (1993) Centre for the Study of the Economy and the State, The University of Chicago Working Paper 87

<<http://research.chicagobooth.edu/economy/research/articles/87.pdf>> accessed 1 May 2014, 29-30. See also: Stephen

phenomenon is dated and perhaps only relevant to the anomalous conditions experienced by the affected industries at the time. However, it can also be argued that challenging large firms in courts is often politically popular, but neither policymakers nor economists are required to offer compelling evidence of marked consumer gain from antitrust policy.⁵⁰⁴

As to whether antitrust is an appropriate instrument for corrective justice, a principled explanation is offered by Schwartz:

I will say that I know of no widely espoused ground for redistributing wealth that is effectively served by providing compensation to persons injured by antitrust violations.

One must begin with the realisation that disparities in outcome among individuals will inevitably occur. People are born more or less wealthy, with more or less intelligence, and prove to be more or less lucky. Which of the many causes of the disparity in outcome justify compensation? When is the outcome so unfortunate, whatever its cause, that compensation should be paid?

From neither of these perspectives do antitrust violations seem to provide a good case for compensation. The losses from antitrust violations are widely dispersed, do not represent the disappointment of strongly held expectations, and can in many cases be adapted to without severe dislocation in the lives of the persons affected. Moreover, existing welfare laws, unemployment compensation, bankruptcy laws, and a number of provisions in the tax laws provide relief from any catastrophic losses, including those that might result from an antitrust violation.

Of course, the issue is not whether compensation would be justified if it could be provided without cost. If compensation is incorporated as a goal of a private system of antitrust enforcement, the efficacy of the system is greatly impaired. There are, moreover, substantial costs, which will impede the process of providing compensation even if the goal is accepted in principle. The payment of compensation in antitrust proceedings seems both an ineffective way to achieve justice and an unjustifiable impairment of the effort to enforce the law.⁵⁰⁵

Schwartz is taking compensation in antitrust cases to an extreme by objecting to it altogether.

However, he is not the only one questioning the compensation component in antitrust

Martin, 'The Goals of Antitrust and Competition Policy' (*Department of Economics Purdue University*, July 2007) <<http://www.krannert.purdue.edu/faculty/smartin/vita/Goals0707Cmu.pdf>> accessed 10 May 2014, 23

⁵⁰⁴ Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) *Journal of Economic Perspectives* 3, 14

⁵⁰⁵ Warren F Schwartz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (American Enterprise Institute for Public Policy Research 1981), 32

enforcement.⁵⁰⁶ Specifically in relation to the EU, Wils points out: 'I am not aware of any evidence that the citizens of Europe, outside the narrow circle of antitrust professionals, are seriously disturbed by the current absence of compensation for antitrust offences'.⁵⁰⁷

Arguably compensation does contribute to both deterrence and by reimbursing victims of antitrust violations it also contributes to the public good, but there are difficulties and hence costs in truly achieving these aims. To keep these costs under control compensation, whether used for corrective justice or not, should be dealt with by public authorities so as to be free from private interest in financial gain. Otherwise, it is submitted, the efficacy of the enforcement system would be significantly impaired.

As far as the pursuit of corrective justice through compensation is concerned, private actions for damages in principle appear a useful tool and to some extent, superior to public enforcement. In terms of comparative competence, there is no reason to think that competition authorities are particularly well suited to decide on the relevant issues, at least not on the assessment of causality and on the amount of the harm. The technical knowledge of an undertaking/victim operating in the same industry may be superior to those of a public authority. As Stelzer argues:

[W]ho better to argue that to be the case than a competitor, injured by illegal anti-competitive practices, conversant in the technical jargon, on the sharp edge of customer relations, well informed of the details and consequences of the dominant firm's practices.⁵⁰⁸

Private parties should generally enjoy an inherent advantage in knowledge because they are the ones who are engaging in and deriving benefits from their activities.

However, the compensation umbrella must not obfuscate the principle that antitrust laws are not designed to protect competitors, but rather to protect competition.⁵⁰⁹ Such an approach, which originated in the US when the US' Supreme Court first said it in *Brown Shoe*,⁵¹⁰ appears to be endorsed by the Commission in the EU.⁵¹¹ Consequently, as Areeda emphasises, as long as there is no anti-competitive activity, the fact of injury to a competitor is not, or should not be, a concern of

⁵⁰⁶ For the costs of compensation in general, see: Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006); Patrick S Atiyah, *The Damages Lottery* (Hart Publishing 1997)

⁵⁰⁷ Wouter P J Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 (3) *World Competition* 473, 19

⁵⁰⁸ Irwin Stelzer, 'Implications for Productivity Growth in the Economy (Notes for Talk at Workshop on Private Enforcement of Competition Law, sponsored by Office of Fair Trading)' (*Hudson Institute*, 19 October 2006) <<http://www.stelzerassoc.com/Speeches/Implications%20for%20Productivity%20Growth%20in%20the%20Economy%20OFT%20Oct%2019,%2006.pdf>> accessed 8 January 2014, 5-6

⁵⁰⁹ See chapter 3.1.3

⁵¹⁰ *Brown Shoe Co. v. United States* 370 US 294, 332-33, 320

⁵¹¹ See chapter 3.1.3; Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (*SPEECH/05/537, Speech at the Fordham Corporate Law Institute*, 23 September 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 January 2014. See also: Commission, 'Delivering for Consumers, What is Competition Policy?' (*European Commission Competition*) <http://ec.europa.eu/competition/consumers/what_en.html> accessed 9 April 2014

the antitrust laws. To argue otherwise is to stand the public interest on its head and to suggest that the public would be better off if the plaintiff found itself without competition.⁵¹² The risk is that damages awarded to an inefficient competitor warn other firms that it should avoid vigorous competition that will reduce rivals' profits and thereby increase the damages it may eventually have to pay if those rivals challenge the firm in court.

4.1.4 The Insurance Alternative

The immediate consequences for a company, stemming from private enforcement of competition law, are the need to defend the lawsuits and the potential liability for damages. In principle, both elements can be of no concern if company/defendant it is covered by an appropriate insurance policy. A comprehensive or commercial general liability insurance policy may provide full coverage not only for the costs and fees incurred in defending claims, including antitrust, but also for settlements and judgments. Hence, from a pure theoretical prospective an insurance policy could offset any unwanted side effect of private enforcement.⁵¹³ This thesis however, argues that such an approach does not represent an appropriate option and as such the insurance argument should not be used to justify pitfall in antitrust enforcement policy for two main reasons. First, the costs incurred by a company in obtaining the insurance policy increase the company's production costs which in turn increase the cost of the product or service. Hence, in the end such costs will be borne by the society as a whole. Second, considering that apart from injunctive relieves, under EU competition provisions the penalties for antitrust violations are financial penalties (i.e. fines), if the threat of such penalties is effectively nullified, then it becomes questionable the level of deterrence that antitrust law can achieve.

A key aspect of the Commission proposal for a private enforcement regime in the EU is the compensation to victims of antitrust violations. Compensation to victims of antitrust infringements appears to be the first and foremost guiding principle behind the Commission proposals.⁵¹⁴ The question is who pays these damages? As Atiyah put it:

Although it is often difficult to say who exactly does (in the last analysis) pay for awards of damages, it is at any rate clear who does 'not' pay them. The damages are hardly 'ever' paid by the actual wrongdoer.⁵¹⁵

⁵¹² Philip Areeda, 'Antitrust Violations Without Damage Recoveries' (1976) 89 Harvard Law Review 1127, 1134

⁵¹³ A full appraisal of the costs of compensation is beyond the scope of this thesis. For a further discussion see: Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006); Patrick S Atiyah, *The Damages Lottery* (Hart Publishing 1997)

⁵¹⁴ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

⁵¹⁵ Patrick S Atiyah, *The Damages Lottery* (Hart Publishing 1997), 21

In situations where the wrongdoer is insured, damages are usually paid in the first instance by insurance companies. Atiyah argues that contrary to general belief, insurance companies do not just pay these sums out of profits. They pay them out of premiums paid by the public, directly or indirectly.⁵¹⁶ Consequently, in the last analysis, most damages awards are borne by the public.⁵¹⁷ This general principle also applies to commercial insurance policies covering antitrust liability. Considering the staggering fines that antitrust infringements can attract, such as that of €497 million imposed on Microsoft,⁵¹⁸ that of €799 million imposed on airfreight carriers,⁵¹⁹ and that of €1.47 billion related to computer monitor cartels.⁵²⁰ Considering also that although the Commission has fined these companies, private parties can claim damages without these being reduced on account of the Commission fine,⁵²¹ then it is easy to see how high the stake is. Any such insurance cover would significantly increase the business operating costs and inevitably, such costs will be passed to customers who beforehand, and regardless of the occurrence of antitrust litigation, will have to bear the costs.

While the aim of compensating antitrust victims could be seen a laudable one, thoughts should also be given to the costs of operating such a system. Under the private enforcement regime envisaged in the EU, compensation would be awarded by civil courts. The court system also has running costs which are borne by EU tax payers. Commenting on the cost of tort compensation, Cane contends that 'The total costs of the system are nearly double the amounts paid out in compensation because the tort liability insurance system is so staggeringly expensive to operate'.⁵²² Although this conclusion refers to industrial injury cases and road accidents in the UK, considering the length and complexities of antitrust cases, courts' costs in antitrust proceedings are also worthy of consideration.

According to the Commission, a system of private enforcement created in the EU should deliver overall better compliance with competition rules while creating and sustaining a competitive economy.⁵²³ Regarding liability insurance, it should be noted that it is unlikely that a party would purchase cover substantially exceeding his assets. This result from the fact that purchase of such

⁵¹⁶ Ibid, 113

⁵¹⁷ Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006), ch 16

⁵¹⁸ Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3601, 46. Antitrust, 'Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine' (IP/04/382, 24 March 2014) <http://europa.eu/rapid/press-release_IP-04-382_en.htm> accessed 5 January 2014 See also:

⁵¹⁹ Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (IP/10/1487, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

⁵²⁰ Antitrust, 'Commission Fines Producers of TV and Computer Monitor Tubes € 1.47 Billion for Two Decade Long Cartels' (IP/12/1317, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014

⁵²¹ Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (IP/10/1487, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014, 3; Antitrust,

'Commission Fines Producers of TV and Computer Monitor Tubes € 1.47 Billion for Two Decade Long Cartels' (IP/12/1317, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014, 4

⁵²² Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7 edn, Cambridge University Press 2006), 396

⁵²³ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

cover, is in effect purchase of protection against losses which the party would otherwise have to bear only in part.⁵²⁴ As Shavell explains, a party with assets of \$20,000 may not wish to buy insurance coverage for a potential liability of \$100,000. Purchasing such cover means that his premium would be much higher (maybe five times) for risks which he would not otherwise bear. Hence, it may be rational for the party not to insure against the \$100,000 potential risk. However, if the party does choose to buy insurance coverage for losses exceeding his assets, or it is necessary due to a foreseeable threat of damages actions ‘what then is the incentive to take care?’⁵²⁵ Or, in the antitrust field, what is the incentive for a company to abide competition rules if all it has to do is to forward the claim to the insurers who will instruct a lawyer and pay out damages? With regards to automobile accidents, Shavell emphasises that individuals have several good reasons not to cause automobile accidents.⁵²⁶ Apart from wanting to avoid liability, they may be injured themselves, and they face fines for traffic violations and also serious criminal penalties for grossly irresponsible behaviour, therefore:

Given the existence of these incentives toward automobile accident avoidance, and given that the deterrent due to liability is dulled by ownership of liability insurance, one wonders how much the threat of tort liability adds to deterrence.⁵²⁷

Considering that in the US many business do have insurance coverage against antitrust and non-antitrust violations of law,⁵²⁸ and considering that a similar form of coverage, insuring either the claimant against losing the case it has brought or the defendant against such actions, is already available in many EU Member States,⁵²⁹ as Shavell points out, one wonders how much the insurance approach undermines the deterrent aims of competition law.

A further point to note is that although the violation of antitrust rules can be seen as an intentional offence, this does not appear to affect the insurance coverage, hence the protection for antitrust defendants. In *California Shoppers* the defendants had infringed antitrust law by selling below-cost advertising with the intent to injure a competitor.⁵³⁰ The insurance company argued that the cover did not apply ‘to personal injury or advertising offense arising out of the wilful violation of a penal

⁵²⁴ Steven Shavell, ‘Liability for Harm Versus Regulation of Safety’ (1984) 13 *The Journal of Legal Studies* 358

⁵²⁵ *Ibid*, 361

⁵²⁶ Steven Shavell, ‘The Fundamental Divergence Between the Private and the Social Motive to Use The Legal System’ (1997) 26 *The Journal of Legal Studies* 575

⁵²⁷ *Ibid*, 589

⁵²⁸ Kirk A Pasich, ‘Insurance Coverage for Lawsuits Involving Antitrust and Other Anticompetitive Practice Claims’ (*DicksteinShapiro LLP*, 2007)

<http://www.dicksteinshapiro.com/sites/default/files/IC_Antitrust_Anticompetitive_Claims.pdf> accessed 6 April 2014; Amar Gande and Craig M Lewis, ‘Shareholder Initiated Class Action Lawsuits: Shareholder Wealth Effects and Industry Spillovers’ (*Owen Graduate School of Management*, October 2005)

<<http://apps.olin.wustl.edu/jfi/pdf/ShareholderICAL.pdf>> accessed 5 March 2014

⁵²⁹ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules’ (*Ashurst, Comparative Report* 31 August 2004)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 15 April 2014, 95 - 96

⁵³⁰ *California Shoppers, Inc. v. Royal Globe Insurance Co.* 175 Cal App 3d 1, 221 Cal Rptr 171 (1985)

statute'.⁵³¹ In dismissing the argument as unmeritorious the US court of Appeal held that the action was in the nature of a civil antitrust action, and the judgment imposed was in the nature of a civil remedy, i.e. damages.⁵³² Indeed the court concluded that as neither the insurance policy itself nor the statutes and public policy of that state precluded coverage for the treble damages, it necessarily followed that the insurer had and continues to have a duty to indemnify the defendants for the full amount of the judgment.⁵³³ Despite arguments raised by insurer, the US courts seem to have ruled in favour of defendants even in case of doubts regarding the coverage. In *U.S. Fidelity* the District court held that:

[T]he policy protects against poorly or incompletely pleaded cases as well as those artfully drafted ... If the allegations of the complaint are ambiguous or incomplete, the insurer is nevertheless obligated to defend if the case is potentially within the coverage of the policy. Any doubt as to whether the allegations of the complaint state a claim that falls within the policy must be resolved in favour of the insured and against the insurer.⁵³⁴

Likewise in *CNA Cas* the US Court of Appeal held that it is not the form or title of a cause of action that determines the insurer's duty to defend, but the potential liability suggested by the alleged or otherwise available facts.⁵³⁵

Accordingly, as insurance coverage could result in nullifying the deterrent effect of antitrust enforcement policy at the expense of society as a whole, such a strategy should not be used to balance detrimental side effects of private enforcement.

The next part of the analysis focusses on the link between private enforcement and deterrence.

4.2 Deterrence

4.2.1 Deterrence and Private Enforcement

The deterrence effect of antitrust damages actions should be analysed with reference to the ex-ante perspective of the would-be infringer. In this respect, effective deterrence requires that the infringer compares the expected penalty with the expected benefit of engaging in illegal conduct. The concern is whether private enforcement helps the deterrent effect despite the fact that it is

⁵³¹ *Ibid*, 16

⁵³² *Ibid*, 32

⁵³³ *Ibid*, 34

⁵³⁴ *U.S. Fid. & Guar. Co. v. Executive Ins. Co.* 893 F2d 517, (2d Cir 1990), 519

⁵³⁵ *CNA Cas. v. Seaboard Sur. Co.* 176 Cal App 3d 598, 222 Cal Rptr 276 (1986), 609

motivated by the pursuit of a more personal and at times lucrative interest when compared with public enforcement.

In the US, although private enforcement accounts for 90% of all the antitrust enforcement⁵³⁶ anti-competitive conducts, including those breaches giving rise to criminal antitrust violations currently appears to occur far too frequently and it is considered significantly under deterred, even after taking into consideration the effects of the present system of private litigation.⁵³⁷ According to Land and Davis private enforcement does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the Department of Justice. Although admittedly 'it is extremely difficult to measure the deterrence effects of private actions', by at least one measure the effects are considered significant.⁵³⁸ As one of the goals of the antitrust system is optimal deterrence of anti-competitive behaviour Lande and Davis compared the \$18.006 billion paid in private litigation to the \$4.232 billion paid in criminal fines for the same period (1990-2006) in which \$50 million or more was paid to victims of antitrust violations.⁵³⁹ Measured this way private litigation, at least in theory, provides more than four times the deterrence of the criminal fines. In other words an undertaking, before engaging in illegal conduct, would/should give more thought to potential private action for damages than to a case brought by public antitrust authority. The former could attract far larger payments and therefore it would have a greater deterrent effect. This anecdote, about the superior deterrent effect of private enforcement above any other form of antitrust enforcement, is claimed to be so even in respect of criminal prosecution that result in criminal fine and/or jail sentence.⁵⁴⁰ Although the authors plainly acknowledge that there is no objective way to compare the deterrence effect of time spent in prison to the deterrence effect of a criminal fine; that different people would trade off jail and fines in different ways; and that any 'average' figure used to equate the two necessarily is speculative and arbitrary, nevertheless it is argued that a year of incarceration has the same deterrent effect as a \$5 million fine.⁵⁴¹ In the US for the period 1990-2006 there were imposed collectively 428.6 year of jail sentence which are then considered equivalent to \$2.143 billion in criminal fines. Criminal antitrust fines during the same period were approximately \$4.232 billion. Therefore the combined deterrent effect of criminal fines and prison sentence together was in the region of \$6.4 billion. Considering that private enforcement for the same period had attracted \$18 million in damages paid out to private parties,

⁵³⁶ Private actions from 1992 to 2012 range from 84.9% to 96.6%: 'Sourcebook of Criminal Justice Statistics Online' (*Antitrust Cases Filed in U.S. District Courts*, 2012) <http://www.albany.edu/sourcebook/tost_5.html> accessed 16 September 2014, table 5.41

⁵³⁷ Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879, 907

⁵³⁸ *Ibid*, 893

⁵³⁹ *Ibid*, 893 - 894

⁵⁴⁰ *Ibid*, 896

⁵⁴¹ *Ibid*, 895 - 896

private enforcement is considered to be significantly more effective at deterring illegal behaviour than criminal antitrust prosecutions.⁵⁴²

The main criticism to the approach taken by Lande and Davis is that the effectiveness of antitrust enforcement and in this instance the deterrent effect is measured in monetary terms without taking into account of potential or indeed actual consequence for the undertaking/s affected, for the industry concerned and in turn for the wider economy. This approach has also made its way into the EU as a more effective system of private antitrust enforcement is found 'to potentially lead to damage recoveries of €25.7 billion yearly'.⁵⁴³ Even if it is accepted the view that by creating a credible threat of penalties undertakings can be deterred from committing antitrust violations, why cannot a substantial fine be imposed by the public antitrust authority? Or to look at the issue from another angle, what is the aim of an antitrust punishment, compliance with the law or revenue?

The arguments about the quantification of deterrence appear to be based on assumptions and anecdotes of those clearly in support of private enforcement. Lande and Davis acknowledge⁵⁴⁴ that to equate fines and imprisonment is a 'speculative and arbitrary' exercise,⁵⁴⁵ nevertheless the argument is used in an attempt to promote private enforcement. It is worth noting that the same study (ironically titled 'Benefits from Private Antitrust Enforcement') concludes that private enforcement provides a better deterrent effect when compared to public enforcement also reports that in a suit stemming purely by private action, 'To avoid industry-wide bankruptcy, the plaintiffs settled with the buyers' cartel for roughly \$5 million'.⁵⁴⁶ Although not reported by supporters of private enforcement, such as Lande and Davis, it is not uncommon in the US that private enforcement brings to the verge of bankruptcy otherwise viable businesses.⁵⁴⁷ Consequently, the argument that private enforcement could provide better deterrence than public enforcement based on the amount paid out to private parties is rather misleading. Indeed it does not take into consideration the devastating effect, such as 'industry-wide bankruptcy' and unduly excessive settlements that private enforcement could have on market actors and in turn to the nation's economy.⁵⁴⁸

⁵⁴² Ibid, 897

⁵⁴³ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 26

⁵⁴⁴ Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879, fn 61 to 65

⁵⁴⁵ Ibid, 895

⁵⁴⁶ Ibid, fn 41; *Pease v. Jasper Wyman & Son* Reporter of Decisions Docket Kno-04-19, 13 February 2004 Maine Supreme Judicial Court

⁵⁴⁷ For instance: *AT&T Mobility LLC v Concepcion* 131 Sct 1740; *Szabo v. Bridgeport Machines* 249 F3d 672, 49 FedRServ3d 716; *In re Rhone - Poulenc Rorer Incorporated* 1995, 51 F3d 1293, 63 USLW 2579; See chapter 9.2.1

⁵⁴⁸ See chapter 8.2.3

In the EU the system of competition law enforcement has been traditionally less geared towards achieving deterrence through the initiative of private claimants,⁵⁴⁹ as opposed to the US system, where private enforcement is way more developed, and public enforcement was added only at a later stage. In the EU the impact of private enforcement on deterrence is considered 'significant' at the edge and prospective infringers may face an expected liability of up to €29.4 billion annually (including the opponents' legal fees) which, could bring about yearly social benefits as high as 1% of the EU Gross domestic product (GDP), or €113 billion in 2006.⁵⁵⁰ In 2012, the cost of ineffective private enforcement of competition law is estimated at up to € 23 billion or 0.18 % of the EU's 2012 GDP, in terms of compensation that is foregone by victims each year across the EU.⁵⁵¹ Again, as in the US, deterrence is measured by estimating the amount that undertakings found in breach of competition rules could be required to pay to private parties. There appear to be the assumption that the greater the amount to be paid out the greater the deterrent effect and presumably it should be beneficial for competition. Admittedly, achieving greater victim compensation does not necessarily imply achieving optimal deterrence.⁵⁵² The concern is that if effective and not damaging deterrence is to be achieved, any penalty should be imposed in a controlled manner via public enforcement, and not be linked to the interests of private parties. Indeed, there is no reason whatsoever why they would care about optimal deterrence.

4.2.2 Optimal Deterrence and Private Enforcement

The optimal use of private enforcement of public laws, and the relative merits and potential complementarity between public and private enforcement, is particularly relevant when it comes to set an optimal level of deterrence.

Becker notes that obedience to the law is not taken for granted, and public and private resources are generally spent in order to both prevent offences and to apprehend offenders.⁵⁵³ The optimal amount of enforcement depends on, among other things, the cost of catching and convicting offenders, the nature of punishments (for example, whether they are fines or prison terms) and the responses of offenders to changes in enforcement. Becker stressed the need for high penalties to

⁵⁴⁹ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 28

⁵⁵⁰ *Ibid*, 11

⁵⁵¹ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' (Executive Summary of the Impact Assessment Report) SWD(2013) 204 final, 8

⁵⁵² Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 33

⁵⁵³ Gary S Beker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169

compensate for low probabilities of detection.⁵⁵⁴ Becker and Stigler argued that deterrence could be effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable. In addition private parties, and their lawyers, generally motivated by their self-interest could enjoy an implicit advantage over public officials, rewarded by a fixed salary, and could hence remedy to the government's failure leading to inaction in a number of antitrust cases.⁵⁵⁵ However, such an approach, it is submitted, could lead to over-enforcement due to the resulting race to damages.

When viewed in context, the conclusion that private enforcement can prove as efficient as public enforcement rests on the high damages awards required to motivate private parties. Landes and Posner argued that if fines or damages higher than the social costs of the illegal activity were required to achieve an optimal level of deterrence, this would attract higher than optimal numbers of individuals seeking to collect such damages by being private enforcers of the law and devoting their own private resources to detection and prosecution. This would encourage an excessive number of claimants to start competing for the damages award, hence leading to excessive litigation, a consequent waste of resources resulting in over-enforcement and deterrence above socially optimal levels.⁵⁵⁶ Although Roach and Trebilcock suggested that this insight about the potential for over-deterrence does not justify a total abandonment of private enforcement but a need for carefully controlled rewards,⁵⁵⁷ these observations show light on the inherent limits of private enforcement through optimal (or high) sanctions, and on the potential over-detering effect of private damages actions.⁵⁵⁸

Public enforcers not driven by profit maximization could make better decisions about what resources to devote to prosecution than the uncoordinated activities of private parties competing for high damages awards. Private enforcement is particularly efficient when the rewards available are greater than their enforcement costs. In all other cases, public enforcement is most needed in those cases where the fine or damages that can be extracted from a wrongdoer is significantly less than the costs of enforcement.⁵⁵⁹ Under public enforcement, the fine should be set equal to the external damage caused by the activity. By raising the fine and lowering the probability of enforcement, the same level of deterrence can be achieved at less cost. Under private

⁵⁵⁴ Ibid, 170

⁵⁵⁵ Gary S Beker and George J Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 *Journal of Legal Studies* 1

⁵⁵⁶ William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 *Journal of Legal Studies* 1

⁵⁵⁷ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 476

⁵⁵⁸ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 57

⁵⁵⁹ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 477

enforcement, however, raising the fine would lead to a higher probability since profit-maximizing enforcers would be induced to invest more in enforcement.⁵⁶⁰

Polinsky argues that the risk of over-enforcement is not as significant as it might first appear since rational private enforcers would only act in cases where the reward available was greater than the costs of enforcement.⁵⁶¹ Stated differently, if the latter cost significantly increases as a result of growing competition for damages, some plaintiffs would drop the action as it would not be worth the cost of litigation.

Enforcement has a significant administrative cost, which includes both the cost borne by the public sector (operational costs of competition authorities and courts) and the cost borne by the businesses and individuals concerned (cost of lawyers and experts, management time). Moreover, in addition to administrative costs, the pursuit of deterrence could also have undesirable side effects. For instance, errors or the risk of errors in the imposition of sanctions could lead to lawful and economically desirable conduct being deterred.⁵⁶² Consequently as Wils stresses, 'given the existence of these costs, it is unlikely to be optimal to pursue full prevention of antitrust violations ... the optimum will be to pursue a certain degree of prevention, which in all likelihood will be less than 100 %'.⁵⁶³ Melamed argues that compensation for antitrust victims is not always optimal because even a simple, single-damages remedy could create excessive incentives to avoid harm and could thus over deter socially desirable conduct.⁵⁶⁴ Indeed, as Stigler emphasises, one special aspect of the costs limitation upon enforcement is the need to avoid over-enforcement.⁵⁶⁵

In giving preference to private or public enforcement, there is a need to evaluate the deterrent effect of the overall antitrust proceedings. The benefits or detriments of antitrust enforcement are not limited to the competitive conditions in the particular market in which the case is brought, but include significant effects in other markets. The existence of redress for antitrust violation is an opportunity for small firms to bring damages actions against other small firms, even if most cases are brought against large firms.⁵⁶⁶ Encouraging private enforcement presents the risk that litigation costs would significantly increase which would increase the risk of over-deterrence, which could jeopardise the sustainability of the enforcement system, resulting in a misallocation of resources and a net loss to society. Arguably, public enforcement should be used to achieve an optimal level of enforcement of public standards.

⁵⁶⁰ William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 *Journal of Legal Studies* 1

⁵⁶¹ Mitchell A Polinsky, 'Private Versus Public Enforcement of Fines' (1980) 9 *Journal of Legal Studies* 105, 108

⁵⁶² See chapter 8.2.2

⁵⁶³ Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) *World Competition* 3, 13

⁵⁶⁴ Douglas A Melamed, 'Damages, Deterrence, and Antitrust - A Comment on Cooter' (1997) 60 (3) *Law and Contemporary Problems* 93, 93 - 94

⁵⁶⁵ George J Stigler, 'The Optimum Enforcement of Laws' (1970) 78 (3) *Journal of Political Economy* 526, 528

⁵⁶⁶ William M Landes and Richard A Posner, 'Market Power in Antitrust Cases' (1981) 94 (5) *Harvard Law Review* 937, 953

4.2.3 Optimal Deterrence and Public Enforcement

Arguably, a possible way to maximise the effectiveness of antitrust enforcement and at the same time minimising the use of resources is to achieve, or at least make an effort to achieve, an optimal level of deterrence via public enforcement. A Report for the Commission argues that optimal deterrence:

[R]equires that the expected sanction faced by undertakings wishing to adopt an anti-competitive conduct is just sufficient to deter that conduct without deterring also purely legal actions. If this is possible, then all illegal actions will be deterred, and there would not be any need for private enforcement'.⁵⁶⁷

Certainly, setting a perfect level of deterrence in antitrust is a very difficult task if at all possible. However, it is hard to see how private enforcement is the answer to this requirement.

In respect to the deterrence rationale for both public and private enforcement, the optimal sanction is a product of the probability of successful action and the sanction in that event, resulting in an appropriate expected cost of that violation. With private enforcement (unlike public enforcement), these two variables cannot easily be established independently. If a high sanction is set on a low probability of enforcement, this sanction will result in encouraging excessive enforcement activity by private parties motivated by the incentive to obtain the high sanction/compensation. With public enforcement, sanctions can be altered without in any way affecting the resources going into detection and conviction of violators.⁵⁶⁸ But, with a mixed and uncoordinated system of public and private enforcement, it is impossible to set the sanction and probability of enforcement in a systematic way.⁵⁶⁹

A follow-on action for damages can have some additional deterrence as damages clearly are additional costs to the fine or other penalties imposed as result of public enforcement. However, if additional monetary sanctions were required to increase deterrence, as stressed by Wils 'these could be provided for in a much cheaper and more reliable way by increasing the fines imposed in the public enforcement proceeding'.⁵⁷⁰ Moreover, if effective deterrence is to be achieved by monetary sanctions (fines and/or damages), in private enforcement who is setting the optimal amount of the sanctions? Violators of competition rules may well deserve a punishment in the form

⁵⁶⁷ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 59

⁵⁶⁸ William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) *Journal of Law and Economics* 405, 440

⁵⁶⁹ Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall Law Journal* 461, 492

⁵⁷⁰ Wouter P J Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 (3) *World Competition* 473, 16

of monetary sanction and/or injunction when appropriate, but it is hard to see how private enforcement could create and sustain a competitive EU economy,⁵⁷¹ and stimulating economic growth and innovation⁵⁷² by exposing businesses to unlimited private claims worth an unlimited amount. For this very reason ‘Elzinga and Breit would replace the entire damage induced private actions approach with a system of fines (well in excess of current levels)’.⁵⁷³ Such a system would eliminate the perverse incentives of private parties and the effects of reparation costs. While public enforcement has the advantage of separating incentive for enforcement from the penalty itself, the same goal is unachievable under private enforcement.

The task of calculating the optimal amount of the penalties is no doubt a difficult one in practice, because it does not appear feasible to measure economically the theoretically optimal fine for a given antitrust violation.⁵⁷⁴ With public enforcement, however, at least there can be an attempt to target the optimal amount, proportionate to the effect of the anti-competitive conduct in the related market, administratively. Public authorities are subjected to public scrutiny of their behaviour and are free from private lucrative motivation to file lawsuits. When the sanction consists of damages awarded as a result of private litigation, it becomes virtually impossible to target the optimal amount because damages will be calculated not by reference to the offender’s gain, but by reference to the losses which those claimants who happen to bring claims manage to prove.⁵⁷⁵ Seeking the right balance between punishment and deterrence is therefore essential for the effectiveness and efficiency of a system of antitrust enforcement. Private enforcement appears to be unfit to further these objectives.

The US’s approach to antitrust, in the areas of monopolisation, collusion and mergers, suggests that antitrust actions have not promoted competition and benefitted consumers,⁵⁷⁶ therefore as Crandall and Winston emphasises ‘supporters of an interventionist antitrust policy are left with the argument that such policy deters businesses from anti-competitive behaviour’⁵⁷⁷. In the EU (like in any other jurisdiction) the question is what violation would have occurred if the Commission had not prosecuted, for instance, Microsoft?⁵⁷⁸ Obviously, providing evidence on what has been deterred, and therefore did not happen, is a difficult task. As matter of fact however, in the US was ‘not found any evidence that antitrust enforcement has deterred businesses from engaging in

⁵⁷¹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

⁵⁷² Commission, ‘Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council’ SWD(2013) 203 final (Impact Assessment Report), 71

⁵⁷³ William Breit and Kenneth G Elzinga, ‘Private Antitrust Enforcement: The New Learning’ (1985) 28 (2) *Journal of Law and Economics* 405, 440

⁵⁷⁴ Wouter P J Wils, ‘Optimal Antitrust Fines: Theory and Practice’ (2006) 29 (2) *World Competition* 1, 30

⁵⁷⁵ Wouter P J Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 (1) *World Competition* 3, 11

⁵⁷⁶ See chapter 4.1.3

⁵⁷⁷ Robert W Crandall and Clifford Winston, ‘Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence’ (2003) 17 (4) *Journal of Economic Perspectives* 3, 20

⁵⁷⁸ Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3601

actions that would have seriously harmed consumers'.⁵⁷⁹ Indeed contrary to the historical belief, the view that government victories in cases against large industry such as oil and tobacco have deterred other, such as steel companies, from pursuing similar paths to monopoly power, is misleading. For instance, the US Steel's failure to maintain its large share of the country's steel output in the first half of the twentieth century was due to its high costs, not to a concerted effort to avoid antitrust prosecution.⁵⁸⁰

Arguably, antitrust enforcement does have some beneficial deterrent effect. However, any deterrent effect of the antitrust laws must be assessed against the well demonstrated ability of competitive markets to deter anti-competitive practice.⁵⁸¹ The US experience shows that concerns about over-deterrence has led scholars to propose various approaches that would restrict the operation and reduce the power of private antitrust suits.⁵⁸² This need to restrict and reduce the power of private parties, it is submitted, is strictly linked to the compensation factor as under a private enforcement regime it is impossible to control and thus to obtain an optimal level of deterrence, even after setting an adequate level of compensation.

4.2.4 Conclusion

Viewed in isolation, the issue of victims' compensation coupled with the derived deterrent effect seems to tilt the scale in favour of a system of private enforcement. Indeed the Commission contends that public enforcement is not there to serve the compensation goal. While private enforcement could ensure victims compensation, and as by-product also deliver deterrence. However, such an approach appears to be grounded on the theoretical effectiveness of a system of private enforcement. Indeed, empirical studies and antitrust scholars are calling into question whether antitrust should be used for corrective justice, hence whether private enforcement is suitable to achieve the goals of compensation and deterrence.

Arguably, the Commission approach to the issues of compensation and deterrence does not take into consideration the impossibility of knowing the amount that an antitrust defendant would be required to pay out in damages as result of private actions. The impossibility of coordinating litigation stemming from private actions, arguably, results in over or under-enforcement. This chapter shows that while under public proceedings it is possible to adjust the punishment of

⁵⁷⁹ Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) *Journal of Economic Perspectives* 3, 20

⁵⁸⁰ *Ibid*, 20. For a detailed analysis of the US steel failure see: Thomas K McCraw and Forest Reinhardt, 'Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901-1938' (1989) 49 (3) *The Journal of Economic History* 593

⁵⁸¹ Robert W Crandall and Clifford Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17 (4) *Journal of Economic Perspectives* 3, 21

⁵⁸² William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] *Columbia Business Law Review*, 53

antitrust violators according to the severity of the breach, such as in the *Microsoft* case,⁵⁸³ under a private regime it appears impossible to set an ideal amount that will compensate victims while bringing an optimal level of deterrence. Consequently, in this respect, public enforcement appears to be a superior instrument when compared with private enforcement.

The next part of the analysis explores implications deriving from the difficulties in designing an effective level of damages award.

⁵⁸³ Nicholas Banasevic and others, 'Commission Adopts Decision in the Microsoft Case' (*Directorate-General Competition, Competition Policy Newsletter n. 2, Summer 2004*) <<http://europa.eu.int/comm/competition/publications/cpn/>> accessed 6 February 2014, 48

Chapter 5: LEVEL OF DAMAGES AWARDS AND CONCERNS

5.1.1 Introduction

The main objective of the Commission proposals for a private enforcement regime is to improve the legal conditions for victims of antitrust violations to exercise their right to reparation of all damage suffered, 'full compensation is, therefore, the first and foremost guiding principle'.⁵⁸⁴ The Commission also contends that the creation of an effective private antitrust enforcement system is an important tool to create and sustain a competitive EU economy.⁵⁸⁵ A crucial feature of such a system is the level of damages awards as it is directly linked to the incentive, or lack of it, of a private party to file a claim for infringement of competition law.

In principle, the use of private enforcement could be a valid instrument in the prevention of violations and in the compensation of affected victims. However, private enforcement in the US has become the most important agent of enforcement. The reason appears obvious: every nominal violation that held out the prospect of treble damages is challenged regardless of its effects on competition. The level of award is a key element from both the claimant's incentive to bring a suit and for the efficiency of the enforcement system in relation to disgorgement. This chapter presents the 'paradox' that an award of single damages appears to be insufficient is effective in both adequately compensating victims and acting as a deterrent, while multiple damages (or, the 'generous damages' envisaged in the EU)⁵⁸⁶ will inevitably trigger a race to damages.

5.1.2 Single or Multiple Damages?

In the area of antitrust enforcement, once an undertaking is found to have violated competition law then the matter turns on how much it is to be paid to those who have suffered losses as a result of the violation.

According to Becker, as general theory, there is a function relating the number of offences committed by a person to his probability of conviction, to his punishment if convicted, and to other variables, such as the benefit to him from illegal activities, that will determine his willingness to commit an illegal act.⁵⁸⁷ Since only convicted offenders are punished, in effect there is 'uncertainty': if convicted, he pays per convicted offence, while otherwise he does not. An increase in either

⁵⁸⁴ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 1.2

⁵⁸⁵ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

⁵⁸⁶ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, fn 29

⁵⁸⁷ Gary S Beker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169, 177

probability of conviction or punishment would reduce the utility expected from an offence and thus would tend to reduce the number of offences.⁵⁸⁸

In antitrust, the consideration of multiple damages arises because if damages are not multiplied, the award is no more than reparation of harm that is unlawfully caused. The rationale is that after all, if the violator, found guilty of anti-competitive behaviour, merely has to refund his ill-gotten gains, he has nothing to lose by engaging in such acts since not all violations are detected and prosecuted.⁵⁸⁹ As Hovenkamp explains, damages aimed at deterrence need be large enough to deprive an antitrust violator of reasonably anticipated improperly obtained gains plus a little more, adjusted by the probability of detection and prosecution.⁵⁹⁰ For example, suppose a cartel sold £1 million units at a cartel overcharge of £10 per unit, and thus earned total profits of £10 million (ignoring all costs of administering the cartel, internal inefficiencies etc...). Because that £10 million gain to cartel members is identical to the overcharge, optimal damages measured ex-post facto would be £10 million plus a small amount so that the conduct is unprofitable. However, suppose that only one in three cartels is detected and successfully prosecuted. In that case, considered ex-ante, the correct rule would be treble damages. That is, the trebled overcharge is the correct rule assuming that the probability of detection is one in three. Stated differently, the optimal damages award is the overcharge multiplied by the inverse of the probability of detection and successful prosecution.⁵⁹¹

Of course, as Easterbrook emphasises, establishing the correct multiplier is by no means easy, because there is no right answer to the sanctions problem.⁵⁹² Lande argues that a standard optimal deterrence theory suggests that the multiplier should be larger than one because not all antitrust violations are detected and proven.⁵⁹³ For example, sometimes it is assumed that only one-third of all cartels are detected and proven. If this is true, then a multiplier of three is appropriate.⁵⁹⁴

From a deterrence perspective, multiplying actual damages is necessary because some violations of the antitrust laws go undetected. Cavanagh explains that theoretically, a defendant, in evaluating potential liability, discounts damages caused by its illegal conduct by the probability of detection.⁵⁹⁵

⁵⁸⁸ Ibid, 177

⁵⁸⁹ For instance: cartel detection in the EU range between 10% and 20%. In the US range between 15% to 25%. The conviction rate in cartel cases is 75%, see: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 97

⁵⁹⁰ Herbert Hovenkamp, 'Quantification of Harm in Private Antitrust Actions in the United States' (2011) University of Iowa Legal Studies Research Paper <<http://ssrn.com/abstract=1758751>> accessed 29 March 2014, 2

⁵⁹¹ Ibid

⁵⁹² Frank H Easterbrook, 'Detrebbling Antitrust Damages' (1985) 28 *Journal of Law and Economics* 445, 448

⁵⁹³ Robert H Lande, 'Five Myths About Antitrust Damages' (2006) 40 *University of San Francisco Law Review* 651, 657

⁵⁹⁴ Ibid

⁵⁹⁵ Edward D Cavanagh, 'Statement of Edward D. Cavanagh Before The Antitrust Modernization Commission' (*Washington D.C.*, 28 July 2005) <http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Cavanagh.pdf> accessed 23 April 2014, 5

A multiple is necessary to force the violator to equate liability with damages caused. If the probability of detection and prosecution is one in ten, then ten is the appropriate multiple. Under this view, trebling would be appropriate only where the probability of detection is one in three.⁵⁹⁶ On the other hand, trebling is too low for concealable offences such as price-fixing, and too high for unconcealed acts which may be illegal, such as tying and some merger activity. However, this theoretical approach falters when one attempts to translate it into a legal rule. It would be impractical, if not impossible, to compute the likelihood of detection and hence the proper multiple for each industry for each antitrust violation. As Cavanagh puts it, trebling possibly provides only rough justice and predictable, workable rule of law.⁵⁹⁷

An additional consideration is the costs of the judicial system. Every antitrust case involves costs to the judicial system that directly harm the taxpayer and society as a whole. The argument is that if the violation had not occurred, taxpayers would not have incurred these costs. According to Lande, a theory of optimal deterrence requires that all enforcement costs that are a net damage to others, such as costs of judicial administration, should be considered as damages from antitrust violations.⁵⁹⁸ The judicial costs involved in obtaining an award for the victorious claimant are as necessary and inevitable as lawyers' fees, and should therefore be considered 'another damage' from antitrust violations which if met by the violator would increase its costs of wrongdoing.⁵⁹⁹ Although it can be argued that certain fixed and indirect costs of maintaining the judiciary would remain even if the antitrust laws were repealed.

In essence, if awarded damages are not greater than one, potential violators would have an incentive to engage in anti-competitive conduct. Consequently, multiplication is essential to create a credible threat for would-be violators when unlawful acts are not certain to be prosecuted successfully. Some multiplication is necessary even when most of the liability-creating acts are open and notorious because the defendants may be able to conceal facts that are essential to liability.⁶⁰⁰

Following this approach, Stelzer argues that private enforcement is effective only if the successful litigant is awarded some multiple of the damages inflicted upon him if these cases are to act as a deterrent.⁶⁰¹ Undeniably, it must be stressed that a system of private enforcement does not come without costs. Inevitably it has far wider implications than a merely theoretical consideration of victims' compensation. These include those implications derived from the 'need' to award multiple

⁵⁹⁶ Ibid

⁵⁹⁷ Ibid, 5 - 6

⁵⁹⁸ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio State Law Journal 115, 144

⁵⁹⁹ Ibid

⁶⁰⁰ Frank H Easterbrook, 'Detrebling Antitrust Damages' (1985) 28 Journal of Law and Economics 445, 454

⁶⁰¹ Irwin Stelzer, 'Implications for Productivity Growth in the Economy (Notes for Talk at Workshop on Private Enforcement of Competition Law, sponsored by Office of Fair Trading)' (*Hudson Institute*, 19 October 2006) <<http://www.stelzerassoc.com/Speeches/Implications%20for%20Productivity%20Growth%20in%20the%20Economy%20OFT%20Oct%2019,%202006.pdf>> accessed 8 January 2014, 6

damages which could result in over-deterrence and over-compensation. It is worth recalling that treble damages were adopted in the US, in part 'to provide an incentive for private litigants to find and prove violations'.⁶⁰² Therefore, fostering private enforcement in the EU coupled with multiple damages awards, would achieve just that, an incentive to litigation. Whether such outcome would benefit competition and the EU's economy is another matter.

In the EU the myth is that a system of private enforcement would not be a carbon copy of US antitrust private enforcement. In presenting the Green Paper at the European Parliament workshop on antitrust damages actions, Neelie Kroes emphatically stated:

First, let me emphasise that the Green Paper is not a blueprint for an American-style system of actions for damages ... It would be irresponsible not to learn some lessons – positive and critical - from those countries that have already gone through this process.⁶⁰³

A feature of the US system of private enforcement is that of mandatory treble damages award under Section 4 of the Clayton Act.⁶⁰⁴ Because in the EU there is no equivalent provision, compensation should not result in over-compensation nor it should over-deter legitimated business practices. This perception is flawed for two main reasons. First, despite the use of the term 'treble', arguably, damages awards in the US are not treble but equal to, or even less than the actual damages caused by antitrust violations (i.e. single damages).⁶⁰⁵ Second, in the EU the combination of actual loss, loss of profit and a right to interest⁶⁰⁶ makes the award at least equivalent to that of the US.⁶⁰⁷ Consequently, the same issues that have caused the US courts since the early 1970s to impose significant burdens on plaintiffs, especially private ones, to prevent excessive compensation and to prevent over-deterrence,⁶⁰⁸ will inevitably be replicated in the EU.

⁶⁰² Robert H Lande, 'Five Myths About Antitrust Damages' (2006) 40 University of San Francisco Law Review 651, 72. See also: John H Beisner and Charles E Borden, 'Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience' (*Washington D.C. Office of O'Melveny & Myers LLP*) <www.litigationfairness.com/get_ilr_doc.php?fn=Expanding%20priva> accessed 18 January 2014

⁶⁰³ Neelie Kroes, 'The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights' (*Opening Speech at the European Parliament Workshop on Damages Actions for Breach of the EC Antitrust Rules*, 6 June 2006) <http://ec.europa.eu/competition/speeches/text/06062006_en.pdf> accessed 17 April 2014. See also: Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107

⁶⁰⁴ Clayton Act (2006) 15 U.S.C., § 15

⁶⁰⁵ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115,118; Robert H Lande, 'Five Myths About Antitrust Damages' (2006) 40 *University of San Francisco Law Review* 651; Michael C Lovell, 'Are Treble Damages Double Damages?' (1982) 34 (3) *Journal of Economics and Business* 263

⁶⁰⁶ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 2.5; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95; Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 7

⁶⁰⁷ Indeed the award can be even larger, see chapter 5.1.4. See also: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, fn 29

⁶⁰⁸ William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] *Columbia Business Law Review*, 19

5.1.3 The US Treble/Single Damages

A distinctive feature of the US antitrust laws is the provision that automatically trebles (threefold) damages awards to private claimants.⁶⁰⁹ However a detailed analysis of the issue reveals that antitrust violations in the US do not actually give rise to treble damages but are approximately equal to or in fact less than the actual damages caused by antitrust violations. Considering those factors that affect the magnitude of the antitrust damages multiplier, actually awarded damages are most probably at the single level. Indeed the argument goes to the extreme that to be effective, damages awards should be raised. Lande argues that, in light of the general consensus that antitrust damages should be substantially higher than single-fold to account for detection and proof problems, antitrust damages levels should be raised.⁶¹⁰ Indeed Lande emphatically argues that because there is no convincing evidence that, overall, the current combination of damages and fine levels is too high, that they constitute effective duplication or lead to over-deterrence, antitrust damages levels should be raised, for example, by awarding prejudgment interest.⁶¹¹ In this respect, it should be noted that under Section 4 of the Clayton Act a plaintiff may recover prejudgment interest, but only on finding of bad faith on the part of the defendant/s that caused a material delay in the adjudication of the dispute.⁶¹² If the court finds such limited circumstances exist, the court may award simple interest on actual damages for the period beginning on the date of service of the complaint and ending on the date of judgment.⁶¹³ However, as reported by the American Bar Association, there are no reported cases where a court has awarded prejudgment interest to a successful antitrust plaintiff under Section 4a.⁶¹⁴

To ascertain if an award is really trebled or whether despite the term 'treble' the amount awarded is in fact equivalent to the actual harm (i.e. single damages) caused by the violation need calculate, or at least estimate, those factors that affect the amount of antitrust damages actually awarded. These factors, in essence, include: (1) the lack of prejudgment interest; (2) the effects of the statute of limitations; (3) plaintiffs' attorneys' fees and costs and (4) other costs to plaintiffs pursuing cases. Admittedly, each estimate must be approached with extreme caution because the data are far too uncertain to permit precision. Nevertheless, Lande contends that:

⁶⁰⁹ Clayton Act (2006) 15 U.S.C., § 4

⁶¹⁰ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio State Law Journal 115, 119

⁶¹¹ Robert H Lande, 'Why Antitrust Damage Levels Should Be Raised' (2004) 16 (4) Loyola Consumer Law Review 329, 330

⁶¹² Clayton Act (2006) 15 U.S.C., § 15 (a)

⁶¹³ Joseph Goldberg and Dan Gustafson, 'Plaintiffs' Remedies' in Albert A Foer and Jonathan W Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar Publishing Limited 2010), 207

⁶¹⁴ American Bar Association, Jonathan I Gleklen and Tomas P Brown, *Antitrust Law Developments*, vol 1 (7 edn, 2012), 795

[E]ven the rough data presented ... should lead one safely to conclude that awarded damages are much more likely to be the equivalent of actual damages than treble damages. This conclusion, moreover, is relatively robust.⁶¹⁵

To determine the validity of Lande's arguments, those factors affecting the final figure of the damages to be awarded should be scrutinised individually and objectively.

Lack of Prejudgment Interest

Under US antitrust laws automatic interest on antitrust damages only accrues after judgment for the plaintiff. This issue is particularly relevant in the antitrust area because these cases usually take longer to resolve than most others. Considering the duration of the violation, delays between detection and filing of the suit and the litigation period, although the available data is deemed incomplete and imprecise, they do suggest an average delay between breaches and judgment of between eight and nine years. In this instance the argument is that during this period, the victims of antitrust harms are deprived of this money while defendants enjoy its use. Accordingly the award eventually made should be viewed in the light of this by-product/benefit to the defendant.⁶¹⁶ In fact, in *Fishman*, although the US Court of Appeals denied the recovery of prejudgment interest despite the fact that the case lasted for 14 years, dissenting Judge Easterbrook observed:

[T]he time value of money works in defendants' favour. Antitrust cases can be long-lived affairs. This one has lasted 14 years, 2 1/2 of which passed between the finding of liability and the award of damages. During all of the time, the defendants held the stakes and earned interest . . . To deny prejudgment interest is to allow the defendants to profit from their wrong, and because 14 years is a long time the profit may be substantial.⁶¹⁷

Effects of the Statute of Limitations

Section 4 (b) of the Clayton Act provides that any action to enforce any cause of action under the Act shall be forever barred unless it commences within four years after the cause of the action accrued.⁶¹⁸ Some violations, for instance cartels, might persist for seven to eight years, ending either because it collapsed or was detected. In such a case, if the conspiracy lasted for seven to eight years and was followed by a zero to one-half year delay before suit was filed, the four-year statute of limitations would immunise the first 3 to 4.5 years of damages caused by the violation.

⁶¹⁵ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio State Law Journal 115, 171

⁶¹⁶ Ibid, 130

⁶¹⁷ *Fishman v. Estate of Wirtz* 807 F2d 520, 55 USLW 2317, 583 -584

⁶¹⁸ Clayton Act (2006) 15 U.S.C., § 15b

The statute of limitations might immunise an average of 38% to 64% of the damages caused by the conspiracy. Accordingly, some violations that are detected run longer than the statute of limitations and are therefore detected too late for recovery of damages.⁶¹⁹ Moreover, many violations are not detected at all, so their perpetrators pay no damages. Estimation of the rate of detection varies between scholars. In relation to price fixing conspiracies, it is estimated less than one in ten according to some, and between 13% and 17% according to others are successfully prosecuted.⁶²⁰ Therefore, although the presence of these considerations does not necessarily mean that three is the correct multiplier, the primary reason why antitrust damages are automatically trebled is that the violations are frequently difficult to detect.

Plaintiffs' Attorneys' Fees and Costs

An analysis of the Georgetown data sample concluded that awarded attorneys' fees were, on average, the equivalent of approximately 10% to 20% of the monetary awards.⁶²¹ Most of these fees are likely to be paid years before the date of judgment. Although the judgment may reimburse a successful plaintiff the nominal dollars paid to counsel, the plaintiff nevertheless will lose the time value of this money during the lag between the payment of the fees and the date of judgment because plaintiffs are not awarded interest on their attorneys' fees. It is difficult to ascertain whether plaintiffs or their lawyers lose as a result of this effect. However it is more likely that plaintiffs, not their attorneys, will absorb this loss.⁶²² Because the average time lag until judgment is substantial, it should be taken into account in the evaluation as to whether awards are in effect treble or single. It seems likely that plaintiffs are not fully reimbursed for all their legal expenses, therefore the court award does not equal to a treble recovery.

Other Plaintiff Costs of Pursuing the Case

Inevitably any individual or business facing a lawsuit must invest resources in dealing with it and antitrust is no exception. Indeed it is common for corporate employees to spend significant amounts of time pursuing antitrust litigation. This investment includes time spent conferring with lawyers, assembling necessary documentation, testifying, and responding to the inevitable requests from the other parties. Antitrust cases often require the attention of top corporate executives which then are prevented from dedicating their time to their businesses related duties. A sample

⁶¹⁹ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio State Law Journal 115, 136

⁶²⁰ Ibid, fn 1

⁶²¹ Steven C Salop and Lawrence J White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 The Georgetown Law Journal 1001, 1013

⁶²² Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio State Law Journal 115, 140

data of corporate officials shows an average of 203 hours of executive time per case.⁶²³ This figure does not include administrative or nonexecutive time, corporate overhead or direct expenses, Board of Directors time, in-house counsel time, time wasted because of disruption of employee's routine, or time spent by employees discussing the case. Although admittedly the data is uncertain, taking these elements under consideration the lost corporate time and expenses could constitute from 19% to 63% of the transfer.⁶²⁴ Moreover, plaintiffs are required to mitigate damages, and these efforts are not compensated by the judgment.⁶²⁵

In summary,⁶²⁶ Lande argues that important US policy analysis is predicated in part upon the assumption that antitrust damages currently are, on the whole, at the threefold level, but this 'assumption is at best unproven and most likely is significantly in error'.⁶²⁷ Accordingly, Lande contends, that antitrust damages levels should be raised so that they do result in the effective treble damages necessary to insure optimal deterrence of anti-competitive conduct.

In considering factors such as adjustments for lack of prejudgment interest, limitations imposed by statutes, legal fees, and corporate costs for plaintiffs to pursue the case, the analysis shows that the US awarded antitrust damages are probably only really equal to, at most, the actual harms caused by the violation, in other words, US antitrust 'treble' damages are actually only single damages.⁶²⁸ Indeed Lande recommends that damages levels should be raised so that they are at the real three-fold level for all types of antitrust cases. Prevailing plaintiffs should automatically receive prejudgment interest, starting when the antitrust damages first occur as an important move towards this goal.⁶²⁹

With regard to the issue of whether the US antitrust damages awards can be considered single or multiple damages, a further point to note is that the majority of cases are settled out of court. In these circumstances, as Leslie explains, despite the fact that that trebling is automatic in antitrust cases, US courts do not consider trebling of antitrust damages to ascertain the adequacy of a proposed settlement.⁶³⁰

⁶²³ Paul V Teplitz, 'The Georgetown Project: An Overview of the Data Set and its Collection' in Lawrence White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 72-73

⁶²⁴ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115, 143

⁶²⁵ *Fishman v. Estate of Wirtz* 807 F2d 520, 55 *USLW* 2317, 557. See also: American Bar Association, *Antitrust Law Developments*, vol 1 (6 edn, 2007), 845

⁶²⁶ Lande offers a detailed analysis of the adjustments made to awards. Here those adjustments are reported only in summary. Moreover here are discussed those adjustments that, although estimate, are plausible. Other factors such as 'duplicative recovery' (six-fold) which are 'only a theoretical possibility that has never occurred in the real world' are omitted. Robert H Lande, 'Five Myths About Antitrust Damages' (2006) 40 *University of San Francisco Law Review* 651, 658

⁶²⁷ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115, 172

⁶²⁸ Robert H Lande, 'Five Myths About Antitrust Damages' (2006) 40 *University of San Francisco Law Review* 651, 656

⁶²⁹ *Ibid*, 674

⁶³⁰ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1011

Particularly in class action proceedings, the settlement figure reported in various studies suggests a settlement rate between 70% and 78%.⁶³¹ In the US class action proceedings, an out-of-court settlement must be approved by the court.⁶³² Criteria for approval, amongst other things, include the range of reasonableness of the settlement amount in the light of the best possible recovery.⁶³³ Indeed, in *Grinnell* which represents the landmark case on the issue, the US Court of Appeals considered that it was ‘improper’ to consider trebling in evaluating the recovery figure which will be used to measure the adequacy of a settlement offer.⁶³⁴ In *Alexander*, the court explained that ‘in reviewing the range of reasonableness of the settlement fund in the light of the best possible recovery, the trebling of the estimated recovery following trial may not be considered’.⁶³⁵ Accordingly, considering the significant percentage of cases settled, despite Section 4 of the Clayton Act stating that any one injured by antitrust violation ‘shall recover threefold the damages by him sustained’,⁶³⁶ in reality it appears that the US damages awards are not three times the actual loss suffered by victims.⁶³⁷ Therefore the reason as to why the US Courts and Congress⁶³⁸ are limiting private antitrust litigation does not lie in the award itself, but on the fact that private damages actions merely result in a powerful weapon in the hand of private claimants whose objective is not optimal enforcement. Consideration should be given by EU policy makers as to whether such scenario would be replicated in the EU as a consequence of facilitating private enforcement.

The next topic is to examine the level of damages awards contemplated in the EU so as to ascertain the likelihood, of the US over-enforcement by private parties, taking place in the EU.

5.1.4 The EU Damage Awards

The primary objective of the Commission proposals is to improve the legal conditions for victims to exercise their right, under the TFEU, to reparation of all damage suffered as a result of a breach of the EU antitrust rules. Accordingly, full compensation is the first and foremost guiding principle.⁶³⁹ It

⁶³¹ Ibid, 1011 -1012; Steven C Salop and Lawrence J White, ‘Economic Analysis of Private Antitrust Litigation’ (1986) 74 The Georgetown Law Journal 1001, 1010 table 8; Jeffrey M Perloff and Daniel L Rubinfeld, ‘Settlements in Private Antitrust Litigation’ in Lawrence J White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 166; John M Bizjak and Jeffrey L Coles, ‘The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm’ (1995) 85 The American Economic Review 436, 457 table 6

⁶³² US Federal Rules of Civil Procedure, December 2010, Rule 23 (a)

⁶³³ *City of Detroit v. Grinnell Corp.* 495 F2d 448, 463 (2d Cir 1974), 463

⁶³⁴ Ibid, 458

⁶³⁵ *Alexander v. National Football League* 1977 WL 1497, 17

⁶³⁶ Clayton Act (2006) 15 U.S.C., § 15 (a)

⁶³⁷ The de-trebling by US courts is further discussed in the context of class action proceedings, see chapter 9.1.5

⁶³⁸ Leon B Greenfield and David F Olsky, ‘Treble Damages: to What Purpose and to What Effect?’ (*British Institute of International and Comparative Law*, 2 February 2007)

<<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014, 1. For a detailed analysis of the measures taken by US court, see: William E Kovacic, ‘The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix’ [2007] Columbia Business Law Review

⁶³⁹ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

follows, that if compensation is a goal, the remedies must be sufficiently meaningful to motivate claimants to come forward.⁶⁴⁰ Back in 2005 the Commission proposed the doubling of damages at the discretion of the court, automatic or conditional,⁶⁴¹ as one of the options in the remedies aimed at promoting greater use of private enforcement.⁶⁴² In 2013 the Commission seems to have excluded the multiple damages option due to a disproportionate cost/benefit ratio (high costs entailed in exchange for a higher rate of achievement of the objectives).⁶⁴³ The fact remains, however, that in order to deter, fines/damages must exceed the expected gain from the violation, multiplied by the inverse of the probability that a fine will be imposed. Penalties hence set need to exceed the unjust enrichment, and should automatically have disgorgement as one of their objectives.⁶⁴⁴ Because a single damages award fails to incorporate the necessary multiplier inversely reflecting the probability of detection and punishment, an alternative is that of multiple damages. This raises the question of whether it is realistic to design a damages award that creates an incentive for private party to come forward, adequately compensate victims without incentivising a race to damages due to generous monetary awards. Furthermore, considering the components of the EU antitrust damages award, although in theory it should not be as generous as the US treble damages awards, in reality the EU damages award could end up in being even larger.

One crucial aspect of the US system which actually weakens the impact of treble damages is the lack of prejudgment interest and this 'substantial flaw' means that in practice treble damages are equivalent to single damages awards, particularly given the time-lag between violation and judgment.⁶⁴⁵ If prejudgment interest is considered, the treble damages remedy is less significant than it first appears.⁶⁴⁶ As it is admitted, 'the application of prejudgment interest in Europe may

⁶⁴⁰ Albert A Foer, 'The Ideal Model of Private Enforcement of Competition Law' (*The American Antitrust Institute*, 26 June 2009) <http://antitrustinstitute.org/files/Prague%20paper%20Foer.6.27.09_070920091619.pdf> accessed 1 March 2014, 21

⁶⁴¹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 2.3

⁶⁴² Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 33 - 34;

Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 2.3

⁶⁴³ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' (Executive Summary of the Impact Assessment Report) SWD(2013) 204 final, 13; Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 80

⁶⁴⁴ Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) *World Competition* 3, 14

⁶⁴⁵ On this point see chapter 5.1.3. Barry J Rodger, 'Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages?' [2003] *European Competition Law Review* 103, 104; Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115, 118; Robert H Lande, 'Five Myths About Antitrust Damages' (2006) 40 *University of San Francisco Law Review* 651; Michael C Lovell, 'Are Treble Damages Double Damages?' (1982) 34 (3) *Journal of Economics and Business* 263

⁶⁴⁶ Barry J Rodger, 'Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages?' [2003] *European Competition Law Review* 103, 104

lead double damages to end up being larger than treble damages without prejudgment interest'.⁶⁴⁷ However, as the Commission admits and it is documented in studies focusing specifically on private damages actions,⁶⁴⁸ 'on average, single damages with pre-judgment interest can be said to equate roughly to double damages without pre-judgment interest'.⁶⁴⁹ Therefore, considering that despite the term 'treble' in reality the US damages awards is single damages,⁶⁵⁰ an European antitrust claimant can expect to recover an amount at least as generous as an equivalent case in the US.

Following the Court of Justice ruling in *Courage and Manfredi*,⁶⁵¹ any citizen or business who suffered harm as a result of a breach of EU antitrust rules must be able to claim reparation from the party who caused the damage as this right of victims to compensation is guaranteed by EU law. This 'reparation' means that victims of an EU competition law infringement are entitled to full compensation of the harm caused.⁶⁵² This means compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus interest⁶⁵³ from the time the damage occurred until the capital sum awarded is actually paid.⁶⁵⁴ As for the concepts *damnum emergens* and *lucrum cessans*, AG Capotorti defined them in the following terms in his opinion in *Ireks-Arkady*:

It is well known that the legal concept of 'damage' covers both a material loss *strict senso*, that is to say, a reduction in a person's assets, and also the loss of an increase in those assets which would have occurred if the harmful act had not taken place (these two alternatives are known respectively as *damnum emergens* and *lucrum cessans*).⁶⁵⁵

⁶⁴⁷ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, fn 29

⁶⁴⁸ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Ashurst, Comparative Report* 31 August 2004)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 15 April 2014; Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Analysis of Economic Models for the Calculation of Damage, Ashurst*, 31 August 2004)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 9 January 2014; Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014

⁶⁴⁹ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), fn 58

⁶⁵⁰ Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115, 118; Michael C Lovell, 'Are Treble Damages Double Damages?' (1982) 34 (3) *Journal of Economics and Business* 263; Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009

⁶⁵¹ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

⁶⁵² For details of the quantification of harm see: Commission, 'Staff Working Document Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' SWD(2013) 205 final

⁶⁵³ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95

⁶⁵⁴ Oxera and others, *Quantifying Antitrust Damages. Towards Non-Binding Guidance for Courts* (Study Prepared for the European Commission, Publications Office of the European Union 2009), 2

⁶⁵⁵ Case 238/79 *Ireks-Arkady GmbH v. Council and Commission* [1979] ECR 2955, 2998

Compensation, therefore, is not limited to actual loss, for example due to an anti-competitive price increase, but also extends the loss of profit, for example as a result of any reduction in sales, and encompasses a right to interest.⁶⁵⁶ The Commission stresses that 'in particular, the damage awards should include pre-judgment interest in order to compensate the victims for the real value of the harm suffered'.⁶⁵⁷ Indeed the Commission is bound to follow the Court of Justice ruling in *Courage and Manfredi*.⁶⁵⁸ The Commission in 2005 proposed the introduction of double damages,⁶⁵⁹ but, having noted the disproportionate costs of such feature in terms of potential overcompensation of victims and over-deterrence retracted from that position in 2013,⁶⁶⁰ stating that punitive damages should be excluded.⁶⁶¹ However, this change of strategy cannot happen in relation to the components (compensation for actual loss, loss of profit and interest) of the damages award, as neither the Commission (nor NCAs) nor the national courts of EU Member States can override the Court of Justice ruling.

What is remarkable is that the EU legal system is deemed very different from the US legal system. The latter is considered the result of a 'toxic cocktail' because of the combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures).⁶⁶² However when it comes to awards for breaches of antitrust rules the two systems appear to be closer than first envisaged. Although the 'Commission seeks to encourage a competitiveness culture e.g. where businesses which play by the rules can realise their competitive advantages, not a litigation culture'.⁶⁶³ A system of private enforcement in the EU, it is submitted, would result in exactly that, a litigation culture in which businesses will fight in court to obtain what they cannot obtain with honest competition.

As a matter of fact it must be recognised that compensation does not come without costs. Fundamentally, the award of multiple damages appears unavoidable if the goals of compensation and deterrence are to be achieved. Stelzer, speaking in London, emphasised that private enforcement can only be effective if the successful litigant is awarded some multiple of the

⁶⁵⁶ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 2.5

⁶⁵⁷ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

⁶⁵⁸ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

⁶⁵⁹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 2.3

⁶⁶⁰ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' (Executive Summary of the Impact Assessment Report) SWD(2013) 204 final, 13 Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 80

⁶⁶¹ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' (Executive Summary of the Impact Assessment Report) SWD(2013) 204 final, 13

⁶⁶² Commission, 'Green Paper on Consumer Collective Redress - Questions and Answers' (MEMO/08/741, 27 November 2008) <<http://europa.eu/rapid/pressReleasesAction.do?format=HTML&aged=0&language=EN>> accessed 14 February 2014, 4

⁶⁶³ *Ibid*, 4

damages inflicted upon him if these cases are to act as a deterrent.⁶⁶⁴ On the other hand, as Greenfield and Olsky are stressing, the availability of multiple damages deters competitive behaviour that promotes efficiencies, encourages frivolous lawsuits and forces unduly large settlements.⁶⁶⁵

Against the background that damages awards in the EU are, at least equivalent, to those of the US, it is worth noting that in the US there is a phenomenon that Calkins calls the concept of 'equilibrating tendencies'.⁶⁶⁶ The core of this concept is that the government institutions responsible for implementing antitrust policy, such as enforcement authorities and courts, will use means within their control to correct perceived imbalances in the competition policy system. The judiciary's role in deciding antitrust disputes provides several possible examples of equilibrating tendencies at work. For example, a court might perceive that private parties, especially plaintiffs who are the defendant's competitors, too often challenge behaviour that is benign or pro-competitive. Or a court might fear that the US statutory requirement that successful private plaintiffs be awarded treble damages runs a risk of over-deterrence.⁶⁶⁷ A court might seek to correct such perceived infirmities in the antitrust system by recourse to means directly within its control. Namely, by modifying doctrine governing liability standards or by devising special doctrinal tests to evaluate the worthiness of private claims.⁶⁶⁸ The rationale for the court intervention can be found in the fact that the rule of mandatory trebling has adverse effects, not only in encouraging baseless or trivial suits brought in hopes of coercing settlements, but also discouraging legitimate competitive behaviour.⁶⁶⁹

Arguably, in the EU, the costs of providing an adequate level of compensation to victims of antitrust violations, although unavoidable can be mitigated by empowering public authorities to award compensation once the harm to competition has been identified and quantified. Although not perfect, such a system would be free from incentives rooted in private financial gains or other

⁶⁶⁴ Irwin Stelzer, 'Implications for Productivity Growth in the Economy (Notes for Talk at Workshop on Private Enforcement of Competition Law, sponsored by Office of Fair Trading)' (*Hudson Institute*, 19 October 2006) <<http://www.stelzerassoc.com/Speeches/Implications%20for%20Productivity%20Growth%20in%20the%20Economy%20OFT%20Oct%2019,%202006.pdf>> accessed 8 January 2014, 6

⁶⁶⁵ Leon B Greenfield and David F Olsky, 'Treble Damages: to What Purpose and to What Effect?' (*British Institute of International and Comparative Law*, 2 February 2007)

<<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014, 1

⁶⁶⁶ Stephen Calkins, 'Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System' (1986) 74 *Georgetown Law Journal* 1065, 1067

⁶⁶⁷ *Ibid*, 1081 - 1082

⁶⁶⁸ William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (*British Institute of International & Comparative Law*, 15 May 2003) <<http://www.ftc.gov/speeches/other/030514biicl.shtml>> accessed 3 April 2014, 4

⁶⁶⁹ For a detailed analysis of the measures taken by US courts, see: William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] *Columbia Business Law Review*; Leon B Greenfield and David F Olsky, 'Treble Damages: to What Purpose and to What Effect?' (*British Institute of International and Comparative Law*, 2 February 2007) <<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014

private interests. Conversely, if compensation is incorporated as a goal of a private system of antitrust enforcement, the efficacy of the system is greatly impaired.⁶⁷⁰ This conclusion emerges from the serious conceptual difficulties in designing a private enforcement regime that simultaneously serves both incentivising and compensation rationales without at the same time instigating unmeritorious claims simply aimed at monetary awards.

5.2 Abuse of Damages Provisions by Private Parties

5.2.1 Damages and Abuses

Although the EU, the US and the Canadian antitrust system are different, when it comes to private actors empowered to enforce competition law, the similarities are significant. Private individual and private firms will generally pursue antitrust actions when it is in the private individual or firm's interest, an interest that could easily diverge from the social interest.⁶⁷¹ As McAfee points out, individuals and firms may have incentives to use the antitrust laws strategically, which may hinder rather than promote competition.⁶⁷² The issue of 'abuse' of the power given to private party appears of relevance in the evaluation of the effectiveness of a private enforcement regime in the EU.

In the EU, although it is stressed that a private enforcement regime should not be 'a blueprint for an American-style system of actions for damages' as it will be 'irresponsible not to learn some lessons',⁶⁷³ nevertheless the arguments about potential benefits of private enforcement in the EU are based on the US system. A report prepared for the Commission stating that under a conservative assumption, foregone benefits for victims of antitrust infringement range between

⁶⁷⁰ Warren F Schwartz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (American Enterprise Institute for Public Policy Research 1981), 32 - 33

⁶⁷¹ See chapter 2.1.6

⁶⁷² Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private Antitrust Litigation: Pro-competitive or Anti-competitive?' (2005) Emory Law and Economics Research Paper No 05-18 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=784805>, 2; Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014; Preston R McAfee and Nicholas V Vakkur, 'The Strategic Abuse of Antitrust Laws' (2004) 1 (3) Journal of Strategic Management Education 1

⁶⁷³ Neelie Kroes, 'The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights' (*Opening Speech at the European Parliament Workshop on Damages Actions for Breach of the EC Antitrust Rules*, 6 June 2006) <http://ec.europa.eu/competition/speeches/text/06062006_en.pdf> accessed 17 April 2014. See also: Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107, 111

€5.7 billion and €23.3 billion each year, admits 'this result was reached using US data as a benchmark'.⁶⁷⁴ Consequently the link damages-abuses under the US system must be considered. In the US more than 90% of antitrust cases are by private plaintiffs rather than government enforcement.⁶⁷⁵ The vast majority of private antitrust actions include a claim for damages.⁶⁷⁶ In 2007 the US Antitrust Modernisation Commission (AMC) was tasked to report on the issue of treble damages.⁶⁷⁷ The AMC reported that in addition to other goals; such as deterrence, punishment of violator and compensation, one important goal, according to the AMC, is that of creating an incentive for private parties to enforce antitrust law.⁶⁷⁸ According to the AMC incentives for private enforcement reinforce the other objectives of treble damages by increasing the likelihood that claims will be brought against violators, thereby enhancing deterrence, appropriate disgorgement and punishment, and compensation to victims.⁶⁷⁹ The AMC concluded that 'no change is recommended to the statute providing for treble damages in antitrust cases'.⁶⁸⁰ Arguably, this recommendation simply reflected the political approach to the issue, and not a realistic economic analysis. In fact 'Congress has never seriously considered changing it'.⁶⁸¹ Indeed, mandatory treble damages are such a bedrock of the US antitrust landscape that they are likely to remain part of US antitrust law for our lifetimes.⁶⁸² However, there is evidence that since the early 1970s, US courts have restricted the possibility of private party to obtain treble damages, by means available to them, i.e. by imposing significant burdens on claimants.⁶⁸³ Therefore, the rhetorical question is: if awarding treble damages is so beneficial in antitrust enforcement, as the AMC contends, why are the US courts keen to limit it? The answer is that given by Schwartz in that, if compensation could be provided without costs, then it would not be a problem justifying it.⁶⁸⁴ In this instance, the costs

⁶⁷⁴ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 11

⁶⁷⁵ Private actions from 1992 to 2012 range from 84.9% to 96.6%: 'Sourcebook of Criminal Justice Statistics Online' (*Antitrust Cases Filed in U.S. District Courts*, 2012) <http://www.albany.edu/sourcebook/tost_5.html> accessed 16 September 2014, table 5.41

⁶⁷⁶ Herbert Hovenkamp, 'Quantification of Harm in Private Antitrust Actions in the United States' (2011) University of Iowa Legal Studies Research Paper <<http://ssrn.com/abstract=1758751>> accessed 29 March 2014, 1

⁶⁷⁷ Deborah A Garza and others, 'Report and Recommendations' (*Antitrust Modernization Commission*, 2 April 2007) <http://www.amc.gov/report-recommendation/amc_final_report.pdf> accessed 29 January 2014

⁶⁷⁸ *Ibid*, 245

⁶⁷⁹ *Ibid*, 245 - 246

⁶⁸⁰ *Ibid*, 245

⁶⁸¹ Herbert Hovenkamp, 'Quantification of Harm in Private Antitrust Actions in the United States' (2011) University of Iowa Legal Studies Research Paper <<http://ssrn.com/abstract=1758751>> accessed 29 March 2014, 2

⁶⁸² Leon B Greenfield and David F Olsky, 'Treble Damages: to What Purpose and to What Effect?' (*British Institute of International and Comparative Law*, 2 February 2007)

<<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014, 2

⁶⁸³ For a detailed analysis of the measures taken by US court, see: William E Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] *Columbia Business Law Review*; Leon B Greenfield and David F Olsky, 'Treble Damages: to What Purpose and to What Effect?' (*British Institute of International and Comparative Law*, 2 February 2007)

<<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014

⁶⁸⁴ Warren F Schwartz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (American Enterprise Institute for Public Policy Research 1981), 32. See chapter: 4.1.3

are in terms of impairing and discouraging legitimate businesses enterprise. Of course, compensation has a more devastating effect when damages are trebled. As Cavanagh put it, mandatory trebling has been a key element in a remedies regime that has evolved over the last 120 years in the US. Ironically, at the very time the private antitrust remedy is limited in the US, antitrust enforcement authorities in Europe have contemplated the adoption of the private right of action in antitrust enforcement.⁶⁸⁵

The next part of the analysis explores the approach taken by the Canadian antitrust authorities towards private enforcement with focus on the level and under what conditions damages are awarded.

5.2.2 The Canadian Competition Regime

An overview of the Canadian competition provisions furthers the evaluation of the efficacy of private enforcement in the EU as features and implications can be compared between the EU and the Canadian approach to private enforcement. Due to a different terminology and operation of the Canadian provisions (compared to that of the EU and that of the US), in order to evaluate the role of private parties in the enforcement process, an overview of the Competition Act is necessary.

The Canadian Competition Act⁶⁸⁶ is the oldest antitrust statute in the western world.⁶⁸⁷ Indeed it was enacted in 1889, one year before the US Sherman Act in 1890. Unlike in the US, in which more than 90% of antitrust cases are brought by private plaintiffs rather than antitrust authorities,⁶⁸⁸ the Canadian regime can be considered a public enforcement regime as private parties have a limited role and private actions are in effect rare.⁶⁸⁹

Until 1976 the Competition Act was exclusively criminal in nature but now it includes both criminal offences and civil provisions. The latter, labelled under the Act as 'reviewable matters'.

⁶⁸⁵ Edward D Cavanagh, 'The Private Antitrust Remedy: Lessons from the American Experience' (2009) 41 Loyola University Chicago Law Journal 629, 629 - 630

⁶⁸⁶ Competition Act R.S.C., 1985, c. C-34

⁶⁸⁷ Yves Bériault and Oliver Borgers, 'Overview of Canadian Antitrust Law' (*The Antitrust Review of the Americas*, 2004) <http://www.mccarthy.ca/pubs/antitrust_overview.pdf> accessed 11 March 2014; Competition Bureau, 'Competition Law in a Global and Innovative Economy - A Canadian Perspective' (3rd Brics International Competition Conference, New Delhi, India, November 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>> accessed 27 January 2014

⁶⁸⁸ Private actions from 1992 to 2012 range from 84.9% to 96.6%: 'Sourcebook of Criminal Justice Statistics Online' (*Antitrust Cases Filed in U.S. District Courts*, 2012) <http://www.albany.edu/sourcebook/tost_5.html> accessed 16 September 2014, table 5.41

⁶⁸⁹ Stephen Krebs, 'Top Ten Things to Know about the Canadian Competition Act' (*Association of Corporate Counsel*, 1 October 2010) <<http://www.acc.com/legalresources/publications/topten/canadian-competition-act.cfm?makepdf=1>> accessed 31 January 2014, 4; Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 469

Criminal offences are contained in Sections 45 to 55 of the Act.⁶⁹⁰ Broadly speaking these offences are the Canadian equivalent of the provisions contained in Art 101 TFEU, however, unlike in the EU under the Canadian Competition Act they are criminal offences. Under Section 45 a person commits an offence if, with a competitor or with respect to a product, conspires, agrees or arranges price-fixing agreements. Section 47 deals with bid-rigging defined as an agreement or arrangement between two or more persons whereby one of those persons agrees not to submit a bid or tender in response to a call or request for bids or tenders, or agrees to withdraw a bid or tender submitted in response to such a call or request. Section 52 deals with criminal misleading advertising and deceptive telemarketing, and Section 55 deal with pyramid selling schemes. Under the Act, anti-competitive agreements such as agreements between competitors to fix prices, allocate markets or customers, or control the supply of a product (Section 45) and bid-rigging (Section 47) are 'per se illegal' and violate criminal provisions of the Act, regardless of whether they have an anti-competitive impact.⁶⁹¹

The civil sections of the Competition Act can be found from Section 75 to 92.⁶⁹² These are civil provisions and accordingly a breach of such rules does not attract prison sentences. Under the Act these offences are considered 'matters reviewable by tribunal', and accordingly the Canadian Competition Tribunal has jurisdiction to deal with such infringements. Except for price-fixing agreements which is dealt with under the criminal provision of the Competition Act, broadly speaking, these offences resemble the EU competition provisions contained in Art 102 TFEU. Section 75 deals with refusal to supply, and Sections 77 to 79 make commercial practices such tied selling, exclusive dealing and market restriction an abuse of a dominant position held by businesses.

The Canadian Competition Act is administered and enforced by the Bureau lead by the Commissioner. In addition to criminal offences under the Competition Act, the Bureau also investigates the so called 'Civil Reviewable Matters' under the Act's civil provisions.⁶⁹³ The Bureau investigates reviewable practices and may challenge them directly before the Competition Tribunal. These provisions cover activities that are generally legal (such as lowering prices) and only take on an illegal nature when the Competition Tribunal reviews all the circumstances and concludes that the activity has a harmful, anti-competitive effect. Indeed the Tribunal clarified that:

Part VIII [Matters reviewable by the Tribunal, i.e. civil provisions] establishes a special regime for addressing what is in the usual course normal and legal competitive behaviour among firms. It is for this reason that the Act refers to these practices as 'reviewable'

⁶⁹⁰ Competition Act R.S.C., 1985, c. C-34

⁶⁹¹ Stephen Krebs, 'Top Ten Things to Know about the Canadian Competition Act' (*Association of Corporate Counsel*, 1 October 2010) <<http://www.acc.com/legalresources/publications/topten/canadian-competition-act.cfm?makepdf=1>> accessed 31 January 2014, 2

⁶⁹² Competition Act R.S.C., 1985, c. C-34

⁶⁹³ *Ibid*, sections 75 - 92

instead of 'unlawful', 'illegal' or 'prohibited'. Indeed, 'reviewable' practices are presumptively legal.⁶⁹⁴

Practices such as alliances and joint venture are not per se illegal, but the Competition Tribunal may determine that a civil violation exists if it finds that the agreement has or is likely to prevent or lessen competition substantially in a market. As the Supreme Court of British Columbia held in *Novus Entertainment*, the lawfulness or unlawfulness of the conduct under scrutiny remains subject to the Competition Tribunal's finding that the violator has engaged in anti-competitive conduct.⁶⁹⁵ Reviewable matters are adjudicated by the Tribunal and the penalties imposed are called Administrative Monetary Penalties and can be up to \$10 million, and for each subsequent order up to \$15 million.⁶⁹⁶ In addition the Tribunal may make remedial orders, for instance prohibiting a specific conduct or requiring the violator to do business with the supplier on usual terms.⁶⁹⁷

The Act permits plaintiffs to pursue two types of claims: a 'private action' before the courts for damages and other relief for conduct that violates the Act's criminal provisions, and an application for 'private access' before the Competition Tribunal for conduct that qualifies as a reviewable practice.⁶⁹⁸ Section 36 of the Canadian Competition Act provides the statutory base for private action, while Section 103.1 permits private parties to apply for leave to make an application to the Tribunal (i.e. private access) for remedial orders.⁶⁹⁹

The difference in operation of these two forms of private actions is of fundamental importance in the appraisal of private enforcement in Canada and it is the focus of the next part of the analysis.

5.2.3 Private Enforcement of Canadian Competition Rules

Under the Canadian Competition Act⁷⁰⁰, parties may commence private actions for violations of either the criminal provisions of the Act (Sections 45 to 55) or a breach of a court or Competition Tribunal order made under the Act (Section 75 to 92). Private competition law actions in Canada are typically commenced in the context of three circumstances: 1) consumers alleging damages as a result of a conspiracy between suppliers (i.e. a price fixing conspiracy relating to a product or key input); 2) consumers alleging damages as a result of misleading advertising claims (i.e. false or misleading claims in relation to a product, investment or other business opportunity, etc... under

⁶⁹⁴ *Commissioner of Competition v Canada Pipe Company LTD* CT-2002-006, 0076a, 90

⁶⁹⁵ *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.* 2010 BCSC 1030, 36

⁶⁹⁶ Competition Act R.S.C., 1985, c. C-34, section 79 (3.1)

Competition Act, R.S.C. 1985, c. C-34, Section` 79 (3.1)

⁶⁹⁷ For example under the price maintenance provision, section 76: *ibid*

⁶⁹⁸ Stephen Krebs, 'Top Ten Things to Know about the Canadian Competition Act' (*Association of Corporate Counsel*, 1 October 2010) <<http://www.acc.com/legalresources/publications/topten/canadian-competition-act.cfm?makepdf=1>> accessed 31 January 2014, 3 - 4

⁶⁹⁹ Competition Act R.S.C., 1985, c. C-34

⁷⁰⁰ *Ibid*

Section 74⁷⁰¹); or 3) competitors alleging damages based on misleading claims made by a competitor or alleged conspiracy entered into among other competitors.⁷⁰²

Under the Act,⁷⁰³ private enforcement takes two different forms: one is 'private action' for damages under Section 36 and the other is 'private access' to the Competition Tribunal under Section 103.1. A significant difference exists in the types of remedies available under each section. While under Section 36 successful plaintiffs are entitled to recover damages, under Section 103.1 only remedial orders are available.

Private Action

The legal basis for a 'private action' for damages are contained in Section 36 (1) of the Competition Act which reads:

Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI, or (b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.⁷⁰⁴

Section 36 enables anyone who has been harmed as a result of conduct that is contrary to Part VI (the criminal provisions of the Act), or failure to comply with a Tribunal or court order under the Act (civil provisions), to commence a 'private action' for damages. Private damages actions, therefore, may be commenced for contravention of the criminal conspiracy (e.g., price fixing agreements), bid-rigging and criminal false or misleading advertising rules. The absence of a prior criminal conviction does not act as a bar to the commencement of a private action. It should be noted however, that unlike the treble damages awards available to plaintiffs in the US⁷⁰⁵ the Canadian Competition Act only allows an award for actual damage or loss and the cost of the investigation and legal

⁷⁰¹ In essence, section 74.01(a) makes illegal making a representation to the public that is false or misleading in a material respect: *ibid*

⁷⁰² Steve Szentesi, 'Competition Law Private Actions in Canada - The Expanding Playing Field Following Competition Act Amendments and Plaintiff-favourable Class Action Decisions' (*Canadian Competition Law & Regulatory Law*, August 2010) <<http://www.ipvancoverblog.com/2010/08/competition-law-private-actions-in-canada>> accessed 27 February 2014, 5 - 6

⁷⁰³ Competition Act R.S.C., 1985, c. C-34

⁷⁰⁴ *Ibid*, section 36 (1)

⁷⁰⁵ Clayton Act (2006) 15 U.S.C., §15

proceedings.⁷⁰⁶ Although the Competition Act does not provide for prejudgment interests, Canadian courts may award prejudgment interests to successful litigants from the date the cause of action arose to the date of the order.⁷⁰⁷

As for violations of the civil sections a private party can commence a private action for damages only after the Competition Tribunal has first declared the conduct in question unlawful and the defendant fails to comply with an order made by the Tribunal, for instance the defendant fails to end the practice condemned by the Tribunal under the competition rules.⁷⁰⁸ Again only actual damages can be recovered in addition to the costs incurred in the proceedings.

Private Access

Contrary to the US⁷⁰⁹ and the EU antitrust provisions on damages actions,⁷¹⁰ under the Canadian Competition Act,⁷¹¹ private parties do not have a 'right' to commence private actions for breaches of the civil sections of the Act. Under the Act those provisions are 'reviewable matters' and consequently only the Competition Tribunal has the power to review the lawfulness of conducts that qualify as a reviewable practice.⁷¹² Private parties can file a lawsuit only in two circumstances: 1) if the Tribunal, having first held anti-competitive a particular behaviour, makes an order and the recipient fails to comply with it (private action under Section 36 above); 2) a private party may obtain 'private access' to the Competition Tribunal only in relation to specific elements of the civil sections and with leave from the Tribunal.

The Competition Tribunal, in *National Capital* established that in order to exercise its discretion to grant leave, the Tribunal must be satisfied that it had reason to believe that: (1) the applicant is directly and substantially affected in his business by any practice referred to in Sections 75 -77 of the Act; and (2) the alleged practice could be subject to an order under that section.⁷¹³

⁷⁰⁶ Competition Act R.S.C., 1985, c. C-34, section 36 (1)

⁷⁰⁷ Ontario Courts of Justice Act, RSO 1990, ch C-43, Sections 128 (1) - 130 (1). See also: Subrata Bhattacharjee and Gregory Sullivan, 'Private Enforcement of Canadian Competition Laws' in Marsden and Hutchings (eds), *Current Competition Law*, vol IV (The British Institute of International and Comparative Law 2005)

⁷⁰⁸ Steve Szentesi, 'Competition Law Private Actions in Canada - The Expanding Playing Field Following Competition Act Amendments and Plaintiff-favourable Class Action Decisions' (*Canadian Competition Law & Regulatory Law*, August 2010) <<http://www.ipvancouverblog.com/2010/08/competition-law-private-actions-in-canada>> accessed 27 February 2014, 2

⁷⁰⁹ Clayton Act (2006) 15 U.S.C., § 15

⁷¹⁰ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

⁷¹¹ Competition Act R.S.C., 1985, c. C-34

⁷¹² *Ibid*, sections 75 - 92

⁷¹³ *National Capital News Canada v. Milliken* 2002 Comp Trib 41, 8. See also: 'Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment' (*The Canadian Bar Association*) <http://www.cba.org/cba/sections_Competition/pdf/Private%20Party%20Access%20to%20the%20Competition%20Tribunal.pdf> accessed 1 May 2014

Unlike in ‘private actions’, damages are not available in ‘private access’ proceedings. The outcome is only remedial orders from the Tribunal, for example orders for conduct to cease, or for a supplier to resupply on usual trade terms.

Section 103.1 (1) of the Competition Act permits private parties to apply for leave to make an application to the Competition Tribunal for remedial orders only on matters brought pursuant to Sections 75 (refusal to deal), Section 76 (price maintenance) and Section 77 (tied selling, exclusive dealing and market restriction) of the Act.⁷¹⁴ Accordingly, a private party can make a request for leave to proceed only if the alleged wrongdoing falls within these three sections. For instance violation of Section 79, abuse of a dominant position (substantial or completely control of an area or species of business having or likely to have the effect of preventing or lessening competition), is not an option available to private parties. Under the Act, such a breach can only be dealt with by Bureau and private access to the Competition Tribunal is unavailable.⁷¹⁵

Clearly, the Canadian Competition Act imposes significant limitations on the enforcement by private parties of competition rules, from the breaches for which a private action is at all possible, to the requirement that a potential claimant must first obtain leave from the Competition Tribunal before commencing a claim. These limitations, absent in the Commission proposed private enforcement regime in the EU, it is submitted, prevent, or at least significantly reduce abuses by private parties of the damages provisions.

The next part of the analysis explores how the EU envisaged private enforcement regime compares with the Canadian system in term of the power given to private parties.

5.2.4 Canada – EU Different Approaches

In June 2013 the Commission published a Staff Working Document accompanying the proposal for a EU Directive on rules governing actions for damages under the competition law provisions of the Member States.⁷¹⁶ In order to ensure the effective exercise of the EU right to compensation the Commission repeated once more that ‘a private action can be brought before a court without a prior decision by a competition authority (“stand-alone actions”)⁷¹⁷. Unlike in Canada, in the EU any business or citizen who considers himself harmed as a result of a breach of EU antitrust rules is able

⁷¹⁴ Competition Act R.S.C., 1985, c. C-34

⁷¹⁵ Bureau, ‘Information Bulletin on Private Access to the Competition Tribunal’ (*Competition Bureau Canada*, April 2005) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01392.html>> accessed 28 February 2014, 4

⁷¹⁶ Commission, ‘Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council’ (Executive Summary of the Impact Assessment Report) SWD(2013) 204 final

⁷¹⁷ *Ibid*, 10

to file a claim in a civil court,⁷¹⁸ and if successful he can be compensated for actual loss, for loss of profit plus interest.⁷¹⁹

In contrast, the Canadian Competition Act contains substantial constraints as to when private parties are allowed to interfere with the enforcement of competition law.⁷²⁰ These bars have the effect of limiting unmeritorious litigation at least in three ways.

First, although a private party can file an antitrust lawsuit for breaches of the criminal provisions of the Act if successful he can recover only an amount equal to the loss or damage proved to have been suffered and the cost of the investigation not exceeding the full cost to him. Thus, no treble damages as in the US and nor generous damages award as envisaged in the EU,⁷²¹ hence no race to court with the hope of lucrative monetary awards. The result is that, as Szentesi emphasises, although there have been some cases, it is relatively uncommon for private plaintiffs to commence proceedings under the criminal provisions.⁷²²

Second, in relation to the availability of damages for breaches related to the civil provisions, although a private action is possible, is it not open to a private party to commence it. If a private party considers that a breach of competition rules has occurred, the most he or she can do is to alert the Bureau. Moreover, even if the Bureau investigates the matter and the Tribunal makes an order, unless the defendant breaches that order, a private party still has no cause of action. Thus, unlike in the EU, the award of damages in competition proceedings is entirely controlled by public officials and not left to the whim of private parties.

Third, even injunctive reliefs appear to be strictly controlled by the public antitrust authority under the Competition Act.⁷²³ Despite the phrase 'private access' to the Competition Tribunal, the only access that is effectively given to a private party is the possibility to ask for permission to proceed. In addition to the absence of damages which arguably weeds out some unmeritorious claims, a private party must first convince the Tribunal that it is appropriate to proceed.

Unlike the Commission proposed measures for damages action in the EU in which anyone can file a claim in a civil court alleging breaches of competition rules regardless of the merit of the case, in Canada unless the Competition Tribunal endorses the private party case, leave to proceed will not be granted. This difference is significant for the efficacy of private enforcement as it prevents

⁷¹⁸ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

⁷¹⁹ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95

⁷²⁰ Competition Act R.S.C., 1985, c. C-34

⁷²¹ See chapter 5.1.4

⁷²² Steve Szentesi, 'Competition Law Private Actions in Canada - The Expanding Playing Field Following Competition Act Amendments and Plaintiff-favourable Class Action Decisions' (*Canadian Competition Law & Regulatory Law*, August 2010) <<http://www.ipvancouverblog.com/2010/08/competition-law-private-actions-in-canada>> accessed 27 February 2014, 2

⁷²³ Competition Act R.S.C., 1985, c. C-34

unmeritorious (both, aimed at damages and injunctive reliefs) claims. While in the EU anyone can invoke breaches of competition rules before a civil court and might obtain damages on an assessment made by a court of general jurisdiction, the Canadian Competition Tribunal, effectively, acts as gatekeeper and it is in a strong position to dismiss unmeritorious cases because it enjoys statutory power. The Canadian Competition Act provides the Tribunal with the possibility to refuse leave made under Section 103.1 (1) if it believes that the practice in question could not be the subject of an order by the Competition Tribunal. Section 103.1 (7) provides that:

The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.⁷²⁴

In relation to price maintenance (Section 76) breaches Section 103.1 (7.1) states that:

The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.⁷²⁵

It goes without saying that the Canadian provisions in relation to private actions are far better controlled than the EU equivalent. This control, it is submitted, is of paramount importance for the effectiveness of private enforcement. Of course, no legal system is perfect and the Canadian antitrust regime is not an exception. However the Canadian Competition Act appears to contain effective safeguards against abusive lawsuits by private parties with interests counter to the goals of maintaining and encouraging competition in Canada in order to promote the efficiency and adaptability of the Canadian economy.⁷²⁶ In the EU similar goals are the objectives of a private antitrust enforcement system.⁷²⁷ It is seen as an important tool to create and sustain a competitive EU economy,⁷²⁸ and the Commission policy initiative has the objective of stimulating economic growth and innovation.⁷²⁹ However, it is debatable that there are in place safeguards against inappropriate use of competition law under a private enforcement regime.

It should be noted, that despite the severe statutory restrictions, the Canadian system is not immune from abuse by private parties attempting to circumvent the rules so as to obtain monetary awards. The next part of the thesis explores this issue.

⁷²⁴ Ibid, section 103.1 (7)

⁷²⁵ Ibid, section 103.1 (7.1)

⁷²⁶ Ibid, section 1.1

⁷²⁷ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

⁷²⁸ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

⁷²⁹ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

5.2.5 Misuse of Private Enforcement under the Canadian Rules

Notwithstanding the restricted cause of action accorded to private parties under the Canadian Competition Act,⁷³⁰ resourceful individuals have attempted to recover antitrust damages by combining antitrust claims with other torts, such as the tort of interference with economic relations.⁷³¹ The 2010 case of *Novus Entertainment*, eventually struck out by the Supreme Court of British Columbia, is a clear example of claimants attempting to find ways to expand their private rights of action under the Competition Act which subjects defendants, perhaps law abiding as the claim was struck out altogether, to needless waste of resources in defending the lawsuit.⁷³²

Novus Entertainment's claim against Shaw Cablesystems was based on the abuse of dominance provisions of the Competition Act. Novus' claim was substantially based on a Shaw promotional campaign in which it offered promotional pricing for some of its services (high definition television, digital telephone and high-speed internet services). In particular, Novus claimed that Shaw had deliberately interfered with Novus' economic interests by illegal means, namely by contravening the abuse of dominance provisions of the Competition Act through allegedly predatory conduct. In alleging that Shaw had engaged in illegal conduct, and had violated the Act's abuse provisions, Novus included rather extensive pleadings setting out the requisite elements to establish abuse of dominance, including allegations of Shaw's dominance in several markets (including cable and satellite television in Western Canada), that Shaw engaged in a practice of anti-competitive acts (including sales below variable or avoidable costs) and that its conduct was likely to prevent or lessen competition substantially in several relevant markets.

Novus argued for a re-interpretation of the competition provisions. According to Novus, Parliament intended to recognise that conduct that 'breaches s. 79' are like breaches of any other statutory provision and can serve as the 'unlawful means' element of economic torts.⁷³³ Hence, the Supreme Court of British Columbia was called to determine: 'whether the pleadings set out ... pertaining to the Introductory Promotion Campaign should be struck out because the subject of the claim falls within the exclusive jurisdiction of the [Competition] Tribunal'.⁷³⁴ In reiterating that, in the case of conduct of the nature described in Part VIII of the Competition Act (Matters Reviewable by Tribunal) the Parliament decided in Section 36 of the Act that a remedy is available in a court of

⁷³⁰ Competition Act R.S.C., 1985, c. C-34

⁷³¹ For details on how this is possible under the Canadian law see: Norton Rose Fulbright, 'Yes, it Must be Unlawful and Actionable - Supreme Court of Canada Considers the Tort of Unlawful Interference with Economic Relations' (*Norton Rose Fulbright Canada LLP 2014*, February 2014) <<http://www.nortonrosefulbright.com/knowledge/publications/112402/yes-it-must-be-unlawful-and-actionablesupreme-court-of-canada-considers-the-tort-of-unlawful-interference-with-economic-relations>> accessed 6 April 2014

⁷³² *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.* 2010 BCSC 1030

⁷³³ *Ibid*, 32

⁷³⁴ *Ibid*, 16

competent jurisdiction only when the Competition Tribunal has made an order prohibiting the conduct and there has been noncompliance with the order, the Supreme Court held:

The Tribunal can only specify an administrative monetary penalty 'if' it makes a finding and order under s. 79(1). The lawfulness or unlawfulness of the conduct remains subject to the Tribunal's finding the respondent has engaged in anti-competitive conduct. Such order is discretionary as s. 79(1) provides that even in the event of such a finding the Tribunal 'may' make an order.

Accordingly I conclude that in the absence of an order from the Tribunal under s. 79 of the *Act*, those portions of the statement of claim alleging a breach of s. 79 of the *Act* be struck out.⁷³⁵

It is worth noting that the *Novus Entertainment* case is not unique. Previously, in 2006, the same Court (Supreme Court of British Columbia) was called to deal with similar circumstances.⁷³⁶ In *Pro-Sys* the Court had already held that it had jurisdiction 'only' when the Tribunal had made an order prohibiting the conduct complained of and the order had not been complied with as it stated:

My ruling at this stage is that it is plain and obvious that, in the absence of an order of the Competition Tribunal and with no other reason to make it illegal or unlawful, conduct of the nature described in Part VIII of the Competition Act does not constitute illegal or unlawful means to satisfy the second element of the tort of interference with economic relations. I order that the portions of the Statement of Claim alleging that conduct of the nature described in Part VIII was illegal or unlawful be struck out.⁷³⁷

Again, back in 1998 the Ontario Supreme Court in *Chadha* explained that:

Section 79 confers jurisdiction on the Competition Tribunal to make an order prohibiting certain activity, after which that prohibited activity is unlawful. However, before any prohibition is made at the Tribunal, the effect of s. 79 is plainly not to make the activity described unlawful. It is not alleged that any order by the Tribunal has been made in the present case. Accordingly, I find that para. 24 of the Statement of Claim should be struck out as disclosing no cause of action.⁷³⁸

Nevertheless, as can be seen, private parties have used (or attempted to use) competition provisions for private interests. Considering the Canadian experience of private enforcement, it appears clear that it is an extraordinarily powerful weapon that a claimant can wield against a

⁷³⁵ *Ibid*, 36 - 37

⁷³⁶ *Ibid*

⁷³⁷ *Pro-Sys Consultants Ltd. v. Microsoft Corporation* 2006 BCSC 1047, 49

⁷³⁸ *Chadha v. Bayer Inc.* (1998), 82 CPR (3d) 202, 10

defendant, which in turn creates the potential for abuse. Of course here can be argued that these are a feature of the Canadian legal system which do not necessarily apply in the EU or, that a change in the Canadian competition provisions authorising damages in any case is needed. However, these cases show that despite the prescriptive nature, private damages actions provisions can be exploited for private interests. The damages incentive, which is necessary to ensure that private parties do come forward, is not limited to compensation of genuine victims of antitrust violations, rather it creates an opportunity for abuse. It is worth recalling that under the Canadian competition provisions only single damages and the costs of the litigation can be recovered.⁷³⁹ Therefore, as correctly emphasised by Melamed, ‘procompetitive conduct could be deterred, even by a regime limited to single damages’.⁷⁴⁰ The point to note is that even if in the end the claim eventually fails, the defendant has no choice but to defend himself before the court, thus dissipate resources unnecessarily. In the EU, anyone considering himself harmed by violations of competition rules has a right in law to claim compensation.⁷⁴¹ This right can be exercised without any precondition. Indeed the Commission initiative for a private enforcement in the EU is to ensure that anyone harmed by unlawful action should not have to wait for a public body to intervene.⁷⁴² Considering the abuses that have emerged under the Canadian provisions, it become questionable that the private enforcement regime proposed by the Commission will deliver the stated aims of creation and sustainment of a competitive EU economy.⁷⁴³ Indeed, considering the significant safeguards embedded into the Canadian rules, absent in the regime proposed in the EU, it appears inevitable that there will be a proliferation of abusive litigation aimed at private interests to the detriment of businesses and in turn to the EU economy.

5.2.6 Conclusion

The case for structuring private enforcement remedies in the EU to serve deterrence and compensation is unpersuasive. The literature and the US experience of private enforcement suggest difficulties in designing an ideal level of damages award. A single damages award appears to be insufficient to adequately compensate victims of antitrust violations for the harm they suffered and to create an incentive for those parties to come forward. Moreover, such an award is unlikely to

⁷³⁹ Competition Act R.S.C., 1985, c. C-34, section 36 (1)

⁷⁴⁰ Douglas A Melamed, ‘Damages, Deterrence, and Antitrust - A Comment on Cooter’ (1997) 60 (3) Law and Contemporary Problems 93, 94

⁷⁴¹ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

⁷⁴² Neelie Kroes, ‘More Private Antitrust Enforcement Through Better Access to Damages: An Invitation for an Open Debate’ (*Speech/06/158*, 9 March 2006)

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/328&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 5 January 20104

⁷⁴³ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

effectively deter anticompetitive behaviours. Conversely, a multiple damages award creates the conditions for abuse of the rules by private aiming at financial awards irrespectively of the effect of competition.

This chapter shows that despite the term 'treble' used to define the US level of damages, the EU single damages award is, at least likely to be, equivalent to the US's treble damages. Furthermore, the comparison with the Canadian competition regime shows that despite the statutory limitation imposed on private actions, and despite the availability of only single damages, nevertheless resourceful private parties have attempted to circumvent the rules to obtain damages.

Consequently in the EU, a run to court by private parties aiming at monetary compensation is unavoidable. This is not the Commission's stated intent of private enforcement.⁷⁴⁴ The high level of damages awards contemplated in the EU, it is submitted, will harm consumers by encouraging inefficient business relationships and inhibiting aggressive competition.

The analysis now focusses on specific elements of antitrust prohibitions, such as the abuse of dominance, and compares the underpinning principles of Art 102 with the US and Canadian equivalents to ascertain how different approaches might affect the operation of private enforcement.

⁷⁴⁴ Commission, 'Green Paper on Consumer Collective Redress - Questions and Answers' (*MEMO/08/741*, 27 November 2008) <<http://europa.eu/rapid/pressReleasesAction.do?MEMO/08/741&format=HTML&aged=0&language=EN>> accessed 14 February 2014, 4

Chapter 6: PRIVATE ENFORCEMENT AND DOMINANCE

6.1.1 Introduction

In antitrust, like other areas of law, before any enforcement regime, whether public or private, has a part to play, a breach of antitrust rules must occur. Thus, at which point an undertaking's behaviour is considered in breach of the rules is of fundamental importance as it is the point at which a business is exposed to sanction/can be punished. Obviously, the lower the standard applied, greater is the probability that an undertaking is found in breach of antitrust law. In relation to private enforcement the liability standards clearly determine at which point a private party can commence an antitrust lawsuit and claim damages or injunctive relief. In assessing the standards applied to the finding of dominance in the EU, it appears that, when compared to that of the US and Canada, a lower standard is applied. Consequently, an unmeritorious private case has more chance of success with inevitably detrimental consequences for anyone trading in the EU. This difference increases the possibility of success for private enforcement, in this instance, to the detriment of businesses.

6.1.2 Abuse of Dominance

Before considering at which point an undertaking's behaviour contravene the dominance rules, it is important to note that, despite different standards, all three jurisdictions adopt, at least in their objectives, a similar approach to the issue of market dominance.

In the EU the Court of Justice has defined dominance as:

[A] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.⁷⁴⁵

The US equivalent adopts a different terminology, in that a dominant firm is one that monopolises the market. According to the US Supreme Court in the context of antitrust monopolisation:

[M]eans to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, accompanied with such power that the parties are able, as a group, to exclude actual or

⁷⁴⁵ Case 27/76 *United Brands Co. v Commission* [1978] ECR 207, 65

potential competition from the field, and accompanied with the intent and purpose to exercise that power.⁷⁴⁶

With regard to the Canadian authorities, the Canadian Federal Court of Appeal⁷⁴⁷ endorsed the Competition Tribunal definition of market power. According to the Tribunal: 'Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period'.⁷⁴⁸ The Bureau in its part explains that:

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. These provisions, contained in sections 78 and 79 of the Competition Act, establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in anti-competitive activities that damage or eliminate competitors and that maintain, entrench or enhance their market power.⁷⁴⁹

The similarity in objectives as expressed in these definitions indicates that there is the common goal of preventing distortion to competition by firms which hold dominant positions. However when it comes to the enforcement of the dominance rules, the lowest liability standard together with a 'prima facie' condemnation, can be found in the EU.

6.1.3 Abuse of Dominance in the EU and US

In the EU, the United Brands companies were considered dominant with 40% to 45% share of the market.⁷⁵⁰ This position was confirmed in *Hoffmann-La Roche* where the Court of Justice added:

[T]he existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares.⁷⁵¹

Of course, before a firm is deemed dominant other factors must be considered, such as the structure and the circumstance of the relevant market as far as competition is concerned.⁷⁵²

⁷⁴⁶ *American Tobacco Co. v. United States* 328 US 781, 66 Sct 1125, 6

⁷⁴⁷ *Commissioner of Competition v. Canada Pipe Company_ Ltd* 2006 FCA 236, 23 - 25

⁷⁴⁸ *Canada (Director of Investigation & Research) v. NutraSweet Co.* 32 CPR (3d) 1, [1990] CLD 1078, 73

⁷⁴⁹ Bureau, 'Abuse of Dominance' (*Competition Bureau Canada*) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html> accessed 11 January 2014

⁷⁵⁰ *Case 27/76 United Brands Co. v Commission* [1978] ECR 207, 108

⁷⁵¹ *Case 85/76 Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, 38

⁷⁵² *Ibid*, 65

However, if the undertaking concerned has a high market share compared to other players on the market and this position has been held for some time, it is an indication of dominance.⁷⁵³

In *AKZO Chemie*, the Court of justice made it clear that:

[W]ith regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position....[and] that is the situation where there is a market share of 50% such as that found to exist in this case.⁷⁵⁴

This principle was followed in 2002 by the CFI in *Atlantic Container*, where it was emphasised that even if a dominant position cannot be treated, purely and simply, as the elimination of competition it should be recalled for guidance that according to the case law very large market shares, i.e. 50%, are in themselves evidence of dominance.⁷⁵⁵

Furthermore in *Gøttrup-Klim* although the undertaking concerned held market shares of 36 % and 32 %, the Court of justice stated that an undertaking holding market shares of that size may, depending on the strength and number of its competitors, be considered to be in a dominant position.⁷⁵⁶ Arguably, the EU approach to the issue of dominance is summarised in the Court of Justice's ruling in *Hilti*. Recalling its previous judgement in *Hoffmann-La Roche*,⁷⁵⁷ the Court reiterated that:

With particular reference to market shares, the Court of Justice has held (*Hoffmann-La Roche* judgment ...) that very large shares are in themselves, and save in exceptional circumstances, evidence of a dominant position.⁷⁵⁸

Stated differently, unless there are exceptional circumstances, a large market player in the EU is under the spotlight of the antitrust authorities. Indeed the 'strength' of its competitors, a factor outside the large market player's control, is relevant to the finding of dominance. Consequently a private party, whether an individual, an association of consumers or indeed a competitor, can commence a private action alleging abuse of dominance even if the targeted business has a market share as low as 32%.

In comparing the EU approach to the finding of liability in dominance cases, with that of the US, it emerged that as Kovacic correctly points out:

⁷⁵³ Ibid, 41

⁷⁵⁴ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 60

⁷⁵⁵ Case T-395/94 *Atlantic Container Line AB and others v European Commission* [2002] All ER (EC) 684, 328

⁷⁵⁶ Case C-250/92 *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvarereselskab AmbA* [1994] ECR I-5641, 48

⁷⁵⁷ Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461, 41

⁷⁵⁸ Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-01439, 91

[A] finding of dominance can occur in the EU at or somewhat below a 40% market share, while the US offence of attempted monopolisation usually treats shares below 50% as being inadequate to establish substantial market power.⁷⁵⁹

Of course there can be circumstances in which a firm with market share below 50% can nevertheless be found to be in breach of the monopolisation rules. For instance, in the *Microsoft* case the US District Court dismissed exclusive dealing claim against Microsoft because it had not completely excluded Netscape (a competitor).⁷⁶⁰ The US Court of Appeal, however, found that the same agreements supported liability under Section 1 and 2 of the Sherman Act⁷⁶¹ even though the foreclosure was less than the 40-50% share usually required. The Court of Appeal explained:

The basic prudential concerns relevant to §§ 1 and 2 are admittedly the same: exclusive contracts are commonplace—particularly in the field of distribution—in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm. At the same time, however, we agree with plaintiffs that a monopolist’s use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.⁷⁶²

Consequently, in the absence of specific circumstances justifying a departure from the rules, the US courts are reluctant in finding dominance where the market shares are below 40% 50%. This position is now compared to the Canadian approach.

6.1.4 Abuse of Dominance in Canada

The Canadian approach to abuse of dominance can be deduced from the Bureau’s Enforcement Guidelines which states that:

Abuse of a dominant position occurs when a dominant firm or a dominant group of firms in a market engages in a practice of anti-competitive acts, with the result that competition has been or is likely to be prevented or lessened substantially.⁷⁶³

⁷⁵⁹ William E Kovacic, ‘Competition Policy in the European Union and the United States: Convergence or Divergence?’ (*Bates White Fifth Annual Antitrust Conference Washington, D.C.*, 2 June 2008)

<www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> accessed 2 January 2014, 12

⁷⁶⁰ *United States v. Microsoft Corp* 87 F Supp 2d 30, 53 (DDC 2000), 18

⁷⁶¹ Sherman Antitrust Act, 15 U.S.C., § 1 contract in restraint of trade; § 2 monopolize or attempt to monopolize

⁷⁶² *United States v. Microsoft Corp.* 253 F3d 34, 346 US App DC 330, 35

⁷⁶³ Bureau, ‘The Abuse of Dominance Provisions (Enforcement Guidelines)’ (*Competition Bureau Canada*, 20 September 2012) <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html> accessed 12 March 2014, 1

Similarly to the EU and US abuse of dominance rules, under the Canadian Competition Act the fact that a firm holds a dominant position or using the Canadian terminology holds market power is not, of itself unlawful. Likewise, charging higher prices to customers, or offering lower levels of service than would otherwise be expected in a more competitive market, will not alone constitute abuse of a dominant position. Rather, all elements of Section 79(1) must be satisfied to constitute an abuse of dominance. Section 79 (1) of the Act defines the constituent elements of abuse of dominance, each of which must be established for the Tribunal to grant a remedy:

Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.⁷⁶⁴

It must be noted also, that a violation of Section 79 does not give a cause of action to private parties. Under the Act, such a breach can only be prosecuted by the Bureau before the Competition Tribunal.⁷⁶⁵ A private party can claim damages only if the breach was successfully prosecuted by the Bureau and the defendant fails to comply with a prohibition order that the Tribunal may make.⁷⁶⁶ The other possibility in which a private party can play a part is only in relation to specific elements, which according to the EU rules (Art 102) are seen as abuses of dominant position but under the Canadian rules are dealt under specific sections of the Competition Act, i.e. Sections 75 (refusal to deal); Section 76 (price maintenance) and Section 77 (tied selling, exclusive dealing and market restriction) of the Act.⁷⁶⁷ Under these sections, leave from the Tribunal is needed before a private action can commence and the remedies are prohibition orders and/or fines but not damages.

A significant point to note is that the approach taken in the EU towards abuse of dominance is rather different compared to that of the Canadian antitrust authorities. This difference is significant for the enforcement of competition rules by private parties, for two main reasons. First, under the Canadian rules, a key element that must be present before a practice can be condemned, is that it

⁷⁶⁴ Competition Act R.S.C., 1985, c. C-34, section 79 (1)

⁷⁶⁵ Bureau, 'Information Bulletin on Private Access to the Competition Tribunal' (*Competition Bureau Canada*, April 2005) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01392.html>> accessed 28 February 2014, 3 - 4

⁷⁶⁶ Competition Act R.S.C., 1985, c. C-34, section 36 (1)

⁷⁶⁷ Ibid

must at least, have the effect of preventing or lessening competition. By contrast in the EU a dominant firm is considered to have a special responsibility.⁷⁶⁸ Stated differently, a commercial strategy is lawful if carried out by a small business, while it is in breach of competition rules if the same strategy is employed by a firm which, because of its size, is deemed dominant in a market. Inevitably, this approach makes large corporations trading in the EU vulnerable under the competition rules and consequently a target for cunning private parties.

The second point to note is that unlike the equivalent EU provision, the Canadian Competition Act contains strong safeguards against abusive intervention by private parties. Even if a violation is successfully prosecuted before the Tribunal, under the Act the Tribunal 'may' make a prohibition order and only if the firm ignore it a private party can then file a claim for damages.⁷⁶⁹ By contrast, in the EU, anyone that considers himself harmed by a breach of competition rules can commence a private action for damages at any time and for any breach. According, it appears that unlike in Canada, the impact of private enforcement can be detrimental to businesses trading in the EU.

In Canada, like in the US but unlike in the EU, a measured approach is taken as to what weight is to be given to market share in abuse of dominance cases and the emphasis is on whether the conduct by the firm has the effect of substantially lessened competition. The Bureau enforcement guidelines state that:

[M]arket share is one of the most important indicators of market power. While there is no definitive numeric threshold, the Bureau is of the view that high market share is usually a necessary, but not sufficient, condition to establish market power.⁷⁷⁰

It follows that in investigating allegations of abuse of dominance, the Bureau's general approach is that:

A market share of less than 35 percent will generally not prompt further examination.

A market share between 35 and 50 percent will generally only prompt further examination if it appears the firm is likely to increase its market share through the alleged anti-competitive conduct within a reasonable period of time.

A market share of 50 percent or more will generally prompt further examination.

In the case of a group of firms alleged to be jointly dominant, a combined market share equal to or exceeding 65 percent will generally prompt further examination.⁷⁷¹

⁷⁶⁸ Case 322/81 *Michelin v Commission* [1983] ECR 3461, 57

⁷⁶⁹ Competition Act R.S.C., 1985, c. C-34, section 36 (1)

⁷⁷⁰ Bureau, 'The Abuse of Dominance Provisions (Enforcement Guidelines)' (*Competition Bureau Canada*, 20 September 2012) <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html> accessed 12 March 2014, 7

⁷⁷¹ *Ibid*, 8

Although a market share of 50% generally attracts the Bureau's attention, it must be noted that this is not a benchmark for a 'prima facie' finding of liability under the abuse of dominance provisions. Indeed in *Laidlaw*, the Competition Tribunal in determining the geographic dimensions of the alleged abuse by Laidlaw observed: 'Laidlaw's share of that market is probably below 50% and no prima facie finding of dominance would arise'.⁷⁷² In *Tele Direct* the Tribunal held that: 'A large market share can support an initial determination that a firm likely has market power, absent other extenuating circumstances, in general, ease of entry'.⁷⁷³ The Tribunal however was considering two markets in which Tele-Direct, although facing the most significant competition, its market share was still over 90%.⁷⁷⁴ The Tribunal stated:

[T]his fact, allied with Tele-Direct's overwhelming share of sales over its territory as a whole, leads us to conclude that Tele-Direct dominates telephone directory advertising in markets in Ontario and Quebec. *Prima facie*, we are of the view that Tele-Direct has market power based on its large share of the relevant market, absent compelling evidence of easy entry into the supply of telephone directory advertising.⁷⁷⁵

In summary, the difference between the EU, the US and the Canadian approach to abuse of dominance, is that a large firm in the EU is at risk. In the EU, unless there are exceptional circumstances, market share of 50% are considered 'large' market share and are in themselves 'evidence' of dominance.⁷⁷⁶ This means that 50% of market share give rise to a 'prima facie' finding of dominance. Therefore, a private action for damages can be commenced. In the US the emphasis is on the effect that high market share could have. Indeed, from the reasoning of the US Court of Appeal in *Microsoft* it can be seen that if the effect is 'small', even in the presence of market share of 50% the Court is reluctant to intervene as this would create an unacceptable and unjustified burden upon businesses.⁷⁷⁷ Under the Canadian provisions, it must be recalled that abuse of dominant provision is not actionable by private parties as under the Competition Act,⁷⁷⁸ such a breach can only be dealt with by Bureau and private access to the Competition Tribunal is unavailable.⁷⁷⁹ Although some elements are actionable by private parties (refusal to deal, price maintenance, tied selling, exclusive dealing and market restriction)⁷⁸⁰ which have similarities with

⁷⁷² *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* 40 CPR (3d) 289 (Comp Trib), 47

⁷⁷³ *Ibid*, 118

⁷⁷⁴ *Ibid*, 119

⁷⁷⁵ *Ibid*, 120

⁷⁷⁶ Case T-395/94 *Atlantic Container Line AB and others v European Commission* [2002] All ER (EC) 684, 328

⁷⁷⁷ *United States v. Microsoft Corp.* 253 F3d 34, 346 US App DC 330, 70

⁷⁷⁸ Competition Act R.S.C., 1985, c. C-34

⁷⁷⁹ Bureau, 'Information Bulletin on Private Access to the Competition Tribunal' (*Competition Bureau Canada*, April 2005) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01392.html>> accessed 28 February 2014, 4

⁷⁸⁰ Competition Act R.S.C., 1985, c. C-34, sections 75, 76, 77

the provisions of Art 102 TFEU, private parties must apply for leave to make an application to the Competition Tribunal, and the outcome is only remedial orders,⁷⁸¹ not damages.

The analysis now move to the comparison of EU and US cases law involving specific businesses practices which are forbidden under both the EU and the US antitrust rules.

6.1.5 Private Enforcement and Predatory Pricing

Having discussed the general approach taken in the EU, in the US and in Canada in relation to the abuse of dominant position, the analysis now focusses on one specific aspect of the abuse, predatory pricing. In this part of the thesis the EU rules on predatory pricing are compared with those of the US. Predatory pricing is chosen for two main reasons. First, the US is predominantly a private enforcement regime and in principle the criteria used in defining at which point a price strategy is deemed predatory are similar to those of the EU. However, as the threshold for the application of these criteria appears different, by directly comparing case law decided under the EU rules and under the US rules it can be ascertained which jurisdiction gives private parties a better chance of success.

Second, the enforcement of predatory pricing provisions, whether via public officials or via private parties, arguably represents one of the most controversial areas of antitrust enforcement policy. This point is explained by using one EU case as an example.

In the *Wanadoo's* case,⁷⁸² the Commission intervention was triggered by the fact that Telefónica had priced residential broadband internet services, essentially,⁷⁸³ below its costs. According to the Commission there was a foreclosure effect on the Spanish broadband market and a detrimental impact for end users. Therefore, Telefónica was fined (€ 151,875,000) for trading at prices below its costs under the provisions of Art 82 EC.⁷⁸⁴ Potentially the argument here is a valid one because in such circumstances it is unlikely that any competitor would be able to enter the market and therefore there is no competition. However, once the related competition rules have been enforced, the question is: who guarantees that: a) a competitor does enter the market, and b) who guarantees that prices stay low? If the ultimate goal of antitrust is that of benefitting consumers,⁷⁸⁵ and consumer welfare is at the heart of the Commission's fight against abuses by dominant

⁷⁸¹ Ibid, section 103 (1)

⁷⁸² *Wanadoo España v Telefónica* (Case COMP/38784, Summary of Commission Decision 4 July 2007 Relating to a Proceeding Under Article 82 of the EC Treaty [2008] OJ C 83/5, 3.2

⁷⁸³ The *Wanadoo* case is discussed in detail below: chapter 6.1.7

⁷⁸⁴ *Wanadoo España v Telefónica* (Case COMP/38784, Summary of Commission Decision 4 July 2007 Relating to a Proceeding Under Article 82 of the EC Treaty [2008] OJ C 83/5, 4.3

⁷⁸⁵ Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (*SPEECH/05/537, Speech at the Fordham Corporate Law Institute*, 23 Septemeber 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 January 2014; Commission, 'Delivering for Consumers, What is Competition Policy?' (*European Commission Competition*) <http://ec.europa.eu/competition/consumers/what_en.html> accessed 9 April 2014

undertakings as the Commission eloquently commented in relation to Telefónica,⁷⁸⁶ it is debatable that the predatory pricing provisions contributed in the achievement of these goals. Undeniably, in this example, consumers had enjoyed lower prices when Telefónica provided the service. Ironically, at least in the immediate future, the effect of the enforcement of competition rules is to eliminate low price commercial practices. Theoretically, prices should be lowered in future by the market self-regulation, but antitrust does not offer assurance of that. As Delrahim points out in antitrust the challenge is that even if it is possible to conclude that certain conduct is anti-competitive, it may be more difficult to implement workable remedies that will restore any lost competition.⁷⁸⁷ The issue is of more significance if predatory pricing provisions are used (or abused) by private parties, for instance against a competitor, for either harming him or extorting damages.

The analysis now focusses on the US approach to the finding of liability for price practices deemed predatory.

6.1.6 The US Liability Standard for Predatory Pricing

In *Brooke Group*,⁷⁸⁸ a cigarette manufacturer brought antitrust action against a competitor, alleging violation of US antitrust provision in relation to predatory pricing. The case shows that the US Supreme Court employed a high standard (compared to that of the EU) of liability by requiring proof of recoupment before condemning the defendant for violation of antitrust law in respect of predatory pricing. The case eventually reached the Supreme Court which held:

Whether claim (sic) alleges predatory pricing under the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same: first, plaintiff seeking to establish competitive injury resulting from rival's low prices must prove that prices complained of are below appropriate measure of its rival's costs; second is demonstration that competitor had reasonable prospect or, under Sherman Act, dangerous probability, of recouping its investment in below-cost prices.⁷⁸⁹

The Court explained that the inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb. If so, then there is the further question whether the below-cost pricing would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices

⁷⁸⁶ Antitrust, 'Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings' (IP/08/1877, 3 December 2008) <http://europa.eu/rapid/press-release_IP-08-1877en.htm?locale=en> accessed 30 April 2014

⁷⁸⁷ Makan Delrahim, 'Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice' (*U.S. Department Of Justice*, 15 November 2004)

<<http://www.usdoj.gov/atr/public/speeches/208479.htm%3e>" <http://www.usdoj.gov/atr/public/speeches/208479.htm>> accessed 1 February 2014, 5

⁷⁸⁸ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 S Ct 2578

⁷⁸⁹ *Ibid*, 3

above a competitive level sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.⁷⁹⁰

Specifically to the issues of recoupment the US Supreme Court emphasised that below-cost pricing is not alone sufficient to permit inference of probable recoupment and injury to competition.⁷⁹¹ The Court held that two prerequisites are necessary for the element of recovery:

A plaintiff must prove (1) that the prices complained of are below an appropriate measure of its rival's costs and (2) that the competitor had a reasonable prospect of recouping its investment in below-cost prices. Without recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced.⁷⁹²

The Court also explained that for recoupment to occur under antitrust laws, below cost pricing must be capable, as threshold matter, of producing intended effects on firm's rivals, whether driving them out of the market, or causing them to raise their prices to supra-competitive levels within disciplined oligopoly.⁷⁹³

Accordingly, because of the lack of evidence suggesting that the competitor was likely to obtain the power to raise the prices for generic cigarettes above a competitive level, which is an indispensable aspect, the court concluded that no inference of recoupment was sustainable in the *Brooke Group* case.⁷⁹⁴ Hence, the competitor's alleged below-cost sales of generic cigarettes through discriminatory volume rebates did not create competitive injury. The fact that below-cost pricing may impose painful losses on its target is of no consequence to antitrust laws if competition is not injured.⁷⁹⁵ Indeed the Supreme Court stated that:

Even act (sic) of pure malice by one business competitor against another does not, without more, state claim under federal antitrust laws; those laws do not create federal law of unfair competition, or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.⁷⁹⁶

It is worth noting that in 2007 the US Supreme Court extended this predatory pricing test to predatory bidding cases and thus established a new stringent standard for buying practices. Arguably, this means that US courts are raising the bar for success of private actions aimed at financial awards.

⁷⁹⁰ Ibid, 8

⁷⁹¹ Ibid, 9

⁷⁹² Ibid, 17

⁷⁹³ Ibid, 7

⁷⁹⁴ Ibid, 17

⁷⁹⁵ Ibid

⁷⁹⁶ Ibid, 6

In *Weyerhaeuser*,⁷⁹⁷ Ross-Simmons the plaintiff, alleged that Weyerhaeuser monopolised the market by artificially increasing the price of alder saw-logs through overpaying and overbuying in order to restrict its competitors' access to these necessary inputs and, consequently, to drive them out of business. The US District Court entered judgment on jury verdict in the plaintiff's favour. On appeal by the defendant (Weyerhaeuser) the US Court of Appeals, affirmed the decision of the District Court. On further appeal by the defendant, the US Supreme Court unanimously reversed the appeal court decision, thus rejecting the claim, holding: 'The test this Court applied to predatory-pricing claims in *Brooke Group* also applies to predatory-bidding claims'.⁷⁹⁸

Based on economic ground, the US Supreme Court explained that predatory pricing and predatory bidding claims are analytically similar, and the close theoretical connection between monopoly and monopsony⁷⁹⁹ suggests that similar legal standards should apply to both sorts of claims. Both involve the deliberate use of unilateral pricing measures for anti-competitive purposes and both require firms to incur certain short-term losses on the chance that they might later make supra-competitive profits.⁸⁰⁰

Clearly, the Court's holding sets a high bar for establishing a predatory bidding violation, and requires compelling economic evidence to satisfy that standard. By imposing a test that requires a plaintiff to prove: 1) below-cost pricing of the defendant's outputs; and 2) a dangerous probability that the defendant will recoup its losses incurred in its predatory scheme by later lowering the prices paid for inputs below the competitive level, the US Supreme Court requires lower courts to undertake a close analysis of both the scheme and the structure and conditions of the relevant market.⁸⁰¹

The US Supreme Court approach to find liability in predatory pricing/bidding cases clearly shows that low prices benefit consumers regardless of how those prices are set, and they do not threaten competition. The Court has adhered to this principle regardless of the type of antitrust claim involved. Indeed recalling *Brooke Group*⁸⁰² the Court in *Weyerhaeuser* eloquently stated:

[T]he exclusionary effect of higher bidding that does not result in below-cost output pricing 'is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate' procompetitive conduct ... Given the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behaviour with

⁷⁹⁷ *Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., Inc.* 127 S Ct 1069 (2007)

⁷⁹⁸ *Ibid*, 1070

⁷⁹⁹ Monopsony, i.e. monopoly power on the buy-side of the market, which enables the firm to drive the price for the commodity in question

⁸⁰⁰ *Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., Inc.* 127 S Ct 1069 (2007), 1071

⁸⁰¹ Stephen Smith and Jeny Maier, 'Supreme Court Establishes New Antitrust Standards for Buying Practices' (2007) 22 (2) *The Corporate Counselor* <http://www.lawjournalnewsletters.com/issues/ljn_corpcounselor/22_2/news/148920-1.html> accessed 5 May 2014

⁸⁰² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 S Ct 2578

too lax a liability standard is as serious here as it was in *Brooke Group*. Consequently, only higher bidding that leads to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding.⁸⁰³

In *Weyerhaeuser*, the US Supreme Court was presented with the question of the appropriate legal standard for determining liability in claims of alleged predatory bidding. The Court held that in such a case, the high standard established in *Brooke Group*⁸⁰⁴ for predatory pricing must be applied.⁸⁰⁵ The court stressed that unless there is the possibility of recoupment the practice does not infringe antitrust law. Indeed the Court commented that like the predatory conduct, actions taken in a predatory bidding scheme are often the very essence of competition, because a ‘failed predatory-bidding scheme can be a “boon to consumers”’.⁸⁰⁶ However, the same cannot be said for the approach taken by the EU authorities in prosecuting predatory pricing in the EU, as recoupment is not part of the requirement before an undertaking is found liable under competition rules.

6.1.7 The EU Liability Standard for Predatory pricing

This part of the analysis shows the difference in findings of liability between the US antitrust system and the EU competition system. This difference in the standards applied to determine liability is fundamentally important to the assessment of the effect of private enforcement in the EU. While in the US, due to a higher liability standard, a low price trading strategy might be deemed lawful, under the EU law, the same price strategy is considered in breach of Art 102. In turn this lower threshold facilitates the success of private actions for damages or injunctive reliefs to the detriment of businesses.

In the EU, the view taken towards predatory pricing is that under most market conditions a dominant company is unlikely to have to price below average total cost and make a loss. When a business is trading at-loss, according to the Commission, there is a lack of an economic rationale; consequently that business could find its costs and profits accounts under the spotlight as the Commission consider that in such a case ‘...there may be good reasons for the Commission to look into such behaviour’.⁸⁰⁷

Under Art 102 the notion of predatory pricing denotes the circumstance in which a dominant firm is charging for its product a reduced price to a loss-making level. In the determination of whether a

⁸⁰³ *Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., Inc.* 127 S Ct 1069 (2007), 1078

⁸⁰⁴ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 S Ct 2578

⁸⁰⁵ *Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., Inc.* 127 S Ct 1069 (2007), 1070

⁸⁰⁶ *Ibid*, 1071

⁸⁰⁷ European Commission, ‘DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses’ (*Directorate-General for Competition*, December 2005)

<<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 23 October 2013, 102

dominant undertaking's pricing practice is abusive, it is of paramount importance the cost of production because:

In its assessment the Commission may use certain cost benchmarks, below which there is more reason to assume predation may take place and/or below which no additional proof may need to be brought by the authority because predation can be presumed.⁸⁰⁸

Consequently, in order to evaluate the test applied to determine predation, it is necessary to explore the cost concepts employed in competition analysis. The task of ascertaining at what point a competitively low price becomes predatory is far from easy, but the starting point seems to be the relation of that price with the dominant undertaking's own costs. The Commission adopted a price categorisation in 1985 in its Decision⁸⁰⁹ relating to proceeding under the then Art 86 EEC Treaty against AKZO Chemie BV, part of the large multinational group AKZO in which AKZO was fined €10 million for abuse of the dominant position it held in the EU organic peroxides market.⁸¹⁰

The AKZO Case

The AKZO case came about because a small UK firm (ECS), producing benzoyl peroxide and having sold it as a bleach in the treatment of flour in the UK and Eire, decided also to sell it to users in the polymer industry. According to ECS, AKZO a Dutch company, in a meeting informed ECS that unless it withdrew from the polymer market AKZO would reduce its prices, in particular in the flour additives market, essentially in order to harm ECS.⁸¹¹ Subsequently AKZO appears to have lowered its prices to any customer to the lowest price going in the market, irrespective of actual competitive conditions.⁸¹²

In order to appreciate the EU approach to prices/costs related breaches, first it is necessary an overview of costs classification. In holding that AKZO had abused its dominant position the Commission's approach was that cost-price analysis is a significant element in deciding whether a price is predatory.⁸¹³ Accordingly, the Commission's classification of costs in the AKZO's proceedings states that:

a) Fixed costs are costs which remain constant in spite of changes in output and generally include management overheads, depreciation, interest and property taxes;

⁸⁰⁸ Ibid, 103

⁸⁰⁹ *ECS/AKZO* (Case IV/30698) Commission Decision 85/609/EEC [1985] OJ L 374/1

⁸¹⁰ Ibid, art 2

⁸¹¹ Ibid, 26

⁸¹² Ibid, 28

⁸¹³ Ibid, 52 - 54, 75

- b) Variable costs are costs which vary with changes in output and generally include materials, energy, direct labour, supervision, repair and maintenance, and royalties;
- c) Total cost is the sum of fixed and variable costs;
- d) Average cost is total cost divided by output; and
- e) Marginal cost is the addition to cost resulting from the production of an additional unit of output.⁸¹⁴

The implication of the Commission's classification of costs (i.e. variable and total costs) is that it identified two categories of prices that could be considered abusive in relation to predation. Prices below average variable costs (AVC), which are those costs that vary depending on the quantities produced, and prices below average total costs (ATC), which are the fixed costs plus variable costs, but above average variable costs. Thus the cost-price analysis in the determination of liability in predation cases can be summarised as follow:

- a) Where a dominant firm is charging prices above ATC, it is not guilty of predation under the rule in *AKZO*.
- b) Where a dominant firm is selling at less than ATC, but above AVC, it is guilty of predation where this is done as part of a plan to eliminate a competitor.
- c) Where a dominant firm is selling at less than AVC, it is presumed to be acting abusively. This presumption may be rebuttable where there is an objective justification for below-cost selling.⁸¹⁵

The issue of cost classification is of particular relevance since the Court of Justice endorsed the Commission's price-costs assessment. In considering the action for annulment brought by *AKZO* unfounded, the Court held that not all competition by means of price can be regarded as legitimate and plainly stated that these were 'the criteria that must be applied'⁸¹⁶ to the situation in the present case:

Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

⁸¹⁴ *Ibid*, 58

⁸¹⁵ *Ibid*, 52 - 54, 75

⁸¹⁶ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 73

Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.⁸¹⁷

Accordingly, when a dominant firm is trading at a price below its costs it is in breach of Art 102 as such a practice is considered predation and 'must' be regarded as abusive if from such practice can be deduced an intention to eliminate a competitor. However the intentions to eliminate a competitor, or indeed the effect on the competitor appear to have a marginal role to play, or none at all, in the condemnation of the practice in question. The Court of Justice explained that where the low pricing could be susceptible of several explanations, evidence of an intention to eliminate a competitor or restrict competition might also be required to prove an infringement, otherwise the cost-prices assessment is sufficient in establishing a violation as, according to the Court 'The exclusionary consequences of a price-cutting campaign by a dominant producer might be so self-evident that no evidence of intention to eliminate a competitor is necessary'.⁸¹⁸

It is worth recalling that the US Supreme Court in *Brooke Group* plainly stated that below-cost pricing is not alone sufficient to permit inference of probable recoupment and injury to competition.⁸¹⁹ Under the US antitrust rules, unless the plaintiff is able to prove that prices complained of are below an appropriate measure of its rival's costs and that the competitor had a reasonable prospect of recouping its investment in below-cost prices, the claim of predation will fail.⁸²⁰ Moreover, the US Supreme Court clearly explained the rationale for the inclusion of recoupment to the liability test by stating that without recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced.⁸²¹

In comparing the EU and the US approach towards predatory pricing it emerges that while *Brooke Group* pricing practice was deemed lawful as does not harm competition, indeed it brings lower prices to consumers, had it been prosecuted under the EU competition law, undoubtedly it will have been found in breach of Art 102 under the cost-prices test employed in *AKZO*. What is significant in the Court of Justice ruling in *AKZO* is that cost-prices test, in essence, determines

⁸¹⁷ Ibid, 71 - 72

⁸¹⁸ Ibid, 65

⁸¹⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 Sct 2578, 3

⁸²⁰ Ibid, 8

⁸²¹ Ibid, 17

liability and the intention to eliminate a competitor is presumed.⁸²² Contrary to the US, whether the violator has any prospect of recovering its losses, in the EU it is not part of the equation under the rules in AKZO. Moreover, while in the EU a plan or intention to eliminate a competitor⁸²³ is a significant element in determining liability, in the US, even an act of pure malice against a competitor does not form part of the assessment criteria to establish violation of antitrust rules.⁸²⁴ In this respect, it appears that the private enforcement regime envisaged in the Commission proposals will not deliver the stated aims of stimulating economic growth and innovation.⁸²⁵ Although the US is predominantly a private enforcement regime, any detrimental effect stemming from private actions, arguably is amortized in the first place by the higher liability standard.

In considering the different approaches taken by the EU and US authorities to predatory pricing, it is interesting to note, that AG General Ruiz-Jarabo Colomer in *Tetra Pak*, considered that proof of recoupment was not necessary when he stated: 'I do not consider it desirable that the Court of Justice should lay down the prospect of recouping losses as a new prerequisite for establishing the existence of predatory pricing.'⁸²⁶ Yet in *Compagnie Maritime* AG Fennelly said that recoupment '...should be part of the test for abusively low pricing by dominant undertakings'.⁸²⁷ However, in *France Télécom* the then CFI endorsed the Commission approach to recoupment by holding that recoupment is not part of the test to determine ability as:

In line with Community case-law, the Commission was therefore able to regard as abusive prices below average variable costs. In that case, the eliminatory nature of such pricing is presumed ... In relation to full costs, the Commission had also to provide evidence that WIN's predatory pricing formed part of a plan to 'pre-empt' the market. In the two situations, it was not necessary to establish in addition proof that WIN had a realistic chance of recouping its losses.

The Commission was therefore right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing.⁸²⁸

Consequently, had the *Brooke Group* case⁸²⁹ been prosecuted under the no-recoupment test as crafted and applied by the EU authorities the Group would have faced both the penalties imposed by the Commission and/or the EU courts and, it would have also been exposed to private actions for

⁸²² Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-00755, 148

⁸²³ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 73

⁸²⁴ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 S Ct 2578, 6

⁸²⁵ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

⁸²⁶ Case C-333/94 *Tetra Pak International SA v European Commission* [1996] ECR I-5951, Opinion of AG Ruiz-Jarabo Colomer, 78

⁸²⁷ Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA and others v European Commission and others* [2000] All ER (EC) 385, Opinion of AG Fennelly, 136

⁸²⁸ Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107, 228 -229

⁸²⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 S Ct 2578

damages. It is worth recalling that in such a case the violation of competition law would have been already established. Therefore, a private party only needs to prove that he had been affected by the price practice. Accordingly, it is submitted that, due to the lower standard in determining liability, businesses trading in the EU are under a severe risk (compared to US's businesses) that a low price strategy is deemed in breach of competition rule. Despite any benefits that such a practice might bring to consumers, large companies are facing the prospect of paying out damages to both competitors (perhaps inefficient) and to private parties under a private enforcement regime.

The Wanadoo Case

In *Wanadoo*⁸³⁰, a fine of € 151,875,000 was imposed by the Commission on Telefónica for having priced residential broadband internet services at levels that, until August 2001, fell considerably below average variable costs (AVC), and which subsequently until 2006 were approximately equivalent to AVC, but were significantly below average total costs (ATC). The Commission held that because of Telefónica's behaviour, the market was free from distortions, and consumers did not benefit from choice or innovation, as the '...margin squeeze in this case has had concrete foreclosure effects in the retail market and a detrimental impact for end users'.⁸³¹ The Commission commented that the abuse on which it had taken action 'was designed to take the lion's share of a booming market, at the expense of other competitors'.⁸³² The Commission's decision was upheld on appeal to the CFI in *France Télécom v Commission*.⁸³³

In *Wanadoo/ France Télécom*, in finding an abuse the CFI followed the Court of Justice's approach in *AKZO*,⁸³⁴ which established that a finding of abuse can be based upon one of two conditions, when prices are below AVC, or when prices are below ATC but above AVC and an intention to eliminate competitors is proven. France Télécom challenged the Commission's application of the test for predation on three grounds. First, that it was entitled to align its prices to those of its competitors. Second, that there was no plan of predation or reduction of competition. Third, that the Commission should be required to prove that France Télécom would be able to recoup its losses.

⁸³⁰ *Wanadoo España v Telefónica* (Case COMP/38784, Summary of Commission Decision 4 July 2007 Relating to a Proceeding Under Article 82 of the EC Treaty [2008] OJ C 83/5, 4.3

⁸³¹ *Ibid.*, 3.3

⁸³² Commission, 'High-speed Internet: the Commission Imposes a Fine on Wanadoo for Abuse of a Dominant Position' (IP/03/1025, 16 July 2003) <<http://ec.europa.eu/competition/antitrust/IP/03/1025/index.html>> accessed 30 January 2014

⁸³³ During the judicial proceedings, Wanadoo and its parent France Télécom merged, thus France Télécom became the applicant in an action for the annulment of the Commission Decision, Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107

⁸³⁴ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 71 -72

However the CFI dismissed all three arguments and on appeal the Court of Justice endorsed the CFI's finding.⁸³⁵

In relation to price alignment the CFI held that although an undertaking is not strictly speaking prohibited from aligning its prices to those of its competitors that possibility is not open to it if it involves charging prices below cost in respect of the services in question.⁸³⁶ The CFI explained:

It is therefore not possible to assert that the right of a dominant undertaking to align its prices to those of its competitors is absolute ... in particular where this right would in effect justify the use of predatory pricing otherwise prohibited under the Treaty.⁸³⁷

As to the issue of a plan of predation, the CFI applied the test previously established in *AKZO*⁸³⁸ saying that price-cutting could be abusive where there was an intention on the part of the dominant firm to eliminate a competitor/s. The CFI held:

[I]n the case of predatory pricing, the first element of the abuse applied by the dominant undertaking comprises non-recovery of costs. In the case of non-recovery of variable costs, the second element, that is, predatory intent, is presumed, whereas, in relation to prices below average full costs, the existence of a plan to eliminate competition must be proved.⁸³⁹

As for the question whether it is necessary for a finding of predation to show the possibility of recoupment, the CFI endorsed the Commission's approach by stating that it was right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing.⁸⁴⁰ From its side, the commission emphasised its view, about the *Wanadoo* deserved fine by eloquently stating:

Community case law applies two tests to establish whether an abuse in the form of predatory pricing has been committed: where variable costs are not covered, an abuse is automatically presumed; where variable costs are covered, but total costs are not, the pricing is deemed to constitute an abuse if it forms part of a plan to eliminate competitors. The two tests have been applied in the Commission's decision⁸⁴¹

It is worth noting the phrase 'an abuse is automatically presumed'. As Miguel argues the approach taken by the EU courts shows that 'it is the elimination of a competitor that is viewed as a risk ... not

⁸³⁵ Case C-202/07 P *France Télécom SA (Appellant) v Commission of the European Communities* [2009] ECR I-02369

⁸³⁶ Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107, 174

⁸³⁷ *ibid*, 182

⁸³⁸ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 65

⁸³⁹ Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107, 197

⁸⁴⁰ *Ibid*, 228

⁸⁴¹ Commission, 'High-speed Internet: the Commission Imposes a Fine on Wanadoo for Abuse of a Dominant Position' (IP/03/1025, 16 July 2003) <<http://ec.europa.eu/competition/antitrust/IP/03/1025/index.html>> accessed 30 January 2014

the direct harm of consumers--the latter is presumed by the former'.⁸⁴² Indeed from the *AKZO*⁸⁴³ and *Wanadoo*⁸⁴⁴ cases it can be seen that a below cost-price is considered unlawful without exploring if there, in effect, exists the possibility of regaining the losses incurred during the time in which a price was deemed predatory. As Gal argues, if the predatory strategy was not rational as recoupment is not possible since the dominant firm would not be able to raise prices in the second stage, then the dominant firm's conduct actually benefits consumers, as they enjoy the low prices in the first period while not suffering from high ones in the second one.⁸⁴⁵ Such conduct should therefore not be prohibited. Indeed, the recoupment requirement should thus form an inherent part of any assessment of alleged predatory pricing, at least as a possible defence.⁸⁴⁶ Otherwise, it is submitted, private action for damages coupled with a low liability standard result in a lethal weapon in the hand of private party whose interests are counter to competition policy.⁸⁴⁷

In *Weyerhaeuser* the US Supreme Court held that the costs of erroneous findings of predatory pricing liability are quite high because the mechanism, by which a firm engages in predatory pricing--lowering prices, is the same mechanism by which a firm stimulates competition, and therefore mistaken liability findings would chill the very conduct the antitrust laws are designed to protect.⁸⁴⁸ In the EU, however, the cost analysis is sufficient for the condemnation of a price-practice as below the variable costs benchmark a violation of Art 102 in the form of abuse of dominant position is automatically presumed. In practise this means that, a competitor who by operating in the same market is able to ascertain/predict the dominant firm's costs, can initiate a claim aimed at harming the dominant firm (as direct competitor) and also aimed at financial awards in the form of damages. This represents, it is submitted, a detrimental side effect of a private enforcement regime in the EU. Regardless of effect on competition (indeed in *AKZO*⁸⁴⁹ and *Wanadoo*⁸⁵⁰ consumers were benefitting from the condemned price practice) undertakings trading in the EU could find themselves in a civil court awarding damages to inefficient competitors and/or to private individuals who spotted the possibility of financial awards. This difference in attitude to the find of liability taken by the EU competition authorities when compared with the non-intervention attitude taken by the US antitrust authorities shows a fundamental difference in policy approach which makes

⁸⁴² Moura Miguel and Silva Miguel, 'Predatory Pricing Under Article 82 and the Recoupment Test: Do not go Gentle into that Good Night' (2009) 30 (2) European Competition Law Review 61, 65

⁸⁴³ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965

⁸⁴⁴ Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107

⁸⁴⁵ Michal S Gal, 'Below-Cost Price Alignment: Meeting or Beating Competition? The France Telecom Case' (2007) 28 (6) European Competition Law Review 382

⁸⁴⁶ *Ibid*, 383

⁸⁴⁷ See chapter 2.1.4, 2.1.6

⁸⁴⁸ *Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., Inc.* 127 S Ct 1069 (2007), 1070

⁸⁴⁹ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965

⁸⁵⁰ Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107

private enforcement viable in the US, but arguably, not in the EU. This difference and the implication of it, is further discussed in the next part of the analysis.

6.1.8 Fundamental Difference of Approach

Possibly, the issue of condemning a pricing practice goes beyond the technical test applied to determine liability. A further difference in antitrust policy approach between the EU and the US appears to be US's non-intervention strategy⁸⁵¹ when compared with the apparent 'suspicion of wrongdoing' with which large firms are targeted in the EU. This difference significantly affects enforcement policy, thus while private enforcement can be effective in the US, it can be devastating in the EU.

In the US the Supreme Court eloquently said that the fact that below-cost pricing may impose 'painful losses' on its target is of no relevance to antitrust laws if competition is not injured.⁸⁵² Furthermore, even act of 'pure malice' by one business competitor against another does not, without more, warrant a claim under antitrust laws as those laws do not purport to afford remedies for all torts committed by or against persons engaged in commercial activities.⁸⁵³ This approach shows reluctance in intervention to the benefit of large firms that are able to deal with competitive markets, even if this results in weaker market actor to exit. To the contrary, from the language of the Court of Justice, it seems that a large firm in the EU is looked at suspiciously, simply because of its presence in the market even before any wrongdoing occurs.⁸⁵⁴ Indeed the Court of Justice in AKZO explained:

[T]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and through recourse to methods which, different from those which condition normal competition in products or services on the basis of the transactions of commercial operators.⁸⁵⁵

Accordingly, the 'very presence' of an undertaking deemed in a dominant position, which may trade in way considered different than the 'normal' competition in products or services could be viewed as hindering the maintenance of the degree of competition or the growth of that competition.

⁸⁵¹ For instance, the US Supreme Court has held that industries such as the banking sector may be immune from the application of antitrust law, see: Andrea Lista, *EU Competition Law and the Financial Services Sector* (Informa Law from Routledge 2013), ch 9.4. See also: Andrea Lista, 'Stairway to Competition Heaven or Highway to Hell: What Next for Insurance Competition Regulation' (2011) 1 *The Journal of Business Law* 1

⁸⁵² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 S Ct 2578, 17

⁸⁵³ *Ibid*, 6

⁸⁵⁴ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 69

⁸⁵⁵ *Ibid*

Stated differently, perhaps in more realistic terms by Neils and Jenkins, a dominant firm in the EU is in effect regarded as the proverbial bull in a china shop, it must be restrained to prevent it from inflicting further damage to its already fragile surroundings.⁸⁵⁶ Established in *Michelin*⁸⁵⁷ a dominant firm has a 'special responsibility'⁸⁵⁸ not to allow its conduct to impair genuine undistorted competition on the common market. The effect of it is that as matter of EU law undertakings deemed to be in a dominant position have in effect restraints imposed on them before any violation of competition rules occurs. Therefore, a large firm that holds a large portion of a given market is in effect constantly under the threat of private actions. The CFI in *France Télécom* recalling its previously ruling held:

The specific obligations imposed on undertakings in a dominant position have been confirmed by the case-law on a number of occasions. The Court stated in Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937, paragraph 139, that it follows from the nature of the obligations imposed by Article 82 EC that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.⁸⁵⁹

The issue on how to treat large firms was dealt with by the US Court of Appeals back in 1945 and, arguably, it explains the US's non-intervention approach, as back then the courts explained 'the successful competitor, having been urged to compete, must not be turned upon when he wins.'⁸⁶⁰ In the EU the CFI seems to have taken the opposite approach.

It is important to note that a particular commercial practice can be lawful or forbidden simply by looking at the size of the business in question. In a report commissioned by the Directorate-General for Competition, the group of experts called to comment on the then Article 82 EC explained that:

Our proposed effect-based approach also allows us to capture in a balanced and meaningful way the notion of special responsibility of a dominant firm. The reference to such responsibility is often intended to prohibit some practices when exerted by a dominant firm, while considering them lawful if practiced by smaller competitors.⁸⁶¹

⁸⁵⁶ Gunnar Niels and Helen Jenkins, 'Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down' [2005] *European Competition Law Review* 605

⁸⁵⁷ Case 322/81 *Michelin v Commission* [1983] ECR 3461, 57

⁸⁵⁸ A detailed analysis of implications related to the 'special responsibility' is beyond the scope of this thesis. For further information see: Massimiliano Vatiere, 'Power in the Market: on the Dominant Position' (*ec.europa.eu*) <<http://ec.europa.eu/competition/antitrust/art82/005.pdf>> accessed 15 February 2014

⁸⁵⁹ Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107, 186

⁸⁶⁰ *United States v. Aluminum Co. of America* 148 F2d 416, 430

⁸⁶¹ Jordi Gual and others, 'An Economic Approach to Article 82' (*Report by the Economic Advisory Group for Competition Policy*, July 2005) <<http://ec.europa.eu/competition/antitrust/art82/index.htm>> accessed 29 November 2013, 15

This approach of considering a particular commercial practice lawful or unlawful depending on the size of the company performing it, arguably shows an unwarranted willingness to intervene by the EU courts. As Kovacic stresses:

The interpretations of Article 82 by the CFI and the Court of Justice have tended to create a wider zone of liability for dominant firms than the decisions of the US courts under Section 2 of the Sherman Act. At the margin, US courts have tended to say that courts and enforcement agencies commit greater errors by intervening too much rather than too little. This perspective does not appear in EU jurisprudence or in speeches by EU enforcement officials.⁸⁶²

Because of the rationale underpinning the EU competition policy enforcement, even if it can be argued that in the US private enforcement delivers benefits to the enforcement system, in the EU due to a radical different policy approach (i.e. interventionist), which in the instance of predatory pricing results in a lower liability standard (compared with that of the US) being applied, private enforcement in the EU presents a serious risk to businesses. Due to a low liability standard and therefore due to a greater possibility of success, private parties are thus incentivised to bring actions for self-interests whether for damages award or injunctions against a competitor.

The next part of the analysis explores a situation in which the participation by private parties in the enforcement process can be dangerous even under a public enforcement regime.

6.1.9 The Contribution by Private Parties in Public Enforcement Proceedings

Having considered that under the EU antitrust policy a large firm's commercial practices, which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings,⁸⁶³ nevertheless can be considered in breach of Art 102, a further point to note is the danger posed by the input of a private party even when the case is prosecuted by the Commission. The case of *AKZO* is a clear example of this danger.⁸⁶⁴

As the *AKZO* group was found to have abused its dominant position by lowering its prices to any customer to the lowest price going in the market, irrespective of actual competitive conditions as to the detriment of a competitor (ECS), and it was fined by the Commission.⁸⁶⁵ Initially the Commission fined *AKZO* €10 million.⁸⁶⁶ However, when the case eventually reached the Court of Justice the fine

⁸⁶² William E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (*Bates White Fifth Annual Antitrust Conference Washington, D.C.*, 2 June 2008)

<www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> accessed 2 January 2014, 11

⁸⁶³ Case T-340/03 *France Télécom SA, formerly Wanadoo Interactive SA* [2007] ECR II-107, 186

⁸⁶⁴ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965

⁸⁶⁵ *ECS/AKZO* (Case IV/30698) Commission Decision 85/609/EEC [1985] OJ L 374/1, 28

⁸⁶⁶ *Ibid*, art 2

imposed was reduced from €10 million to €7, 5 million.⁸⁶⁷ The three factors which prompted the Court to reduce the fine show the danger posed to enforcement policy by private parties, even when the case is prosecuted exclusively under public enforcement.

In AKZO, although the Court observed that the infringement committed by AKZO was particularly serious, since the behaviour complained of was intended to prevent a competitor from extending its activity into a market in which AKZO hold a dominant position,⁸⁶⁸ nevertheless the Court applied a 25% reduction to the €10 million fine previously imposed by the Commission.⁸⁶⁹ The Court gave three reasons for the reduction:

First, with regard to the unreasonably low prices that AKZO quoted or granted both to its own customers and to those of ECS, it must be observed that abuses of this kind come within a field of law in which the rules of competition had never been determined precisely.⁸⁷⁰

Arguably, here Court acknowledged that the AKZO group had been fined for breaching competition rules that had not been defined yet. By contrast in the US the Supreme Court has repeatedly pointed out its reluctance in intervention as mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect.⁸⁷¹

The second ground for reduction was the rather minimum effect that AKZO behaviour had on the competitor. The Court stated that:

[T]he limited effect of the dispute between AKZO and ECS must be taken into account, since the infringement did not significantly affect their respective shares of the flour additives market. It is mentioned in the decision (point 18) that before the dispute ECS had a market share of 35%, compared with 30% in 1984, while that of AKZO rose from 52% to 55%.⁸⁷²

In other words the Commission, in punishing AKZO for abusing its dominant position, failed to appreciate the effect of the infringement to both, potential gains by violator and losses by the complainant.

The third and final factor that prompted the Court to apply the reduction is of particular relevance. During proceedings, the Commission imposed on AKZO interim measures for the benefit of the

⁸⁶⁷ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 164

⁸⁶⁸ *Ibid*, 162

⁸⁶⁹ *Ibid*, 164

⁸⁷⁰ *Ibid*, 163

⁸⁷¹ *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* 475 US 574, 106 Sct 1348, 3; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 US 209 (1993), 113 Sct 2578, 11; *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko* 540 US 398, 157 LEd2d 823 (2004) 882, 882; *Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., Inc.* 127 Sct 1069 (2007), 1078

⁸⁷² Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-1965, 163

competitors and complainant Dialex. A breach by AKZO of such interim measure was considered by the Commission as an aggravating factor capable of justifying the high amount of the fine. The problem is that Dialex was not a genuine competitor and was not acting in good faith. Consequently the Court had to correct the Commission's harsh punishment imposed on AKZO by stating:

[T]he Commission was not justified in regarding the infringement of the interim measures decision, consisting in alignments on Diaflex's prices, as an aggravating factor capable of justifying the high amount of the fine. That decision permitted alignment on the prices of any competitor and did not exclude those of Diaflex. Consequently, as soon as the Commission had evidence proving that Diaflex was not a genuine competitor and that the alignments were therefore not made in good faith, it should have exercised the powers to impose sanctions that it had reserved to itself.⁸⁷³

The point appears of particular relevance because it shows the danger posed by private parties when involved in antitrust enforcement. In this instance, Diaflex managed to mislead the Commission for its own benefit and to the detriment of AKZO. Although the AKZO case was dealt with by the Commission and thus via public enforcement, nevertheless the input and information from the private parties involved resulted in an excessive penalty to the AKZO group. Hence, this case casts some doubts about the desirability of creating an enforcement regime in which anyone at any time can file an antitrust claim. The AKZO case shows that the rather strong point made by McAfee is not a theoretical one but it is reality in court rooms. As a matter of fact, potential private enforcers do have incentive to behave strategically, that is, to use the law to win in the courts what they were unable to win in honest competition with their rivals.⁸⁷⁴

6.1.10 Conclusion

This Chapter shows that because liability standards in relation to anti-competitive conducts are different between EU, US and Canada, this could result in the condemnation of a practice under the EU provision, hence give rise to a private action from damages, while lawful in other jurisdictions. Therefore, while private enforcement might have limited detrimental side effects under the US and Canadian system, it raises concerns in the EU as it opens the possibility for private actions in the first place. Considering that the US courts are limiting the private cause of action by rising liability standards,⁸⁷⁵ to avoid an excessive amount of antitrust litigation, the concern is that such excess will

⁸⁷³ Ibid

⁸⁷⁴ Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014

⁸⁷⁵ William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (*British Institution of International & Comparative Law*, 15 May 2003) <<http://www.ftc.gov/speeches/other/030514biicl.shtm>> accessed 3

be replicated in the EU. However, while the US courts under a common law regime have limited the amount of litigation and effectively deny damages,⁸⁷⁶ it will be difficult to achieve the same limitation in the EU. Unless the EU courts are ruling otherwise, national courts are required to award damages under the current provisions. Hence, national courts will be awarding damages for every nominal violation of competition rules regardless of its effect on competition. This, it is submitted, will have a detrimental effect on competition and in turn the EU economy by discouraging and not promoting, as the Commission expects, new investments and innovation.⁸⁷⁷ The analysis now moves to an appraisal of private enforcement specifically in relation to cartels.

April 2014; Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107

⁸⁷⁶ Leon B Greenfield and David F Olsky, 'Treble Damages: to What Purpose and to What Effect?' (*British Institute of International and Comparative Law*, 2 February 2007)

<<http://www.wilmerhale.com/files/Publication/Treble%20Damages%20Article.pdf>> accessed 14 January 2014

⁸⁷⁷ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

Chapter 7: PRIVATE ENFORCEMENT AND CARTELS

7.1.1 Introduction

Having discussed the implications of private enforcement with reference to specific elements under the heading of abuse of dominant position forbidden by Art 102, the analysis now moves to an appraisal of private enforcement in relation to unlawful agreements under Art 101, i.e. cartels.

Cartels are generally, and rightly, portrayed with a particularly negative connotation around the world and the EU is not an exception.⁸⁷⁸ An assessment of the efficacy of private enforcement in the EU, will not be complete without an appraisal of the impact of the Commission's proposals on the detection and prosecution of cartels' activities.

Cartels are often difficult to detect and consequently it requires a considerable amount of resources to successfully prosecute such agreements. A successful strategy employed in prosecuting cartels is that of using evidence of wrongdoing given by an insider. As explained by Lord Mustill:

It has been recognised for centuries that the practice of allowing one co-accused to 'turn Queen's evidence' and obtain an immunity from further process by giving evidence against another was a powerful weapon for bringing criminals to justice.⁸⁷⁹

As the main difficulty in prosecuting cartels is their detection, this chapter discusses what effectively is, the incompatibility between the private enforcement regime proposed by the Commission and leniency programmes. The Commission, both in the past and at present, is keen to establish a system that preserves the confidentiality of documents provided to it by leniency applicants while at the same time not hindering the right of victims to claim full compensation proportioned to the full extent of the cartel activity. However, a detailed analysis of these initiatives reveals that the Commission goals are, effectively, unachievable in light of the jurisprudence of the EU courts. This chapter argues that while in the US and Canada, due to jail sentences faced by cartelists leniency programmes is still attractive, in the EU, leniency is far less useful to cartel members. To the contrary, leniency applicants could find themselves in a worse position of those cartelists who did not make a leniency application.

7.1.2 The EU approach to Cartels

According to the Commission, cartels can detrimentally affect markets in various ways as they are:

⁸⁷⁸ Organisation for Economic Co-operation and Development - Competition Committee, 'Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws' (*Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee, DAFFE/COMP(2002)7*, 9 April 2002)

<<http://www.oecd.org/competition/cartels/2081831.pdf>> accessed 21 January 2014

⁸⁷⁹ *Chan Wai Keung v. The Queen* [1995] 2 All ER 438, 444

[A]greements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.⁸⁸⁰

Cartels harm consumers and have pernicious effects on economic efficiency, in that a successful cartel raises prices above the competitive level and reduces output. The *Pre-Insulated Pipe Cartel* is a clear example of strategies carefully designed to draw competitors out of business.⁸⁸¹ In a record of a management meeting which ended in the Commission hands it was recorded:

Everyone was of the opinion that it was an action against Powerpipe that should be undertaken (instead of a September campaign against Løgstør because Løgstør has the financial strength to withstand it)... Were Powerpipe to be forced into bankruptcy, then ABB would be the only company producing on that market and a powerful sales argument could be built up, and we can go after Løgstør in Phase 2.⁸⁸²

Clearly, from this example can be appreciated the danger posed by cartelists to honest businesses and the resulting harm to the market. In such circumstance, consumers choose either not to pay the higher price for some or all of the cartelised product that they desire, thus abandoning the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators.⁸⁸³

Although it is impossible to determine the exact amount of cartel-induced losses, they have an overall adverse impact on competition and welfare. The worldwide economic harm from cartels is considered very substantial; although it is difficult to quantify it accurately, conservatively, it exceeds many billions of US dollars per year.⁸⁸⁴ The yearly estimated welfare impact of cartels reaches a total overcharge from EU-wide (detected and undetected) cartels ranges between €16.8 billion and €261.22 billion. This would in turn mean an impact of 0.15% of the EU GDP in the lower band and an impact of 2.3% of the EU GDP in the upper band.⁸⁸⁵ The total impact of EU-wide cartels over the period 2002-2007 is in the region of €44.6 billion, of which approximately €14.9 billion is the net loss to society from reduced output (allocative inefficiency), whereas €29.7 billion is the

⁸⁸⁰ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 1

⁸⁸¹ *Pre-Insulated Pipe Cartel* (Case No IV/35691/E-4) Commission Decision 1999/60/EC [1999] OJ L 24/1

⁸⁸² *Ibid*, 90

⁸⁸³ Organisation for Economic Co-operation and Development - Competition Committee, 'Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws' (*Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee, DAFFE/COMP(2002)7*, 9 April 2002)

<<http://www.oecd.org/competition/cartels/2081831.pdf>> accessed 21 January 2014, 2

⁸⁸⁴ *Ibid*

⁸⁸⁵ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 96

transfer from buyers to sellers (cartelists).⁸⁸⁶ Such consequences are despite the EU antitrust authorities' effort in fighting cartels which, in the period between 1990 and 2013,⁸⁸⁷ resulting in 100 cartel cases⁸⁸⁸ decided by the Commission and in € 17 408 460 001,50 total fines imposed by the Commission and endorsed by the EU courts.⁸⁸⁹

The explanation, as to why although competition law forbids cartels, nevertheless cartels continue to form and operate in a significant number of industries, possibly, can be found in the judgement of the Court of Justice in *Courage* and *Manfredi*, cartels '... are frequently covert ...'.⁸⁹⁰ Indeed, a Report for the Commission, extensively covering old and new researches, concludes that the cartel detection rate in the EU is in the range between 10% and 20%; whereas the detection rate in the US is in the range between 15% and 25%. The conviction rate in cartel cases is 75%.⁸⁹¹

It is well acknowledged that one of the most difficult area in the fight against cartels is the detection of them.⁸⁹² Strict antitrust rules and harsh penalties are totally irrelevant if an unlawful agreement, for instance a price fixing or a market share, does not come to light and thus cannot be prosecuted. Detection, thus, is of paramount importance. To this end, the Commission is equipped with a legal instrument (Regulation 1/2003) granting it the necessary legal powers to conduct all necessary inspections of undertakings and associations of undertakings. As Friederiszick and Maier-Rigaud put it, the Commission cartel detection based on inspections at the premises of firms plays a crucial role. Surprise inspections are by far the most effective and sometimes the only means of obtaining the necessary evidence necessary for prosecuting a cartel.⁸⁹³ Arguably, this fact seems to indicate the superior stance of public enforcement in prosecuting cartels when compared to private enforcement, hence the need in the EU to preserve a strong public enforcement regime.

It is clear that the Commission is not entitled to undertake 'fishing expeditions', i.e. to launch intrusive investigative measures in an attempt of finding some evidence of a cartel. Under Art 20 (4) of Regulation 1/2003 inspection decisions 'shall specify the subject matter and purpose of the

⁸⁸⁶ Ibid, 95

⁸⁸⁷ Decided cases up to July 2013 and fine imposed up to 22 October 2013, 'Cartels Statistics' (ec.europa.eu/competition, 2013) <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 25 January 2014

⁸⁸⁸ A cartel case concerns a single proceeding against various undertakings concerned, and may involve more than one infringement. Only those cartel cases where a fine was imposed were considered for this purpose, see: *ibid*, table 1.10

⁸⁸⁹ Amounts corrected for changes following judgments of the Courts (General Court and Court of Justice) and only considering cartel infringements under Article 101 TFEU, see: *ibid*, table 1.4

⁸⁹⁰ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 27; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 91

⁸⁹¹ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 97

⁸⁹² For a analysis of this issue, see: Hans W Friederiszick and Frank P Maier-Rigaud, 'The Role of Economics in Cartel Detection in Europe' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Tubingen 2007)

⁸⁹³ *Ibid*, 183

inspection'.⁸⁹⁴ Accordingly, the Commission suspicion of cartel activity must therefore be sufficiently specific as to enable the Commission to identify the products or services concerned, the anti-competitive behaviour and the competition rules violated. There are no explicit rules on the exact level of suspicion the Commission needs to have for a decision ordering surprise investigations to be lawful.⁸⁹⁵ However, it is clear that the Commission decision must be authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. Indeed national courts, in assessing the proportionality of the coercive measures, may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 101 and 102, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned.⁸⁹⁶ It should be noted, as the Court of Justice emphasised in *Roquette*, the need for the Commission to be in possession of sufficient evidence and to state the reasons for the decision ordering an investigation by specifying its subject matter:

[I]s a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence.⁸⁹⁷

Accordingly, the need for protection against arbitrary or disproportionate intervention must be recognised as a general principle of EU law. The Court of Justice explained that having regard to the invasion of privacy which the Commission's inspection entails, recourse to such coercive measures necessitates the ability of the competent national body autonomously to satisfy itself that they are not arbitrary. Therefore, the court stated that:

[F]or the purposes of enabling the competent national court to satisfy itself that the coercive measures sought are not arbitrary, the Commission is required to provide that court with explanations showing, in a properly substantiated manner, that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned.⁸⁹⁸

⁸⁹⁴ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

⁸⁹⁵ An extended analysis of these issues is beyond the scope of this thesis, see further: Hans W Friederiszick and Frank P Maier-Rigaud, 'The Role of Economics in Cartel Detection in Europe' in Schmidtchen, Albert and Voigt (eds), *The More Economic Approach to European Competition Law* (Tübingen 2007); Cécile Aubert, Patrick Rey and William E Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' (*Elsevier*, 2006) <<http://www.ftc.gov/speeches/kovacic/2006leniency.pdf>> accessed 28 November 2013

⁸⁹⁶ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 20 (8)

⁸⁹⁷ Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-09011, 47

⁸⁹⁸ *Ibid*, 59 / 61

It follows that to adopt a decision under Art 20 of Regulation 1/2003 the Commission must be in possession of sufficiently precise information as to the existence of a cartel so as to enable an inspection decision to stand the scrutiny of national courts and in turn that of the EU courts. Given the generally secret nature of cartels, no real alternative exists that can be equally efficient in the detection and prosecution of cartels than information coming from an insider. The initial evidence prompting the Commission to adopt an inspection decision that has the potential to lead to a successful prosecution is often provided by whistle blowers (often former employees) and by cartel members in the context of a leniency application. Hence the efficacy of the private enforcement regime proposed by the Commission must also be assessed in the context of the EU leniency programme.

7.1.3 Private Enforcement and Leniency

In the EU internal market, the effect of cartels is the opposite of the general aim of antitrust policy of stimulating competition to the benefit of consumers.⁸⁹⁹ In a cartel, independent companies join together to fix prices, to limit production or to share markets or customers between them. Thus, instead of competing with each other, cartel members rely on each other's agreed course of action, which reduces their incentives to provide new or better products and services at competitive prices. As a consequence, their clients (consumers or other businesses) end up paying more for less quality. The Commission acknowledges that since they are illegal, they are generally highly secretive and evidence of their existence is not easy to find.⁹⁰⁰ For this reason the EU leniency policy encourages companies to hand over inside evidence of cartels to the Commission. The first company in any cartel to do so could have a total immunity from fines. Usually, this results in the cartel being destabilised. The Commission recognises that although it has played a part in the successful investigation and detection of cartels 'In recent years, most cartels have been detected by the European Commission after one cartel member confessed and asked for leniency ...'.⁹⁰¹ Leniency, therefore, is of paramount importance in the fight against cartels. The concern is whether the Commission's proposals for a private enforcement are compatible with the leniency programme or whether such a system has the potential to undermine the current success of leniency policy by discouraging future leniency applications.

In the EU the term 'leniency programme' is used to describe all programmes which offer either full immunity or a significant reduction in the penalties which would have been otherwise imposed on a

⁸⁹⁹ See chapter 3.1.3

⁹⁰⁰ Commission, 'Cartels Overview' (*European Commission Competition*)

<http://ec.europa.eu/competition/cartels/overview/index_en.html> accessed 3 January 2014

⁹⁰¹ Ibid

participant in a cartel, in exchange for the freely volunteered disclosure of information on the cartel which satisfies specific criteria prior to or during the investigative stage of the case. The term does not cover reductions in the penalty granted for other reasons.⁹⁰²

In essence, in order to obtain total immunity under the leniency policy, a company which participated in a cartel must be the first one to inform the Commission of an undetected cartel by providing sufficient information to allow the Commission to launch an inspection at the premises of the companies allegedly involved in the cartel. If the Commission is already in possession of enough information to launch an inspection, the company must provide evidence that enables the Commission to prove the cartel infringement. Companies which do not qualify for immunity nevertheless may benefit from a reduction of fines if they provide evidence that is deemed of 'significant added value' to that already in the Commission's possession. The Commission considers evidence to be of a 'significant added value' when it reinforces its ability to prove the infringement. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.⁹⁰³

In all cases, in addition to stop the infringement immediately, the company must also fully cooperate with the Commission throughout its procedure and provide it with all evidence in its possession. Furthermore, the Commission plainly states that: 'The cooperation with the Commission implies that the existence and the content of the application cannot be disclosed to any other company'.⁹⁰⁴ Hence, a leniency application must be kept confidential in all aspects. Accordingly the Commission, due to the high value of insider evidence enabling it 'to pierce the cloak of secrecy in which cartels operate'⁹⁰⁵ is committed to protect the information about the cartel infringement and in turn to protect the cartel member that provides it. However, despite the Commission's best intention, a detailed analysis of leniency proceedings shows that the Commission is not really able to guarantee that the information received in the context of a leniency application is not 'used for any other purpose than the Commission's own cartel proceedings'.⁹⁰⁶

With regard to private enforcement of competition law and specifically in relation to damages actions the Commission is facing a dilemma. On one hand it must take great care to protect corporate statements of the applicants in order to guarantee that companies which cooperate with the Commission are protected from discovery requests. On the other hand, if a particularly strict disclosure regime is implemented, this would hinder the ability of private parties to obtain 'full

⁹⁰² Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43, fn 14

⁹⁰³ Commission, 'Cartels Leniency' (*European Commission Competition*)

<<http://ec.europa.eu/competition/cartels/leniency/leniency.html>> accessed 3 December 2013

⁹⁰⁴ Ibid

⁹⁰⁵ Ibid

⁹⁰⁶ Ibid

compensation' for the harm suffered established by the Court of Justice.⁹⁰⁷ For instance, in relation to actual losses and loss of profits, a limit imposed on what evidence of a breach can be disclosed to private parties, could result in the private parties' inability to fully demonstrate the extent of their losses.

The Commission, however, is keen to use all the means at its disposal to protect information received in the course of leniency applications. The question is whether such protection is achievable in practice.

7.1.4 The Commission Steps in Preventing Disclosure

In cases concerning an alleged infringement of Articles 101 or 102 the Commission may open a case on its own initiative, for instance as a result of information gathered in the context of sector enquiries, informal meetings with industry, or monitoring of markets or on the basis of information exchanged within the European Competition Network (ECN).⁹⁰⁸ Information from citizens and undertakings is also important in triggering investigations by the Commission. Hence, the Commission encourages citizens and undertakings to inform it about suspected infringements of the competition rules.⁹⁰⁹ In relation to cartels, as a cartel case can also be initiated on the basis of an application for leniency by one of the cartel members, the exchange of information within the ECN raises the issues of what evidence and to who can be disclosed. In an attempt to prevent that leniency material is disclosed, thus used for matters detrimental to the leniency applicant, the Commission has issued a Notice on cooperation within the ECN stating under what circumstances leniency material can be passed to another authority.⁹¹⁰

The Notice begins by reiterating that together, the NCAs and the Commission form a network of public authorities, they act in the public interest and cooperate closely in order to protect competition.⁹¹¹ In this context, the Commission considers that it is in the Union interest to grant favourable treatment to undertakings which co-operate with it in the investigation of cartel infringements. Accordingly, the Commission emphasises that the aim of these leniency programmes is to facilitate the detection by competition authorities of cartel activity and, as a by product, also to act as a deterrent to participation in unlawful cartels.⁹¹²

⁹⁰⁷ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95

⁹⁰⁸ The network consists of the Commission and NCAs

⁹⁰⁹ Commission Notice on the Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU [2011] OJ C 308/6, 9 - 11

⁹¹⁰ Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43

⁹¹¹ *Ibid*, 1

⁹¹² *Ibid*, 37

Article 11 of Regulation 1/2003 imposes an obligation to both the Commission and the NCAs to make the information they hold available to other members of the network. This obligation also applies when a case has been initiated as a result of a leniency application.⁹¹³ However, in order to preserve the benefits of the leniency programme, the Commission states that:

[I]nformation submitted to the network pursuant to Article 11 will not be used by other members of the network as the basis for starting an investigation on their own behalf whether under the competition rules of the Treaty or, in the case of NCAs, under their national competition law or other laws.⁹¹⁴

The Commission also intends to further reassure leniency applicants of the confidentiality accorded to leniency material by stating that information voluntarily submitted by a leniency applicant will only be passed to another member of the network pursuant to Art 12 of Regulation 1/2003 only with the consent of the applicant,⁹¹⁵ or:

[W]here the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions:

(a) on the leniency applicant;

(b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme;

(c) on any employee or former employee of any of the persons covered by (a) or (b).⁹¹⁶

Therefore, according to the Commission's official Notice, despite the cooperation requirement between the authorities within the network, a cartel member and the firm is protected by limiting who and for what reason has access to the information voluntarily submitted in a leniency application. A deconstructive reading of the Commission's approach to the disclosure of leniency material, however, reveals that while the Commission may be able to prevent the transmission of information from one NCA to another, the same cannot be said when the case is dealt with in a civil court. Therefore, despite the Commission's effort, the concern is whether it is possible to prevent disclosure of evidence when a national court has jurisdiction over the leniency applicant.

⁹¹³ Ibid, 39

⁹¹⁴ Ibid

⁹¹⁵ Ibid, 40

⁹¹⁶ Ibid, 41

The Commission's position with regard to its cooperation with national courts, particularly with reference to actions for damages- leniency, is the next stage of the analysis.

7.1.5 Private Enforcement and the Threat to Leniency

The duty to a mutual and loyal cooperation, between the EU institutions and the Member States, is well established and the Court of Justice has stressed its importance.⁹¹⁷ For instance, in *Roquette* the Court emphasised:

[I]t should be noted that where ... the Community authorities and national authorities are called upon to assist in the attainment of the objectives of the Treaty by the coordinated exercise of their respective powers, such cooperation is particularly crucial.⁹¹⁸

The Commission for its part has issued a Notice specifically dealing with such cooperation in the application of Articles 101 and 102.⁹¹⁹ With reference to the information that the Commission will or will not pass to national courts the Commission explains that there are exceptions to the general rule of cooperation. For instance, in order to guarantee the protection of confidential information and business secrets, unless the receiving court offers such guarantee, 'the Commission shall not transmit the information covered by professional secrecy to the national court'.⁹²⁰ Moreover, in relation to leniency material, the Commission eloquently states that:

There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it. Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.⁹²¹

The Commission's high level of confidentiality accorded to leniency information in its possession can be deduced from the expression used: the Commission 'shall not' and 'will not' transmit to a national court confidential information. However, the fallacy with this arguments is that when it comes to private action for damages in a civil court the Commission is no longer able to guarantee

⁹¹⁷ Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-09011, 31; Case C-234/89 *Stergios Delimitis v Henninger Bräu AG.* [1991] ECR I-935, 53

⁹¹⁸ Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-09011, 32

⁹¹⁹ Commission Notice on the Cooperation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC [2004] OJ 101/54

⁹²⁰ *Ibid*, 25

⁹²¹ *Ibid*, 26

such confidentiality because it is not in the position to control neither what a private party contemplating a damages action may request to be disclosed nor whether a judge in a national court may grant access to it. It is for the courts and tribunals of the Member States, on the basis of their national law, to determine whether access to leniency material have to be permitted or refused by weighing the interests protected by EU law.⁹²² The ‘interests’ to be protected under the EU law, in this context, are those of the victims of infringements. Thus, a strict approach to disclosure is simply unachievable as it would jeopardise the effectiveness of the application of the EU competition law in relation to full compensation of harm suffered as result of breaches of Articles 101 and 102.⁹²³ At the same time, the attractiveness of the leniency programme is undermined if evidence of antitrust illegal activities voluntarily given to the Commission in a leniency application, is subsequently used in private action for damages (i.e. against those who enabled the discovery of a cartel in the first place). Consequently, the introduction of a private enforcement regime, in this instance with reference to cartels, has the potential to undermine the leniency programme which, by the Commission’s own admission, has proved to be the best instrument in detecting and therefore prosecuting cartels.⁹²⁴ The issue of disclosure, it is submitted, could be less relevant if compensation was awarded under a public enforcement regime, i.e. via the Commission itself and NCAs.⁹²⁵

The Commission appears to be mindful of the importance of leniency, in fact, in setting the framework for rewarding cooperation in its investigation by firms which are or have been party to secret cartels, the Commission reiterates that:

By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission’s investigation.⁹²⁶

The Commission also explains the rationale for the total or partial immunity from fines to leniency applicants. The Commission contends that:

⁹²² Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 32

⁹²³ As established by the Court of Justice in: Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 27; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 91

⁹²⁴ Commission, ‘Cartels Overview’ (*European Commission Competition*) <http://ec.europa.eu/competition/cartels/overview/index_en.html> accessed 3 January 2014

⁹²⁵ See chapter 10.2

⁹²⁶ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 3

The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.⁹²⁷

It should be noted that in addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role in it prepared specially to be submitted under the leniency programme, and the Commission acknowledges that 'these initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation'.⁹²⁸ Stated differently, the Commission is aware that despite its effort in establishing an attractive and in turn useful leniency programme, such a system could be nullified by private parties empowered to enforce antitrust rules. Indeed, in the same Notice in which the Commission promises immunity or at least reduction from fines to those who voluntarily assist the Commission in prosecuting cartels, the Commission has no choice but to state:

Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.⁹²⁹

In the same Notice the Commission clearly acknowledges that such a Notice, setting out the criteria for total or partial immunity from fines, obviously, creates legitimate expectations on which firms rely when disclosing the existence of a cartel to the Commission.⁹³⁰ However the Notice concludes with a warning to anyone contemplating a leniency application which arguably has the potential to nullify the leniency provisions all together as it states: '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'.⁹³¹

Therefore, under a private enforcement regime, it is impossible for a leniency applicant to predict the level of punishment that he will be exposed to. Indeed the fact that he has voluntarily provided the antitrust authorities with insider information about the cartel makes him more vulnerable to private action for damages than other participating in the same cartel as he has provided evidence which the prosecuting authority may or may not discovered. The Commission has been warned that in order not to hamper the incentives provided by leniency mechanisms, which are currently the

⁹²⁷ Ibid

⁹²⁸ Ibid

⁹²⁹ Ibid, 6

⁹³⁰ Ibid, 38

⁹³¹ Ibid, 39

most effective public enforcement investigative tool against secret ‘naked cartels’,⁹³² the interrelation between extensive availability of private enforcement and leniency programmes has to be carefully taken into account.⁹³³ As it stands, however, the Commission can guarantee full immunity from fines if the criteria are met (which in effect means fully revelation of the cartel and its extent by a participant), but the Commission cannot guarantee full confidentiality of the information provided to it as this would prevent the full compensation of the cartel’s victims.

Hence, the question is whether the EU leniency programme is still attractive to cartel members after contemplating the potential exposure to private damages actions. The issue was presented to the Court of Justice.

7.1.6 The Court of Justice Position in Relation to the Disclosure of Leniency Material

In *Pfleiderer*⁹³⁴ the Court of Justice was called to give a preliminary ruling regarding the interpretation of Articles 11 of Regulation 1/2003, which deals with the cooperation between the Commission and the NCAs of the Member States, and Art 12 of the same Regulation which deals with the exchange of information. The need for a preliminary ruling came about because a private party, *Pfleiderer*, in order to prepare an action for damages requested full access to the case files containing, among other things, leniency material.

Previously, the German NCA had imposed fines totalling €62 million on manufacturers and individuals involved in price agreements relating to decor paper. *Pfleiderer*, a purchaser of decor paper, applied for access to the case files with a view to a civil action for damages. The NCA provided redacted documentation. *Pfleiderer* applied for access to all the material in the files, including the documents relating to leniency applications which had been submitted. The NCA partly rejected *Pfleiderer*’s application and provided restricted access to the files. *Pfleiderer* brought proceedings before the German courts. However, as the court considered that resolution of the dispute required an interpretation of EU law, it stayed the proceedings and referred the matter to the Court of justice. The question referred to the Court was whether the provisions of EU competition law, in particular Art 11 and Art 12 of Regulation 1/2003, were to be interpreted as meaning that parties adversely affected by a cartel might not, for the purpose of bringing civil law

⁹³² Arrangements among a group of firms that does not result into any pro-competitive benefit: Frank H Easterbrook, ‘The Limits of Antitrust’ (1984) 63 (1) Texas Law Review 1

⁹³³ Andrea Renda and others, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’ (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 77

⁹³⁴ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161

claims, be given access to leniency applications or to information and documents voluntarily submitted as part of that application.⁹³⁵

The Court of Justice dealt with the question referred to it by stressing at the outset that when NCAs of the Member States, their courts and tribunals are required to apply Articles 101 and 102 they must ensure that those articles are applied effectively in the general interest.⁹³⁶ Thus, to leniency applicant and leniency material voluntarily given to the Commission, no special protected status is accorded. The need of an effective application of competition rules prevails over other matters. Specifically in relation to the utmost confidentiality of leniency material which the Commission promises to leniency applicants before they voluntarily provide evidence of a cartel, the Court of Justice seems to have taken a particularly strong position as the principle of compensation of antitrust victims would be undermined if the Commission guidance were to be followed. The Commission states that information submitted as part of leniency programmes may 'not be disclosed or used for any other purpose than the Commission's own cartel proceedings'.⁹³⁷ Further, within the network of competition authorities⁹³⁸ and even in the context of the cooperation with national courts, the Commission is reassuring leniency applicants that it 'will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant'.⁹³⁹ Stated differently, the Commission is saying that leniency material will not be used for ends adverse to the leniency applicant. In *Pfleiderer* however, the Court reiterated that neither the provisions of the Treaty on competition nor Regulation No 1/2003 lay down common rules on leniency or common rules on the right of access to documents relating to a leniency procedure which have been voluntarily submitted to NCAs pursuant to a leniency programme.⁹⁴⁰ Arguably, a particularly strong rebuke for the Commission came in relation to the Commission promises of confidentiality contained in the Commission's Notices.⁹⁴¹ The Court of Justice stressed that: 'it should be pointed out that those notices are not binding on Member States. Further, the latter notice relates only to leniency programmes implemented by the Commission itself'.⁹⁴² The Court, also emphasised that the model of leniency programme designated to achieve harmonisation within the ECN 'has no binding effect on the courts and tribunal of the Member States'.⁹⁴³ Consequently, in the absence of binding rules under EU law on the subject, it is for Member States

⁹³⁵ Ibid, 9 - 18

⁹³⁶ Ibid, 19

⁹³⁷ Commission, 'Cartels Leniency' (*European Commission Competition*)

<<http://ec.europa.eu/competition/cartels/leniency/leniency.html>> accessed 3 December 2013

⁹³⁸ Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43, 39

⁹³⁹ Commission Notice on the Cooperation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC [2004] OJ 101/54, 26

⁹⁴⁰ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 20

⁹⁴¹ Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43; Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17

⁹⁴² Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 21

⁹⁴³ Ibid, 22

to establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures.⁹⁴⁴ The Court eloquently stated that while Member States have competence to define and apply those rules they must be particularly carefully that:

[T]hey may not render the implementation of European Union law impossible or excessively difficult ... and, specifically, in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU...⁹⁴⁵

Recalling the cases of *Courage* and *Manfredi*⁹⁴⁶ the Court reiterated that it is settled case law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition.⁹⁴⁷ Accordingly the Court held that the EU provisions on cartels, and in particular Regulation 1/2003:

[M]ust be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.⁹⁴⁸

The ruling of the Court of Justice appear of significance as it exposes the reality about the Commission's unrealistic promise of confidentiality of leniency material, and in turn, shows a much wider impact of private enforcement than the Commission envisaged in its proposals. The case of *Pfleiderer* simply shows that private enforcement of competition law in the EU has far wider implications than the laudable aims of compensating victims⁹⁴⁹ while creating and sustaining a competitive EU economy as the Commissions contends.⁹⁵⁰ The Court ruling in *Pfleiderer* shows that a strict disclosure regime cannot be implemented as this would result in undermining the right of victims of infringements to obtain full compensation for the harm they suffered. It is worth noting that *Pfleiderer* had 'partial disclosure' in the form of redacted documents given by the German NCA, but it appears that in the circumstance it was insufficient to make a claim for damages and the Court of Justice seems to have agreed.

The leniency programme is inevitably compromised if documents relating to a leniency procedure voluntarily given to the authorities, were subsequently disclosed to persons wishing to bring an

⁹⁴⁴ Ibid, 23

⁹⁴⁵ Ibid, 24

⁹⁴⁶ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 27; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 90

⁹⁴⁷ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 28

⁹⁴⁸ Ibid, 32

⁹⁴⁹ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

⁹⁵⁰ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

action for damages. This clearly shows a fundamental fallacy in the private enforcement regime proposed by the Commission. It is worth recalling that the cartel detection rate in the EU is in the range between 10% and 20%.⁹⁵¹ This means that the vast majority of cartels remain undetected. Furthermore, by the Commission's own admission in the EU most cartels have been detected by the Commission after one cartel member confessed and asked for leniency.⁹⁵² Therefore, the concern is that private enforcement in the EU has the potential to undermine programmes that, as the Commission admits, '... have proved to be useful for the effective investigation and termination of cartel infringements...'⁹⁵³ and have enabled the Commission 'to pierce the cloak of secrecy in which cartels operate'.⁹⁵⁴ As it stands, private enforcement has an undeniable potential to kill the incentive of a cartel member to voluntarily inform the Commission about the existence and extent of a cartel. In turn, this means that more cartels remain undetected in the first place and consequently more victims of unlawful agreements remain uncompensated.

Arguably, the efficacy of the EU leniency programmes could be maintained under a competition regime in which compensation is awarded via public antitrust authorities (i.e. Commission and NCAs).⁹⁵⁵ In such a case, it is submitted, full compensation in a case such as that of *Pfleiderer* could have been awarded without the need to disclose to him the details of the leniency material by relating (administratively) to the cartel infringement the damages claimed by *Pfleiderer*.⁹⁵⁶ Had *Pfleiderer* been unhappy with the level of damages awarded by the NCA, the matter could have been reviewed by the Commission and in turn by the EU courts in the usual ways and, arguably, confidentiality could have still be maintained. Hence, the leniency programme could still be effective.

7.1.7 Leniency v Disclosure

The interests of potential leniency applicants and private damages claimants have increasingly been brought into direct conflict. The difficult at issue is that of striking an appropriate balance between these interests which both safeguards the effectiveness of the EU leniency regime and supports the effective exercise of rights of redress. Numerous attempts by private parties to gain access to leniency material in view of damages actions, have forced the Commission to fight its cases in court

⁹⁵¹ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 97

⁹⁵² Commission, 'Cartels Overview' (*European Commission Competition*)

<http://ec.europa.eu/competition/cartels/overview/index_en.html> accessed 3 January 2014

⁹⁵³ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 3

⁹⁵⁴ Commission, 'Cartels Leniency' (*European Commission Competition*)

<<http://ec.europa.eu/competition/cartels/leniency/leniency.html>> accessed 3 December 2013

⁹⁵⁵ See chapter 10.1.2

⁹⁵⁶ See chapter 10.1.3

in order to protect the confidentiality of leniency information. From the Court of Justice ruling in *Pfleiderer*, it seems clear that the balance is tipped in favour of private parties as the Court held that leniency materials are not protected from disclosure as a matter of EU law.⁹⁵⁷ Therefore, in what can be described as ‘last resource measure’ to protect the confidentiality of leniency material, the Commission has attempted to resist applications for access to leniency materials by invoking the provisions of the Transparency Regulation (Regulation 1049/2001).⁹⁵⁸ The EU Courts, however, seem to have curtailed the Commission’s ability to refuse access based on such provisions.

Regulation 1049/2001 provides that all documents of all EU institutions are open to public access. However, the Commission relies on exceptions to the general rules on disclosure such as the protection of commercial interests and the protection of the purpose of investigations, to protect leniency documents that it held in its files. This can be seen as the Commission’s effort in reassuring leniency applicants, who could rely on the Commission blocking this route of access to leniency materials. However, despite the Commission’s best intentions, this approach is unworkable for two main reasons. First, the matter falls outside the scope of Regulation 1049/2001, and second, this argument once more impinges on follow-on damages actions by private parties.

In *CDC*, the Commission by a decision, rejected a request for full access to the case file, but the General Court⁹⁵⁹ annulled the Commission’s decision.⁹⁶⁰ Having found that nine undertakings had taken part in a cartel in the hydrogen peroxide market, the Commission imposed fines amounting to €338 million on the undertakings that had taken part in that cartel. CDC, relying on Regulation 1049/2001 sought from the Commission ‘full access to the statement of contents of the case-file in the hydrogen peroxide decision’.⁹⁶¹ The Commission, relying on the first and third indents of Art 4 (2) of Regulation 1049/2001, rejected CDC’s application on the basis that such disclosure would have undermined the protection of: commercial interests of a natural or legal person, including intellectual property; and: the purpose of inspections, investigations and audits.⁹⁶² Before the General Court, the Commission argued that:

[I]nformation contained in the statement of contents could expose to a greater extent to actions for damages the undertakings at which the Commission carried out on-the-spot verifications and those which co-operated with it in return for a reduction of their fine.⁹⁶³

⁹⁵⁷ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 32

⁹⁵⁸ Council Regulation (EC) 1049/2001 of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents [2001] OJ L 145/43

⁹⁵⁹ Until 2009 when the Lisbon Treaty came into force, the General Court was known as the Court of First Instance: Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01

⁹⁶⁰ Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2011] ECR II-08251, 83

⁹⁶¹ *Ibid*, 3

⁹⁶² *Ibid*, 6

⁹⁶³ *Ibid*, 46

In annulling the Commission's decision the Court, recalling the cases of *Courage* and *Manfredi*,⁹⁶⁴ held that:

[E]ven if the fact that actions for damages were brought against a company could undoubtedly cause high costs to be incurred ... the fact remains that the interest of a company which took part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition.⁹⁶⁵

Stated differently, the General Court has remarked that the right to compensation of victims of infringements cannot be considered more important than the leniency programmes. The fact that a leniency applicant might become an easier target as a defendant in damages actions than other participants in the cartel cannot be regarded as commercial interest and as such is outside the scope of Regulation 1049/2001. Hence, despite the Commission's efforts in protecting those who provided it with evidence of the hydrogen peroxide cartel, as a result of private enforcement, CDC obtained full access to the case-file and the Commission was ordered to bear its own costs and to pay those incurred by CDC.⁹⁶⁶ Consequently, the question is: had this outcome been known to the cartel members, would there have been a leniency application in the hydrogen peroxide cartel? Or, worse still, considering the low rate of detection of cartel in the EU (between 10% and 20%),⁹⁶⁷ would the hydrogen peroxide cartel ever come to light?

It is worth noting that the *CDC*'s case is not an exception.⁹⁶⁸ To the contrary, five months after the General Court annulled the Commission's decision in the *CDC* case (15th December 2011), the General court was presented with a similar request (i.e. access to leniency material) by another private party (a third party) who considers itself to have been affected by a cartel operated by producers of gas insulated switchgear. On the 22nd May 2012 the General Court in *EnBW* annulled the Commission's decision refusing access to its file containing leniency materials.⁹⁶⁹ The Commission appealed and the case was decided by the Court of Justice.⁹⁷⁰

⁹⁶⁴ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 27; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 90

⁹⁶⁵ Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2011] ECR II-08251, 49

⁹⁶⁶ *Ibid*, 83

⁹⁶⁷ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 97

⁹⁶⁸ Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2011] ECR II-08251

⁹⁶⁹ Case T-344/08 *EnBW Energie Baden-Württemberg AG* [2012] 5 CMLR 4

⁹⁷⁰ Case C-365/12 P *EnBW Energie Baden-Württemberg _ AG* [2014] ECR 000

In *EnBW*,⁹⁷¹ the Commission had imposed a fine totalling € 750 million on a number of undertakings that had taken part on a cartel in the gas insulated switchgear market involving bid-rigging, price fixing and allocation of projects and markets in the EU.⁹⁷² *EnBW*, a third-party, on the basis of Article 2(1) of Regulation 1049/2001 sought from the Commission full access to the documents relating to proceedings in the case.⁹⁷³ The Commission strongly argued that all the documents contained in the file were covered in their entirety by the exceptions listed in Regulation 1049/2001.⁹⁷⁴ Further the Commission stated that it could see nothing that indicated there was an overriding public interest in granting access to the documents requested, as provided for in Article 4(2) of Regulation 1049/2001.⁹⁷⁵ In annulling the Commission's decision in its entirety the General Court held that the Commission had held 'incorrectly' that the documents in question were falling within the exceptions of Art 4(3) of Regulation 1049/2001, hence the Commission had, incorrectly, held that disclosure of those documents would seriously undermine its decision-making process.⁹⁷⁶

On appeal to the Court of Justice, the Commission claimed that the General Court erred in holding that the Commission was not entitled to take the view that all such documents were covered by the first and third indents of Article 4(2) of Regulation No 1049/2001 and the second subparagraph of Article 4(3) as related to the protection of commercial interests, the purpose of investigations and the Commission's decision-making process.⁹⁷⁷ The Court of Justice explained that unless there is an overriding public interest in disclosure, the institutions are to refuse access to a document in two circumstances. First, where the disclosure would undermine the protection of the commercial interests of a specific natural or legal person or the protection of the purpose of inspections/ investigations. Second, where the document contains opinions for internal use as part of deliberations and preliminary consultations within the institution concerned, if disclosure of the document would seriously undermine the institution's decision-making process.⁹⁷⁸ The Court held that there is a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation No 1049/2001 therefore it enables the institution to refuse disclosure.⁹⁷⁹ Hence:

[T]he General Court erred in law in its interpretation and application of the exceptions to the right of access to documents provided in the first and third indents of Article 4(2) of Regulation No 1049/2001 and in the second subparagraph of Article 4(3) of that regulation,

⁹⁷¹ Case T-344/08 *EnBW Energie Baden-Württemberg AG* [2012] 5 CMLR 4, 2

⁹⁷² *Gas Insulated Switchgear* (Case COMP/F/38899) Commission Decision Relating to a Proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement [2008] OJ C 5/7

⁹⁷³ Case T-344/08 *EnBW Energie Baden-Württemberg AG* [2012] 5 CMLR 4, 3

⁹⁷⁴ *Ibid*, 8 - 12

⁹⁷⁵ *Ibid*, 11

⁹⁷⁶ *Ibid*, 175 - 176

⁹⁷⁷ Case C-365/12 P *EnBW Energie Baden-Württemberg _ AG* [2014] ECR 000, 60

⁹⁷⁸ *Ibid*, 62

⁹⁷⁹ *Ibid*, 68

by ruling that there was no general presumption ... in so far as concerns a request for access to all the documents in the file in question, relating to a procedure under Article 81 EC.⁹⁸⁰

Although in this instance the disclosure of documents contained in the Commission file was denied, it should be noted that EnBW was not party to the Commission proceedings against the gas insulated cartel, and the request for disclosure by EnBW was made before the conclusion of the proceedings. The Court of Justice held that a third party who does not have the status of complainant does not have right of access to the Commission file, therefore there is no need for a case-by-case assessment.⁹⁸¹ Moreover, as at the date on which the request was made legal proceedings were pending against gas insulated switchgear, the General Court erred in law 'by finding that disclosure of the documents requested was not likely to undermine the protection of the investigations relating to the proceeding under Article 81 EC in question'.⁹⁸²

While in this occurrence the Court of Justice endorsed the Commission position in favour of non-disclosure the Court's reasoning, it is submitted, could not be seen as endorsing refusal of access to leniency documents to third parties. It was the specific circumstance and in particular the timing of the request that resulted in the denial of access. Indeed, the refusal of access to leniency material has resulted in applicants, including third parties, invoking fundamental principles of the EU law, such as that of equivalence and that of effectiveness, to obtain access to documents otherwise protected under a leniency programme.

In *Donau*,⁹⁸³ an Austrian trade association active in the printing sector sought to obtain access to documents on the file of the Cartel Court (in Austria, the competition authority prosecutes alleged infringements before a designated court) related to proceedings which had been brought by the Austrian competition authority (the BWB) against a number of distributors of printing chemicals. In the proceedings, the BWB successfully demonstrated the existence of a cartel in breach of Article 101, and the Cartel Court had imposed fines on the cartel members. Unsurprisingly, the trade association relying on *Pfleiderer*,⁹⁸⁴ was interested in exploring the potential for follow-on damages actions to be brought by its members, hence, sought access to documents that would help in assessing the value of any potential claim. Under the Austrian legislation, disclosure of documents may not be granted unless all parties agree for such disclosure to be ordered.⁹⁸⁵ Since a leniency applicant is always likely to refuse disclosure, the argument was that the Austrian law effectively creates a bar on disclosure. In a request for a preliminary ruling the Court of Justice was asked to

⁹⁸⁰ Ibid, 71

⁹⁸¹ Ibid, 94 / 96

⁹⁸² Ibid, 98

⁹⁸³ Case C-536/11 *Bundswettbewerbsbehörde v Donau Chemie AG* [2013] ECR 000

⁹⁸⁴ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161

⁹⁸⁵ Case C-536/11 *Bundswettbewerbsbehörde v Donau Chemie AG* [2013] ECR 000, 8

clarify whether this is compatible with EU law. Before the Court's ruling, the AG eloquently reiterated that:

Well-established case-law of the Court limits the national procedural autonomy of the Member States in the application of EU law, whether the dispute concerns competition law or otherwise. The principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union ('EU') law as are extended to analogous claims of a purely domestic nature. The principle of effectiveness, or effective judicial protection, obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce.⁹⁸⁶

The AG went on to explain that the principle of effectiveness needs to be reconsidered in light of provisions contained in Article 19(1) TEU which states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.⁹⁸⁷ The AG also reiterated that the principle of effectiveness, in turn requires consideration of the right of access to a court, as protected by Article 47 of the Charter of Fundamental Rights of the European Union⁹⁸⁸, as interpreted in the light of Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms⁹⁸⁹ and the case-law of the European Court of Human Rights related to this provision.⁹⁹⁰ Stated differently, a national rule that gave absolute protection to a leniency programme to the detriment of other legitimate legal interests cannot be implemented as it is incompatible with EU fundamental principles. As established in *Pfleiderer* national courts are required to conduct a balancing exercise between competing interests.⁹⁹¹ Indeed the Court of Justice in *Donau* held that:

European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to

⁹⁸⁶ Case C-536/11 *Bundeswettbewerbshörde v. Donau Chemie AG* [2013] ECR 000, Opinion of AG Jääskinen, 3

⁹⁸⁷ Consolidated Version of the Treaty on European Union [2010] OJ C 83/01

⁹⁸⁸ Right to an effective remedy and to a fair trial: Charter of Fundamental Rights of the European Union [2010] OJ C 83/389

⁹⁸⁹ European Convention on Human Rights <http://www.echr.coe.int/Documents/Convention_ENG.pdf>

⁹⁹⁰ Case C-536/11 *Bundeswettbewerbshörde v. Donau Chemie AG* [2013] ECR 000, Opinion of AG Jääskinen, 5

⁹⁹¹ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 24

those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.⁹⁹²

Accordingly, there is a need to balance the interests of cartel members by protecting information given voluntarily to a competition authority in the context of a leniency programme with the interest in ensuring that the disclosure rules do not operate such as to make it practically impossible or excessively difficult for victims of breaches of the EU competition rules to obtain compensation.

However, the Court of Justice seems to have tilted the balance in favour of the fundamental right to an effective remedy as established in the landmark cases of *Courage* and *Manfredi*.⁹⁹³ Although the Court acknowledges the usefulness of leniency programmes and national courts are left with the discretion as to disclosure, the Court has forcefully reiterated in each occasion that it is settled case law that any individual has the right to claim damages for loss caused to him by conduct which is liable to infringe EU competition rules. This position clearly confirms the supremacy of the right to compensation over the confidentiality of leniency material. Hence, as the Court of Justice is not prepared to endorse the absolute protection promised by the Commission to leniency applicants, as a matter of fact, the private enforcement regime proposed by the Commission has significant pitfalls. In this instance, it undermines the EU leniency programmes as private enforcement appears to be incompatible with leniency programmes that have proved to be useful in term of detection and prosecution of cartels. It should be noted that in the *Donau* and *EnBW* cases investigation had been triggered by a leniency application which subsequently led to successful prosecution of the cartel members.⁹⁹⁴ If the effectiveness of the leniency programme were reduced by granting access to the applications, a significantly lower number of cartels would be detected. In turn, this would hamper not only the punishment of the infringers, but ironically a measure designed to facilitate redress for victims of cartels, by lowering the detection rate it would also reduce the chances that victims are compensated.

It is worth recalling that the right to compensation of victims of infringements of Art 101 and 102 was established as matter of EU law⁹⁹⁵ and, as the Court of Justice eloquently put it:

It must be borne in mind in that regard that it is the EU Courts – not the courts of the Member States – which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid.⁹⁹⁶

⁹⁹² Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 51

⁹⁹³ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 27; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 91

⁹⁹⁴ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000; Case T-344/08 *EnBW Energie Baden-Württemberg AG* [2012] 5 CMLR 4

⁹⁹⁵ In *Donau*, the Court once more recalled this principle at paragraphs 20 to 28: Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000

⁹⁹⁶ Case C-199/11 *Europese Gemeenschap v Otis NV* [2013] ECR 000, 53

Indeed as the Court of Justice has exclusive jurisdiction to declare void an act of a EU institution, the coherence of the system requires that where the validity of a Union act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.⁹⁹⁷ Hence, any argument counter to the established right to compensation for victims of antitrust violations is unlikely to succeed. In what can be described a failed attempt to prevent disclosure of leniency material in the *Donau* case, the Austrian government in its submitted observations argued that disclosure of the documents in question should have been denied as matter of public interest in protecting an effective leniency programme. The Court rejected this argument and once more emphasised the superior status of EU rights over leniency programmes when it held:

In particular, as regards the public interest of having effective leniency programmes referred to by the Austrian Government in the present case, it should be observed that, given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union (see *Courage and Crehan*, paragraph 27),⁹⁹⁸ the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence.⁹⁹⁹

The Court also commented that the fact that such a refusal is liable to prevent those actions from being brought against undertakings that have already benefitted from immunity (at the very least partial) from pecuniary penalty, also, is an opportunity to circumvent their obligation to compensate for the harm resulting from the infringement of Article 101, to the detriment of the injured parties.¹⁰⁰⁰

From the Court of Justice ruling in *Donau*, it appears that since the right to compensation has 'become part of the legal assets'¹⁰⁰¹ of anyone living in the EU, the exercise of that right is not depending on national rules. Although national courts are tasked to assess each case individually, their primary objective is not to protect leniency material from disclosure as the Commission hoped for, but rather to uphold the right to compensation established by the EU courts.

As the private enforcement regime continues to develop in the EU competition field, there is an increasing risk that the cartel participant's potential exposure to damages actions exceeds the administrative fine that they may avoid by cooperating with the Commission and NCAs. Inevitably,

⁹⁹⁷ Case 314/85 *Foto-Frost* [1987] ECR 4199, 17

⁹⁹⁸ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297

⁹⁹⁹ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 46

¹⁰⁰⁰ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 47

¹⁰⁰¹ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 20

the risk of disclosure in civil actions of information voluntarily provided to the authorities under a leniency programme is a factor that a well-advised potential leniency applicant will wish to carefully assess and take into consideration when considering the advantages of applying for leniency.

The recent decisions of the EU courts in *Pfleiderer*, *CDC*, *EnBW*, and *Donau* seems to have threatened conventional leniency incentives by tilting the balance in favour of private claimant's interest in disclosure of leniency materials.¹⁰⁰² Despite the Commission's effort in protecting leniency material, from the EU courts' ruling it appears clear that the right to reparation of harm suffered as result of infringements of competition rules cannot be conditional on confidentiality promised by the Commission or other national rules preventing disclosure. The delicate balancing exercise surrounding the disclosure of leniency materials has been deferred to the courts of the Member State, which arguably creates an unsettling lack of predictability. The Commission has undertaken to overcome this uncertainty by introducing legislative proposals at EU level that, in the words of Vice President Almunia, 'will strike the right balance between the protection of leniency programmes and the victims' rights to obtain compensation'.¹⁰⁰³

It is to this legislative proposal that the analysis now turns.

7.1.8 Disclosure and the Commission's Proposal for a Directive

In this part of the analysis, the focus is on the Commission proposals for a Directive on Antitrust Damages action regarding, amongst other things, the protection of leniency programmes.¹⁰⁰⁴ Arguably, in the face of the resulting legal uncertainty as to what leniency documents would or would not be disclosed, and the perceived risk to its leniency programme, the Commission decided to introduce a Directive.

In explaining the reasons behind the leniency related proposal, the Commission has no choice but admit that at present:

[L]eniency applicants cannot know in advance whether documents submitted to competition authorities in the context of a leniency application might be disclosed to claimants in antitrust damages actions and if so, what categories of documents would be disclosable ... the current legal uncertainty could affect the willingness of cartel participants

¹⁰⁰² Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161; Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2011] ECR II-08251; Case T-344/08 *EnBW Energie Baden-Württemberg AG* [2012] 5 CMLR 4; Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000

¹⁰⁰³ Joaquín Almunia, 'Antitrust Enforcement: Challenges Old and New' (*SPEECH/12/428, 19th International Competition Law Forum, St. Gallen*, 8 June 2012) <http://europa.eu/rapid/press-release_SPEECH-12-428_en.htm> accessed 06 January 2014

¹⁰⁰⁴ Commission, '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' COM(2013) 404 final

to cooperate with the Commission and NCAs under the leniency programmes and thus negatively affect the public enforcement of competition law.¹⁰⁰⁵

In presenting the disclosure regime in the proposed Directive the Commission emphasises that the proposal follows the tradition of the great majority of Member States and relies on the central function of the court presented with an action for damages to assess the necessity, scope and proportionality of the evidence sought to be disclosed.¹⁰⁰⁶ The question is whether despite the Commission's effort this proposal could be effective, or whether the proposed measure are still affecting the victims' right to full compensation and as such they cannot be implemented.

With regard to disclosure, in essence, the proposed Directive contains four specific measures. First, under Article 5(1) and 5(2) disclosure can be ordered only when a claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendant's infringement of competition law.¹⁰⁰⁷ Member States shall ensure that disclosure is limited to evidence relevant to substantiating the claim or defence and, on the basis of reasonably available facts, the claimant narrowly identifies the documents sought to be disclosed. In other words, in order to limit disclosure to the minimum necessary, a claimant must first show, to the satisfaction of the court, that he is in fact a victim of the violation and having identified specific document/s, how the disclosure sought would help his claim.

Second, disclosure must be proportionate. Global disclosure requests for documents normally would be considered disproportionate as not complying with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible. Proportionality is determined by considering the legitimate interests of all parties concerned including, the scope and cost of disclosure, and the confidential nature of the evidence.¹⁰⁰⁸

Third, it is interesting to note that two types of documents are excluded from the general rule that documents can be disclosed at any time. Under Art 6 (1) Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party to disclose leniency corporate statements and settlement submissions.¹⁰⁰⁹ Unfortunately the proposal does not specify if there is a time at which those documents can be disclosed and if so when. However, under Art 7(1) Member States must ensure that such documents, obtained solely through access to the file of the competition authority (under Art 6(1)), are not admissible in actions for damages. In

¹⁰⁰⁵ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 32

¹⁰⁰⁶ Commission, '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' COM(2013) 404 final, 14

¹⁰⁰⁷ Ibid, art 5 (1) (2)

¹⁰⁰⁸ Ibid, art 5 (3) and page 14 Explanatory Memorandum

¹⁰⁰⁹ Ibid, art 6 (1)

relation to documents specifically prepared for the proceedings of a competition authority or, documents drawn up by a competition authority in the course of its proceedings, the proposal suggests that for the purpose of actions for damages, national courts can order the disclosure only after a competition authority has closed its proceedings or taken a decision under Regulation 1/2003, and again, the proposal suggests that such documents shall not be admissible as evidence in action for damages until the authority has concluded its proceedings.¹⁰¹⁰

Fourth, under art 8 national courts are tasked to impose sanctions that are effective, proportionate and dissuasive where a party refuses or fails to comply with a disclosure order, for the destruction of evidence or for the failure to comply with court orders regarding confidentiality of information.¹⁰¹¹

Considering the proposed measures in relation to leniency, the need to provide clarity to potential leniency applicant emerges so that leniency programmes are not compromised. The proposed Directive attempts to address critical questions of access to evidence and the need to protect leniency material. However the disclosure provisions, if adopted in their current form, appear to raise questions of incompatibility with the approach taken by the EU courts in this critical area. In *Pfleiderer*, the Court of Justice clearly held that leniency programme cannot justify a refusal to grant access to evidence necessary for exercising a right under the EU law such as that of victims of competition infringements.¹⁰¹² In its recent ruling in *Donau*, the Court before answering the disclosure question referred to it, reiterated that it is settled case-law, that national courts whose task it is to apply the provisions of EU law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.¹⁰¹³ Articles 101 and 102 are indeed creating rights for individuals.¹⁰¹⁴ Consequently, any individual has the right to claim damages for loss caused to him by conduct which is liable to distort or restrict competition.¹⁰¹⁵ Such a right allows persons who have suffered harm due to that infringement to seek full compensation not only for actual loss but also for loss of profit plus interest.¹⁰¹⁶ Hence the question is: would limiting disclosure also limit the ability of a private party to claim full compensation? For instance, if a cartel has prepared a document telling the Commission how long the cartel last and/or its full extent, under the proposal this document is both protected from disclosure and, if disclosed, as the access to it was through the file of the competition authority, it is

¹⁰¹⁰ Ibid, art 6 (2) and art 7 (2)

¹⁰¹¹ Ibid, art 8

¹⁰¹² Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 46

¹⁰¹³ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 22

¹⁰¹⁴ Ibid, 21

¹⁰¹⁵ Ibid, 23

¹⁰¹⁶ Ibid, 24

not admissible in actions for damages. The Commission, commenting on the proposed Directive states that:

We believe that this upfront protection of these two categories of documents [leniency corporate statements and settlement submissions under Art 6(1) of the proposed Directive] only will not deprive victims of the evidence necessary to obtain compensation for the harm caused by the infringement.¹⁰¹⁷

However, contrary to the Commission's believe, the Court of Justice in *Donau* plainly stated that EU law precludes denial of access to documents, including access to documents made available under a leniency programme, by a party with a view to bringing an action for damages against participants in a cartel.¹⁰¹⁸ Although the weighing up of the interests involved is left with the national courts, considering that the right to compensation is well established as matter of EU law, it is hard to see how a national court can balance the conflicting interests against disclosure. It is worth recalling that in many cases in which the EU courts have ordered full disclosure, the claimant had already been provided with partial disclosure, including in the landmark case of *Pfleiderer*,¹⁰¹⁹ and *CDC*.¹⁰²⁰ In *Donau* the right to access was extended to third parties who were not party of the proceedings.¹⁰²¹ In all those instances the claimants, contemplating actions for damages, have deemed the partial disclosure insufficient and the EU courts seem to have agreed to the request for a full disclosure.

Stated differently, the system of private enforcement of competition law proposed by the Commission is incompatible with the leniency programmes. This outcome is not a surprise as back in 2006 the Commission has been warned that there is an interaction between leniency programmes and actions for damages under competition rules. A Report specifically prepared for the Commission clearly stated that: '... for example, leniency applicants may take into account the possibility of subsequent damages claims when considering whether to file for leniency'.¹⁰²² Hence in relation to cartels, the private enforcement regime proposed by the Commission, not only creates uncertainty, but also has the potential to significantly undermine the leniency mechanisms

¹⁰¹⁷ Alexander Italianer, 'Competition Law within a Framework of Rights and the Commission's Proposal for a Directive on Antitrust Damage Actions' (12th Annual Conference of the Association of European Competition Law Judges, 14 June 2013) <http://ec.europa.eu/competition/speeches/text/sp2013_06_en.pdf> accessed 10 May 2014

¹⁰¹⁸ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 51

¹⁰¹⁹ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161

¹⁰²⁰ Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2011] ECR II-08251

Case T 437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2012] 4 C.M.L.R. 14

¹⁰²¹ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000

¹⁰²² Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Ashurst, Comparative Report* 31 August 2004)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 15 April 2014, 97

which are currently the most effective enforcement investigative tool against secret ‘naked cartels’.¹⁰²³

The analysis now turns to the approach taken by the US and Canadian antitrust authorities in relation to leniency so as to provide an appraisal of the effectiveness of those programmes when compared with the EU equivalent.

7.2 The US and Canadian Approach to Cartels and Leniency

7.2.1 The US and EU Leniency Programmes Compared

In the assessment of the efficacy of a private enforcement regime in the EU the comparison with the approach taken in the US appears appropriate because as Kovacic explains: ‘Cartel enforcement is a major example in which the EU embraced techniques – most notably, leniency – that had been tested extensively in the US’.¹⁰²⁴ However, despite the use of similar enforcement policy, such as that of rewording whistle blowers under leniency programmes, the approach taken by the US antitrust authorities in punishing cartels contrasts sharply with the approach taken in the EU. This difference is significant for the effectiveness of leniency programmes. In the EU, leniency appears less attractive when compared with the US equivalent. This part of the analysis explores the US approach in prosecuting cartels with a particular focus on leniency against the backdrop of the penalties faced by cartel members.

Unlike in the US, under the EU competition law cartels are civil offences and the imprisonment of cartel members is not part of the range of punishments that can be imposed by the Commission.¹⁰²⁵ Under Regulation 1/2003 the Commission can impose, to each undertaking and association of undertakings participating in the infringement (both of Articles 101 and 102), fines not exceeding 10% of the firm’s total turnover in the year preceding the Commission’s decision. Article 23(3) provides that in fixing the amount of the fine both the gravity and the duration of the infringement

¹⁰²³ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 6; Andrea Renda and others, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’ (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 77

¹⁰²⁴ William E Kovacic, ‘Competition Policy in the European Union and the United States: Convergence or Divergence?’ (*Bates White Fifth Annual Antitrust Conference Washington, D.C.*, 2 June 2008) <www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> accessed 2 January 2014, 9

¹⁰²⁵ Some Member States have criminal provisions under national laws. However the approach taken at national level is beyond the scope of this thesis, for a discussion see: Kati Cseres, ‘Comparing Laws in the Enforcement of EU and National Competition Laws’ (2011) 3 (1) *European Journal of Legal Studies* <<http://www.ejls.eu/7/89UK.htm>> accessed 08 July 2014

must be taken into consideration.¹⁰²⁶ In addition to those fines, any person or firm affected by the infringement can bring the matter before a national court and seek damages from the violator. Although the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission's fine.¹⁰²⁷

Contrary to the EU, participation in a cartel in the US can attract fines for the firm and also jail terms for the individuals. The maximum antitrust penalty when the defendant is an individual is a prison sentence of 10 years and a fine to the greatest of: \$1 million; twice the gross pecuniary gain the conspirators derived from the crime; twice the gross pecuniary loss caused to the victims of the crime by the conspirators. The maximum penalties that can be imposed on a firm is a fine to the value of the greatest of: \$100 million; twice the gross pecuniary gain the conspirators derived from the crime; twice the gross pecuniary loss caused to the victims of the crime by the conspirators.¹⁰²⁸ In addition, under Section 4 of the Clayton Acts, victims of antitrust violations can recover threefold the damages sustained.¹⁰²⁹

In both jurisdictions, antitrust authorities have a margin of discretion as to the penalty to be imposed so as to adjust the punishment according to the seriousness of the violation in question. Likewise, in both jurisdictions, is the first to come forward to significantly benefit from his cooperation with the investigating authority under a leniency programme.

In relation to cartels, it should be noted that previously to its proposals the Commission was informed that while the impact of private enforcement over leniency programmes has to be carefully taken into account to ensure that it does not hamper the incentives provided by leniency mechanisms, nevertheless:

[E]vidence from the US suggests that more effective private enforcement and powerful leniency programmes can successfully co-exist, as despite the risk of prospective damages claims, leniency applications are still filed.¹⁰³⁰

Hence, the Commission was reassured that the creation of a private enforcement regime in the EU would not impact on the existing leniency programmes as the two 'can actually co-exist'.¹⁰³¹

¹⁰²⁶ For the detail on how fines are set see: Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/02

¹⁰²⁷ See for instance: Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (IP/10/1487, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014; Antitrust, 'Commission Fines Producers of TV and Computer Monitor Tubes € 1.47 Billion for Two Decade Long Cartels' (IP/12/1317, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014

¹⁰²⁸ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, § 215. For an analysis of the US antitrust penalties see: Paul K Gorecki, 'Alternative Approaches to Sentencing in Cartel Cases: The European Union, Ireland and the United States' (2013) 9 (2) European Competition Journal 341

¹⁰²⁹ Clayton Act (2006) 15 U.S.C.

¹⁰³⁰ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (Report for the European Commission, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 77

Arguably this shows a lack of an appropriate assessment of the impact that private enforcement can have in the EU. Indeed in the EU emphasis is given to half of the story while ignoring the other half.

Similarly to the measures already in place in the US, the Commission, in order to preserve the EU leniency programme, proposes a limit on disclosure to leniency corporate statements.¹⁰³² Hence, protecting information provided in the leniency application from disclosure to private parties wanting to file a claim for damages. In the US, corporate statements given as part of a leniency application are protected from discovery and leniency applicants are not exempted from or fully protected from civil litigation.¹⁰³³ However, two significant points must be considered.

First, a US leniency applicant that cooperates with the claimants in any related private claim reduces his damages exposure to single rather than treble damages.¹⁰³⁴ Furthermore, the normal rule of joint and several liability for co-conspirators does not apply to the immunity applicant.¹⁰³⁵ To the contrary, in the EU, the fact that immunity or reduction in respect of fines is granted under a leniency programme, it cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 101 and 102¹⁰³⁶ (i.e. compensation for actual loss, loss of profit and interest).¹⁰³⁷ Moreover under the proposal for a new Directive, in the EU the immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other infringers.¹⁰³⁸ Indeed, each of the infringing undertakings is bound to compensate for the harm in full, and the injured party may require full compensation from any of them until he has been fully compensated.¹⁰³⁹

Second, unlike in the EU, a successful leniency application under the US programme, results in immunity from criminal charges. As matter of EU provisions there is no equivalent in the EU. Therefore, private enforcement and leniency programmes might successfully co-exist in the US,¹⁰⁴⁰ but not necessarily in the EU. In the US, if a corporation qualifies for leniency:

¹⁰³¹ Ibid, 29

¹⁰³² Commission, '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' COM(2013) 404 final, art 6 (1)

¹⁰³³ Wouter P J Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 World Competition 25

¹⁰³⁴ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, § 213

¹⁰³⁵ Ibid

¹⁰³⁶ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 39

¹⁰³⁷ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297;

Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

¹⁰³⁸ Commission, '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' COM(2013) 404 final, Explanatory Memorandum 4.3.3

¹⁰³⁹ Ibid, art 11

¹⁰⁴⁰ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 29 / 77

[A]ll directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity.¹⁰⁴¹

Furthermore, if the corporation does not qualify for leniency, nevertheless all staff will be considered for immunity from criminal prosecution on the same basis as if they had approached the authorities individually.¹⁰⁴²

Considering the range of penalties faced by a cartel member in the US, it emerges clearly that the punishment in the US is significantly different to that faced by a cartel member in the EU in an equivalent case. The US experience is that a criminal regime is a powerful incentive to apply for leniency. While the US Department of Justice as antitrust authority has power to both prosecute and grant amnesty, the same cannot be said about the Commission in the EU.¹⁰⁴³ In the EU, the Commission has not power to impose jail sentence and, in those Member State (such as the UK) that do have criminal provisions, regardless of his cooperation under a EU leniency programme, the Commission is not able to prevent the imprisonment of that person.

The rationale as to why in the US despite the possibility of paying out treble damages leniency applications are still filed is that while damages and fines imposed are of concern to the company, a prison sentence takes away the liberty of the individual/s. Hence, a company director in evaluating the advantages of a leniency programme against the possibility of detection by the authorities, must not only consider the financial implications for the company, but also his own liberty. In the latter case the chances are that, unlikely in the EU, he could personally face a custodial sentence. This shows a substantial incentive for a cartel member to be the first to file the application and consequently to seek amnesty which is absent under the EU provisions.

In the US the incentive to file a leniency application is furthered by the fact that leniency limits the company's exposure to potential damages in private actions to single damages. Other cartel members remain fully liable for treble damages and, their liability is increased as they are also liable for the damages that the amnesty applicant no longer bears following the de-trebling accorded.¹⁰⁴⁴ It is worth recalling that no such equivalent exists in the EU. To the contrary, while the Commission, in the best case scenario, can grant to a cartel member a total immunity from any fine which would

¹⁰⁴¹ 'Corporate Leniency Policy' (*US Department of Justice*, 10 August 1993) <<http://www.justice.gov/atr/public/guidelines/0091.pdf>>

¹⁰⁴² *Ibid*

¹⁰⁴³ Sherman Antitrust Act, 15 U.S.C., § 15c - § 15f; Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, § 211 - 215. See also: Niall Lynch and Kathleen Fox, 'How ACPERA Has Affected Criminal Cartel Enforcement' (*Law360*, 2001) <www.law360.com> accessed 5 April 2014

¹⁰⁴⁴ For an appraisal of these points see: Margaret Bloom, 'Despite Its Great Success, the EC Leniency Program Faces Great Challenges' (*European University Institute*, 2006) <[http://www.eui.eu/RSCAS/Competition/2006\(pdf\)/200610-COMPed-Bloom.pdf](http://www.eui.eu/RSCAS/Competition/2006(pdf)/200610-COMPed-Bloom.pdf)> accessed 1 April 2014

otherwise have been imposed,¹⁰⁴⁵ ‘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’.¹⁰⁴⁶ Indeed, a leniency applicant in effect provides the Commission with a ‘smoking gun’, and the decision thus reached, has a probative value in an action for damages for breach of Articles 101 and 102.¹⁰⁴⁷ Stated differently, a leniency applicant provides private parties with a road map on claims for damages and the Commission’s decision constitutes proof before civil courts that the infringement occurred.

Back in 2005 the Commission, in an attempt to ease the tension between leniency applications and private actions, suggested two options:

Exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of leniency applications.

Removal of joint liability from the leniency applicant, thus limiting the applicant’s exposure to damages. One possible solution would be to limit the liability of the leniency applicant to the share of the damages corresponding to the applicant’s share in the cartelised market.¹⁰⁴⁸

However more recently, in 2013, to facilitate damages actions, the Commission in the proposed Directive suggested that ‘a decision of national competition authorities, in the same way as a Commission decision, will constitute full proof before civil courts that the infringement took place’.¹⁰⁴⁹ Moreover, the Commission proposes joint and several liability for the whole harm caused. In theory, joint and several liability would not apply to a violator who has obtained immunity from fines through leniency. A leniency recipient should only be liable to compensate damages caused to their own direct or indirect customers.¹⁰⁵⁰ However, in this instance the reality is

¹⁰⁴⁵ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 8

¹⁰⁴⁶ *Ibid*, 39

¹⁰⁴⁷ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 16 (1); Case C-199/11 *Europese Gemeenschap v Otis NV* [2013] ECR 000, 8

¹⁰⁴⁸ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 2.7

¹⁰⁴⁹ Alexander Italianer, ‘Competition Law within a Framework of Rights and the Commission’s Proposal for a Directive on Antitrust Damage Actions’ (12th Annual Conference of the Association of European Competition Law Judges, 14 June 2013) <http://ec.europa.eu/competition/speeches/text/sp2013_06_en.pdf> accessed 10 May 2014, 4 -5; Commission, ‘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’ COM(2013) 404 final, art 9

¹⁰⁵⁰ Commission, ‘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’ COM(2013) 404 final, art 11 and Explanatory Memorandum 4.3.3

different from the theory because following the recent jurisprudence of the EU courts,¹⁰⁵¹ the Commission has no options but to admit:

The protection of immunity recipients cannot, however, interfere with the victims' EU right to full compensation. The proposed limitation on the immunity recipient's liability cannot therefore be absolute: the immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other infringers. To guarantee the *effet utile* of this exception, Member States have to make sure that injured parties can still claim compensation from the immunity recipient at the time they have become aware that they cannot obtain full compensation from the co-cartelists.¹⁰⁵²

Hence, the protection in principle accorded to leniency applicants, can be nullified if the injured parties are unable to obtain full compensation from the other cartel members as the right to compensation is undeniable.

Accordingly, it can be seen that while leniency in the EU delivers full or partial immunity from fines, unlike in the US, it fully exposes companies to private actions for damages. In the US the combination of amnesty and reduction on potential damages to be paid makes leniency attractive. In the EU, as immunity from fines also comes with a full exposure of the cartel activity, potential leniency applicant must also take into account an unpredictable amount (both in numbers and value) of private actions for damages. There should be no dispute that a cartel member will not file a leniency application if potential rewards do not outweigh penalties, hence the EU leniency programmes are far less attractive than the US equivalent. In turn, less leniency applications, arguably means less detection of cartel activities and consequently less compensation for victims.¹⁰⁵³ In this respect, therefore, it appears that private enforcement is not suitable to achieve the Commission's goal of full compensation to victims of antitrust infringements.¹⁰⁵⁴

Having ascertained that the arguments based on the US experience invoked in the EU in relation to the interplay between leniency and private enforcement are untenable, the analysis now moves to an evaluation of the approach taken by the Canadian authority in relation to cartel and to leniency.

¹⁰⁵¹ For instance: Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2011] ECR II-08251; Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161; Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000

¹⁰⁵² Commission, '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' COM(2013) 404 final, Explanatory Memorandum 4.3.3

¹⁰⁵³ See chapter 7.1.7

¹⁰⁵⁴ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

7.2.2 The Canadian Approach to Cartels and Leniency

The Canadian antitrust system is prominently a public enforcement regime and like for other competition infringements, in cartel cases private parties have limited (when compared to the EU and US enforcement regimes) access to courts in relation to damages.¹⁰⁵⁵ Moreover:

[I]n contrast to the United States, Canada has determined that punitive sanctions for illegal cartel behaviour be imposed only through prosecutions initiated by the Government. Civil plaintiffs are limited to the recovery of their actual damages and associated costs.¹⁰⁵⁶

This attitude indicates a different approach taken by the Canadian Government to the enforcement policy of competition rules. Unlike in the US, where private enforcement represents the core of antitrust prosecution, in Canada the punishment of infringers is a matter for public officials. This part of the analysis scrutinises the Canadian approach to cartels and compares it with the approach taken in the EU. This comparison permits an evaluation of whether in the EU there is a need for a private enforcement system as suggested by the Commission, or considering the importance of leniency programmes in the fight against cartels and the threat posed to leniency by private enforcement, whether in the EU it would be appropriate to prosecute cartels under a public enforcement regime as in Canada.

Canada's Competition Act contains several provisions that prohibit cartel activities. The prohibitions (price-fixing, market allocation, bid-rigging and other illegal agreements between competitors) are found in Sections 45 to 49 of the Act.¹⁰⁵⁷ Depending on the circumstance, a cartel can be unlawful under more than one of these provisions. Under Section 36 of the Act, private parties who deemed themselves victims of cartel activity can take a legal action against the cartelists for damages.¹⁰⁵⁸

According to the Bureau, Section 45 is the 'cornerstone of the cartel provisions' as it makes it a criminal offence when two or more competitors or potential competitors conspire, agree or arrange to fix prices, allocate customers or markets, or restrict output of a product.¹⁰⁵⁹ This competition offence is known as conspiracy, and is punishable by a fine up to \$25 million, or imprisonment for a term up to 14 years, or both.¹⁰⁶⁰

In Canada, like in the US and in the EU, despite the competition authority's strategies for discouraging and enforcement against violations of competition law, cartels nevertheless are still

¹⁰⁵⁵ See chapter 5.2.3

¹⁰⁵⁶ 'On Writ of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit' (*Brief for the Government of Canada as Amicus Curiae Supporting Reversal*, 3 February 2004) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03211.html>> accessed 28 January 2014, 2

¹⁰⁵⁷ Competition Act R.S.C., 1985, c. C-34

¹⁰⁵⁸ *Ibid*

¹⁰⁵⁹ Bureau, 'Investigating Cartels' (*Competition Bureau Canada*) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02760.html> accessed 23 January 2014

¹⁰⁶⁰ Competition Act R.S.C., 1985, c. C-34, section 45 (2)

formed. While the Bureau has a variety of enforcement tools available for the detection and investigation of competition infringements, including the ability to obtain search warrants, and compulsory production orders (like to the Commission in the EU)¹⁰⁶¹ the Bureau's Immunity and Leniency Programs remain its top enforcement tools. In the words of the Commissioner for Competition:

This Program has proven to be the Bureau's single most powerful means of detecting criminal activity. Its contribution to effective enforcement is unmatched. Its continued appeal to those who would otherwise remain undercover is pivotal to our enforcement efforts.¹⁰⁶²

Several of the Bureau's most significant cases have been as a result of parties cooperating with the Bureau under its Immunity and Leniency Programs. For instance, the record bid-rigging fines of \$30 million imposed on a Japanese supplier of motor vehicle components for its participation in a bid-rigging conspiracy was possible because: 'The Bureau became aware of the motor vehicle components cartels by way of its Immunity Program'.¹⁰⁶³

Similar to the EU leniency programmes, the Canadian Immunity and Leniency programs provide full or partial immunity from penalties to the first party to come forward. Under the Immunity Program, the first party to disclose to the Competition Bureau an offence not yet detected or provide evidence leading to the filing of charges may receive immunity from prosecution from the Director of Public Prosecutions of Canada. While it is the Bureau responsibility to investigate breaches of competition rules, criminal prosecutions of competition offences are the responsibility of the Director of Public Prosecutions following a referral by the Bureau. The Director of Public Prosecutions has the sole authority to grant immunity to a party involved in the offence.¹⁰⁶⁴ Under the Leniency Program, the Bureau may recommend to the Director of Public Prosecutions that cooperating persons who have breached the cartel provisions of the Competition Act, who are not eligible for a grant of immunity, nevertheless be considered for lenient treatment in sentencing.¹⁰⁶⁵

¹⁰⁶¹ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 6; Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 77

¹⁰⁶² Bureau, *Immunity Program under the Competition Act* (Bulletin, Competition Bureau Canada, 2010), 3

¹⁰⁶³ Bureau, 'Record \$30M Fine Obtained by Bureau Against Japanese Auto Parts Supplier' (*Competition Bureau Canada*) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html>> accessed 23 January 2014

¹⁰⁶⁴ Bureau, *Immunity Program under the Competition Act* (Bulletin, Competition Bureau Canada, 2010). For the DPP's policy on the grant of immunity see: Public Prosecution Service of Canada, 'The Federal Prosecution Service Deskbook' (*Part VII, Chapter 35: Immunity Agreements*) <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch35>> accessed 23 January 2014

¹⁰⁶⁵ Bureau, *Leniency Program - Competition Act* (Bulletin, Competition Bureau Canada 2010)

Unlike in the EU, however, where the Commission contends that the creation of an effective private antitrust enforcement system¹⁰⁶⁶ is an important tool to create and sustain a competitive EU economy,¹⁰⁶⁷ the Canadian competition regime does not rely on private enforcement in the prosecution of those infringers that could hinder the Canadian economy. Section 36 of the Competition Act enables anyone who has been harmed as a result of breaches of the criminal provisions of the Act, or failure to comply with a Tribunal or court order under the Act's civil provisions, to commence a 'private action' for damages.¹⁰⁶⁸ It should be noted however, that in the latter scenario, a private party can commence a private action for damages only after Competition Tribunal has first declared the conduct in question unlawful and the defendant fails to comply with an order made by the Tribunal and, leave from the Tribunal must first be obtained.¹⁰⁶⁹ Furthermore, two other significant points should be noted.

First, before a person or a business can be convicted of a conspiracy offence, and thus become liable to damages actions, the claimant must prove all the elements of the criminal offence, i.e. that the accused carried out the specific conduct prohibited by section 45 of the Competition Act and that the accused intended to commit the offence.¹⁰⁷⁰ In principle, the Crown in a criminal proceedings must prove its case 'beyond a reasonable doubt', while to a claimant bringing a damages action under Section 36 the lower civil standard of proof, i.e. on a 'balance of probabilities', is imposed.¹⁰⁷¹ However, as Musgrove stresses, despite the alleviated burden:

The practical reality has always been that where a party in a civil action must prove allegations which are tantamount to criminal conduct, the courts tend to be more strict in the proof they require. As a practical matter, plaintiffs in s. 36 actions are likely to be called upon to meet some intermediate burden of proof, somewhere between the 'balance of probabilities' and 'beyond a reasonable doubt'.¹⁰⁷²

¹⁰⁶⁶ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final) I

¹⁰⁶⁷ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹⁰⁶⁸ Competition Act R.S.C., 1985, c. C-34

¹⁰⁶⁹ See chapter 5.2.3; Steve Szentesi, 'Competition Law Private Actions in Canada - The Expanding Playing Field Following Competition Act Amendments and Plaintiff-favourable Class Action Decisions' (*Canadian Competition Law & Regulatory Law*, August 2010) <<http://www.ipvancouverblog.com/2010/08/competition-law-private-actions-in-canada>> accessed 27 February 2014

¹⁰⁷⁰ Bureau, 'About Cartels' (*Competition Bureau Canada*) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html>> accessed 23 January 2014

¹⁰⁷¹ *Continental Insurance Co. v. Dalton Cartage Co.* [1982] 1 SCR 164, 169; *Hanes v. Wawanesa Mutual Insurance Co.* [1963] SCR 154, 164

¹⁰⁷² James B Musgrove, 'Civil Actions and the Competition Act' (1994) 16 *Advocates' Quarterly* 94, 105

Second, unlike in the EU where the award of compensation for actual loss, for loss of profit, and interest, arguably result in multiple damages,¹⁰⁷³ the Canadian Competition Act only allows an award for actual damage or loss and the cost of the investigation and legal proceedings.¹⁰⁷⁴

Furthermore, although neither the EU leniency program, nor the Canadian equivalent immunity/leniency programmes provide any protection from private damages actions,¹⁰⁷⁵ in Canada a cartel member has an additional and strong incentive, namely to seek immunity from the potential of 14 years in prison.¹⁰⁷⁶ In this respect it should be noted that the first applicant is eligible for recommendation of full immunity from prosecution including with respect to current officers, directors, and employees who cooperate. The second applicant is eligible for recommendation of 50% reduction in fine and no separate charges against current officers, directors, and employees who cooperate. The third applicant is eligible for recommendation of 30% reduction in fine but no automatic recommendation of leniency for current officers, directors and employees.¹⁰⁷⁷ In addition, the company has the statutory guarantee that only single damages would be paid out. Hence, the Canadian immunity/leniency program is still attractive to cartelists, but the same cannot be said about the EU provisions. A cartel member in the EU not only does not face prison sentence under the EU competition rules, but is exposed to damages actions by private parties which, appears to be more generous than the Canadian single damages awards.¹⁰⁷⁸ Accordingly, considering that private enforcement has the potential to undermine the EU leniency program which is the most effective enforcement investigative tool against secret cartels,¹⁰⁷⁹ a similar approach to that of the Canadian Government should be taken in the EU. Sanctions for illegal cartel behaviour should be imposed only through prosecutions initiated by public officials, empowered also, to award compensation to victims of cartels and other antitrust violations.

7.2.3 Conclusion

Arguably, one of the most difficult areas of antitrust enforcement policy is the detection and prosecution of cartels. Considering the EU detection rate of 20% at best, this means that the vast

¹⁰⁷³ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95. See also chapter 5.1.4

¹⁰⁷⁴ Competition Act R.S.C., 1985, c. C-34, section 36 (1)

¹⁰⁷⁵ Bureau, 'Competition Litigation FAQs' (*Competition Bureau Canada*) <www.competitionbureau.gc.ca> accessed 24 January 2014

¹⁰⁷⁶ Competition Act R.S.C., 1985, c. C-34, section 45 (2)

¹⁰⁷⁷ Mark Katz, 'Cartel Enforcement and Sanctions Under Canada's Competition Act' (*New Zealand Commerce Commission*, 17 October 2013) <<http://www.dwpv.com/en/People/~media/Files/PDF/Cartel-Enforcementand-Sanctions-Under-Canadas-Competition-Act.ashx>> accessed 14 January 20104

¹⁰⁷⁸ See chapter 5.1.4

¹⁰⁷⁹ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 6; Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 77

majority of cartels remain undetected. Evidence from the EU, from the US mainly private enforcement regime and from Canadian largely public enforcement system, suggests that the most important tool against cartels is the cooperation of those involved. However, the EU private enforcement regime appears to be incompatible with leniency programmes. Despite the Commission's effort in designing rules that will strike the right balance between the protection of leniency programmes and the victims' rights to obtain compensation, this objective appears unrealistic. The EU courts have made clear that the right to compensation is not depending on the Commission's initiatives. Indeed the balance seems to be tilted in favour of victims to the detriment of leniency applicants. Consequently, considering that in effect a leniency applicant is in a worse position compared to other cartelists, private enforcement, it is submitted, has the potential to destabilize the existing leniency programmes that have proved useful in the detection and prosecution of cartels. What is remarkable is that in the EU evidence is taken from the US that under a private enforcement regime, leniency and damages action can co-exist. This chapter shows, however, that leniency is still attractive under the US regime because, unlike in the EU, cartelists under the US rules are spared jail sentences and obtain reduction in damages to be paid out. Consequently, in the absence of those feature, the EU proposed private enforcement regime, a system proposed to ensure full compensation to victims, will result in less victims being compensated, due to less detection of cartels activities. The attractiveness of leniency programmes, it is submitted, could be maintained under a public enforcement regime.

The analysis now continues by exploring the interplay between private enforcement and collective redress.

Chapter 8: PRIVATE ENFORCEMENT AND COLLECTIVE REDRESS

8.1.1 Introduction

Having discussed implications related to the system of private enforcement suggested by the Commission with reference to actions by single individuals or companies, the analysis now moves to an evaluation of the impact of private enforcement when the claimant, for instance, is an association of consumers or an association of undertakings. Such evaluation furthers the assessment of the efficacy of private enforcement of competition law by highlighting implications deriving from a collective redress mechanism.

In essence the value of collective litigation in antitrust enforcement policy is the compensation of victims and the notion of corrective justice. By aggregating potential claims that might not have otherwise been filed, the collective redress device allows the antitrust injury to be compensated. Conversely, in the absence of such a mechanism, companies who have violated competition rules could not be sued effectively due to the excessive transaction costs of prosecuting a suit. Hence, in addition to the lack of redress for victims, violators would retain their ill-gotten gains.¹⁰⁸⁰ In principle, a collective redress regime overcomes those problems. However, the bundling of rights raises concerns in relation of potential abuses of collective redress mechanisms. While a collective action can lead to a better enforcement of legal norms, it may also enhance incentives for filing arbitrary claims or threatening arbitrary litigation, with the sole aim of forcing payment without any real legal claim. Therefore, in the EU there is a need to analyse whether the expanded rights of actions, within the scope of collective redress, provides more incentives not only for improved competition law enforcement but also for exaggerated, arbitrary and exploitative antitrust litigations.

8.1.2 The State of Play of Collective Redress in the EU

Collective redress is not a new notion in the EU. All Member States have procedures in place which grant the possibility to seek an injunction to stop illegal practices. As result of the Directive on Injunctions in 1998,¹⁰⁸¹ consumer protection authorities and consumer organisations are entitled to bring an action so as to stop practices that infringe national and EU consumer protection rules in all Member States.¹⁰⁸² However, collective redress by way of compensatory relief has not traditionally been part of the Europe's legal landscape. Collective redress mechanisms exist in most, but not all

¹⁰⁸⁰ Commission, 'Towards a Coherent European Approach to Collective Redress: Next Steps' (Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli) SEC (2010) 1192, 4 / 7

¹⁰⁸¹ Council Directive (EC) 98/27 on Injunctions for the Protection of Consumers' Interests [1998] OJ L 166/51

¹⁰⁸² Commission, 'Towards a Coherent European Approach to Collective Redress' (Staff Working Document Public Consultation) SEC (2011) 173 final, 8

Member States. Eight EU countries currently do not have a collective redress mechanism in place: Belgium, Cyprus, Czech Republic, Estonia, Latvia, Luxembourg, Slovakia and Slovenia. Moreover, even in those Member States that provide a collective redress mechanism, these are not specific to antitrust infringements, but they encompass a wide variety of violations. The only exception is the UK, which provides a collective redress scheme specific to antitrust infringements.¹⁰⁸³

In order to develop a mechanism of collective redress, in 2012 the European Parliament's Committee on Economic and Monetary Affairs, requested a Study specifically on Collective Redress in Antitrust.¹⁰⁸⁴ Following the assessment of the national collective redress systems, the Study recommends three key legal objectives that an EU antitrust collective redress regime should achieve:

- (i) to discourage unmeritorious actions, while guaranteeing that those who have actually suffered harm obtain an adequate and fair compensation;
- (ii) to ensure a fair trial by providing legal certainty and consistency;
- (iii) to lower the financial and organisational hurdles that consumers and small businesses face.¹⁰⁸⁵

In principle all these points are all laudable objectives that in theory would deliver an excellent enforcement regime where violators of antitrust rules are punished and victims are compensated. When it comes to the delivering of those objectives, however, the landscape changes dramatically. One of the challenging areas of private enforcement in antitrust, whether single or collective actions, is the control of it, which appears exceptionally difficult, if at all possible. Private enforcement is motivated by the interests of private parties regardless of its effect on competition, hence, on the economy of the country is in force.¹⁰⁸⁶ Although the study suggesting ideal features that a collective redress regime in the EU should contain is based on the US class action regime, and it is considered 'a natural point of reference and an important benchmark to assess the potential implications of changes to the EU system',¹⁰⁸⁷ crucial safeguards appear to have been overlooked. For instance, measures against abusive litigation that are an integral part of the US systems, such as the strict test to obtain class certification before a legal action can be commenced and the judicial control over settlements, are not envisaged for the EU system.

¹⁰⁸³ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 19

¹⁰⁸⁴ *Ibid*

¹⁰⁸⁵ *Ibid*, 12

¹⁰⁸⁶ Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014; Gary S Beker and George J Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 *Journal of Legal Studies* 1

¹⁰⁸⁷ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 34

As recognised by EU officials, any European approach to collective redress would have to avoid from the outset the risk of abusive litigation.¹⁰⁸⁸ In the EU it is well acknowledged that:

Such abuses have occurred in the US with its ‘class actions’ regime. This form of collective redress is considered to contain strong economic incentives for parties to bring a case to court even if, on the merits, it is not well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties) the possibility of contingency fees for attorneys and the wide-ranging discovery procedure for procuring evidence.¹⁰⁸⁹

At first glance, the US class action regime is condemned as it increases the risk of abusive litigation resulting from these combined incentives. Therefore as these features are not compatible with the EU legal tradition, the approach taken is that: ‘We therefore firmly oppose introducing “class actions” along the US model into the EU legal order’.¹⁰⁹⁰ However, an analysis of the EU proposed collective redress regime reveals that it may have more of the US system than first spelled out by the EU officials. As there is no tradition of group litigation in Europe, most of the arguments are based on the available studies discussing the US class action.¹⁰⁹¹ Indeed the US represents a road map for changes in the EU system and a Study conducted for the EU stresses that:

The US have been one of the first countries to introduce a collective litigation instrument and thus represents a natural point of reference and an important benchmark to assess the potential implications of changes to the EU system.¹⁰⁹²

In order to provide a benchmark to assess the efficacy of the collective redress regime envisaged in the EU, the analysis now outlines, first the core features of the US class action mechanism, then considers whether features of the US regime resulting in abusive litigation, are nevertheless pertinent to the EU.

¹⁰⁸⁸ Commission, ‘Towards a Coherent European Approach to Collective Redress: Next Steps’ (Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli) SEC (2010) 1192

¹⁰⁸⁹ Ibid, 17

¹⁰⁹⁰ Ibid

¹⁰⁹¹ Andrea Renda and others, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’ (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 277

¹⁰⁹² Paolo Buccirosi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 13

8.1.3 The US – EU Safeguards Against Abusive Collective Litigations

An overview of the US rules related to collective redress appears necessary, in the evaluation of the EU proposed regime, because the US system is used as reference to explain benefits and to warn about disadvantages.

According to the Commission, the US system is often perceived as encouraging unmeritorious or vexatious litigation.¹⁰⁹³ The Commission warns that such a system should be examined carefully and lessons drawn from it, as well as from the experiences of other foreign jurisdictions in this field, as appropriate. The Commission emphasises that the protection of rights deriving from Community competition law is important, but it is also important to keep excessive litigation in check and to try to achieve some form of moderation in the enforcement system.¹⁰⁹⁴ However, although the US system is professed as encouraging unmeritorious and indeed vexatious litigations, it contains several safeguards against such litigation which are absent in the EU proposed collective redress mechanism. Consequently the concern is that, potentially, an even greater amount of abusive litigation maybe experimented in the EU.

The US class action mechanism is essentially based on the Clayton Act which entitles any victim of antitrust law infringements to recover threefold the damages he/she suffered (treble damages),¹⁰⁹⁵ and on the Federal Rules of Civil Procedure which govern the conduct of all civil actions brought in Federal District Courts, including collective actions.¹⁰⁹⁶

Before a class action lawsuit can be filed, four prerequisites must be satisfied in order to be certified as a class by the courts. Under the Federal Rules of Civil Procedure, one or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (a) the class has to be so numerous that the joining of other parties would be impractical;
- (b) there are questions of law or fact common to the class;
- (c) the claims or defences of a represented party are typical of those of the class; and
- (d) the representative party can adequately represent the interests of the entire class.¹⁰⁹⁷

In essence, a class action becomes available when the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.¹⁰⁹⁸ One of the most significant features of the US class action mechanism is the 'opt-

¹⁰⁹³ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 47

¹⁰⁹⁴ *Ibid*

¹⁰⁹⁵ Clayton Act (2006) 15 U.S.C., § 4

¹⁰⁹⁶ US Federal Rules of Civil Procedure, December 2010

¹⁰⁹⁷ *Ibid*, rule 23 (a)

¹⁰⁹⁸ *Ibid*, rule 23 (b) (3)

out' provision. As opposed to 'opt-in' class actions, in which all members of a class desiring to share in the recovery must come forward, opt-out class actions automatically include all members unless they affirmatively ask to be excluded (i.e. 'opt out'). Under the US opt-out scheme, for those who fail to 'opt-out' the final judgment, or settlement, is binding on them.¹⁰⁹⁹

In order to facilitate collective actions in the EU, the Study requested by the European Parliament, points out that the ability of a collective redress mechanism to bring effective compensation to the victims of a competition law infringement depends in fact on how the procedural and substantive rules affect the incentives of the parties.¹¹⁰⁰ The Study stresses that 'Ideally a well-functioning mechanism should provide incentives to encourage well-grounded actions while at the same time envisaging safeguards that protect from meritless claims'.¹¹⁰¹ In essence the Study suggests: (a) an opt-in model as it has the advantage of limiting the risk of unmeritorious actions, although it results in a low participation rate;¹¹⁰² (b) both representative actions and collective actions should be allowed and no restriction should be placed on the ability of any subject to bring a collective action to claim compensation; (c) the collective redress system should also be open to small enterprises; and (d) private funding mechanisms should be used to foster consumer and small enterprise as they are unlikely to induce excessive litigation.¹¹⁰³

Considering the state of play of collective redress in the EU it appears that there is a trend towards adopting aggregate litigation devices. The concern is that such approach seems to leave the operation of collective actions in the hands of private parties without any effective control. The emphasis seems to be on victim's compensation with very little importance given to side effects, such as that of abusive litigation, stemming from private actions. The EU Parliament acknowledges the risk when it states that it:

Notes the efforts made by the US Supreme Court to limit frivolous litigation and abuse of the US class action system, and stresses that Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions.¹¹⁰⁴

Nevertheless, despite this acknowledgement, the position taken by EU Parliament seems to be similar to the approach taken in the Study,¹¹⁰⁵ as those features of the US system that have proved

¹⁰⁹⁹ For a detailed discussion of the US class action certification see: Tiana Leia Russell, 'Exporting Class Actions to the European Union' (2010) 28 Boston University International Law Journal 141

¹¹⁰⁰ Paolo Buccrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012)

¹¹⁰¹ *Ibid*, 13

¹¹⁰² The analysis of the opt-in model is at chapter 9.1.4

¹¹⁰³ For the full version of the recommendations see: Paolo Buccrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 13

¹¹⁰⁴ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' ((2011/2089(INI) Resolution of 2 February 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 2

¹¹⁰⁵ Paolo Buccrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012)

to be detrimental to honest competition, such as unduly out-of-court settlements,¹¹⁰⁶ in the EU appears to be encouraged. While the Parliament 'reiterates that safeguards must be put in place ... in order to avoid unmeritorious claims and misuse of collective redress, so as to guarantee fair court proceedings...',¹¹⁰⁷ out-of-court settlement is considered to be an efficient mechanism to resolve antitrust disputes between private claimants and undertakings deemed to have violated competition rules. In commenting on 'Alternative Dispute Resolution' (ADR) the EU Parliament states that:

[T]he availability of an effective judicial redress system would act as a strong incentive for parties to agree an out-of-court settlement, which is likely to avoid a considerable amount of litigation; encourages the setting-up of ADR schemes at European level so as to allow fast and cheap settlement of disputes as a more attractive option than court proceedings.¹¹⁰⁸

The concern is: which safeguards are in place to ensure that businesses in the EU are not coerced (or at very least to limit the phenomenon) into the so called 'blackmail settlement'¹¹⁰⁹ stemming from, possible abusive, private actions? As commented by Leslie, in the US Congress sought to prevent collusive settlements by requiring trial judges to approve all class action settlements in federal court.¹¹¹⁰ Indeed under the US Federal Rules of Civil Procedure the court may approve a proposed settlement only after a hearing and on finding that it is fair, reasonable, and adequate.¹¹¹¹ However, none of these elements appear in the envisaged EU collective redress mechanism. In turn, this could result in a propensity of private parties to commence antitrust litigation, as due to lack of safeguards, there are good chances of success, hence, of obtaining damages.

Under the US provisions, in distinguishing reasonable from inadequate settlements, courts look at a number of factors. The most common test is that provided by the US Court of Appeals in *Grinnell* in which the court held that in order to determine the adequacy of a proposed settlement factors specifically to be considered include:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;

¹¹⁰⁶ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, fn 22

¹¹⁰⁷ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' ((2011/2089(INI) Resolution of 2 February 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 20

¹¹⁰⁸ *Ibid*, 25

¹¹⁰⁹ Paolo Buccirosi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 41; Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009

¹¹¹⁰ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1010

¹¹¹¹ US Federal Rules of Civil Procedure, December 2010, rule 23 (e) (2)

- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery;
- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.¹¹¹²

This test has been subject to several decisions and courts have held some factors more important than others.¹¹¹³ However, perhaps the more important refinement is that the proposed settlement cannot be judged without reference to the strength of claimants' claims. Indeed, 'The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement'.¹¹¹⁴ As Leslie emphasises,¹¹¹⁵ all courts recognise that the adequacy of the amount offered in settlement '... must be judged not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case'.¹¹¹⁶ Hence, the adequacy of a proposed settlement represents a compromise between the strengths of claimants' case and the possible success of the defendants' defences.¹¹¹⁷ Ultimately, it appears that judges must balance the Grinnell factors to determine whether the settlement is fair, adequate, and reasonable in the circumstances. Arguably, this judicial evaluation discourages unmeritorious claims by alerting potential claimants that even if they succeed in forcing defendants into a settlement, the matter must nevertheless be endorsed by the court.

This significant judicial scrutiny, however, seems to be absent from the collective redress regime envisaged in the EU. Indeed the approach taken is that: 'The "loser pays" principle seems efficient and apt to discourage frivolous claims'.¹¹¹⁸ Such approach raises several issues, each of which requires a separate analysis. For instance, the rationale behind a decision to settle an antitrust case. What lessons can be learned from the approach taken by the US and Canadian authorities towards out-of-court settlements and the consequences of an excessive reliance on the 'loser pays' rule.

It is to these issues that the analysis now turns.

¹¹¹² *City of Detroit v. Grinnell Corp.* 495 F2d 448, 463 (2d Cir 1974), 463

¹¹¹³ For a discussion on this point see: Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1017

¹¹¹⁴ *City of Detroit v. Grinnell Corp.* 495 F2d 448, 463 (2d Cir 1974), 455

¹¹¹⁵ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1018

¹¹¹⁶ *In re PaineWebber Ltd. P'ships Litigation* 171 FRD 104, 130 (SDNY 1997), 130

¹¹¹⁷ *Frank v. Eastman Kodak Co.* 228 FRD 174, 186 (WDNY 2005), 186

¹¹¹⁸ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 64

8.2 Antitrust Settlements

8.2.1 Propensity to Settle

In essence, the decision to settle is an investment decision. Whether or not to rely on the legal system and what action to take once a suit is filed depends on the net present value of the costs and benefits. Accordingly, a firm propensity to settle cannot be assessed only by a legal analysis but it is better explained by including an economic perspective. Furthermore, as there is evidence of settlements involving only one corporate defendant and only one corporate claimant, the antitrust defendant's propensity to settle is not only related to follow-on claims, for instance after conclusion of the antitrust authority investigation, but it is also a concern in stand-alone litigation. Due to high settlement rates of antitrust litigation, the majority of which results from private actions, the issue of propensity to settle is of relevance in the evaluation of private enforcement in the EU. Arguably, not enough significance has been accorded in the EU to this matter. This part of the thesis provides an appraisal of the issues involved.

Data from the Georgetown Private Antitrust Litigation Project based on over 2,350 antitrust cases filed in five districts between 1973 and 1983, shows that 73.3% of the cases were settled.¹¹¹⁹ A study on the phenomena, taking into account the financial characteristics of the firms and its accounting data, conducted by Bizjak and Coles on a sample of 322 antitrust cases shows a settlement rate of 70%.¹¹²⁰ A study conducted by Perloff and Rubinfeld, based on 145 observations specifically related to antitrust class action litigations, reports that 78.6% of case were settled.¹¹²¹ Arguably, the similar figures resulting from different studies are consistent with the notion that settlement is more relevant to antitrust than other areas of law. Furthermore, these figures might understate the scale of settlements as it is generally accepted that whilst there have been more cases involving private claims for damages than those cases reported in some of the literature,¹¹²² these have typically been settled out of court and therefore little information is available in the public domain.¹¹²³ As Breit and Elzinga notes, collecting data on the magnitude of settlements effect is problematic because:

¹¹¹⁹ Steven C Salop and Lawrence J White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 *The Georgetown Law Journal* 1001, 1010 table 8

¹¹²⁰ John M Bizjak and Jeffrey L Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm' (1995) 85 *The American Economic Review* 436, 457 table 6

¹¹²¹ Jeffrey M Perloff and Daniel L Rubinfeld, 'Settlements in Private Antitrust Litigation' in White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 166

¹¹²² Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Analysis of Economic Models for the Calculation of Damage*, Ashurst, 31 August 2004) <<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 9 January 2014, fn 2

¹¹²³ Barry J Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005' [2008] *European Competition Law Review* 96; See also: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>>

Defendant firms and their counsel are reluctant to provide data on either the number of such settlements or the amounts of money involved, for fear that the data would provoke the fabrication of additional lawsuits against their companies and clients, or stockholder reprisals, or both.¹¹²⁴

Various authors, however, have conducted studies on the issue of antitrust settlements providing reliable data. One of these studies is that conducted by Bizjak and Coles.¹¹²⁵

In the study performed by Bizjak and Coles, a firm enters the sample each time it is either a defendant or a claimant filing a lawsuit or settlement in an inter-firm lawsuit. In total firms enter the sample 550 times.¹¹²⁶ The authors analysed how the likelihood of settlement are influenced by litigation costs and the uncertainty surrounding the outcome of the dispute. The higher the joint costs of the conflict and the more uncertainty as to the outcome, the greater is the likelihood of an out-of-court settlement. The evidence collected suggests that the potential for follow-on suits and behavioural restrictions that harm defendants more than they help claimants are major sources of costs and inconvenience for antitrust defendants. To the extent that a request for injunctive relief or higher monetary damages increases the range or uncertainty of the possible outcomes from trial, both increase the likelihood of settlement.¹¹²⁷ Therefore is not the prospect of high damages that in itself is a determining factor prompting a settlement, indeed according to Bizjak and Coles 'the presence of a request for injunctive relief and higher litigation-related costs of financial distress both increase the chances that a firm will settle a dispute'.¹¹²⁸

Bhagat points out that direct costs such as lawyers' fees, court costs and damages are well documented, indirect costs in contrast, are potentially more important but less well documented.¹¹²⁹ These indirect costs, referred to as financial distress, are consequence of the very fact that the company is involved in the litigation. Financial distress costs include lower sales or higher factor costs due to the inability to do business with customers and suppliers on favourable terms, the greater difficulty of raising funds or obtaining credit, the distraction of management, and the resulting inefficient investment policy.¹¹³⁰ In this respect a distinction must be made between

accessed 19 January 2014, 39; Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Analysis of Economic Models for the Calculation of Damage*, Ashurst, 31 August 2004) <<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 9 January 2014, fn 2

¹¹²⁴ William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) *Journal of Law and Economics* 405, 433

¹¹²⁵ Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221

¹¹²⁶ *Ibid*, 225

¹¹²⁷ John M Bizjak and Jeffrey L Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm' (1995) 85 *The American Economic Review* 436, 453

¹¹²⁸ *Ibid*, 438

¹¹²⁹ Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 222

¹¹³⁰ *Ibid*, 223

economic distress and financial distress. Economic distress is the result of poor operating performance in principle unconnected with the litigation. For instance, underlying business problems make liquidation a viable option.¹¹³¹ As explained by Ross, financial distress is a situation where a firm's operating cash flows are not sufficient to satisfy current obligations (such as trade credits or interest expenses) and the firm is forced to take corrective action.¹¹³² Financial distress results from leverage in a firm's capital structure. It occurs when the firm has trouble meeting its fixed obligations (for example, interest payments) because of insufficient cash flow. Financial distress may lead a firm to default on a contract, and it may involve financial restructuring between the firm, its creditors, and its equity investors. Usually the firm is forced to take actions that it would not have taken if it had sufficient cash flow.¹¹³³ In principle a firm can be in financial distress without being in economic distress. However, as Bhagat put it 'lawsuits are interesting because they can place a firm in financial distress'.¹¹³⁴ Consequently a lawsuit can trigger a firm's fiscal disruption. Indeed, as explained by Bhagat 'Firms in financial distress are usually also in economic distress and hence face costs from reduced customer support, reduced trade credit, etc., independent of capital structure'.¹¹³⁵

It is worth noting that at the commencement of a legal action, the antitrust defendant experiences significant losses in terms of waste of employees' time,¹¹³⁶ negative impact on the stock-market¹¹³⁷ and loss of the ability to engage in preferred/profitable business practices.¹¹³⁸ Such circumstances create the conditions in which the defendant ends in financial distress before and, regardless of, the conclusion the case. In turn these conditions result in the defendant's propensity to settle at an early stage. Indeed as documented by Bizjak and Coles 'dollar damage requests do not appear to influence settlement behaviour in litigation'.¹¹³⁹ Rather, 'the presence of a request for injunctive

¹¹³¹ Ibid, fn 1

¹¹³² Stephen A Ross, Randolph W Westerfield and Jeffrey Jaffe, *Corporate Finance*, vol 1 (6 edn, McGraw-Hill Primis 2006), 859

¹¹³³ Ibid

¹¹³⁴ Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 223

¹¹³⁵ Ibid, 223

¹¹³⁶ Paul V Teplitz, 'The Georgetown Project: An Overview of the Data Set and its Collection' in White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 72-73; Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115, 142; Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 223

¹¹³⁷ Daniel R Fischel and Michael Bradley, 'The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis' (1986) 71 *Cornell Law Review* 261; 277-281; Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 223

¹¹³⁸ John M Bizjak and Jeffrey L Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm' (1995) 85 *The American Economic Review* 436, 437; Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 223

¹¹³⁹ John M Bizjak and Jeffrey L Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm' (1995) 85 *The American Economic Review* 436, 437

relief and higher litigation-related costs of financial distress both increase the chances that a firm will settle a dispute'.¹¹⁴⁰ These results are consistent with the results of Bhagat that:

[I]n litigation, the defendant's financial distress appears to be a net source of leakage of shareholder wealth. That wealth leakages and financial-distress costs are central in litigation suggests that these costs are also likely to be important in other potentially more significant cases of bargaining among firm.¹¹⁴¹

According to Bhagat the defendant firms experience wealth gains from settling lawsuits.¹¹⁴² Hence it explains the defendant's propensity to settle. Stock-market data shows a significant positive relation between abnormal market returns of defendants upon announcement of settlement and at the news of defendant relief from costs of financial distress arising from the dispute.¹¹⁴³ These results also show that while the announcement of the filing results in a decline in the combined equity value of both firms, the gains from settlement are related to the defendant's relief from financial distress.¹¹⁴⁴ The authors concluded that one possible explanation for the asymmetry in wealth effects upon settlement is that the defendant receives relief from financial distress associated with the litigation, whereas the plaintiff receives no such benefits.¹¹⁴⁵ Giving the damaging factors of a litigation and the relief when it is concluded, it can be seen how the antitrust defendant has a general propensity to settle. The rationale is that once the uncertainty surrounding the legal action is over the defendant firm's officials can concentrate in running the business, the firm can resume trading in profitable practices and in turn it regains the trust of customers and that of the stock-market.

A further point to note is that, as documented by Bhagat, while the defendant firms tend to lose expected wealth from the filing of each of the various types of lawsuits, the defendant's stock-market returns at the announcement of settlement are significantly larger for antitrust suits than for other suits.¹¹⁴⁶ Stated differently, an antitrust defendant is more damaged by a lawsuit than other defendants sued for other issues, hence settling, gives the antitrust defendant significant benefits. These findings are based on a sample of 330 firms involved in inter-firm lawsuits in action related to breach of contract, patent infringement, antitrust, corporate control and a group defined by the author as 'other' namely slander, product liability, securities/disclosure violations, and bankruptcy.¹¹⁴⁷ The study includes both stated intent to file or settle and actual filings and

¹¹⁴⁰ Ibid, 438

¹¹⁴¹ Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 224

¹¹⁴² Ibid, 231

¹¹⁴³ Ibid, 232 table 4

¹¹⁴⁴ Ibid, 224

¹¹⁴⁵ Ibid, 243

¹¹⁴⁶ Ibid, 229 - 231, table 3

¹¹⁴⁷ Ibid, 230 table 3

settlements. Of the 83 lawsuits actually settled 29 of them were antitrust cases; 15 breach of contract; 17 patent infringements; 5 corporate control and 17 others.¹¹⁴⁸ The authors do not fully explain the reasons why antitrust defendants have an accentuated propensity to settle. However they indicate few possible causes: a) court-imposed behavioural constraints that harm the defendant; b) indirect costs for the defendant from an increased probability of bankruptcy and financial distress; c) information revealed about the firm prospects that is not directly related to the costs and benefits of the suits; and d) the possibility of follow-on suits against the defendant.¹¹⁴⁹

Arguably, all of these issues are applicable to the private enforcement regime envisaged in the EU. The damaging effect of court-imposed behavioural constraints and the financial and economic distress resulting from the involvement in an antitrust litigation are issues that cannot be denied. Indeed it is debatable whether such matters are appropriately considered in the Commission proposals. Likewise, as antitrust lawsuits usually involve large companies, bad press, for instance about the company's prospective relocation to another country revealed at the wrong time, could damage that company and these issues are outside the remit of antitrust rules. With regard to the possibility of follow-on suits against the defendant, which appear to be particularly relevant to antitrust actions,¹¹⁵⁰ considering the approach taken in the EU, this issue too is of concern to business trading in the EU. Particularly in relation to collective redress (but also significant in individual actions) it is well accepted that antitrust actions often follow an antitrust decision taken either by an NCA or by the Commission.¹¹⁵¹ Indeed under Article 16(1) of Regulation 1/2003, the decision taken by the European Commission is binding in all Member States and represents a non-rebuttable presumption as far as the existence of the infringement is concerned.¹¹⁵² Hence, the only item that a claimant has to prove before obtaining damages is simply that he was affected by the breach. Furthermore, once the defendant is found guilty of an antitrust infringement, the Commission seems to run a campaign in order to invite private parties to come forward and claim damages. Examples include the case involving 11 air cargo carriers after been fined by the Commission a total of €799 million, and the case of producers of TV and computer monitor tubes fined by the Commission € 1 47 billion. In both announcements the Commission states:

Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the European Court of Justice (ECJ) and the Antitrust Regulation (Council Regulation

¹¹⁴⁸ Ibid, 226 table 1

¹¹⁴⁹ Ibid, 233 - 234

¹¹⁵⁰ Ibid, 229 - 231, table 3

¹¹⁵¹ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 24. See also generally: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014

¹¹⁵² Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 24

1/2003) both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine.¹¹⁵³

Considering the legal basis for follow-on actions and the broadcasted possibility of damages awards, it can be seen that, confronted with a private action, in the EU antitrust defendants will have a propensity to settle at any early stage in an attempt to avoid the implications resulting from the continuation of the litigation. Whether as result of a private action, an early settlement is beneficial or detrimental, is debatable. On one hand, the avoidance of costs and implications resulting from the litigation can be beneficial to both the claimant and the defendant and in turn for the public finances by saving court expenses. On the other, as antitrust rules are not always clear in scope, is it appropriate to settle a case out of court before it is ascertained that the defendant did in fact violate antitrust rules? This issue is explored in the next part of the analysis.

8.2.2 The Uncertainty of Antitrust Rules

A further reason explaining both the higher tendency to settle of antitrust defendants when compared to other defendants and the higher possibility of follow-on suits which appears more accentuated in antitrust actions when compared to other areas,¹¹⁵⁴ arguably is the uncertainty surrounding the prohibitions contained in antitrust rules.¹¹⁵⁵ A rational potential claimant might prefer awaiting the resolution of the antitrust authority case before filing a claim, hence having free-riding over the public enforcement and making a claim only if he can foresee, now with accuracy as the breach is established, the possibility of monetary awards. Furthermore, evidence suggests that the uncertainty of antitrust rules can be exploited by private parties for private interests even before the conclusion of the antitrust authority case.

It is well documented that the lack of clarity of antitrust rules makes predicting the extent of their application a rather difficult quest. As Melamed explains, consider, for example, an information exchange through a trade association.¹¹⁵⁶ Such exchanges are generally procompetitive, but as we move along the range, depending on the type of information exchanged, the exchange could

¹¹⁵³ Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014; Antitrust, 'Commission Fines Producers of TV and Computer Monitor Tubes € 1.47 Billion for Two Decade Long Cartels' (*IP/12/1317*, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014

¹¹⁵⁴ Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 229 - 232

¹¹⁵⁵ For an example in which the CFI misinterpreted the concept of abuse of dominant position see: Rosa Greaves, 'Magill est arrive...RTE and ITP v Commission of the European Communities' [1995] *European Competition Law Review* 244

¹¹⁵⁶ Douglas A Melamed, 'Damages, Deterrence, and Antitrust - A Comment on Cooter' (1997) 60 (3) *Law and Contemporary Problems* 93, 94

become anti-competitive and unlawful. Or consider a joint venture that justifies production facilities but at some point turns into an anti-competitive practice because of the creation of market power.¹¹⁵⁷ For instance, the Court of Justice in *Wouters* noted that not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties falls within antitrust prohibitions.¹¹⁵⁸ However, in these instances the line between pro-competitive and anti-competitive, lawful and unlawful is uncertain, and the consequence of crossing the line is exposure to liability.¹¹⁵⁹

Page explains that existing definitions of substantive antitrust liability bring many efficient business arrangements arguably within the prohibition of the antitrust laws.¹¹⁶⁰ Posner contends that if antitrust doctrine were pellucid and courts unerring in applying it to particular disputes, there would be no problem, unmeritorious cases would fail and the extortion problem would disappear, but in reality these conditions are unachievable.¹¹⁶¹ Easterbrook emphasises:

If the substantive rules could discriminate perfectly between efficient and monopolistic conduct, no one would worry about penalties. Those whose conduct was beneficial would be left alone; others could be hanged. But no one thinks that courts can assess the full welfare consequences of all business conduct.¹¹⁶²

Cavanagh explains that antitrust laws are somewhat imprecise. The line between what is permitted and what is forbidden is often blurred.¹¹⁶³ McAfee points out that the antitrust field is a particular one, because claimants often are competitors or takeover targets of defendants.¹¹⁶⁴ Rodger reports that 61.1% of antitrust cases filed in the UK between 2000 and 2005, were settled because of the uncertainty of litigation.¹¹⁶⁵ This means that, as emphasised by Breit and Elzinga, the vast majority of damages paid as a result of antitrust litigation (or its threat) come through the settlement process.¹¹⁶⁶

The consequence of the uncertainty surrounding the content of antitrust rules is that, as argued by Perloff and Rubinfeld, whether parties to private antitrust lawsuits settle or go to trial depends on

¹¹⁵⁷ Ibid

¹¹⁵⁸ C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, 97

¹¹⁵⁹ Douglas A Melamed, 'Damages, Deterrence, and Antitrust - A Comment on Cooter' (1997) 60 (3) *Law and Contemporary Problems* 93, 94

¹¹⁶⁰ William H Page, 'The Scope of Liability for Antitrust Violations' (1985) 37 *Stanford Law Review* 1445, 1445

¹¹⁶¹ Richard A Posner, *Antitrust Law* (The University of Chicago Press 2001), 275. See also: Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books 1978)

¹¹⁶² Frank H Easterbrook, 'Detrebling Antitrust Damages' (1985) 28 *Journal of Law and Economics* 445, 449

¹¹⁶³ Edward D Cavanagh, 'Detrebling Antitrust Damages: An Idea Whose Time Has Come?' (1987) 61 *Tulane Law Review* 777, 780

¹¹⁶⁴ Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014

¹¹⁶⁵ Barry J Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005' [2008] *European Competition Law Review* 96, table 23

¹¹⁶⁶ William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) *Journal of Law and Economics* 405, 421

their 'beliefs' about the likely trial outcome and on their attitudes toward risk.¹¹⁶⁷ It is important to note that in such circumstances the likelihood of settlement depends on the 'parties' beliefs' about trial outcomes. Consequently, the uncertainty of antitrust rules, coupled with the power given to private parties under a private enforcement regime, makes antitrust a fertile ground for extortion by coercing defendants into the settlement of possibly unmeritorious cases.

The uncertainty about the outcome of the case calls the defendant to carry out a delicate, but highly risky balancing exercise. The defendant must evaluate the benefits of accepting a settlement with the claimant/s against the possibility of losing the case in courts and, in addition to further disruption in defending the case, potentially be required to pay out damages exceeding the price of the settlement. Defendants considering the risks of not settling, particular in collective actions, are confronted with potential staggering levels of liability. The US experience shows that private treble damage actions that coerce unjust settlements may have an enhanced validity in the context of class actions.¹¹⁶⁸ The next part of the analysis focuses on the issue of unwarranted settlements.

8.2.3 Unwarranted Settlements – The 'Loser Pays' Rule

This part of the analysis deals with a scenario in which the claimant/s in an antitrust action settle with the defendant/s case after the initiation of a legal proceeding or before reaching the hearing phase, hence avoiding the judicial decision. This has to be distinguished from the administrative settlement procedures available for and used by companies to settle their cases with the antitrust authority without court proceedings initiated by the authority.¹¹⁶⁹

The issue of unwarranted settlement as a result of antitrust private enforcement appears significant because as reported by Leslie:

Unfortunately, the pressure to settle exists even with respect to frivolous filings, which are an ongoing concern in the class action context, and are as costly to litigate as legitimate claims. The pressure on defendants to settle even non-meritorious claims gives plaintiffs substantial leverage—so much so that some courts and commentators characterize it as 'blackmail'.¹¹⁷⁰

¹¹⁶⁷ Jeffrey M Perloff and Daniel L Rubinfeld, 'Settlements in Private Antitrust Litigation' in White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988)

¹¹⁶⁸ Yosef J Riemer, 'Sharing Agreements Among Defendants in Antitrust Cases' (1983 - 1984) 52 *The George Washington Law Review* 289, 294 - 295

¹¹⁶⁹ Administrative settlements are Commitment Decisions under Art 9 of Regulation 1/2003 and settlement of cartel cases under Article 7 and Article 23 of Regulation 1/2003. For additional information see: Wouter P J Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29 (3) *World Competition*

¹¹⁷⁰ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, fn 22

In principle, settlements produce a substantial saving in judicial resources and hence aid in reducing backlog in the courts. Defendants may find that high costs of litigation combined with the risk of an adverse judgement are less desirable than an early settlement. Claimants may also find that settlement provides at least some recovery without the burden of litigation.¹¹⁷¹ In this respect, settlement promotes efficient use of private resources by reducing litigation and related costs. However, in the EU the problem of undue settlements (or blackmail settlements) appears to be acknowledged,¹¹⁷² but arguably not enough importance is given to an issue that can have significant detrimental effect to the operation of private enforcement. For instance, the Report for the Commission which spreads over several hundreds of pages on potential benefits of private enforcement, arguably, contains very little in relation to unmeritorious claims, hence on consequences of them, such as that of undue settlements.¹¹⁷³ Indeed, the Report suggests a solution to the problem which, although not without its merit, appears insufficient to effectively limiting the problem of unmeritorious claims. The Report states:

[A]s regards fee allocation rules, a loser-pays rule such as the one applied – with variants – in EU countries seems to strike a more satisfactory balance than the –each party bears her own cost rule, as the two-way shifting mechanism discourages unmeritorious claims – indeed, a plaintiff with a low-probability of success at trial will refrain from initiating a private action, and mostly high-probability cases will be brought.¹¹⁷⁴

The Study prepared for the EU Parliament, specifically on collective redress, contends that: ‘The “loser pays” principle seems efficient and apt to discourage frivolous claims’.¹¹⁷⁵ Moreover, the Study stresses:

As long as the ‘loser party pays’ rule remains valid and punitive damages are prohibited, we consider it unlikely that the introduction of some forms of entrepreneurship, either by lawyers or by third parties, may provoke a surge in meritless actions.¹¹⁷⁶

Stated differently, the ‘loser party pays’ rule in the EU is in effect considered as the solution for all detrimental side effects of collective action as:

¹¹⁷¹ Yosef J Riemer, ‘Sharing Agreements Among Defendants in Antitrust Cases’ (1983 - 1984) 52 *The George Washington Law Review* 289, 306

¹¹⁷² Andrea Renda and others, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’ (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014

¹¹⁷³ *Ibid*

¹¹⁷⁴ *Ibid*, 214

¹¹⁷⁵ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 64

¹¹⁷⁶ *Ibid*, 41

This rule is efficient because by forcing parties to consider the entire cost of the trial when making decisions it discourages frivolous claims and promotes the use of cheaper alternatives to obtain compensation (e.g. out-of-court settlements).¹¹⁷⁷

The EU Parliament seems to endorse this strategy as it states:

Member States are to determine their own rules on the allocation of costs, under which the unsuccessful party must bear the costs of the other party in order to avoid the proliferation of unmeritorious claims in an EU-wide collective redress mechanism.¹¹⁷⁸

In the EU there appear to be a trend in elevating the 'loser pays' principle above its realistic applicability. For instance, in the UK the Department for Business Innovation & Skills, with regard to the issues of vexatious claims contends that:

[A]s companies facing vexatious claims would be able to claim back costs in court if the case is unsuccessful, there would be a zero net cost to business. Any other costs to business would arise from not being compliant with the competition act.¹¹⁷⁹

Such approaches, both that of the EU and that of the UK, if implemented, raises serious concerns as the 'loser pays' rules might not be as effective as it is contended in the EU. Even when the defendant succeeds in defending his actions, the costs for an antitrust defendant in dealing with a court case are well above and beyond the monetary recoup of its legal costs. Regardless of the outcome of the case, upon filing of a claim by a private party the antitrust defendant experiences significant losses at least in three areas: first, waste of employees' time because of disruption of employees' routine, or time spent by employees discussing the case,¹¹⁸⁰ second, negative reaction of the stock-market, triggered by the potential liability for damages,¹¹⁸¹ third, loss of the ability to

¹¹⁷⁷ Ibid, 89

¹¹⁷⁸ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' ((2011/2089(INI) Resolution of 2 February 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 20

¹¹⁷⁹ Department for Business Innovation & Skills, 'Private Actions in Competition Law: A Consultation on Options for Reform - Final Impact Assessment' (BIS - 13-502, January 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69124/13-502-private-actions-in-competition-law-a-consultation-on-options-for-reform-final-impact.pdf> accessed 12 March 2014, 49

¹¹⁸⁰ Paul V Teplitz, 'The Georgetown Project: An Overview of the Data Set and its Collection' in White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 72-73; Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio State Law Journal 115, 142; Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 Journal of Financial Economics 221, 223

¹¹⁸¹ Daniel R Fischel and Michael Bradley, 'The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis' (1986) 71 Cornell Law Review 261; 277-281; Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 Journal of Financial Economics 221, 223

engage in preferred/profitable business practices as result of expected imposition of behavioural restraints.¹¹⁸²

Furthermore, particularly when it comes to collective actions, it is rather questionable that the 'loser pays' rule is sufficient to curb unmeritorious claims. It is worth recalling that in the US, despite the general rules that each party bears its own costs irrespectively of the outcome of the case, a successful antitrust claimant can recover lawyers' fees and costs together treble damages.¹¹⁸³ Similarly, under the Canadian Competition Act, successful claimants can recover the costs of any investigation in connection with the matter and of proceedings.¹¹⁸⁴ Nevertheless, the percentage of cases actually concluded by judgement is particularly low. Indeed the literature shows that the percentage of antitrust case settled, for those cases where the data is available, is above 70%.¹¹⁸⁵ This figure must be considered within the background that, due to the uncertainty of antitrust rules,¹¹⁸⁶ antitrust defendants have a propensity to settle even unmeritorious cases.¹¹⁸⁷ Accordingly, the 'loser pays' rule under which the unsuccessful party bears the costs of the other party appears inefficient to avoid the proliferation of unmeritorious claims in an EU-wide collective redress mechanism as the Parliament contends.¹¹⁸⁸

8.2.4 Funding Opportunities and Settlements

A further significant reason why the 'loser pays' rule is inadequate to limit abusive litigation is the approach taken in the EU toward funding of legal costs. Arguably, the availability of such a mechanism has the potential to nullify any constraint on abusive litigation that the 'loser pays' rule in principle could impose. Indeed, there is evidence that funding mechanisms can actually incentivise unmeritorious claims.

For antitrust victims, seeking compensation for the harm suffered could be a costly and risky activity, which may be undertaken only by victims that can rely on substantial financial and

¹¹⁸² John M Bizjak and Jeffrey L Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm' (1995) 85 *The American Economic Review* 436, 437; Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 223

¹¹⁸³ Clayton Act (2006) 15 U.S.C., § 15a

¹¹⁸⁴ Competition Act R.S.C., 1985, c. C-34, section 36 (1)

¹¹⁸⁵ John M Bizjak and Jeffrey L Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm' (1995) 85 *The American Economic Review* 436, 457; Steven C Salop and Lawrence J White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 *The Georgetown Law Journal* 1001, 1010 table 8; Jeffrey M Perloff and Daniel L Rubinfeld, 'Settlements in Private Antitrust Litigation' in White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 166

¹¹⁸⁶ See chapter 8.2.2

¹¹⁸⁷ See chapter 8.2.1

¹¹⁸⁸ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' ((2011/2089(INI) Resolution of 2 February 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 20

organisational resources.¹¹⁸⁹ Consequently, several funding opportunity for collective redress actions have been introduced in various Member States. They include: contingency or conditional fees; private insurance products (such as after-the-event 'ATE' insurance); legal aid; contingency Legal Aid Funds-(CLAFs); private funds acting on a commercial basis.¹¹⁹⁰ However, while these mechanisms lower the financial hurdle by allowing a multitude of victims, who individually may have suffered damages of relatively small value, to share the costs of a lawsuit and/or to benefit from these funding opportunities, all of these arrangements have a common denominator, virtually all of them are risk free for the claimants. If the collective action eventually fail it is the insurance or the organisation that effectively bears the costs of litigation, with little or no costs for the group of individuals that commenced it, while the defendant, being a business, is likely to be penalised in a number of ways, for instance, by negative reaction of the stock-market, by inconvenience in defending the suit and by potential bad press that an antitrust case is likely to attract.¹¹⁹¹

Under the heading of 'incentives and safeguards' the Study on collective redresses states:

There are clear indications that private funding mechanisms are unlikely to induce excessive litigation ... Contingency and conditional fee arrangements are efficient funding solutions that allocate the risk to the subject that can bear it more efficiently and force lawyers to act as gatekeeper to justice pre-assessing the merits of a case.¹¹⁹²

Although the same document asserts that the US represents a natural point of reference and an important benchmark to assess the potential implications for the EU system,¹¹⁹³ the US negative experience in this respect appears to be discounted.

Contingency and conditional fees are both arrangements between the lawyer and client in which the client payment to the lawyer depends on the success of the case. In a contingency arrangement the client pays the lawyer only if the case is successful, usually with a share of the sum received. Under a conditional fees arrangements the client pays a premium to the lawyer, above the agreed hourly fees, in case of success. The notion that under these arrangements lawyers are forced to act as gatekeepers to justice appears too optimistic. Like any other professionals, lawyers have an unquestionable interest in their fees. Such an interest can be significant if it is proportioned to the type of case and/or outcome. The US experience of funding mechanisms indeed shows that

¹¹⁸⁹ Paolo Buccirrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 70

¹¹⁹⁰ *Ibid*, 32 / 70

¹¹⁹¹ See chapter 8.2.3

¹¹⁹² Paolo Buccirrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 64

¹¹⁹³ *Ibid*, 13

lawyers have attempted to obtain a class action certification under the US provisions,¹¹⁹⁴ in cases where the trivial amount recoverable would not have justified any litigation at all.

For instance, the *Concepcion* case involved a husband and wife who entered into an agreement for the sale and servicing of cellular telephones with AT&T.¹¹⁹⁵ Alleging unfair charges by Telephone Company of \$30.22 in sales tax to customers, the Concepcions brought a putative class action. The case eventually reached the Supreme Court which dismissed the class action proceedings. In doing so, the US Supreme Court observed: 'What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?'¹¹⁹⁶

Similar situation arose in the case of *Carnegie*. In this instance, recipients of income-tax refund brought class actions against bank and tax preparers. Amongst other things, the claimants argued that, as the class contained millions of members, individual litigation were unmanageable. The court held:

The fact that class certified in consumer fraud action ... contained millions of members did not, by itself, make litigation unmanageable; if no settlement occurred and liability was found, separate proceedings could be held to determine entitlements of individual class members to relief.¹¹⁹⁷

The court explained that: 'the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30'.¹¹⁹⁸

Unquestionably, these cases are a clear example in which lawyers have attempted to exploit class action funding mechanisms in the hope of recovering fees resulting from potential large judgement or settlement of a class action. Consequently, it is doubtful that contingency and conditional fee arrangements are efficient solutions to force lawyers to act as gatekeepers to justice by pre-assessing the merits of a case.¹¹⁹⁹ Indeed, it appears that such funding mechanism can result in incentivising lawyers in failing unmeritorious claims.

Arguably, the collective redress regime envisaged in the EU lacks safeguards against abusive litigation. In these circumstances, with regard to collective actions, private enforcement is unlikely to deliver the stated aims of creation and sustainment of a competitive EU economy.¹²⁰⁰ To the contrary, as large damages deters competitive behaviour that promotes efficiencies, encourages

¹¹⁹⁴ US Federal Rules of Civil Procedure, December 2010, rule 23 (a); *City of Detroit v. Grinnell Corp.* 495 F2d 448, 463 (2d Cir 1974), 463

¹¹⁹⁵ For a detailed discussion see: Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107

¹¹⁹⁶ *AT&T Mobility LLC v Concepcion* 131 S Ct 1740, 1761

¹¹⁹⁷ *Lynne A. Carnegie v Household International, Inc., et al.* 376 F3d 656, 657

¹¹⁹⁸ *Ibid*, 661

¹¹⁹⁹ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 64

¹²⁰⁰ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

frivolous lawsuits and forces unduly large settlements,¹²⁰¹ there is a risk of adverse effect on businesses and in turn the wider EU economy.

8.2.5 Conclusion

Private enforcement in antitrust, whether individually or collectively, presents the risk that a private party exploits the litigation process strategically for private gain at the expense of social welfare. Private parties, as are often competitors or takeover targets of defendants, may sue even if they know that their competitor did not violate the antitrust laws.¹²⁰² Moreover, if antitrust doctrines were clear and court unerring in applying it to particular facts the extortion problem would disappear, but these conditions appear to be unachievable.¹²⁰³ Furthermore, bundling of rights can also have unwanted side effects, such as that it may be profitable for a lawyer to conduct a lawsuit despite nominal damages for the class members.¹²⁰⁴ To overcome, or at least to limit, these harmful side effects of collective actions, effective safeguards are needed to prevent the formation and continuation of unmeritorious collective actions. Arguably, in the EU the focus is on facilitating collective actions without effective safeguards against abuses of the rules. Considering the antitrust defendant's propensity to settle out of court due to the uncertainty surrounding antitrust prohibitions, in the EU there appears to be an excessive reliance on the 'loser pays' rule as safeguard against abusive litigations. Indeed this rule appears to be nullified by the envisaged funding schemes. On consideration of the US experience of class action, the EU approach, it is submitted, is insufficient to curb unmeritorious suits and consequently the envisaged collective redress mechanism has the potential to result in exaggerated and exploitative antitrust litigations. The next part of the analysis focusses on the safeguards contained in both the Canadian and US antitrust regimes for prevention of unmeritorious collective actions.

¹²⁰¹ William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) *Journal of Law and Economics* 405, 430 - 435; See also: Jeffrey M Perloff and Daniel L Rubinfeld, 'Settlements in Private Antitrust Litigation' in White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 154

¹²⁰² Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014, 4

¹²⁰³ Richard A Posner, *Antitrust Law* (The University of Chicago Press 2001), 275

¹²⁰⁴ Hans-Bernd Schaefer, 'The Bundling of Similar Interests in Litigation: The Incentives for Class Action and Legal Actions Taken by Associations' (200) 9 (3) *European Journal of Law and Economics* 183, 184

Chapter 9: CANADIAN - US - EU, CLASS ADMISSIBILITY COMPARED

9.1.1 Introduction

Possibly one of the most effective safeguards against abusive class action litigation is the certification of the class so as to prevent the abusive creation of it in the first place. In order to evaluate the importance of class certification as a tool to prevent/limit abusive litigation, the analysis now explores the approach taken by the Canadian antitrust authorities. The findings are compared to those of the US so as to ascertain how effective these two systems are in preventing the commencement of abusive class litigation. Arguably, in the envisaged EU collective redress regime, a significant fallacy is the absence of an effective judicial control over the formation of class action proceedings so as to prevent the commencement of unmeritorious collective actions.

This chapter evaluates how effective, or ineffective, the criteria for certification of class actions are under the US and Canadian provisions. Whether, despite the measures in place, nevertheless the systems are exploited by private parties for private interests and the likelihood of such a scenario being replicated in the EU. The analysis also highlights the lack of effective safeguards in the EU that could result in potential devastating consequences for businesses. This chapter also emphasises the superiority of public enforcement over private enforcement in terms of calibrating the punishment of antitrust violations to the defendant's ability to pay without commercially destroying him.

9.1.2 The Canadian and US Approach to Class Certification

Class action proceedings in Canada are governed by the Class Proceedings Act.¹²⁰⁵ Under the Act's provisions, essentially, a class can be certified if the court is satisfied that:

- a) the pleadings in the action disclose a reasonable cause of action;
- b) there is an identifiable class of two or more persons that would be represented by the representative claimant;
- c) the claims of the class members raise common issues;
- d) a class proceeding is the preferable procedure for the resolution of the common issues; and
- e) there is a representative claimant who, amongst other things, would fairly and adequately represent the interests of the class.¹²⁰⁶

¹²⁰⁵ Class Proceedings Act, 1992, S.O. 1992, c. 6

¹²⁰⁶ Ibid, section 5 (1); See also: The Canadian Bar Association, 'Class Actions in British Columbia' (*British Columbia Branch, Script 233*, April 2013) <http://www.cba.org/dev/BC/public_media/credit/PrintHtml.aspx?DocId=22289> accessed 19 March 2014

Broadly, the Canadian system for class proceedings is similar in many ways to the US Federal Rules of Procedure.¹²⁰⁷ For instance both regimes are adopting an opt-out system. Class members can choose not to be part of a class action (i.e. 'opt out' of it) if they so wish. The claimant must notify the class members of the class action in a way approved by the court.¹²⁰⁸ This notification can be by letter if the class members are known; otherwise, most often it will be by newspaper or magazine advertising. Class members must also be notified of any determination of common issues and any settlement.¹²⁰⁹ To opt-out, usually they must fill out a form or write a letter to the court or the lawyer of the representative claimant.¹²¹⁰ People who do not opt out have to accept the result of the class action.¹²¹¹ As class members probably would not be in court, to protect their interests, a judge supervises every stage of the class action, from start to end. The judge looks out for the best interests of the class as a whole, not just the representative claimant, to ensure both the process and results are fair. If the representative claimant agrees to settle the class action, the judge will ensure that a notice to class members is published and that the settlement is fair, reasonable and in the best interests of the class as a whole.¹²¹²

However, as commented by Bhattacharjee and Sullivan, although the Canadian class action framework is generally similar to that under the US Federal Rules of Procedure, there is one significant exception.¹²¹³ Under the US Rules, before a class action is certified, the court must be satisfied that the questions of law or facts common to class members 'predominate' over any questions affecting only individual members.¹²¹⁴ Criteria to be considered include: a) the class members' interests in individually controlling the prosecution or defence of separate actions; b) the extent and nature of any litigation concerning the controversy already begun by or against class members; c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and, d) the likely difficulties in managing a class action.¹²¹⁵ Arguably, the requirement of 'predominance' means a judicial protection against unmeritorious collective actions. The US courts have made it clear that the requirements under Rule 23 related to class action certification, are different than the requirements in a single action, which in effect, this means a higher standard to be satisfied before a class action is certified. In *Szabo* the US Court of Appeals, in

¹²⁰⁷ US Federal Rules of Civil Procedure, December 2010

¹²⁰⁸ Class Proceedings Act, 1992, S.O. 1992, c. 6, section 17

¹²⁰⁹ The Canadian Bar Association, 'Class Actions in British Columbia' (*British Columbia Branch, Script 233*, April 2013) <http://www.cba.org/dev/BC/public_media/credit/PrintHtml.aspx?DocId=22289> accessed 19 March 2014, 2

¹²¹⁰ Class Proceedings Act, 1992, S.O. 1992, c. 6, section 9

¹²¹¹ The Canadian Bar Association, 'Class Actions in British Columbia' (*British Columbia Branch, Script 233*, April 2013) <http://www.cba.org/dev/BC/public_media/credit/PrintHtml.aspx?DocId=22289> accessed 19 March 2014, 2

¹²¹² *Ibid*, 3

¹²¹³ Subrata Bhattacharjee and Gregory Sullivan, 'Private Enforcement of Canadian Competition Laws' in Marsden and Hutchings (eds), *Current Competition Law*, vol IV (The British Institute of International and Comparative Law 2005), 47

¹²¹⁴ US Federal Rules of Civil Procedure, December 2010, rule 23 (b) (3); For a detailed discussion on the issue of predominance see: Fabio Polverino, 'A Class Action Model for Antitrust Damages Litigation in the European Union' (*SSRN*, 29 August 2006) <<http://ssrn.com/abstract=927001> or <http://dx.doi.org/10.2139/ssrn.927001>> accessed 26 March 2014

¹²¹⁵ US Federal Rules of Civil Procedure, December 2010, rule 23 (b) (3)

reiterating that a court may certify a class under Rule 23(b)(3) only if it finds that all of the prerequisites have been demonstrated, held:

Questions such as these require the exercise of judgment and the application of sound discretion; they differ in kind from legal rulings under Rule 12(b)(6). And if some of the considerations under Rule 23(b)(3), such as ‘the difficulties likely to be encountered in the management of a class action’, overlap the merits ... then the judge must make a preliminary inquiry into the merits.¹²¹⁶

Rather strongly, the court explained that:

Often personal jurisdiction is closely linked to the nature, and merit, of the claim being asserted ... but this does not mean that the judge will just take the plaintiff’s word about what happened. Nor will the court accept the plaintiff’s say-so when deciding how much could be recovered (and thus whether the amount in controversy for diversity jurisdiction is present), even though the maximum recovery depends strongly on the merits.¹²¹⁷

A motion under Rule 12(b)(6) is unique in requiring the district judge to accept the plaintiff’s allegations; we see no reason to extend that approach to Rule 23.¹²¹⁸

Accordingly, the court concluded that in deciding whether to grant class certification, the lower court (District Court) was not required to accept allegations in complaint as true, rather further consideration of certification decision was required, and remanded the case accordingly. Such an approach shows a significant level of judicial protection for defendants against the easy certification of class actions. Indeed in *Re Rhone*, the US Court of Appeals refused certification although a group of 300 individuals had already obtained class certification in lower court for the same facts.¹²¹⁹ In allowing the defendants’ petition for denial of class action, the court noted that there was a class of 300 individual already identified and potentially many more could come forward.¹²²⁰ However, the court took into account the fact that thirteen other cases had been tried already in various courts around the country, and the defendants have won twelve of them. Therefore the court reasoning was that if class action treatment was denied the defendants will be compelled to pay damages only in a few cases.¹²²¹ The court explained:

¹²¹⁶ *John D. Szabo v Bridgeport Machines* 2001, 249 F3d 672, 49 FedRServ3d 716, 676

¹²¹⁷ *Ibid*

¹²¹⁸ *Ibid*, 677

¹²¹⁹ *In re Rhone - Poulenc Rorer Incorporated* 1995, 51 F3d 1293, 63 USLW 2579

¹²²⁰ *Ibid*, 1296

¹²²¹ *Ibid*, 1298

These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs.¹²²²

In denying class certification, the court also emphasised that a notable feature of that case was the lack of legal merit inferred from the fact that the defendants had won 92.3% (12 out of 13) of the cases already tried.¹²²³ Therefore, the judicial discretion applied under the US rules on class action certification results in a significant protection for defendants against unwarranted collective actions. This level of judicial protection under the US rules is absent in the Canadian class proceedings framework.

Under the Canadian Class Proceeding Act, the test for certification appears less stringent than the US equivalent. The court is required to consider 'common issues', defined in the Act as: a) common but not necessarily identical issues of fact; or, b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ("questions communes").¹²²⁴ As explained by Bhattacharjee and Sullivan 'This may generally imply that all other factors being equal, certification in Canadian courts may be easier to obtain than under the US Federal Rules of Procedure'.¹²²⁵

The next part of the analysis explores how the criteria used for allowing or denying a class action proceeding affect its operation.

9.1.3 Is the EU Preliminary Admissibility Check Sufficient?

The approach taken in the EU as to commonality appears to be closer to the Canadian rules than the severe US rules. This raises concerns about an excessive proliferation of antitrust class litigation in the EU. Under the regime envisaged in the EU, a collective action could be admissible when the action refers to the same facts and the same antitrust infringement and when the court can follow a common reasoning for all the claimants, using the same body of evidence.¹²²⁶ Arguably, in the EU the emphasis is in facilitating collective actions without due consideration of its impact on businesses and in turn to the EU economy which appear to be one of the main objectives of private enforcement in the first place.¹²²⁷

The approach taken in the EU, as expressed by the EU Parliament, is that:

¹²²² Ibid

¹²²³ Ibid, 1299

¹²²⁴ Class Proceedings Act, 1992, S.O. 1992, c. 6, section 1

¹²²⁵ Subrata Bhattacharjee and Gregory Sullivan, 'Private Enforcement of Canadian Competition Laws' in Marsden and Hutchings (eds), *Current Competition Law*, vol IV (The British Institute of International and Comparative Law 2005), 48

¹²²⁶ Paolo Buccirosi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 89

¹²²⁷ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

Member States should ensure that a judge or similar body continues to have discretionary powers taking the form of a preliminary admissibility check of any potential collective action in order to confirm that the qualifying criteria have been met and that the action is fit to proceed.¹²²⁸

In essence, the criteria for a representative action to be admissible are that there must be a clearly identified group and, that the identification of the group members must have taken place before the claim is brought.¹²²⁹ Although predicting how exactly the EU collective redress system will develop is a difficult task, this approach appears to be minimalistic to prevent attempts by private parties to enhance their litigation capability by obtaining class action approval. Evidence shows that, despite the safeguards in place, both the US private enforcement and the Canadian public enforcement regimes are not spared from abuses.

It is worth recalling that under the Canadian competition rules private actions, including class actions, are statutory restricted.¹²³⁰ Under the Canadian rules on 'private action' only actual damages can be awarded plus the costs of the litigation for violation of the criminal provision of the Competition Act, or for failure to comply with a Tribunal or court order under the Act' civil provisions.¹²³¹ Under the rules on 'private access' to the Competition Tribunal, damages are not available as the outcome can only be a remedial order, and leave to proceed must be obtained from the Tribunal before an action can be commenced.¹²³² Nevertheless, as observed by Radnoff, the concern is whether class action certification in Canada has gone too far.¹²³³

The Canadian robust approach to protect business from antitrust class action litigation can be seen from the recent (2013) ruling of Federal Court of Appeal in *Murphy* in which the court upheld the validity of a clause, in effect, prohibiting a class action.¹²³⁴ *Murphy*, began a proposed class action proceeding against Amway Canada Corporation and Amway Global claiming their business practices were in violation of the Competition Act. Alleging an illegal scheme of pyramid-selling, *Murphy* filed a claim under Section 36 of the Competition Act seeking \$15,000 in damages, and sought to have the action certified as a class action. In response, Amway brought a motion to stay the proceedings and to compel arbitration as per the agreement to mediate and arbitrate disputes (the Arbitration Agreement) entered into between the parties. The clause prohibited any party from bringing a class

¹²²⁸ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' ((2011/2089(INI) Resolution of 2 February 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 20

¹²²⁹ Ibid

¹²³⁰ See chapter 5.2.3

¹²³¹ Competition Act R.S.C., 1985, c. C-34, section 36 (1)

¹²³² Ibid, section 103 (1)

¹²³³ For a discussion on these points see: Brian N Radnoff, 'A Brave New World Certification of Competition Class Actions' (2010) VII Class Action 486

¹²³⁴ *Kerry Murphy v Amway Canada Corp* 2013 FCA 38

action for an amount exceeding \$1,000 and stated that any class action would have to be resolved individually in private arbitration.¹²³⁵ Murphy had argued in the lower court that statutory protections under the Competition Act in this matter were closely analogous to those in the Business Practices and Consumer Protection Act.¹²³⁶ Murphy further argued that there was a compelling public policy concern that could not be adequately addressed in private and confidential arbitration proceedings.¹²³⁷ In dismissing these arguments and with them the appeal with costs for Murphy,¹²³⁸ the Court of Appeal endorsed the lower court Judge's approach by holding:

He came to the forthright conclusion that the Arbitration Agreement is applicable, enforceable, and serves to bar the initiation of a class proceeding for any amount exceeding \$1,000.¹²³⁹

The Court also clarified that:

Without express legislative language to the contrary, courts must give effect to the parties' agreement to arbitrate. While the appellant submitted that such language could be found in section 36 of the *Competition Act*, the Judge disagreed. In his view, section 36 simply identifies the Federal Court as a court of competent jurisdiction for disputes arising under Part VI of the *Competition Act*, but does not declare it to be the only competent forum. Therefore, section 36 does not prevent parties from contracting out of that jurisdiction through a valid arbitration process.¹²⁴⁰

As explained by Sutton, the Murphy decision confirms that Canada courts:

[W]ill not interfere with parties' class action waivers or agreements to arbitrate their disputes, including statutory claims. This position is consistent with a long line of cases and affirms that such waivers and agreements remain effective tools by which businesses can limit their risk of distracting class actions and costly litigation proceedings.¹²⁴¹

Therefore, following the Canadian Court of Appeal ruling, businesses, to some extent can protect themselves from the exploitation of class action redress mechanisms by private individuals who want to enhance their 'bargaining power' by filing a collective action instead of a single claim. This appears to be an efficient way to protect businesses from abusive litigation.

¹²³⁵ Ibid, 19

¹²³⁶ Ibid, 16; British Columbia Business Practices and Consumer Protection Act, SBC 2004, c. 2

¹²³⁷ *Kerry Murphy v Amway Canada Corp* 2013 FCA 38, 16

¹²³⁸ Ibid, 67

¹²³⁹ Ibid, 15

¹²⁴⁰ Ibid, 17

¹²⁴¹ Randy C Sutton, 'Private arbitration clauses, class action waivers and Canada's Competition Act' (*Nortonrose*, March 2013) <<http://www.nortonrosefulbright.com/knowledge/publications/77437/private-arbitration-clauses-class-action-waivers-and-canadas-competition-act>> accessed 19 February 2014

A similar approach is taken by the US courts. In this respect, it is worth noting that although enforcement policies in the two systems are fundamentally different¹²⁴² can be seen that none of the two is exempt from the misuse of the power given to private party under a private enforcement scheme, in particular of the invocation of class action redress for personal benefits. While the Canadian system is almost exclusively a public enforcement regime with very limited role for private parties, the US system is almost exclusively a private enforcement regime and reliance on antitrust authority is much less apparent. However, both systems are subject to abuse by privates for private interests.

In 2011, in the case of *Concepcion*,¹²⁴³ the US Supreme Court refused a class action certification in similar circumstance to that of *Murphy* in Canada.¹²⁴⁴ As referred to in the previous chapter, the *Concepcion* case involved a husband and wife who entered into an agreement for the sale and servicing of cellular telephones with AT&T.¹²⁴⁵ The Concepcions purchased AT & T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged \$30.22 in sales tax based on the phones' retail value.¹²⁴⁶ The contract provided for arbitration of all disputes between the parties, and required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding'.¹²⁴⁷ Although the amount of money in the particular agreement was trivial (\$30.22) the couple filed a class action which, as commented by Foer and Schultz 'turned a firecracker into a potential bomb for AT&T'.¹²⁴⁸ When AT&T tried to dismiss the claim as violating the arbitration agreement, the lower courts refused, on the ground that the contract was an unacceptable contract of adhesion under California state law. Eventually the case reached the Supreme Court which reversed the lower court decision by repealing the California's judicial rule regarding the intolerability of class arbitration waivers in consumer contracts.¹²⁴⁹ The court observed that defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable 'Faced

¹²⁴² See chapter 5.1.3; chapter 5.2.2; chapter 6.1.8

¹²⁴³ *AT&T Mobility LLC v Concepcion* 131 Sct 1740

¹²⁴⁴ *Kerry Murphy v Amway Canada Corp* 2013 FCA 38

¹²⁴⁵ For additional information see: Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107

¹²⁴⁶ *AT&T Mobility LLC v Concepcion* 131 Sct 1740, 1744

¹²⁴⁷ *Ibid*

¹²⁴⁸ Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107, 108

¹²⁴⁹ *AT&T Mobility LLC v Concepcion* 131 Sct 1740

with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims'.¹²⁵⁰

Arguably, the protection from class actions accorded to businesses by the US courts goes further than the reversal of previously decided judicial rules about the unacceptability of contract clauses. In *Stolt-Nielsen* the US supreme Courts was called to deal with a situation in which there was no agreement as to whether the parties could bring class action proceedings.¹²⁵¹ Animalfeeds brought a class action antitrust suit against the petitioners for price fixing. That suit was consolidated with similar suits brought by other charterers by an arbitration panel which imposed class arbitration on charterers' class antitrust claims. In holding that the arbitration panel exceeded its power by imposing class procedures, the court stated:

We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume ... that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.¹²⁵²

Arguably both, the Canadian case of *Murphy*¹²⁵³ and the US cases of *Concepcion* and *Stolt-Nielsen*¹²⁵⁴ should be considered in the EU in formulating rules of an antitrust collective redress mechanism. Considering the rather severe limitation imposed on private enforcement under the Canadian competition law,¹²⁵⁵ most if not all absent in the EU proposed system, there is a concern that a scenario of excessive litigation could develop in the EU. All these cases undoubtedly show that features of collective action mechanisms can be exploited by a private party for private advantages. In these examples, individuals, instead of pursuing his/her case as an ordinary civil claim involving one claimant, they attempted to obtain certification for a class action, presumably to raise their fight capability. Although in these instances there was a positive outcome for defendants, it must be recalled that these defendants have already been penalised by the commencement of the litigation, and by the continuation of proceedings until dismissal by superior courts.¹²⁵⁶ Arguably, while the Canadian and US courts have given companies the possibility to protect themselves from mistreatment stemming from class action litigation, in the EU the effort appears to facilitate collective redress without due consideration of abusive litigation.

The next part of the analysis focusses on the impact of the model (opt-in) of collective redress proposed in the EU.

¹²⁵⁰ Ibid, 1752

¹²⁵¹ *Stolt-Nielsen S.A. et al. v Animalfeeds International Corp.* 559 US 662, 130 S Ct 1758

¹²⁵² Ibid, 687

¹²⁵³ *Kerry Murphy v Amway Canada Corp* 2013 FCA 38

¹²⁵⁴ *AT&T Mobility LLC v Concepcion* 131 S Ct 1740; *Stolt-Nielsen S.A. et al. v Animalfeeds International Corp.* 559 US 662, 130 S Ct 1758

¹²⁵⁵ See chapter 5.2.3

¹²⁵⁶ See chapter 8.2.3

9.1.4 Does the EU Envisaged Opt-In Model Raise Concerns?

In the EU the approach taken towards the issue of which model to adopt ('opt-in', or 'opt-out') is that although at first there is no clear reasons to prefer one model over the other, in reality the preference is for the opt-in model as it is considered to be more compatible with both national constitutions and the right to a court hearing as laid down in the European Convention on Human Rights.¹²⁵⁷ The EU Parliament stresses that in order to avoid unmeritorious claims and misuse of collective redress:

[T]he European approach to collective redress must be founded on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so, in order to avoid potential abuses.¹²⁵⁸

Hence, in order to achieve both the aim of limiting unmeritorious claims and that of compliance with the provision of the European Convention on Human Rights, the opt-out model in the EU is considered overall preferable.¹²⁵⁹ Indeed the EU Parliament position is that:

[A] collective redress system where the victims are not identified before the judgment is delivered must be rejected on the grounds that it is contrary to many Member States' legal orders and violates the rights of any victims who might participate in the procedure unknowingly and yet be bound by the court's decision ... victims must in any case be free to seek the alternative of individual compensatory redress before a competent court.¹²⁶⁰

From an enforcement policy prospective this approach is questionable for two main reasons. First, although in principle the opt-in model can be seen as an option that limits the number of potential claimants, in that only those who take an affirmative step to the litigation are included, it is also true, that only those who opt-in are bound by the outcome. In turn this raises the rather noteworthy issue that neither a judgement nor a settlement extinguishes the defendants' liability.¹²⁶¹ The threat of additional lawsuits, it is submitted, is not merely theoretical. Indeed it is a plausible scenario in which only a small percentage of the group opts in to a collective action, and subsequently, another collective action is brought on behalf of those who did not opt-in in the first round. Potentially, after the second round of litigation, another group of people (or an individual)

¹²⁵⁷ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 13 - 67 - 78 - 89

¹²⁵⁸ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' ((2011/2089(INI) Resolution of 2 February 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 20

¹²⁵⁹ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 91

¹²⁶⁰ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' ((2011/2089(INI) Resolution of 2 February 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 20

¹²⁶¹ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 338-341

could decide to file another claim.¹²⁶² Considering the significant detrimental effect on defendants which result from the start of an antitrust litigation,¹²⁶³ if the opt-in model is implemented, it could be lethal to companies by exposing them to potential never ending threat of lawsuits.

Furthermore, the Study on Collective Redress contends that it is impossible to introduce:

[S]pecial provision in the overall collective redress in antitrust design that excludes further action if a case was already decided, as this would deprive victims not opting in of their right to be compensated.¹²⁶⁴

It worth noting that in the opt-out model used in the US¹²⁶⁵ and Canadian¹²⁶⁶ antitrust regimes victims are not excluded from compensation if they did not participate in the suit. They are only prevented from commencing ‘another litigation’ for the same breach. Therefore, if anything the opt-out model appears more suitable to ensure compensation as it will be ready available even to those who did not participate in the litigation. Indeed, the opt-out model, appears to be a conceivable way to ensure compensation of all victims while at the same time avoiding that companies in the EU are not under a constant threat of antitrust lawsuits.

Second, the Study on Collective Redress emphatically states that because of the right to a court hearing laid down in Art 6 (1) ECHR ‘the introduction of a pure opt-out model does not seem politically achievable’.¹²⁶⁷ The issue is that with the opt-out model all the victims become parties to the litigation unless they take a step to opt-out of the action. Unless they do so, the outcome of the case is binding on all the victims. In this respect the argument presented in the Study is that under an opt-out model:

Group members need not know about the litigation in order to be a part of it.[Consequently] uninformed people may find themselves bound by a judgment they did not even know was about to be issued.¹²⁶⁸

Arguably, this approach requires a re-definition. While it is possible that some of the victims are potentially bound by a judgement or settlement without their knowledge, steps can be taken to overcome this hurdle, but such a possibility is not suggested in the Study. In the EU, as there is no tradition of group litigation most of the arguments are based on the available studies discussing the

¹²⁶² Paolo Buccrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 65-71

¹²⁶³ See chapter 8.2.3

¹²⁶⁴ Paolo Buccrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), fn 66

¹²⁶⁵ See chapter 8.1.3

¹²⁶⁶ See chapter 9.1.2

¹²⁶⁷ Paolo Buccrossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 67

¹²⁶⁸ *Ibid*, 65

US class action.¹²⁶⁹ What is remarkable is that while the Study unequivocally states that as the US is one of the first countries to introduce collective litigation and thus represents a natural point of reference and an important benchmark, significant features of the US system are overlooked.¹²⁷⁰ Under the US rules, class members must be given the best notice that is practicable in the circumstances, including individual notice to all members who can be identified through reasonable effort.¹²⁷¹ Such a notice must be clear, concise and in an easily understood language.¹²⁷² Therefore, there is a duty imposed on the class action representative to inform other victims and to discharge that duty, he must comply with these requirements. Likewise, under the Canadian rules, the class action claimant must notify the class members of the class action in a way approved by the court.¹²⁷³ As explained by the Canadian Bar Association, this notification can be by letter if the class members are known; otherwise, it will be most often by newspaper or magazine advertising.¹²⁷⁴ Accordingly, the requirement of notification to victims in EU antitrust proceedings can be satisfied by designing rules similar to the US and/or Canadian provisions. Indeed the opt-out model is already in use in several EU Member States,¹²⁷⁵ including the UK where is envisaged a system in which the Competition Appeal Tribunal will be required to certify whether a collective action brought should proceed under an opt-in or an opt-out basis.¹²⁷⁶

Furthermore, the fact that not all the potential victims of an antitrust violation can be informed, thus being unable to appear in court to observe the determination of his civil rights as requested by Art 6 (1) ECHR, should not be considered as a bar to the adoption of the opt-out system. This is not an issue unique to antitrust proceedings and procedural rules can be implemented to overcome such situation. For instance, in the UK the Practice Direction related to competition claims dictates that the claimant must serve notice of proceedings on other parties to the claim.¹²⁷⁷ Like any other claim, the claimant may serve the notice on the defendant's usual or last known address. However, if the claimant cannot ascertain the defendant's current residence or place of business, he must consider whether there is an alternative place or an alternative method by which service may be

¹²⁶⁹ Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007)

<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 277

¹²⁷⁰ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012) 13

¹²⁷¹ US Federal Rules of Civil Procedure, December 2010, rule 23 (c) (2) (B)

¹²⁷² *Ibid*, rule 23 (c) (2) (B) (v)

¹²⁷³ Class Proceedings Act, 1992, S.O. 1992, c. 6, section 17

¹²⁷⁴ The Canadian Bar Association, 'Class Actions in British Columbia' (*British Columbia Branch, Script 233*, April 2013)

<http://www.cba.org/dev/BC/public_media/credit/PrintHtml.aspx?DocId=22289> accessed 19 March 2014

¹²⁷⁵ Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012), 77 table 12

¹²⁷⁶ Department for Business Innovation & Skills, 'Private Actions in Competition Law: A Consultation on Options for Reform - Government Response' (*BIS - 13-501*, January 2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf> accessed 12 March 2014, 26

¹²⁷⁷ UK Practice Direction - Competition Law - Claims Relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998, 3

effected.¹²⁷⁸ Stated differently, the claimant is required to take reasonable steps in locating the other party. Of course, this process is scrutinised by the court to ensure that claimants actually do make an effort in informing other parties in the litigation. A similar procedure could be adopted in the EU in antitrust proceedings as it is already happening in other areas. For instance, Regulation 1346/2000 on Insolvency Proceedings provided that the opening of proceedings should be published in one or more Member States at the request of the liquidator.¹²⁷⁹

Consequently, like the approach taken by the US and Canadian antitrust authorities, in the EU the requirement to inform victims of the determination of antitrust matters under a class action lawsuit, could be satisfied by taking reasonable steps in locating as many as possible and via media advertising. This thesis suggests that to avoid detrimental side effects of private enforcement, antitrust law should be enforced only via a public enforcement regime and compensation should be awarded via the public authority prosecuting the case. However, if a different view is taken, arguably, an opt-out model in the EU can and should be adopted, hence avoiding that firms that have violated competition rules are not exposed to potential never ending liability.

The analysis now continues by scrutinising potential consequences for business in the EU stemming from the lack of effective safeguards to prevent the commencement and continuation of collective class action litigations and by evaluating whether the level of damages is to blame.

9.1.5 Treble Damages and Collective Redress

A key and at time controversial feature of the US private enforcement regime is the 'automatic' trebling of antitrust damages. However, as Leslie contends 'most participants in these ongoing debates fail to recognise that courts have already effectively de-trebled antitrust damages'.¹²⁸⁰ Indeed Leslie argues that as the purpose of the private antitrust cause of action, and that of class action litigation, broadly, is to achieve the twin goals of compensating victims and deterring future violations by making illegal conduct unprofitable, trebling undermines both these core goals.¹²⁸¹

Under the US antitrust law, once the single damages are determined, the trebling is mandatory.¹²⁸² However, despite the obligatory trebling this is not always the case. It should be noted that the vast majority of antitrust litigation, in particular collective actions, settle. The settlement figure reported

¹²⁷⁸ UK Civil Procedure Rules, Part 6 - Service of Documents, 6.9

¹²⁷⁹ Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings [2000] OJ L 160/1

¹²⁸⁰ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009

¹²⁸¹ *Ibid*, 1050

¹²⁸² Clayton Act (2006) 15 U.S.C., § 4

in various studies suggests a settlement rate between 70% and 78%.¹²⁸³ Accordingly, the vast majority of antitrust damages are not resulting from a court's award, but from a settlement. In such circumstances, as explained by Leslie, US 'courts generally refuse to consider the trebling of antitrust damages when evaluating proposed settlements in antitrust class action litigation'.¹²⁸⁴ Therefore, notwithstanding the EU condemnation of the US antitrust regime as a toxic cocktail mainly because of the trebling feature,¹²⁸⁵ it appears that US antitrust claimants in the majority of the cases are recovering only single damages and, unlike in the EU,¹²⁸⁶ no prejudgement interests are awarded.

In *Grinnell* the US Court of Appeals explained:

While it is true that treble damages are extracted from a defendant who ultimately loses a civil antitrust suit on the merits ... the vast majority of courts which have approved settlements in this type of case, even though they may not have explicitly addressed the issue, have given their approval to settlements which are traditionally based on an estimate of single damages only.¹²⁸⁷

In this instance, the court clarified that in evaluating the adequacy of the amount of a proposed settlement, the figure to be considered is that of single damages and not the potential treble damages that could be awarded at the end of a trial. Hence, if the settlement proposed by the parties is approved by the court, claimants are recovering only single damages. Moreover, the court asserted that this was not a new rule but it was an already established common law rule.

Here an argument can be made as to whether the rules established in *Grinnell* are to be considered permissive or mandatory. However, in scrutinising the issue Leslie contends that 'courts evaluating the reasonableness of a proposed class action settlement almost uniformly decline to consider the trebling of antitrust damages'.¹²⁸⁸ Leslie reports of one antitrust case in which the court departed from the single damages approach established in *Grinnell*.¹²⁸⁹ In this instance the court endorsed a proposed settlement of 1.8 times their estimate of single damages on the ground that: 'to ignore

¹²⁸³ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1011 -1012; Steven C Salop and Lawrence J White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 *The Georgetown Law Journal* 1001, 1010 table 8; Jeffrey M Perloff and Daniel L Rubinfeld, 'Settlements in Private Antitrust Litigation' in White (ed), *Private Antitrust Litigation: New Evidence, New Learning* (MIT Press 1988), 166; John M Bizjak and Jeffrey L Coles, 'The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm' (1995) 85 *The American Economic Review* 436, 457 table 6

¹²⁸⁴ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1018

¹²⁸⁵ Commission, 'Green Paper on Consumer Collective Redress - Questions and Answers' (*MEMO/08/741*, 27 November 2008) <<http://europa.eu/rapid/pressReleasesAction.do?&format=HTML&aged=0&language=EN>> accessed 14 February 2014, 4

¹²⁸⁶ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95

¹²⁸⁷ *City of Detroit v. Grinnell Corp.* 495 F2d 448, 463 (2d Cir 1974), 458

¹²⁸⁸ Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1020

¹²⁸⁹ *Ibid*, fn 56

the fact that plaintiffs and defendants both consider the possibility of trebling in coming to their respective assessments is to ignore economic reality'.¹²⁹⁰ Arguably, this represents the exception and not the rule of the US courts approach and the award was not treble damages but less than double.

In *Alexander*, the District Court of Minnesota followed the single damages rule by holding: 'In reviewing the range of reasonableness of the settlement fund in the light of the best possible recovery, the trebling of the estimated recovery following trial may not be considered'.¹²⁹¹

According to Leslie 'this outright prohibition on considering trebling represents the current majority approach to the issue'.¹²⁹² This line of reasoning is confirmed by a number of antitrust cases.

In the *Ampicillin* case the court held that the recovery of actual single damages must be the basis for the court's assessment of monetary recovery in an antitrust settlement.¹²⁹³

In *Fisher Brothers*, the court reiterated that the vast majority of courts which have approved settlements in antitrust class actions have given their approval to settlements which are traditionally based on an estimate of single, rather than treble damages.¹²⁹⁴

In a case involving price fixing of art materials, the court plainly stated that the fact that a successful claimant would be entitled to treble damages, because of the recognised difficulties of proof and requirements of a costly trial on the merits, courts have given their approval to settlements which are traditionally based on an estimate of single damages only.¹²⁹⁵

In analysing the range of possible recoveries, the court asserted that it will consider an estimate of single, rather than treble, damages. The court explained that potential treble recovery (or punitive recovery) should not be superimposed as a yardstick for measuring the adequacy of a settlement, as otherwise the settlement negotiation process would be derailed from the start.¹²⁹⁶

Likewise, although class members have argued that the damages estimate should have taken into account the potential for treble damages under antitrust statutes, the court dismissed such argument by replying that recovery of such damages is purely speculative, and need not be taken into account when calculating the reasonable range of recovery.¹²⁹⁷

Although the courts have acknowledged that direct purchasers could potentially recover treble damages, nevertheless they have affirmed that 'the standard for evaluating settlement involves a

¹²⁹⁰ *In re Auction Houses Antitrust Litigation* 2001 WL 170792, 7

¹²⁹¹ *Alexander v. National Football League* 1977 WL 1497, 17

¹²⁹² Christopher R Leslie, 'De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation' (2008) 50 *Arizona Law Review* 1009, 1019

¹²⁹³ *In re Ampicillin Antitrust Litigation* 82 FRD 652, 654 (DDC 1979), 654

¹²⁹⁴ *Fisher Brothers v. Phelps Dodge Industries* 604 FSupp 446, 451 (ED Pa 1985), 451

¹²⁹⁵ *In re Art Materials Antitrust Litigation* 100 FRD 367, 371-72 (ND Ohio 1983), 372

¹²⁹⁶ *In re Domestic Air Transport Antitrust Litigation* 148 FRD 297, 61 USLW 2610, 319

¹²⁹⁷ *In re Warfarin Sodium Antitrust Litigation* 212 FRD 231, 257

comparison of the settlement amount with the estimated single damages'.¹²⁹⁸ On numerous occasions US courts have emphasised that although in certain circumstances a claimant class may recover treble damages if it prevails at trial, that result is far from certain.¹²⁹⁹

Moreover, even if the ability of the defendants to withstand a larger judgment is not contested, the courts have reiterated that to evaluate the characteristic of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. The fact that a defendant/s could afford to pay more does not mean that it is obligated to pay any more than what the class members are entitled to.¹³⁰⁰

Consequently, it appears that with regard to collective action, the issue of treble damages in the majority of antitrust cases cannot be considered a particularly damaging feature as damages are in effect de-trebled by the courts rulings. Arguably, is not the level of awards that induces US court to limit private actions, and in particular class actions,¹³⁰¹ it is the very nature of private intervention for private interest that is harmful to businesses.

The analysis now turns to a particular scenario which arguably represents the epitome of detrimental side effects of private enforcement.

9.2 Private Enforcement and Bankruptcy

9.2.1 Bankruptcy - A Side Effect of Private Enforcement?

Possibly the most detrimental side effect of private enforcement in antitrust is when a company, due to an antitrust lawsuit, ends in bankruptcy. The issue is of particular significance in the context of collective redress. The Commission contends that in the EU a private enforcement regime is 'an important tool to create and sustain a competitive economy'¹³⁰² as such a system would 'contribute to better allocation of resources, greater economic efficiency, increased innovation and lower prices'.¹³⁰³ However, despite its devastating effect, the issue of bankruptcy resulting from private enforcement, particularly in class action proceedings, seems to attract little attention in designing a

¹²⁹⁸ *In re Lorazepam & Clorazepate Antitrust Litigation* 2003 WL 22037741, Civ 99-0790(TFH), fn 6

¹²⁹⁹ *Ibid*, 3; *In re Ampicillin Antitrust Litigation* 82 FRD 652, 654 (DDC 1979), 654; *In re Remeron End-Payor Antitrust Litigation* 2005 WL 2230314, 24; *In re Remeron Direct Purchaser Antitrust Litigation* 2005 WL 3008808, 9

¹³⁰⁰ *In re Remeron Direct Purchaser Antitrust Litigation* 2005 WL 3008808, 9

¹³⁰¹ See chapter 5.1.3; William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (*British Institution of International & Comparative Law*, 15 May 2003) <<http://www.ftc.gov/speeches/other/030514biicl.shtml>> accessed 3 April 2014; Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107

¹³⁰² Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1; Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

¹³⁰³ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

private enforcement regime. Building on previously discussed features of collective redresses, this part of the analysis explores the relationship between private enforcement and bankruptcy.

In assessing the link private enforcement-bankruptcy, the first point to note is lack of accessible data. To avoid bankruptcy, firms may settle out of court but there is little information available.¹³⁰⁴ Moreover, defendant firms and their lawyers, are reluctant to provide data on either the number of such settlements or the amounts of money involved, and the reason for choosing such course of action.¹³⁰⁵ Unlike filings for which requested monetary damages are documented, for settlements there is no obvious way to calculate a change in bankruptcy probability associated with the event.¹³⁰⁶ Consequently, the data available must be considered as conservative. However, obtainable data shows that private parties empowered under a private enforcement regime forces firms to accept, often unduly, settlements, as the alternative would have been bankruptcy for the entire industry. Indeed the US experience of private enforcement shows that courts intervention is needed to avoid defendants' bankruptcy.

The US case of *Pease* shows a direct link between private enforcement and the bankruptcy of businesses targeted by private action.¹³⁰⁷ It is worth noting that this case is a purely private action as no public enforcement action has ever been brought.¹³⁰⁸

Pease and other Maine's wild blueberry growers brought a class action lawsuit against the four largest processors of wild blueberries in Maine, alleging that the processors conspired to fix the prices they paid to the growers in violation of antitrust rules.¹³⁰⁹ Claimants were awarded damages totalling \$56.04 million¹³¹⁰ in addition to non-monetary reliefs that restructured anti-competitive pricing methods in the industry.¹³¹¹ However, to avoid industry-wide bankruptcy, hence diminishing

¹³⁰⁴ Barry J Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005' [2008] *European Competition Law Review* 96; See also: Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 39; Emily Clark, Mat Hughes and David Wirth, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (*Analysis of Economic Models for the Calculation of Damage*, Ashurst, 31 August 2004) <<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 9 January 2014, fn 2

¹³⁰⁵ William Breit and Kenneth G Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 (2) *Journal of Law and Economics* 405, 433

¹³⁰⁶ Sanjai Bhagat, James A Brickley and Jeffrey L Coles, 'The Costs of Inefficient Bargaining and Financial Distress' (1994) 35 *Journal of Financial Economics* 221, 233-234

¹³⁰⁷ *Pease v. Jasper Wyman & Son* 2004 WL 4967228 (MeSuper)

¹³⁰⁸ Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879, fn 41

¹³⁰⁹ *Pease v. Jasper Wyman_ & Son* 845 A2d 552 (Me 2004)

¹³¹⁰ *Pease v. Jasper Wyman & Son* 2004 WL 4967228 (MeSuper)

¹³¹¹ Robert H Lande and Joshua P Davis, 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies' (*Interim Report*, 8 November 2006) <<http://newaai.com/files/550b.pdf>> accessed 31 March 2014, fn 18

the possibility of getting compensation, the claimants settled for approximately \$5 million.¹³¹² It is worth noting that according to Kirkwood and Lande:

There was no proof that defendants had the power to force blueberry purchasers to pay supra-competitive prices, but the jury found that the prices paid to blueberry growers had been depressed significantly.¹³¹³

Consequently, although the anti-competitive price practice of the defendants appears debatable, due to private actions, they were forced to settle out of court simply to avoid bankruptcy. Likewise in *Szabo*, buyers of control unit for machine tools produced by Bridgeport Machines sought to obtain a nationwide class certification in what the US Appeals Courts described as a ‘...fundamentally a breach-of warranty action’¹³¹⁴ As in the case of *Concepcion*,¹³¹⁵ this is a classic situation where a collective action ‘turned a firecracker into a potential bomb’.¹³¹⁶ In *Szabo*, the court, in denying class certification essentially based on the manageability of the class action and on issues about choice of law, emphasised that the claimants had a number of course of actions available to them such as warranty under contract, negligent misrepresentation and fraud all recognised under the defendants home state law.¹³¹⁷ The court held that as each buyer had a substantial claim, of the sort that could be, and often is, pursued independently, it was unnecessary to certify a nationwide class.¹³¹⁸ In very plain terms the court also explained the rationale behind the ruling. In the circumstance:

[T]he class certification turns a \$200,000 dispute (the amount that Szabo claims as damages) into a \$200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport’s managers and may induce a substantial settlement even if the customers’ position is weak.¹³¹⁹

Arguably, the US Court of Appeals attitude can be explained by the fact that damages leading to industry-wide bankruptcy are undesirable. The underlying concern is that a class action originated by a single misbehaviour can put an otherwise viable company out of business. Furthermore, there is a risk that defendants might face the prospect of bankruptcy stemming from collective actions even when their liability is far from clear. In *Re Rhone* the US Court of Appeals dismissed the lower

¹³¹² *Pease v. Jasper Wyman & Son* Reporter of Decisions Docket Kno-04-19, 13 February 2004 Maine Supreme Judicial Court; ; See also: Robert H Lande and Joshua P Davis, ‘Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) 42 University of San Francisco Law Review 879, fn 41

¹³¹³ John Kirkwood and Robert H Lande, ‘The Fundamental Goal of Antitrust: Protecting Consumers, not Increasing Efficiency’ (2008) 84 Notre Dame Law Review 191, 209

¹³¹⁴ *Szabo v. Bridgeport Machines* 249 F3d 672, 49 FedRServ3d 716, 674

¹³¹⁵ See chapter 9.1.3; *AT&T Mobility LLC v Concepcion* 131 Sct 1740

¹³¹⁶ Albert A Foer and Evan P Schultz, ‘Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier’ [2011] Global Competition Litigation Review 107, 108

¹³¹⁷ *Szabo v. Bridgeport Machines* 249 F3d 672, 49 FedRServ3d 716, 674

¹³¹⁸ *Ibid*, 678

¹³¹⁹ *Ibid*, 675

court class action certification, amongst other things, because the case lacked legal merit inferred from the fact that the defendants had won 12 of the 13 cases already tried for the same matters.¹³²⁰ Remarkably, the court seems to acknowledge the possibility of judicial mistaken interference with business and the devastation that can flow from it. The court explained that:

One jury, consisting of six persons ... will hold the fate of an industry in the palm of its hand. This jury, jury number fourteen, may disagree with twelve of the previous thirteen juries—and hurl the industry into bankruptcy. That kind of thing can happen in our system of civil justice (it is not likely to happen, because the industry is likely to settle—whether or not it really is liable) without violating anyone’s legal rights.¹³²¹

The court clarified that if class action were to be allowed, this meant forcing the defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when in the circumstance it was entirely feasible to allow a final, authoritative determination of their liability.¹³²² Accordingly, from the US experience of private enforcement of antitrust rules two significant points are emerging. First, an action by unscrupulous private parties, especially collective actions, can result in the bankruptcy of antitrust defendants. Second, even in circumstances where the defendant’s liability is questionable, or indeed not fully ascertained yet, private enforcement can bring defendants to the verge of bankruptcy. Hence to avoid a complete ruin, effectively, companies are coerced to accept out-of-court settlements whether or not the company is really liable. This is hardly desirable. If the claimant’s case is in fact, frivolous, then the defendant’s settlement payment may represent a form of ill-gotten gains for the class and its lawyer.¹³²³

Arguably, in such circumstances private enforcement not only cannot be seen as ‘an important tool to create and sustain a competitive economy’¹³²⁴ that would ‘contribute to better allocation of resources, greater economic efficiency, increased innovation and lower prices’,¹³²⁵ but actually it appears to pose a real threat to financially sound companies which in turn could affect the stability of the economy of the nation in which it is implemented. Furthermore, when a defendant is subjected to an enormous pressure to settle the case in order to avoid bankruptcy, this raises a further concern related to the need of ensuring a fair trial for the defendant.¹³²⁶ Like any other defendants, violators of antitrust rules should not be punished until found guilty according to the

¹³²⁰ See chapter 9.1.2; *In re Rhone - Poulenc Rorer Incorporated* 1995, 51 F3d 1293, 63 USLW 2579, 1299

¹³²¹ *Ibid*, 1300

¹³²² *Ibid*, 1299

¹³²³ Christopher R Leslie, ‘De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation’ (2008) 50 *Arizona Law Review* 1009, 1009 - 1010

¹³²⁴ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹³²⁵ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

¹³²⁶ For an assessment of this point see: Fabio Polverino, ‘A Class Action Model for Antitrust Damages Litigation in the European Union’ (*SSRN*, 29 August 2006) <<http://ssrn.com/abstract=927001> or <http://dx.doi.org/10.2139/ssrn.927001>> accessed 26 March 2014

applicable law. Under a private enforcement regime, however, and in particular under class action mechanisms, claimants have higher bargaining power in the settlement negotiations, while the defendant acts under a 'bet-your-company' constraint as in the case of *Szabo*.¹³²⁷ In effect, this results in the defendant's acceptance of the punishment without having first the possibility to fully defend its actions.

The next part of the analysis focuses on another detrimental side effect of private enforcement which emphasises the superiority of public enforcement in delivering antitrust policy.

9.2.2 Inability to Monitor Defendants' Ability to Pay Damages

With regard to the link between private enforcement and bankruptcy a further significant point to note is the consideration of the defendant's ability to pay, which arguably classifies public enforcement as a superior instrument when compared to private enforcement. The antitrust defendant's inability to pay in the EU is a matter that can be considered by the Commission in imposing fines for antitrust violations. However, while this provision might result in the reduction in the amount of fines it does not apply to damages.¹³²⁸ Clearly, the matter is accentuated when damages have to be paid to a large class of claimants due to a collective action.

This thesis suggests that the reduction of fine provisions should be extended to damages so as to monitor the level of punishment effectively imposed on violators of antitrust rules. This objective however, can be achieved if both, fines and damages awards, are under the control of public officials.

The Commission, in exercising its power to impose fines, enjoys a wide margin of discretion within the limits set by Regulation No 1/2003.¹³²⁹ In general, the 10% cap under Article 23(2) of Regulation 1/2003 ensures that fines are not excessive since it aims to protect companies against fines which could destroy them commercially.¹³³⁰ It should be noted that a measure adopted by an EU authority which causes the insolvency or liquidation of a given undertaking is not as such prohibited by EU law.¹³³¹ However, although it does not have legal obligation to do so, upon request by the company concerned, the Commission may take into account the company's inability to pay so as to avoid that the fine 'would irretrievably jeopardise the economic viability of the undertaking concerned

¹³²⁷ *Szabo v. Bridgeport Machines* 249 F3d 672, 49 FedRServ3d 716, 675

¹³²⁸ A detailed analysis of the issues involved is beyond the scope of this research. What follows is a discussion from enforcement policy perspective.

¹³²⁹ Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/02, 2

¹³³⁰ Philip Kienapfel and Geert Wils, 'Inability to Pay - First Cases and Practical Experiences' (*Competition Policy Newsletter* No 3 - 2010) <<http://ec.europa.eu/competition/publications/cpn/>> accessed 2 April 2014

¹³³¹ Case T-62/02 *Union Pigments AS v Commission* [2005] ECR II-5057, 177; Case T-25/05 *KME Germany AG v Commission* [2010] ECR 00, 167

and cause its assets to lose all their value'.¹³³² Criteria to qualify for a full or partial reduction of a fine include, amongst other things, a risk of bankruptcy and causality between the risk of bankruptcy and the fine.¹³³³

In essence, to assess the risk of bankruptcy, the Commission examines the equity and profitability of the companies, their solvency, liquidity and cash flow. The analysis is both prospective and retrospective but with a focus on the present and immediate future of the company. This evaluation also extends to possible restructuring plans and any progress made to achieve them.¹³³⁴ To ascertain if there is a casual link between the risk of bankruptcy and the fine, the Commission assesses the company's financial situation with and without a fine. The link may be lacking in situation where for instance, the company's financial difficulty has been deliberately brought about; where the company is in such serious financial difficulty that it would go bankrupt even without the fine; or where the fine is very small in comparison with the overall turnover and assets of the company that cannot be considered to have a decisive impact on the company's financial situation.¹³³⁵ The CFI in *Tokai Carbon* held that the ceiling of 10% '... aims inter alia to protect undertakings against excessive fines which could destroy them commercially'.¹³³⁶

Stated differently, provided that the company in question has not brought about its own financial misfortune, although the Commission is no under obligation to grant a reduction,¹³³⁷ because the violator's inability to pay, nevertheless in exceptional circumstances it could obtain reduction in the fine to avoid its commercial destruction despite an already ascertained intentional or negligent infringement of Art 101 or 102 TFEU.

Arguably, the rationale behind the 'protection' at EU level of an undertaking that has plainly violated competition rules is that of preventing negative social consequences resulting from the disappearance of that company. It is in the light of a 'specific social context' that a reduction could be justified and therefore granted,¹³³⁸ and unless the company is able to adduce evidence capable of determining it the reduction would be denied.¹³³⁹ The EU courts have held that in this regard a 'specific social context' consists of:

¹³³² Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/02, 35

¹³³³ For an explanation of all the criterias to be meet see: Philip Kienapfel and Geert Wils, 'Inability to Pay - First Cases and Practical Experiences' (*Competition Policy Newsletter* No 3 - 2010) <<http://ec.europa.eu/competition/publications/cpn/>> accessed 2 April 2014, 3

¹³³⁴ *Ibid*, 4.2

¹³³⁵ *Ibid*, 4.3

¹³³⁶ Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon v Commission* [2005] ECR II-10, 5

¹³³⁷ Case T-25/05 *KME Germany AG v Commission* [2010] ECR 00, 167

¹³³⁸ Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/02, 35; Case T-25/05 *KME Germany AG v Commission* [2010] ECR 00, 168

¹³³⁹ Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd v Commission* [2004] ECR II-1181, 171

[T]he consequences which payment of the fine would have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned.¹³⁴⁰

Accordingly, one of the key elements to be evaluated before the Commission can grant a reduction in fines appears to be the concern about job losses as a result of the fine. Another significant aspect is that, when examining the specific economic context, the Commission assesses in particular the economic situation of the sector concerned.¹³⁴¹ Therefore, under this scheme, whether to grant a reduction and its amount can be determined according to the difficulty experimented at that time in that specific sector. For instance, in *FNCBV* the CFI, in view of the specific economic context that the beef sector was marked by a serious crisis following the mad cow disease outbreak,¹³⁴² not only endorsed the Commission reduction of 60% previously granted, but increased that reduction to 70%.¹³⁴³

However, while the defendant's ability to pay is carefully assessed by the Commission and if appropriate a reduction in the amount of the fine would be granted, the same does not apply to damages. The fact that an undertaking has been sanctioned by the Commission does not spare it from additional penalties in other proceedings in a Member State/s.¹³⁴⁴ Arguably, the same criteria used in determining the defendant's ability to pay a fine should also be used by the Commission and NCAs in determining its ability to pay damages so as to avoid its commercial destruction.¹³⁴⁵

While in the EU mechanisms are in place to protect business from bankruptcy deriving from antitrust fine under the public enforcement, it appears unlikely that the same aim can be achieved under a private enforcement regime. Indeed, there is no reason whatsoever why a private party having a standing in an antitrust claim would reduce the amount claimed because the defendant's risk of going out of business.

It is worth recalling that in line with the Court of Justice ruling, victims of antitrust violation are to be compensated for actual loss, for loss of profit, and interests.¹³⁴⁶ Unlike for fines, whether such awards result in the defendant's being drawn out of business, form no part in the equation. Indeed, even if the defendant is benefitting from a leniency programme, should claimant/s be unable to obtain compensation from other infringers, the leniency recipient still remains liable for damages

¹³⁴⁰ Case C-308/04 P *SGL Carbon AG v Commission* [2006] ECR I-5977, 106; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd v Commission* [2004] ECR II-1181, 371

¹³⁴¹ Philip Kienapfel and Geert Wils, 'Inability to Pay - First Cases and Practical Experiences' (*Competition Policy Newsletter* No 3 - 2010) <<http://ec.europa.eu/competition/publications/cpn/>> accessed 2 April 2014, 4.5

¹³⁴² Joined Cases T-217/03 and T-245/03 *FNCBV v Commission* [2006] ECR II-4987, 351

¹³⁴³ *Ibid*, 360 - 631

¹³⁴⁴ *Ibid*, 339; Case 14/68 *Wilhelm and Others* [1969] ECR 1

¹³⁴⁵ Philip Kienapfel and Geert Wils, 'Inability to Pay - First Cases and Practical Experiences' (*Competition Policy Newsletter* No 3 - 2010) <<http://ec.europa.eu/competition/publications/cpn/>> accessed 2 April 2014

¹³⁴⁶ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 95

as the EU victims' right to full compensation must be upheld.¹³⁴⁷ 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 Articles 101 and 102.¹³⁴⁸ Furthermore, unlike in the US where the court called to award damages have also the power to abrogate previously decided antitrust provisions,¹³⁴⁹ national courts in the EU do not have power to override or even to curtail the right to full compensation as it is established at EU level.¹³⁵⁰ Under a public enforcement regime, the Commission and NCAs could be empowered to monitor the defendant's ability to pay a fine but also its ability to pay out damages.

9.2.3 Conclusion

The comparison between the Canadian system, which is almost exclusive public enforcement regime with very limited role for private parties, and the US system which is almost exclusive private enforcement regime and reliance on antitrust authority is much less, shows unambiguously that whatever model the regime is, it is subject to abuse by private for private interests. Arguably, the provisions contained in both the US and Canadian regimes in relation to class certification, albeit in different ways, are an effective safeguard against the formation, hence the proliferation, of unmeritorious class actions litigations. Moreover, from the approach taken by the courts in both jurisdictions it can be seen a predisposition to protect businesses from exploitations of collective action rules, for instance by upholding a contract clause excluding collective action. By contrast in the EU there appear that the objective is that of facilitating collective redress with little or no consideration of its effect on businesses. For instance, if the opt-in model of collective action is adopted, this will effectively, expose any firm that violated competition rules to potential never ending liability. This chapter shows, that despite the arguments presented by the EU institutions to the contrary, it is possible to implement an opt-out model similar to that in use in the US and Canadian antitrust regimes. This option, it is submitted, should be preferred.

As there appear to be a link between private enforcement, particularly in collective action proceedings, and the bankruptcy of antitrust defendants, to overcome this issue, antitrust law in the EU should be enforced via a public enforcement regime. Indeed the analysis shows that while it is possible to adjust antitrust fines, for instance to the difficulties encountered by a particular sector at the time, or by the defendant's ability to pay, the same flexibility is not achievable in relation to

¹³⁴⁷ Commission, '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' COM(2013) 404 final, Explanatory Memorandum 4.3.3

¹³⁴⁸ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 39

¹³⁴⁹ *AT&T Mobility LLC v Concepcion* 131 S Ct 1740

¹³⁵⁰ Case C-199/11 *Europese Gemeenschap v Otis NV* [2013] ECR 000, 53; Case 314/85 *Foto-Frost* [1987] ECR 4199, 12 - 20

damages. Therefore, while public enforcement might not deliver the creation and stimulation of the EU economy,¹³⁵¹ at least it is possible to prevent the destruction of viable companies, whereas, private enforcement, being motivated by private interests, does not contemplate whether as result of the suit the defendant ends in bankruptcy.

Considering the significant detrimental side effects of private enforcement, the next and final part of this thesis presents the legal basis for the operation of an antitrust regime based solely on public enforcement.

¹³⁵¹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1; Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3; Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

Chapter 10: FINAL OBSERVATIONS AND SUGGESTIONS

10.1.1 Introduction

In principle, the Commission's suggested private enforcement regime could deliver the twin goals of compensation to victims of antitrust violations and at the same time, by creating a threat of prosecution, it could also increase deterrence.¹³⁵² However, when the costs of achieving these goals are considered the landscape changes considerably. Private parties do not have incentives to pursue an optimal level of enforcement, consequently, the power thus given, can be used for private interests counter to the goals of antitrust policy.¹³⁵³ The US enforcement regime, which is mainly based on actions by private parties, shows the difficulties in controlling the misuse of the rules. Likewise, although the Canadian regime can be considered a public enforcement system as private parties have limited right of actions, both systems are not immune from the exploitation by private of the power given under private enforcement provisions.¹³⁵⁴ To overcome those issues, this chapter suggests that in the EU competition rules could and should be enforced exclusively by public officials so as to avoid the use of rules for self-interest.

First this chapter discusses the rationale for the suggestion that compensation should be awarded via the Commission and NCAs. Subsequently, are presented the legal and procedural basis that could make this suggestion achievable without resorting to Treaty changes.

10.1.2 Why Compensation Should be Awarded via Public Enforcement

According to the Commission the aim of a system of private enforcement is different from that of public enforcement in that the former primarily pursues compensation of a loss (even though it also increases deterrence). The latter, primarily pursues deterrence and overall compliance with the rules by penalising infringements of Articles 101 and 102.¹³⁵⁵ However, an effective antitrust enforcement system, it is submitted, cannot be based on private enforcement because of the different incentive of private parties to use the legal system, for instance to obtain monetary awards. Moreover, the enforcement of public laws should be left to public enforcers only, so as to penalise real infringements of competition rules without serving private interests. Accordingly, to

¹³⁵² Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 17; Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹³⁵³ Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) Emory Law and Economics Research Paper No 05-20 <<http://ssrn.com/abstract=775245>> accessed 2 February 2014

¹³⁵⁴ See chapter 9.1.3

¹³⁵⁵ Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 17

prevent, or at least to limit unmeritorious suits aimed at financial awards,¹³⁵⁶ the compensation elements in any antitrust proceedings should be left only to public enforcers (i.e. enforcement by the Commission and by NCAs).

It should be emphasised that, before imposing a fine and/or an injunction on an undertaking, the Commission must ascertain a violation of Art 101 or 102 and its impact on the related market. Therefore, if the Commission could award damages to victims of antitrust violations as part of the same process of punishing the breach, it will be beneficial for two main reasons. First, it will be cheaper.¹³⁵⁷ Although it may be necessary to increase the Commission's resources, arguably the cost to the public purse is far greater if thousands of cases are brought to civil courts due to separate private actions. Moreover, under Regulation 1/2003, the Commission is released from some of the enforcement work as NCAs can apply Articles 101 and 102 entirely. NCAs are already established and financed via public funding and, their budget is separate from that allocated to the civil courts. Second, antitrust defendants would benefit from certainty. Under a system of private enforcement, even when the Commission has concluded its case and imposed a penalty, there is still the ghost of further private claims that are unpredictable in quantity and/or value. This could discourage business' development and new investments.

Whereas, if compensation is left to the discretion of private parties as the Commission effectively suggests, a system thus developed, not only would not deliver the aim of creating and sustaining a competitive EU economy,¹³⁵⁸ but indeed has the potential of hindering it. Businesses have to take into account the possibility of thousands of private claims when developing their commercial practices even when the practice in question has in reality a pro-competitive effect.¹³⁵⁹ Under a private enforcement regime, due to the possibility of a financial award, every nominal breach carries the risk of being challenged regardless of its effect on competition.¹³⁶⁰ Conversely, if compensation is removed from the list of potential private incentives to bring a lawsuit, then an effective antitrust enforcement system can be achieved by limiting unwarranted cases and by providing a redress to victims of antitrust violations by making damages awards part of the Commission proceedings.

¹³⁵⁶ Even under a public enforcement the misuse of antitrust law by private parties can occur, see chapter 6.1.9. and chapter 5.2.5

¹³⁵⁷ Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) *World Competition* 3, fn 29

¹³⁵⁸ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹³⁵⁹ See chapter 8.2.2

¹³⁶⁰ Ilya R Segal and Michael D Whinston, 'Public vs. Private Enforcement of Antitrust Law: A Survey' (2006) *Stanford Law and Economics Olin Working Paper No 335* <<http://ssrn.com/abstract=952067>> accessed 2 February 2014, 8; Preston R McAfee, Hugo M Mialon and Sue H Mialon, 'Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) *Emory Law and Economics Research Paper No 05-20* <<http://ssrn.com/abstract=775245>> accessed 2 February 2014, 4

10.1.3 Does the TFEU Contain Limitations Preventing the Commission From Awarding Compensation?

Article 101 TFEU, in essence, prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the internal market.¹³⁶¹ Article 102 provides that any abuse by undertakings of a dominant position within the internal market shall be prohibited as incompatible with the internal market.¹³⁶² Furthermore, the Court of Justice ruling in *Courage and Manfredi*¹³⁶³ established the right to compensation by holding that any individual can claim compensation for the harm suffered where there is a link between that harm and an agreement or practice prohibited under the Treaty.¹³⁶⁴

To ensure that the Treaty's provision are obeyed the Commission is tasked to investigate and punish individual infringements, as well as the power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Articles 101 or 102.¹³⁶⁵ The Commission has the duty to ensure that competition rules are respected and to achieve this objective it enjoys a good degree of flexibility. In *Musique* for example, the Court of Justice held that the Commission is free to raise fines imposed on undertakings if this is necessary for the correct enforcement of the EU antitrust law.¹³⁶⁶ The Court explained:

The fact that the Commission in the past imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation n° 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.¹³⁶⁷

The flexibility accorded to the Commission of 'at any time adjust the level of fines to the needs' can be construed, it is submitted, as encompassing the awarding of compensation to victims harmed by breach of competition rules as developed by the Court of Justice in *Courage and Manfredi*.¹³⁶⁸ As can be seen from the first paragraph of the White Paper the Commission is supporting (and clearly must do so in order to comply with the Court of Justice ruling on the issue) the notion of compensation as it stated:

¹³⁶¹ Consolidated Version of the Treaty on the Functioning of the European Union [2010] C 83/01

¹³⁶² *Ibid*

¹³⁶³ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

¹³⁶⁴ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

¹³⁶⁵ Joined Cases 100 to 103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR 1825, 105

¹³⁶⁶ *Ibid*

¹³⁶⁷ *Ibid*, 16

¹³⁶⁸ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

Any citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage. This right of victims to compensation is guaranteed by Community law, as the European Court of Justice recalled in 2001 and 2006.¹³⁶⁹

Moreover, it is worth recalling that the Commission has already imposed significant fines on undertakings, notably the fine of €497 million imposed on Microsoft,¹³⁷⁰ that of €799 million imposed on 11 air cargo carriers,¹³⁷¹ and that of €1.47 billion to the producers of TV and computer monitor tubes.¹³⁷² Hence, as compensation now forms part of antitrust proceedings, it can be seen as the 'implementation' of EU antitrust laws which the Commission has a specific duty to enforce under the supervision and ruling of the EU Courts.

Arguably the Commission is already in a position to award compensation because the Court of Justice has ruled that 'any individual' has the 'right' to claim damages in antitrust proceedings in order to strengthen the working of the EU competition rules and discourage agreements or practices, which are liable to restrict or distort competition.¹³⁷³ From the language of the Court of Justice it can be seen that it was because of 'the absence of Community rules governing the matter' that the reparation element is left to Member States, but nothing indicates that the Commission is excluded from discharging this task.¹³⁷⁴ Likewise, NCAs are included in the notion of 'tribunals' having jurisdiction safeguarding the right to compensation for harm suffered as result of violations of antitrust law, thus like the Commission, already enabled to award compensation.¹³⁷⁵

Alternatively, if the view is taken that a specific legal instrument is needed before the Commission can be formally empowered to award compensation, such an approach, it is submitted, would not require amendments of the Treaty. Art 103 TFEU states that the Council, on a proposal from the Commission and after consulting the European Parliament, shall lay down appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102. Such regulation or directive shall be designed 'in particular' to ensure compliance with the prohibitions laid down in Art 101(1) and in Art 102 by making provision for fines and periodic penalty payments (103 (2)

¹³⁶⁹ Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 1.1.

Referring to: Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619

¹³⁷⁰ Antitrust, 'Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine' (*IP/04/382*, 24 March 2014) <http://europa.eu/rapid/press-release_IP-04-382_en.htm> accessed 5 January 2014

¹³⁷¹ Antitrust, 'Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (*IP/10/1487*, 9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en> accessed 9 January 2014

¹³⁷² Antitrust, 'Commission Fines Producers of TV and Computer Monitor Tubes € 1.47 Billion for Two Decade Long Cartels' (*IP/12/1317*, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 11 March 2014

¹³⁷³ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26 - 27

¹³⁷⁴ *Ibid*, 29

¹³⁷⁵ *Ibid*

(a)).¹³⁷⁶ Moreover, Art 103 (2) (d) specifically adds that the Council's regulations and directives shall be designed in particular: 'to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph'¹³⁷⁷ (i.e. the provisions related to Art 101 and 102). Therefore, the Council has the power to define the Commission's role and to give effect to the principles contained in Articles 101 and 102 by way of Directives and Regulations. In line with the development of antitrust policy such role and effect, it is submitted, includes the awarding of compensation to ensure compliance.

Moreover, Art 261 TFEU provides that:

Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.¹³⁷⁸

This unlimited jurisdiction with regard to the penalties can take the form not only of an unlimited review of a Commission decision, but also of imposition of penalties directly by the EU Courts, as it seems to give the Court of Justice a competence which includes the power of unlimited control of judgment and the power to modify or impose such penalties.¹³⁷⁹ Indeed the Court of Justice ruling in *Courage* and *Manfredi*,¹³⁸⁰ can be understood as the modification of the existing penalties for antitrust infringements by adding a new element in the form of reparation for the harm suffered, i.e. compensation.

Consequently, as compensation appears to be an additional tool needed by the Commission to ensure compliance with Articles 101 and 102, the wide mandate to the Council may well cover the empowerment of the Commission to award compensation following a related Commission proposal and a consultation with the European Parliament.

It is necessary to point out that if the measure under consideration had criminal connotations, then it is questionable whether it could be adopted on the basis of Art 103 TFEU alone. For instance in relation to substantive criminal law measures there is a specific legal basis to be found in the Treaty for the adoption of such procedures contained in Art 83 TFEU. A Directive in relation to terrorism, illicit arms trafficking or money laundering must comply with the provisions of Art 83 TFEU.¹³⁸¹

¹³⁷⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2010] C 83/01

¹³⁷⁷ Ibid

¹³⁷⁸ Ibid

¹³⁷⁹ Wouter P J Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 (2) *World Competition* 201, 212

¹³⁸⁰ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

¹³⁸¹ For a detailed discussion on this point see: Gurgen Hakopian, 'Criminalisation of EU Competition Law Enforcement - A possibility after Lisbon?' (2010) 7 (1) 157-173 *The Competition Law Review*
<<http://www.clasf.org/CompLRev/Issues/Vol7Issue1Art6Hakopian.pdf>> accessed 28 March 2014

However, this does not appear to be the case for a Regulation empowering the Commission to award compensation in antitrust proceedings. Since Art 103(2)(a) TFEU enables the Council to adopt Regulations to ensure 'compliance' with the prohibitions laid down in Art 101 and in Art 102 by 'making provision' for fines and periodic penalty payments, it could be concluded that Art 103 does confer the competence to adopt an additional financial penalty in the form of compensation in line with the development in antitrust law. Compensation can be seen as a 'provision' within the range of financial penalties that the Council is called to adopt to ensure compliance with competition rules.

Accordingly, considering that it is a settled EU principle that individuals or businesses have the right to compensation for harm suffered as a result of violations of competition law; considering that the Council under Art 103 TFEU has a mandate to give effect to the principles set out in Articles 101 and 102; in order for the Commission to be formally empowered to award compensation as part of its proceedings in enforcing competition rules, a Treaty amendment would not be necessary. A Commission's proposal for a Regulation, if submitted, will suffice. In line with the approach taken toward compensation in antitrust cases, it appears reasonable to suggest that the Council and in turn the Parliament, could in principle endorse such a proposal, thus a Regulation formally extending the Commission's remit could be enacted. In these circumstances, an effective enforcement of the EU competition law would be achieved solely via public enforcement (i.e. via Commission and NCAs) thus without any negative 'side effect' resulting from a system of private enforcement.

10.1.4 Can the Commission be Both Prosecutor and Judge?

Having considered that in principle the TFEU does not preclude the awarding of compensation via the Commission and NCAs, the next point to consider is whether the Commission can be considered an 'independent and impartial tribunal'. Establishing the legitimacy of the Commission proceedings appears imperative before an enlargement or its current role (i.e. empowered to award compensation) can be suggested. The same reasoning can be applied to the operation of NCAs.

In the current system of EU antitrust enforcement, the Commission combines the investigative and prosecutorial function with the adjudicative or decision-making function. Essentially the same individuals are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved. From a strictly legal point of view, the combination of all powers within one institution raises the question of the compatibility of competition law

proceedings led by the Commission with the fundamental right to a fair trial as enshrined in Art 6 European Conventions on Human Rights (ECHR).¹³⁸²

Although the EU is not a signatory of the ECHR, it is widely recognised that it is also obliged to comply with the ECHR because the key guarantees of the ECHR could otherwise easily be circumvented.¹³⁸³ Article 6 of the TEU provided that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union and those fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights, shall constitute general principles of the Union's law.¹³⁸⁴

In principle, the powers of investigation and that of decision should be separate, the latter being left to an independent judge (Article 6(1) ECHR). Indeed it has been argued before the then CFI by addressee of Commission Decisions that their fundamental right to be heard by an independent and impartial tribunal was infringed.¹³⁸⁵ In *Cimenteries CBR SA* three of the applicants (Aalborg (T-44/95), Asland (T-55/95) and Blue Circle (T-88/95)) contended that the requirements as to independence and impartiality which a tribunal must fulfil for the purpose of Art 6 ECHR preclude the Commission from performing both investigative and decision-making functions in matters of competition.¹³⁸⁶ The CFI rejected the argument by reiterating that is settled case law that the Commission is not a 'tribunal' within the meaning of Art 6 ECHR.¹³⁸⁷ Indeed the Court of Justice in *Heintz van Landewyck* endorsed the Commission view that it is not and, effectively cannot be, a 'tribunal' within the meaning of Art 6 ECHR by pointing out that:

[O]ne of the criteria for the existence of a "tribunal" laid down by the European court of human rights is its independence of the executive ... the Commission observes that since the executive power of the Community is in fact vested in it is at least doubtful whether, not being independent of that power, it can constitute a tribunal within the above-mentioned sense.¹³⁸⁸

Of course, even though the Commission is not a tribunal within the meaning of Art 6 ECHR, the Commission must nevertheless observe the general principles of Union law applicable in the circumstance.¹³⁸⁹ However, the fact that the Commission both investigates and makes findings of infringements of Art 101 and/or Art 102 does not in itself constitute a breach of a general principle

¹³⁸² Similar provision are contained in Art 47 of the Charter of Fundamental Rights of the European Union [2010] OJ C 83/389

¹³⁸³ Donald Slater, Thomas Sébastien and Denis Waelbroeck, 'Competition Law Proceedings Before the European Commission and the Right to a Fair trial: No Need for Reform?' (2008) The Global Competition Law Centre Working Papers Series 04/08 <<http://www.coleurope.eu/template.asp?pagename=gclc>> accessed 17 January 2014, 11

¹³⁸⁴ Consolidated Version of the Treaty on European Union [2010] OJ C 83/01

¹³⁸⁵ Joined cases T-25/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-700, 712 - 724

¹³⁸⁶ *Ibid*, 714

¹³⁸⁷ *Ibid*, 717

¹³⁸⁸ Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and others v Commission* [1980] ECR 3125, 80

¹³⁸⁹ Joined Cases 100 to 103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR 1825, 8

of EU law.¹³⁹⁰ The European Court of Human Rights (ECtHR) has ruled several times that, for reasons of efficiency, the prosecution and punishment of offences, even those that carry a much more onerous and the stigmatic sanction than fines (i.e. imprisonment, or ‘criminal’ within the wider meaning of Art 6 ECHR),¹³⁹¹ can be entrusted to administrative authorities, provided that the persons concerned are enabled to take any decision made before a judicial body that has full jurisdiction and does provide the full guarantees of Art 6(1) ECHR.¹³⁹²

In *Bendenoun v. France* the ECtHR clearly stated that having regard to the large number of offences of the kind referred to in the case (i.e. Article 1729 para. 1 of the French General Tax Code) the Contracting States must be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones.¹³⁹³ The Court held that such a system is not incompatible with Art 6 of the Convention so long as the taxpayer can bring any such decision affecting him before a court that affords the safeguards of that provision.¹³⁹⁴

Subsequently, in *Ozturk v. Germany* the ECtHR reiterated the principle by clearly stating that conferring the prosecution and punishment of offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Art 6 ECHR.¹³⁹⁵ In addition, the ECtHR has clarified that compliance with Art 6 ECHR does not mean a literal application of the requirements at each and every stage of the process. The ECtHR held that:

Whilst Article 6 para. 1 (art. 6-1) embodies the “right to a court” ..., it nevertheless does not oblige the Contracting States to submit “contestations” (disputes) over “civil rights and obligations” to a procedure conducted at each of its stages before “tribunals” meeting the Article’s various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system.¹³⁹⁶

¹³⁹⁰ Joined cases T-25/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-700, 718

¹³⁹¹ *Engel and others v the Netherlands* App no 100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976), 81; *Ozturk v Germany* Application no 8544/79 (ECtHR, 21 February 1984), 52. See also: Case C-185/95 P *Baustahlgewebe GmbH v Commission* [1998] ECR I-08417, Opinion of AG Léger, 31

¹³⁹² Wouter P J Wils, ‘Does the Effective Enforcement of Articles 81 and 82 EC Require not only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment?’ (2001) European University Institute Robert Schuman Centre for Advanced Studies (EU Competition Law and Policy Workshop/Proceedings)

<<http://www.eui.eu/RSCAS/Research/Competition/2001/Wils.pdf>> accessed 5 April 2014, 38 - 40

¹³⁹³ *Bendenoun v France* Application no 12547/86 (ECtHR, 24 February 1994), 46

¹³⁹⁴ *Ibid*

¹³⁹⁵ *Ozturk v Germany* Application no 8544/79 (ECtHR, 21 February 1984), 56

¹³⁹⁶ *Le Compte, Van Leuven and De Meyere v Belgium* App no 6878/75; 7238/75 (ECtHR, 23 June 1981), 51

Provided that anyone concerned is able to take matters before a judicial body that has full jurisdiction, an argument that a Commission's decision is unlawful simply because it was adopted under a system in which the Commission carries out both investigatory and decision-making functions is therefore baseless. This condition is currently satisfied because addresses of Commission decisions dissatisfied with any aspect of the proceedings can take the matter before the EU Courts. Although the Commission's decision is binding upon the undertaking to which it is addressed, it can bring an action for annulment of the decision before the General Court. The application for annulment can be based on both factual and legal grounds. A further appeal, on legal grounds alone, lies before the Court of Justice.¹³⁹⁷

The issue of review by EU courts of competition proceedings is of relevance in the context of antitrust enforcement solely by public enforcement. If, as it is suggested, the Commission and NCAs are empowered to award compensation to victims of infringements of Articles 101 and 102, the amount of the award and the criteria used to achieve that particular figure, must be subject to a full review by the General Court (and in turn by the Court of Justice) along with the criteria used in ascertaining the infringement and any fine/injunction imposed. Both, the victim of the breach and the violator of competition rules must be able to take any decision made before a judicial body that has full jurisdiction and does provide the full guarantees of Article 6(1) ECHR.¹³⁹⁸

In the *Cimenteries CBR SA* case,¹³⁹⁹ two of the applicants (Asland (T-55/95) and Blue Circle (T-88/95)), also questioned the Commission proceeding on the ground that, according to them, Commission decision are not subsequently subject to full review. They argued that:

[T]he nature of the procedure in which the Commission applies Article 85(1) of the Treaty is contrary to Article 6 of the ECHR, as interpreted by the European Court of Human Rights, and to the constitutional traditions common to the Member States, because the Commission has overlapping investigative and decision-making duties and its decisions are not subsequently subject to review of unlimited jurisdiction; the only review subsequently carried out by the Community judicature is a review of legality.¹⁴⁰⁰

The CFI categorically dismissed the argument on alleged limits to the Community/Union judicature's review of legality by stating:

¹³⁹⁷ Respectively Art 263 and Art 256: Consolidated Version of the Treaty on the Functioning of the European Union [2010] C 83/01. See also: DG Competition, *Antitrust Manual of Procedures* (Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU, European Union 2012)

¹³⁹⁸ Wouter P J Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require not only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment?' (2001) European University Institute Robert Schuman Centre for Advanced Studies (EU Competition Law and Policy Workshop/Proceedings) <<http://www.eui.eu/RSCAS/Research/Competition/2001/Wils.pdf>> accessed 5 April 2014, 38

¹³⁹⁹ Joined cases T-25/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-700

¹⁴⁰⁰ *Ibid*, 715

When the Court of First Instance reviews the legality of a decision finding an infringement of Article 85(1) and/or Article 86 of the Treaty, the applicants may call upon it to undertake an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts.¹⁴⁰¹

Recalling its previously ruling in the case of *Enso Espanola v Commission* the Court reiterated that the CFI is an independent and impartial court, established by a Council Decision and it is apparent from the third recital in the preamble to that decision, the Court was established in order to particularly improve the judicial protection of individual interests in respect of actions requiring close examination of complex facts.¹⁴⁰² In *FNCBV* the CFI in increasing the reduction on a fine previously imposed by the Commission (60%) stressed 'the Court, in asserting its unlimited jurisdiction, considers it appropriate to set at 70% the reduction to be allowed'.¹⁴⁰³

Moreover, as the Court of Justice had unlimited jurisdiction under Art 17 of Regulation 17/62/EEC,¹⁴⁰⁴ under Regulation 1/2003, since all decisions taken by the Commission under this Regulation are subject to review by the EU courts as provided by the Treaty, in accordance with Art 261 TFEU the Court of Justice has been given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments. Art 31 of Regulation 1/2003 provides:

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.¹⁴⁰⁵

Hence this 'unlimited' jurisdiction could cover the assessment of any compensation awarded by the Commission.

The requirement for effective judicial review of any Commission decision that finds and punishes an infringement of EU competition rules is a general principle of EU law which follows from the common constitutional traditions of the Member States.¹⁴⁰⁶ It is settled EU principles that the Commission discharges its investigatory and decision-making functions. It is sufficient for Commission decisions in antitrust cases to be subject to review by the Union courts and particularly by the General Court, even if the Commission itself is not an independent and impartial tribunal under Art 6 ECHR. Addressees of Commission decisions have the right to have the Commission's Decision reviewed under Art 263 TFEU by the General Court which manifestly provides the full

¹⁴⁰¹ *Ibid*, 719

¹⁴⁰² Case T-348/94 *Enso Española SA v Commission* [1998] ECR II-01875, 62; Council Decision 88/591/ECSC, EEC, Euratom of 24 October [1988] OJ L 319/1, corrected version in [1989] OJ L 241/4

¹⁴⁰³ Joined Cases T-217/03 and T-245/03 *FNCBV v Commission* [2006] ECR II-4987, 360 - 631

¹⁴⁰⁴ Council Regulation (EEC) 17 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204

¹⁴⁰⁵ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

¹⁴⁰⁶ Case T-348/94 *Enso Española SA v Commission* [1998] ECR II-01875, 60

guarantees of Art 6(1) ECHR and which undertakes a comprehensive review of the Commission's decisions.¹⁴⁰⁷ Moreover an action for annulment, of the Decision by the General Court, can be lodged under the same Article. Judgments of the General Court can in turn be appealed, in whole or in part (but only on point of law), to the Court of Justice by the unsuccessful party under Art 256 TFEU. Accordingly, should the Commission be empowered to award compensation in antitrust proceedings, there is nothing in this approach preventing the compensation element from forming the subject-matter of an action for annulment before the General Court or an appeal before the Court of Justice in accordance with the general principle that there is a right of access to effective judicial review as embedded into the EU Treaties.

10.2 Action for Damages-Leniency. Procedural Issues

10.2.1 The Pfleiderer's Case

Having considered that in principle the TFEU does not preclude the awarding of compensation via the Commission and NCAs and having ascertained the Commission's legitimacy in prosecuting and punishing violators of competition rules, the next point to consider is how to reconcile, from a procedural perspective, the confidentiality of leniency material with the full disclosure of information requested by claimants in actions for damages. The issues involved are better explained by looking at the case of *Pfdehier*¹⁴⁰⁸ in which the Court of Justice ruled in favour of a full disclosure to the detriment of the EU leniency program which appears to be the most effective enforcement investigative tool against secret cartels.¹⁴⁰⁹

In 2008 the Germany competition authority, the Bundeskartellamt, imposed fines amounting in total to € 62 million on three European manufacturers of decor paper and on five individuals who were personally liable for agreements on prices and capacity closure in breach of Art 81 EC.¹⁴¹⁰ Pfleiderer, a purchaser of decor paper submitted an application to the Bundeskartellamt with a view of preparing an action for damages.¹⁴¹¹

¹⁴⁰⁷ Case T-186/94 *Guérin Automobiles v Commission* [1995] ECR II-01753, 23; Wouter P J Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require not only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment?' (2001) European University Institute Robert Schuman Centre for Advanced Studies (EU Competition Law and Policy Workshop/Proceedings) <<http://www.eui.eu/RSCAS/Research/Competition/2001/Wils.pdf>> accessed 5 April 2014, 39

¹⁴⁰⁸ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161

¹⁴⁰⁹ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 6; Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 77

¹⁴¹⁰ Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33

¹⁴¹¹ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 9 - 10

The Bundeskartellamt replied to the application by sending three decisions imposing fines, from which identifying information had been removed. Also a list of the evidence recorded as having been obtained during the search had been removed. Pfleiderer then, sent a second request to the Bundeskartellamt expressly requesting access to 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. The Bundeskartellamt partly rejected that application and restricted access to the file to a version from which confidential business information, internal documents and documents covered by the Bundeskartellamt's notice on leniency had been removed, and again refused access to the evidence that had been seized.¹⁴¹²

Pfleiderer, brought an action before the local court (Amtsgericht Bonn). The Court ordered the Bundeskartellamt to grant Pfleiderer access to the file, through his lawyer, in accordance with the provisions of Germany Code of Criminal Procedure.¹⁴¹³ The German Court however, took the view that the resolution of the dispute before it required an interpretation of EU law, hence it decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling.¹⁴¹⁴

The Court of Justice acknowledged that leniency programmes are useful tools in the efforts to uncover and bring to an end infringements of competition rules, nevertheless, since the right to compensation has 'become part of the legal assets' of EU Citizens,¹⁴¹⁵ the Court ruled that the EU provisions on cartels:

[M]ust be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.¹⁴¹⁶

In this occasion the Court of justice, it is submitted, missed the opportunity to endorse a procedural rules that could reconcile leniency with compensation. Under the German law, Pfleider was given access to the file through his lawyer. This would have enabled Pfleider, as a victim of breaches of competition rules, to obtain the necessary information enabling him to make a claim for damages to the full extent of the infringement. At the same time, if not already in place, a duty to confidentiality can be imposed on lawyers, hence safeguarding leniency material and with it the attractiveness of such programmes.

¹⁴¹² Ibid, 11 - 12

¹⁴¹³ Ibid, 13 - 14

¹⁴¹⁴ Ibid, 18

¹⁴¹⁵ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 20

¹⁴¹⁶ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 32

10.2.2 On What Basis the Court of Justice Deemed Partial Disclosure Inadequate?

The Court of Justice noted that the effectiveness of the EU leniency programmes could be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages.¹⁴¹⁷ The Court observed that a person involved in an infringement of competition law, faced with the possibility of disclosure of information voluntarily provided, would be deterred from taking the opportunity offered by such leniency programmes.¹⁴¹⁸

Nevertheless, recalling its previous rulings in *Courage*¹⁴¹⁹ and *Manfredi*,¹⁴²⁰ the Court of Justice reiterated that it is settled cases law that any individual has the right to claim damages for loss caused to him by breaches of competition rules.¹⁴²¹ Stated differently, the right to damages is not questionable and the exercise of that right cannot be restricted neither by Commission initiatives (such as leniency notices),¹⁴²² nor by national law or procedural rules. In the absence of binding regulation under EU law on the subject, Member States have to establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures.¹⁴²³

Unfortunately the Court of Justice did not comment on the mode in which the German Court, did grant full access to Pfleiderer (i.e. via its lawyer). The Court of Justice commented that national rules applicable to competition claims must not be less favourable than those governing similar domestic claims. The Court stressed that those rules must not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation.¹⁴²⁴

Arguably, the Court of Justice missed the opportunity to endorse a procedural rule that could have been useful in the protection of leniency material. In theory, the Court of Justice seems to have left some discretion to the Member State as to the circumstances in which access is granted or refused:

[T]he courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.¹⁴²⁵

However, the degree of this discretion appears rather limited. As the right to damages is unquestionable,¹⁴²⁶ in the equation leniency-compensation is only in relation to the leniency

¹⁴¹⁷ Ibid, 26

¹⁴¹⁸ Ibid, 27

¹⁴¹⁹ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26

¹⁴²⁰ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

¹⁴²¹ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 28

¹⁴²² Ibid, 21

¹⁴²³ Ibid, 23

¹⁴²⁴ Ibid, 30

¹⁴²⁵ Ibid, 32

¹⁴²⁶ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* [2013] ECR 000, 20; Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 28

component that in effect Member States can exercise their discretion. The Court of Justice failed to recognise that precisely on the basis of the ‘discretion’ exercised by the Germany NCA and on the basis of national procedural laws Pfleiderer had been granted the degree of access that was granted to the NCA’s file.¹⁴²⁷ Although Pfleiderer himself would not have seen the evidence voluntarily submitted by the applicants for leniency and the evidence seized by the competition authority, nevertheless, his lawyer would have been able to obtain all the necessary information to make an appropriate claim on his behalf.

10.2.3 Leniency - Compensation, the Commission Suggestions

On 11 June 2013, the Commission adopted a proposal for a Directive on damages actions for breaches of EU Competition law. Among other things, the proposal has the objective of striking the right balance between the protection of leniency programmes and the victims’ rights to obtain compensation.¹⁴²⁸

With regard to the issue of disclosure of leniency material, in essence,¹⁴²⁹ the Commission suggests that a particular category of documents, ‘leniency corporate statements’, under Art 6 (1) of the proposed Directive should benefit from limitation in their disclosure.¹⁴³⁰ Indeed the Commission stresses that should a party obtain such discloser outside the scope of Art 6, those documents are not admissible in an action for damages.¹⁴³¹

The term ‘corporate statement’ indicates a document given to the Commission by a leniency applicant in order to obtain immunity or reduction of fines in cartel cases, under the related Commission Notice.¹⁴³² The Commission explains that a corporate statement is:

[A] voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking’s knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission’s file and can thus be used in evidence.¹⁴³³

Arguably, the Commission’s suggestions for the protection of leniency material are flawed for two main reasons. First, partial disclosure of information contained in the Commission and NCA’s file

¹⁴²⁷ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 13 - 14

¹⁴²⁸ Joaquín Almunia, ‘Antitrust Enforcement: Challenges Old and New’ (*SPEECH/12/428, 19th International Competition Law Forum, St. Gallen*, 8 June 2012) <http://europa.eu/rapid/press-release_SPEECH-12-428_en.htm> accessed 06 January 2014

¹⁴²⁹ For a full analysis see chapter 7.1.8

¹⁴³⁰ Commission, ‘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’ COM(2013) 404 final, Art 6 (1)

¹⁴³¹ *Ibid* Art 7 (1)

¹⁴³² Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17

¹⁴³³ *Ibid*, 31

has been deemed already insufficient by the Court of Justice for the purpose of damages claims. Indeed in many cases in which the EU courts have ordered full disclosure, the claimant had already been provided with partial disclosure, including in the landmark case of *Pfleiderer*,¹⁴³⁴ and *CDC*.¹⁴³⁵ In *Donau* the right to access was extended to third parties who are not party of the proceedings. Consequently, in view of the Court of Justice position with regard partial disclosure, it appears unlikely that such proposal will become a rule.

Second, and maybe unnoticed by the Commission, is the consequence of this suggested 'categorisation' of certain documents provided to it in the course of a leniency application. If the categorisation is implemented and therefore some documents are protected from disclosure, this will, it is submitted, bring the issue to its starting point. Considering that, potentially a large amount to be paid in damages is at stake, company directors will be very careful of what information to write in a document headed 'corporate statement' and in other general documents. In turn, if information relevant to a claim for damages, for instance the precise duration of a cartel or the precise list of affected products/services, would be carefully removed from 'general documents' subject to disclosure and put into documents labelled 'corporate statement' hence protected from disclosure, this will interfere with the right to damages and consequently it is untenable.

A workable procedural rule, it is submitted, should give access via a lawyer (save for confidential business information) to 'all' documents regardless of their categorisation. In this way any attempt by cartelists to hide information relevant to victims of antitrust breaches will be nullified. To prevent improper use of information, it should be imposed on the lawyer a strict duty of confidentiality and should the information obtained be used for a different purpose to that from which access was given, then that lawyer should be reported to the relevant bar for a disciplinary action.

10.2.4 Rules on Confidentiality for Barristers and Solicitors

This part of the analysis shows how lawyers' duty of confidentiality can be used to protect leniency material. This shows that arguably, the Court of Justice in *Pfleiderer*¹⁴³⁶ erred in disregarding a procedural aspect of the German law that could be adopted in all Member States.

In the *Pfleiderer* case, the Germany court (Amtsgericht Bonn) having ascertained that *Pfleiderer* was an 'aggrieved party', given that he may have paid excessive prices, as a result of the cartel for the goods which he purchased from the cartel members, and having ascertained that *Pfleiderer* had a 'legitimate interest' in obtaining access to the documents, since those were to be used for the

¹⁴³⁴ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161

¹⁴³⁵ Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2011] ECR II-08251

Case T 437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* [2012] 4 C.M.L.R. 14

¹⁴³⁶ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 15

preparation of proceedings for damages, ordered the NCA to grant Pfeleiderer access to the file, through his lawyer.¹⁴³⁷ The German legislation applicable in the circumstances was the combined provisions of Paragraph 406e(1) of the Code of Criminal Procedure and Paragraph 46(1) of the OWiG.¹⁴³⁸ In particular, the German Code of Criminal Procedure provided that:

On behalf of an aggrieved person, a lawyer may inspect the documents which have been submitted to a court ... and may inspect evidence held by the authorities, in so far as the aggrieved person demonstrates a legitimate interest.

Upon application, and unless precluded by compelling reasons, the lawyer may be permitted to take the files, but not the evidence, to his offices or place of residence.¹⁴³⁹

By fine-tuning this rule, this thesis suggests, it is possible to reconcile leniency with compensation. The issues to be fine-tuned are both: the confidentiality aspect and the practical access of the lawyer to leniency and other incriminating material and evidence collected by the NCA or the Commission.

Confidentiality

A practicing lawyer in England and Wales has a duty to confidentiality. For solicitors this duty is governed by the Solicitors Regulation Authority's Code of Conduct. Rule 4.01 provides that a Solicitor and his firm must keep the affairs of clients and former clients confidential. Rule 4.02 (a) also provides that the duty of confidentiality in 4.01 always overrides the duty to disclose.¹⁴⁴⁰

Similar provisions are contained in the rules on confidentiality enacted by the Bar Standards Board for Barristers. Part VII (702) of the Conduct of work by practising barristers states that whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person.¹⁴⁴¹

A breach of the duty to confidentiality by a Solicitor or a Barrister results in a disciplinary action by the relevant body.

The duty of confidentiality imposed on lawyers in England and Wales, this thesis suggests, could be used as a template to enable lawyers in all EU Member States to inspect, on behalf of claimants,

¹⁴³⁷ Ibid, 14

¹⁴³⁸ Ibid, 14 - 15

¹⁴³⁹ Ibid, 7

¹⁴⁴⁰ Solicitors Regulation Authority, Solicitors' Code of Conduct 2007 - Rule 4: Confidentiality and Disclosure

¹⁴⁴¹ Bar Standards Board, Part VII - Conduct of Work by Practising Barristers

documents which have been submitted to the Commission and/or NCAs as part of a leniency application or other incriminating material collected and relevant to victims of antitrust breaches. The lawyer could make use of the information contained in the Commission/ NCA file for the purpose of making a damages claim on behalf of his client but without disclosing any confidential information to his client.

By establishing this procedure, victims can file a claim for the full extent of the harm suffered, and the Commission or an NCA in awarding compensation, could verify that the amount of damages claimed is proportionate to the breach. Victims can be fully compensated without revealing to them the content of leniency materials.

Practical Access to Leniency Material

Under the German law that was applicable in the circumstance of *Pfleiderer*, the lawyer is permitted to take the files to his offices or place of residence.¹⁴⁴² This thesis suggests that in order to enhance the level of confidentiality of documents provided by undertaking as part of a leniency application, the lawyer should be permitted to inspect the material but should be forbidden to take the file in his office or place of residence.

The lawyer, before inspecting documents on behalf of claimants, should require to commit not to make any copy by mechanical or electronic means of any information in the Commission and/or NCA file to which access is being granted and to ensure that the information to be obtained will solely be used for the purposes of claiming damages.

In order to facilitate the practical access to leniency material while maintaining a high level of confidentiality, the Commission and NCAs could, for instance, organise an 'access room procedure'.¹⁴⁴³ Under the procedure, after removing confidential business information (if irrelevant to potential victims), the Commission/NCA file, including leniency material and other evidence relevant to a claim for damages could be brought to a room at the Commission/NCA's premises. Access then could be granted to the lawyer on behalf of his client, under the supervision of a Commission/NCA official. If the Commission/NCA file is fully or partially in electronic format, the room and computers used should provide no network connection and no external communication. The lawyer should be strictly prohibited from taking copies of the documents inspected, but allowed to make short notes/summary to be verified by the Commission/NCA official in order to

¹⁴⁴² Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, 7

¹⁴⁴³ Similar procedure to that in use for facilitating the exchange of confidential information between parties to the proceedings, see: Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU [2011] OJ C 308/6, 97

ensure that it does not contain any confidential information, before the notes/summary is removed from the room.

Each time a lawyer is granted access, he should be required to sign a confidentiality agreement and will be presented with conditions of special access (if any) relevant to that specific case, before entering the 'access room'. Should the information so obtained be used for a different purpose, at any point in time, the Commission or the NCA should report the incident to the bar of that lawyer with a view to disciplinary action.

In sum, it is suggested that due to the position taken by the Court of Justice with regard the issue of access to leniency material, any proposal having the effect of limiting the claimant's full access to the information, is untenable. To reconcile the issues of leniency-disclosure, a workable procedural rule, could be that of imposing a strict regime of confidentiality on lawyer and permitting them to inspect confidential material on behalf of victims of antitrust breaches. In this way, victims would be able to make claims for the full extent of the harm suffered without revealing to them information contained in a leniency application. In turn, this procedure together with the awarding of compensation via the Commission and NCAs, makes the public enforcement of competition rules in the EU a viable and efficient alternative to the private enforcement regime proposed by the Commission.

10.2.5 Conclusion

Some authors, such as Wils have questioned the need in the EU for compensation of antitrust harm.¹⁴⁴⁴ Others, such as Schwartz, have objected altogether to the compensation element in antitrust.¹⁴⁴⁵ Considering the Court of Justice ruling in *Courage and Manfredi*, in the EU the reparation of harm suffered as result of violation of antitrust rules, appears an unquestionable right.¹⁴⁴⁶ Indeed such right has become part of the individuals' legal assets.¹⁴⁴⁷ Consequently, calls for a complete abolition of compensation in antitrust cases are calls for a fundamental restructuring of the EU competition policy. This chapter suggests a potential alternative that, it is submitted, could be achieved without radical changes to the EU competition policy. Arguably, neither the TFEU, nor the EU court's ruling contain any specific prohibitions on compensation to victims being awarded by the Commission and NCAs. Moreover the Court of Justice has established

¹⁴⁴⁴ Wouter P J Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26 (3) World Competition 473, 19

¹⁴⁴⁵ Warren F Schwartz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (American Enterprise Institute for Public Policy Research 1981), 32 - 33

¹⁴⁴⁶ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

¹⁴⁴⁷ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 19 / 23; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 39

the right of victims to obtain compensation and the Commission is bound to observe the court's ruling. This could be seen as an extension of the Commission's remit. Procedural rules can be implemented to reconcile the confidentiality of leniency material with damages action.

Consequently, in order to overcome detrimental side effects of private actions, compensation to victims of antitrust violation in the EU should be awarded solely via public officials.

Chapter 11: CONCLUDING REMARKS

11.1.1 Research Undertaken

The principal purpose of the research undertaken in this thesis has been the evaluation of the private enforcement regime proposed by the Commission for the enforcement of the EU competition law.

The relevance of the research is evidenced by the notion that competition policy can affect the structure and viability of an industry, its ability to compete with other industries both nationally and internationally, the nation's employment patterns and in effect the economy of a nation/s as a whole.¹⁴⁴⁸ Enforcement policy engenders, and is interwoven with patterns of thought, negative institutional relationships, distribution of power and economic structures.¹⁴⁴⁹

The broad frameworks within which the research has been undertaken are the EU competition policy purposes with particular focus on enforcement policy. The Commission proposed private enforcement regime appears to be a significant component in the delivery of the EU antitrust objectives.

The principal research question posed in this thesis is whether a system of private enforcement in the EU antitrust proceedings would ultimately deliver the stated aims. In particular whether it is an important tool to create and sustain a competitive EU economy,¹⁴⁵⁰ deliver the twin goals of compensation to victims of antitrust violations and at the same time, by creating a threat of prosecution, increasing deterrence.¹⁴⁵¹ The Commission contends that its policy objective is stimulating economic growth and innovation.¹⁴⁵²

A subsidiary set of questions was whether in the EU there is a need to supplement the existing public enforcement regime with private enforcement. What 'side effects' can be expected from the development of such a system and whether in the Commission proposals these issues have been addressed. Whether private enforcement is compatible with the EU competition policy and what lessons can be learned from the reliance on private parties to carry out enforcement of antitrust rules in other jurisdictions such as the US. Also, what lessons can be drawn from antitrust regimes mainly relying on public enforcement such as the Canadian system?

¹⁴⁴⁸ Albert A Foer and Jonathan W Cuneo, *The International Handbook of Private Enforcement of Competition Law* (Edward Elgar Publishing Limited 2010), 596; Robert H Lande and Joshua P Davis, 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies' (*Interim Report*, 8 November 2006) <<http://newaai.com/files/550b.pdf>> accessed 31 March 2014

¹⁴⁴⁹ David J Gerber, 'Private Enforcement of Competition Law: A Comparative Perspective' in Mollers and Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007)

¹⁴⁵⁰ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹⁴⁵¹ Commission, 'Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 final, 17; Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹⁴⁵² Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

In line with the Court of Justice approach in determining competition provisions,¹⁴⁵³ the methods used to answer the research questions were a teleological analysis and discourse analysis, as deconstructive reading, was employed to reveal motivations behind the Commission proposals, hence to explain its support for a private enforcement regime. A comparative analysis has been used in evaluating the likelihood of success, or lack of success, of private enforcement against the backdrop of the EU competition policy objectives.

11.1.2 Major Findings

There are five major findings that can be drawn from this research. The first main point to emerge is that the Commission's strong support for a private enforcement regime, although only explicitly promoted in recent years, has a long history. Following the establishment at EU level by the Court of Justice in 2001 and 2004 of the right to damages for harm suffered as result of infringements of Art 101 and 102 TFEU,¹⁴⁵⁴ the Commission has taken initiatives aimed at the involvement of private parties, victims of violations, to the enforcement of competition rules.¹⁴⁵⁵ However, the Commission support for such a mechanism can be traced back to the 1973 at a time when there is no record of any legal action brought with a view to recovering damages as a result of an infringement of competition rules.¹⁴⁵⁶

The second major finding is that in the EU there appears to be an emphasis in facilitating private enforcement without due consideration accorded to detrimental side effects that such a system might bring. In the EU various arguments in support of a private enforcement regime are based on the US experience.¹⁴⁵⁷ However, the underpinning principles of the two legal systems and in particular the objectives of these antitrust regimes are fundamentally different. An analysis of this difference revealed that while in the US private enforcement might be considered an effective enforcement tool, in the EU due to the different aims of competition policy (such as that of unifying the European market, irrelevant in the US) public enforcement appears more suitable in delivering the Union's antitrust objectives. Indeed, the approach taken by the Canadian authorities in relation to competition policy seems to be closer (when compared to that of the US) to the EU approach.

¹⁴⁵³ Ethan Schwartz, 'Politics as Usual: The History of European Community Merger Control' (1993) 18 *Yale Journal of International Law* 607, 619. See also: David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 (1) *Harvard International Law Journal* 97, 116

¹⁴⁵⁴ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

¹⁴⁵⁵ Such as: Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

¹⁴⁵⁶ 'Commission's answer of 10 April 1973 to Written Question No 519/72 by Mr Vredeling' [1973] OJ C 67/55, 2

¹⁴⁵⁷ See for instance: Paolo Buccirossi and others, *Collective Redress in Antitrust* (EU Parliament, DG for Internal Policies 2012)

However, unlike the private enforcement regime proposed in the EU, the Canadian system relies mainly on public enforcement.

The third major finding that can be drawn from this research is that while in principle private enforcement can deliver laudable aims, such as that of compensation of victims of violations and as a by product it might also enhance the level of deterrence, there are difficulties in designing a system that would adequately compensate victims without at the same time incentivising a race to damages. The US antitrust history shows that multiple damages have been introduced to motivate victims of violation to come forward. However, one of the main concerns with private enforcement is the control of it. In the US, in order to limit the operation of private enforcement, courts have raised liability standards to prevent the proliferation of unmeritorious claims at the expenses of legitimate competition. Likewise, although under the Canadian regime private parties have limited courses of action, evidence shows that private parties have attempted to circumvent competition provisions in an attempt to obtain monetary awards.

The fourth major finding emerges after the comparison of the liability standards for equivalent competition infringements such as abuse of dominance and cartels. In comparing the approach taken in the US and Canada towards abuse of dominance it appears that, all other elements being equivalent, the interventionist approach adopted in the EU results in the condemnation of practices that would be considered legitimate in the other two jurisdictions. This would trigger private litigation in the EU but not in the US or Canada. In relation to cartels, all three jurisdictions admit that one of the most effective tools against the detection and prosecution of cartels is the leniency programmes. However in the EU, due to the absence at EU level of criminal penalties (i.e. prison sentence) such programmes are much less attractive. Indeed, the operation of private enforcement could potentially undermine the EU leniency programme. As a leniency applicant, by providing inside information to the Commission/NCA is in effect more vulnerable to damages action than other cartelists, this could result in less leniency applications being made. Hence, due to the side effects of private enforcement, fewer cartels will be prosecuted.

The fifth major finding of this research refers to the operation of private enforcement in a collective action. Again, in comparing the approach taken by the US and Canadian antitrust authorities, in the EU emerges a lack of safeguards against abuse by private parties of the collective redress mechanism. In both the US and Canada antitrust regimes, class certification provisions and judicial control over its formation serves the aims of protecting businesses from unmeritorious class action litigations. The EU class admissibility mechanism appears unlikely to achieve the same result. Evidence shows that a class action claimant has superior bargaining power, when compared to that of a firm. Indeed, the EU envisaged that funding mechanisms would reduce the risk of the litigation for a class of claimants to a negligible level, while the defendant/business is most likely to be in a

bet-your-company situation. In particular, due to the lack of judicial control over antitrust settlements, this could result in firms being coerced into unduly excessive settlements, or worse still being forced out of business.

Accordingly, this research has revealed that arguably, the Commission's motive for the support and promotion of a private antitrust enforcement regime is not grounded in the validity of the system being promoted, but in the alleviation of its enforcement burden. This makes doubtful that private enforcement in the EU will deliver the stated aims of creation and sustainment of a competitive economy while providing a mechanism for compensation of harms and increasing deterrence. Considering these findings, this thesis suggested and presented the legal basis for an enhanced public enforcement of EU competition law.

11.1.3 Thesis Conclusion

*What constitutes the law? ... The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*¹⁴⁵⁸

*The successful competitor, having been urged to compete, must not be turned upon when he wins.*¹⁴⁵⁹

As Oliver Holmes stated in 1897, in effect, the law is what is imposed in court rooms via the enforcement process. Consequently enforcement policy determines whether or not the legislation delivers the intended objectives. The irony in antitrust is that as Judge Hand emphasised in 1945, businesses are urged to compete but punished if they succeed.¹⁴⁶⁰ Inevitably, 'every successful competitive practice has victims. The more successful a new method of making and distributing a product, the more victims, the deeper the victims' injury'.¹⁴⁶¹

A central claim of this thesis is that while in principle private enforcement could deliver benefits, for instance by enabling victims of violations to claim compensation without public intervention, the costs in achieving its objectives outweigh its benefits. The main criticism, to the envisaged private enforcement regime, is that the Commission seems to disregard the fact that all private enforcement presents a risk that it will be employed for strategic and private reasons that may conflict with the public goals of the legislation sought to be enforced.¹⁴⁶² This thesis shows that although private enforcement can be considered successful in other jurisdictions such as the US,

¹⁴⁵⁸ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 460 - 461

¹⁴⁵⁹ *United States v. Aluminum Co. of America* 148 F2d 416, 430 - Judge Learned Hand

¹⁴⁶⁰ *Ibid*

¹⁴⁶¹ Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63 (1) Texas Law Review 1, 5

¹⁴⁶² See chapter 2.1.4 and 2.1.5. See also: Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 (3) Osgoode Hall Law Journal 461, 489

due to significant differences in the underpinning principles of the EU and US antitrust law, public enforcement is more suitable to deliver the goals of EU competition law. Moreover, as private enforcement is less coordinated than public enforcement, even if policymakers can shape the incentives for private enforcement, they cannot confidently predict the level of private enforcement.¹⁴⁶³ These issues make dubious the desirability of a private enforcement regime in the EU antitrust proceedings.

Whether in general compensation in antitrust is appropriate is questionable in the first place.¹⁴⁶⁴ Moreover, the difficulties lie in designing a compensatory award that will achieve the twin goals of compensation to victims and deterrence of anticompetitive conducts, without at the same time incentivising abusive litigation aimed at financial awards. On one hand, a single damages award appears insufficient to adequately compensate victims and to deter violators. On the other, multiple damages (or awards that although termed 'single' in effect correspond to multiple damages)¹⁴⁶⁵ inevitably create the conditions for nominal breaches to be challenged in court by private parties hoping to obtain monetary awards. The US experience of multiple damages shows that 'treble damages' have induced US courts to design and apply liability standards in a manner that limits private actions.¹⁴⁶⁶ Likewise, although under the Canadian rules private parties have a limited cause of action, evidence show that some have attempted to circumvent damages provisions to obtain monetary awards despite only being able to recover single damages.¹⁴⁶⁷

In comparing specific elements of antitrust prohibitions (such as abuse of dominance) common in the EU, US and Canada, the analysis reveals a contrast between the interventionist approach taken in the EU with the policies of non-intervention and protection of business against unmeritorious claims in the other jurisdictions.¹⁴⁶⁸ Due to a lower liability standard applied in determining breaches such as abuse of dominance, a private cause of action can arise in the EU but not in the US and Canadian equivalent schemes. Consequently, while in the US private enforcement might deliver benefits and under the Canadian rules any detrimental effect is limited, in the EU the impact of private actions on businesses could be substantial and harmful.

With regard to cartels a significant concern arises in relation to the leniency programmes, which by the Commission's admission, have proved to be useful for the effective investigation and

¹⁴⁶³ William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 *Journal of Legal Studies* 1, 15

¹⁴⁶⁴ See chapter 4.1.3

¹⁴⁶⁵ See chapter 5.1.4

¹⁴⁶⁶ See chapter 4.1.2. See also: William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' (*British Institution of International & Comparative Law*, 15 May 2003)

<<http://www.ftc.gov/speeches/other/030514biicl.shtm>> accessed 3 April 2014; Albert A Foer and Evan P Schultz, 'Will two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe may be Making it Easier' [2011] *Global Competition Litigation Review* 107

¹⁴⁶⁷ See chapter 5.2.5

¹⁴⁶⁸ See chapter 6.1.8

termination of cartel infringements and have enabled the Commission to pierce the cloak of secrecy in which cartels operate.¹⁴⁶⁹ Although in support of an EU private enforcement regime it is argued that private actions and leniency can successfully co-exist,¹⁴⁷⁰ this thesis contends that such an argument appears misleading. Unlike in the EU, cartelists under the US rules are spared jail sentences and obtain reduction in damages to be paid out. By contrast, an EU leniency applicant become more exposed to damages actions than other cartelists.¹⁴⁷¹ The difference in these features makes leniency in the EU less attractive. Consequently, due to less detection of cartels activities, a system proposed to ensure full compensation of victims,¹⁴⁷² ironically, will result in less victims being compensated.

Any detrimental side effect of private enforcement is greatly felt by businesses if private rights are bundled into collective litigation. In the EU the focus seems to be in facilitating collective redress, but it is questionable whether due consideration is given to the fact that such mechanism also facilitate abusive collective litigations to the detriment of businesses. Safeguards such as the 'loser pays' rule appears to be insufficient to curb unmeritorious litigation. Indeed such a rule is nullified by the envisaged funding mechanisms.¹⁴⁷³ Likewise, the preliminary admissibility criteria to be satisfied for a representative action to be admissible (clear identification of the group before the claim is brought),¹⁴⁷⁴ appears to be insufficient to prevent attempts by private parties to enhance their litigation capability by obtaining class action approval.¹⁴⁷⁵

Considering the US and Canadian experience of collective litigations it emerges that, despite safeguards in place to prevent unmeritorious collective actions, both the US private enforcement and the Canadian public enforcement regimes are not spared from abuses.¹⁴⁷⁶ This thesis highlights that there is a link between collective actions and the bankruptcy of antitrust defendants.¹⁴⁷⁷ Consequently, in the EU a stricter test, such as that under the US rules,¹⁴⁷⁸ should be employed in determining the admissibility of collective action.

¹⁴⁶⁹ See chapter 7.1.6. See also: Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/17, 3

¹⁴⁷⁰ See chapter 7.2.1; Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (*Report for the European Commission*, 21 December 2007) <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 19 January 2014, 29 / 77

¹⁴⁷¹ See chapter 7.1.7

¹⁴⁷² Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final), 3

¹⁴⁷³ See chapter 8.2.4

¹⁴⁷⁴ European Parliament, 'Towards a Coherent European Approach to Collective _ Redress' (*(2011/2089(INI) Resolution of 2 February 2012*) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 3 February 2014, 20

¹⁴⁷⁵ See chapter 9.1.3

¹⁴⁷⁶ See chapter 9.1.2

¹⁴⁷⁷ See chapter 9.2.1

¹⁴⁷⁸ See chapter 8.1.3

This thesis emphasises the advantages of public enforcement over private enforcement. While under public enforcement it is possible to adjust punishment of violators according, for instance to the difficulties encountered by a particular sector at that time, or by the defendant's ability to pay, the same flexibility is not achievable under private enforcement. Private parties motivated by private interests, would not consider whether as a result of the litigation the defendant ends in bankruptcy.

The Commission contends that the creation of an effective private antitrust enforcement system¹⁴⁷⁹ is an important tool to create and sustain a competitive EU economy.¹⁴⁸⁰ Moreover, the Commission's policy initiative has the objective of stimulating economic growth and innovation.¹⁴⁸¹ However, an overall assessment of the Commission's proposed regime reveals that it is unlikely that it would deliver the stated aims. Indeed the absence of effective safeguards against abusive litigation and the threat to the operation of leniency programmes posed by such regime,¹⁴⁸² could be detrimental for businesses trading in the EU and in turn for the EU economy. To overcome harmful side effects of private enforcement on competition policy, the enforcement of the EU competition law should be solely the remit of public officials.

11.1.4 Recommendations

Suggestions for an Ideal Enforcement Regime

Following the Court of Justice ruling in *Courage* and *Manfredi*, in the EU the right to compensation for any victim for harm suffered as result of breaches of antitrust law,¹⁴⁸³ has become part of the individuals' legal assets.¹⁴⁸⁴ This thesis argues that due to this development in antitrust policy, in the absence of specific prohibitions contained in the TFEU, the Commission is legally enabled to award compensation. If a different approach is taken, however, the formal empowerment of the Commission will not require Treaty changes.¹⁴⁸⁵

As noted in this thesis, private enforcement carry with it the risk that private parties, thus empowered, could make use of the system for private interests counter to the aims of antitrust.¹⁴⁸⁶

¹⁴⁷⁹ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final); Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM (2008) 165 final)

¹⁴⁸⁰ Commission, *Green Paper, Damages Actions for Breach of the EC Antitrust Rules* (COM (2005) 672 final), 1.1

¹⁴⁸¹ Commission, 'Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council' SWD(2013) 203 final (Impact Assessment Report), 71

¹⁴⁸² See chapter 7.1.5 and 7.1.8

¹⁴⁸³ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 26; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 61

¹⁴⁸⁴ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2006] ECR I-06297, 19 / 23; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619, 39

¹⁴⁸⁵ See chapter 10.1.3

¹⁴⁸⁶ See chapter 2.1.6

To overcome this issue, or at least significantly limiting the misuse of antitrust law,¹⁴⁸⁷ this thesis suggests and presents the legal and procedural basis for an EU enforcement regime based solely on enforcement via public officials.¹⁴⁸⁸

Suggestions for Future Research

Having analysed the likelihood of success (or unsuccess) of private enforcement in competition proceedings, a future area of research could be the long-term effect of encouraging private actions for breaches of competition rules. Arguably, the reliance on private parties to enforce competition law represents a major change in the EU antitrust enforcement policy. Although from a theoretical perspective the effect in some areas, such as the proliferation of frivolous claims and the undermining of leniency programmes, can be predicted, additional research is needed to ascertain the full extent. Moreover, empirical evidence is needed to shed new light on the impact of private actions in areas such as economic growth and innovation.

¹⁴⁸⁷ Even under a public enforcement regime the misuse of antitrust law by private parties can occur. For an EU example see chapter 6.1.9. For a Canadian example see chapter 5.2.5

¹⁴⁸⁸ See Chapter 10:

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