The Rules of Evidence in Private Enforcement of the EU Competition Law

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Abstract

The dissertation studies the rules of evidence in damages actions for EU competition law infringements. This study examines which norms of EU law and EU law principles govern evidentiary rules in Member States. Further, it discusses ambiguities and open questions in the entirety of EU law that relate to evidence matters in cases involving breaches of EU competition law. The study also investigates the more general theme of the parallel application of EU and national law, in order to explore how the substance and the goals of EU law affect the application of evidentiary rules in private competition enforcement cases.

To serve this purpose, this study applies a predominantly legal doctrinal approach. Hence, this study interprets and systemizes relevant EU laws, EU caselaw and soft-law guidance, which provide details regarding evidence-related issues. The challenge in conducting this study also lies in the difficulty of extracting useful and relevant details from a large amount of EU caselaw and legal documents. It takes time, energy and patience to carry out such research.

This study consists of six sections. Section 1 introduces the background of this topic (i.e. private enforcement of EU competition law), reviews contemporary literatures on related issues, proposes research questions, limits the scope of this study, and describes the legal doctrinal methodology applied. Section 2 discusses the current legal framework for this study, focusing mainly on the applicable EU principles, EU laws, EU caselaw, and soft-law guidance. Section 3 analyses the burden of proof. This section explores the legal burden to prove the infringement, the burden to prove other elements of liability including the harm and the causal link, and presumptions that are employed to alleviate an overwhelming burden of proof. Section 4 concerns issues related to standard of proof. This section analyses in detail the constitutive requirements for a damage claim and the level of persuasiveness to which claimants should prove. It includes standards of proof for the infringement (in stand-alone cases only), the harm, and the causal link between the harm and the infringement. Section 5 considers the central issue – access to evidence. This section enquires into the available approaches for claimants to obtain sufficient evidence to support
their claims. The claimants have, in principle, two options, either to request direct access from competition authorities or to request access indirectly through national courts. Indirect access might target evidence in the hands of competition authorities, a competent review court, the defendant, or a third party. Section 6 concludes the dissertation, first by providing an overview of the issues discussed, second by presenting key findings and further implications therein, and third by looking into future research.

This study observes that EU law and CJEU caselaw remain significantly silent on many issues related to evidentiary rules in private enforcement of EU competition law. In case of genuine ambiguities, the CJEU may interpret the Damage Directive and other EU law in the form of preliminary rulings. Thus, the CJEU is capable of incorporating certain features and concepts of the EU competition law into its caselaw that national courts must respect when they apply the relevant evidentiary rules. Such incorporation has given rise to a set of fragmentary and non-systemized rules of evidence when both EU law and national law apply in antitrust damages actions.

This condition raises concerns when damages claimants are not certain of the applicable rules they could rely on, or of national courts’ application of those rules, or of the rights and obligations conferred to them by those rules. It also imposes higher requirements on the quality and capacity of national judiciaries and pushes national courts to be fully prepared for damages actions for EU competition law infringements. These features all reinforce the perception of EU competition law and damages actions for EU competition law infringements as highly specialized areas that are not easily accessible by ordinary judges or ordinary victims. Thus, damages actions for EU competition law infringements have deviated from other damages claims in normal civil torts.
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1 Introduction

1.1 Background to private enforcement of EU competition law

Infringements of EU competition law (as codified in arts 101 and 102 TFEU) are not only detrimental to the proper functioning of the internal market at large but also cause concrete harm to individual victims. While public enforcement aims to prevent distortion of competition by imposing sanctions, damages actions are also available to remedy the harm by ensuring a right to claim full compensation.

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2 European Parliament (hereinafter 'Parliament'), 'Competition policy' <http://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>; Commission, 'Fines for breaking EU Competition Law' <http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf>. In the factsheet, the Commission states that its policy with regards to competition law infringements is one of prevention: 'Should companies break the law, fines may be imposed.' Art 103 TFEU empowers the European Council to put in place an enforcement system to impose fines. Regulation 1/2003 based on art 103 TFEU empowers the Commission to enforce EU competition rules and fine companies for infringements. It outlines the principles that fines should be based on the gravity and the duration of the infringement. For discussion on fines, see Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2, (Fine Guidelines). See further discussions on sanctions in Peter R. Willis (ed.), Introduction to EU Competition Law (Informa 2005) 262, 268. Michael J. Frese, Sanctions in EU Competition Law: Principles and Practice (Hart Publishing 2014) 182, 185. Frese goes further, viewing the restrictions of the Commission's power to sanction anti-competitive conduct. Notably, Frese identifies regulatory innovation in the Commission’s experiences in imposing fines. An example of such innovation is the Commission's use of periodic penalty payments. That payment can be imposed jointly with a Commission decision or later than the decision, by way of a separate decision or as part of a single one.

3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (Damage Directive), art 1 and recital 4. See further discussion in Assimakis P. Komninos, 'Public and Private Enforcement in Europe: Complement? Overlap?' (2016) 3(1) CLR 5, 9. Komninos identifies three main objectives of enforcement of EU competition law: injunctive objective – to end the infringement by imposing negative measures; restorative or compensatory objective – to remedy harm; and punitive and deterring objective – to punish further infringements. See also Assimakis P. Komninos, EC Private Antitrust Enforcement: Decentralised application of EC Competition Law by National Courts (Hart Publishing 2008). Traditionally, deterring anti-competitive infringements relies on public enforcement. The competition authorities control the application of EU competition rules both at the EU level and at national level. The use of private actions is relatively uncommon. After the adoption of Regulation 1/2003, the responsibility for public enforcement shifted from the Commission to national authorities. This spares the Commission so that it can deal with the most harmful infringements of EU competition law. The decentralized enforcement of the EU competition law paves way for the private enforcement. Academic scholars argue that the private enforcement of competition law is not desirable from an economic and policy perspective and
In practice, ‘a large number of victims of infringements of competition law remain uncompensated for the harm suffered’ and see their right to damages under the EU law frustrated. Under these circumstances, EU legislators have issued the Damage Directive to ensure that anyone who has suffered harm caused by an infringement of the EU competition law can effectively exercise their right to claim full compensation. Damages actions are employed to foster corrective justice by repairing the harm caused to individual victims.

In the context of private enforcement of EU law, actions for damages are an important remedy for individual parties, 'by ways of disputes brought by individual claimants to the Member State courts.' This not only serves the

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5 Damage Directive, art 1 and recital 36.


7 It is also known as 'the private enforcement model of EU law.' See Claire Kilpatrick, 'The Future of Remedies in Europe' in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds.), The Future of Remedies in Europe (Hart Publishing 2000), 1–2. The CJEU ruled that 'it may generally be assumed that a substantive right has as its corollary that it provides the person in whose interest it operates with the means of enforcing it himself by proceedings before the courts rather than the intervention of a third party.' See Humblet v Belgian State (C-6/60) EU:C:1960:48, 571–572. The Court later confirmed more explicitly that 'every time a rule of [EU] law confers rights on individuals, those rights, without prejudice to the methods of recourse made available by the Treaty, may be safeguarded by proceedings brought before the competent national courts.' Molkerei Zentrale Westfalen-Lippe v Hauptzollamt Paderborn (C-28/67) EU:C:1968:17, 153. See also in Les Verts v Parliament (C-294/83) EU:C:1986:166, [23].

interest of private parties, but also supervises the application of EU law, as private parties act as the EU’s ‘private attorneys general’ or ‘private policemen’. In this regard, facilitating damages actions encourages greater participation by citizens in competition law enforcement and fosters greater awareness of any infringements. Such awareness includes not only the awareness of victims’ entitlement to damages, but also the wrongdoer’s awareness of their liabilities.

Moreover, the supervisory power through litigation by private parties before national courts essentially supplements the central function of the public enforcement of EU law. Similarly, in the case of EU competition law, the


11 Sara Drake, ‘More Effective Private Enforcement of EU Law Post-Lisbon: Aligning Regulatory Goals and Constitutional Values’ in Sara Drake and Melanie Smith (eds), New Directions in the Effective Enforcement of EU Law and Policy (Edward Elgar Publishing 2016) 12. See also in Michael Dougan, National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation (Hart Publishing 2004) 1–4. Dougan illustrates two main means by which EU norms can be enforced: centrally (or directly) and de-centrally (or indirectly). Centralized enforcement refers to the ability of the EU institutions, Member States and private parties to bring an action before EU courts (the CJEU and the GC). Due to a number of serious drawbacks in this centralized system, such as limited access to the EU courts, notoriously restrictive rules of locus standi and so on, the CJEU has constructed a supplementary system of decentralized enforcement. Rules of EU law are capable of having direct effect within the national legal order, creating rights and obligations before domestic courts. The CJEU may interpret EU law in preliminary requests and appeals. Art 258 TFEU empowers the Commission to bring a case before the CJEU when it considers that a Member State does not comply with EU law. Art 259 TFEU empowers the Member State to bring a case before the CJEU when it considers a non-compliance with EU law. However, private parties can neither initiate such proceedings nor bring a case to a court in this context. By all these means, 'the entire judiciary of Europe from the lowliest tribunal to the most venerable court.
private enforcement plays a complementary role in filling the gaps in public enforcement.\textsuperscript{12}

Apart from actions for damages, there are other remedies available to national courts for the judicial protection of individuals. For infringements of EU competition law, art 101(2) TFEU provides the contractual remedy for parties to claim that any agreement or decision prohibited under this article shall be ‘automatically void’. In spite of the lack of a paragraph similar to art 101(2), contracts or contractual clauses that amount to abuse under art 102 may also be made ‘void as a consequence.\textsuperscript{13} The Court has held that it is for the national

\textsuperscript{12} The complementary role of private enforcement of the EU competition law has been widely recognized, as officially recognized in: Speech by Mr. Mario Monti, (European Commissioner for Competition Policy) ‘Effective Private Enforcement of EC Antitrust Law’, Sixth EU Competition Law and Policy Workshop, Florence, 1–2 June 2001, 2. See also OECD, ‘Relationship between Public and Private Antitrust Enforcement’ DAF/COMP/WP3/WD(2015)2, 2. Commission, ‘Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damage Proposal)’ COM(2013) 404. 3. See scholarly discussions in Niamh Dunne, ‘The Role of Private Enforcement within EU Competition Law’ in Kenneth Armstrong (ed.), Cambridge Yearbook of European Legal Studies Vol 16 (CUP 2014) 143, 145. Notably, Kathryn Wright pointed out that the relationship between the private enforcement and the public enforcement implied a trade-off between judicial autonomy and the effectiveness of the public enforcement by the Commission and national competition authorities (‘NCAs’). This trade-off calls into the question about ‘the partnership and tension between judicial and administrative bodies, administrative intervention in judicial decision-making and the role of soft law in a system in which the Commission has legislative, executive, as well as adjudicative functions.’ As a result, the complementary role per se is a delicate balance. Kathryn Wright, ‘The Ambit of Judicial Competence after the EU Antitrust Damages Directive’ (2016) 43(1) Legal Issues of Economic Integration 15, 17.

\textsuperscript{13} Bjarte Thorson, Individual Rights in EU Law (Springer 2016), 131. See also Richard Whish and David Bailey, Competition Law (8th edn, OUP 2015) 347–348. Some scholars argue that the absence of such a provision is not decisive in case of the abuse of dominant position and that a similar result could be achieved through interpretation. See Dan Eldöf and Lars Pehrson, ‘General Principles in Private Law’ in Ulf Bernitz, Joakim Nergelius, Cecilia Cardner and Xavier Grousset (eds.), General Principles of EC Law in A Process of Development (Wolter’s Kluwer 2008) 191. That is the case in INNO, where the CJEU ruled that ‘while it is true that [art 102 TFEU] is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness.’ INNO v ATAB (C-13/77) EU:C:1977:185, [31]. Another different approach turns to the fact that the abuse of dominant position – unlike cartels and other concerted practices – usually does not take the form of a contract. Art 102 TFEU shall be not understood as deliberately different from art 101 TFEU in this respect. Instead, where the abuse of a dominant position takes the form of a contract in exceptional cases, it shall still be ‘automatically void’ by analogy to art 101(2) TFEU. See Assimakis P. Komninos, EC Private Antitrust Enforcement: Decentralised application of EC Competition Law by National Courts (n 3) 159. See more discussion in Folkert Wilman (n 9) 315–316.
court to decide whether and to what extent abusive practices have affected the parties concerned, ‘with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions.’

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14 *BRT v SABAM* (C-127/73) EU:C:1974:25, [14]. See also in Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs (C-66/86) EU:C:1989:140, [45]. Hence, EU law is unclear as to the circumstances under which national courts should find nullity applicable, as well as the kind of private law consequences that result from such a contract being void. See Katri Havu and Liisa Tarkkila, 'EU Competition Litigation and Member State Procedural Autonomy –Current Issues' (2018) 2 GCLR 65, 71.
In addition, other measures of private enforcement include actions for injunctions,\textsuperscript{15} interim relief,\textsuperscript{16} recurring penalty payments,\textsuperscript{17} measures on legal costs,\textsuperscript{18} as well as national law measures not provided under EU law.\textsuperscript{19}

\textsuperscript{15} Actions for injunctions usually take two forms, either prohibitive or mandatory injunctions. For prohibitive injunctions, the authority orders the defendant to refrain from acting in a specific manner. For mandatory injunctions, the defendant is ordered to act in a specific manner. See, e.g. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests \textsuperscript{[2009]} OJ L110/30 (Consumer Injunction Directive). Art 1 provides the purpose of this directive as 'to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction...' See also Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts \textsuperscript{[1993]} OJ L95/29 (Unfair Terms Directive), art 7. It requires Member States to ensure that 'in the interests of consumers and of competitors, adequate and effective means exist to \textit{prevent the continued use of unfair terms} in contracts concluded with consumers by sellers or suppliers.' See also Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights \textsuperscript{[2004]} OJ L195/16 (IPR Enforcement Directive), art 9(1)(a) that 'an \textit{interlocutory injunction intended to prevent} any imminent infringement of an intellectual property right, or to forbid...'.

\textsuperscript{16} See for instance Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts \textsuperscript{[2007]} OJ C335/31 (Procurement Remedies Directives), art 2. It speaks of 'interim measures' with the aim of correcting the alleged infringement or preventing further damage to the interests concerned...' IPR Enforcement Directive, art 7(1) concerns 'prompt and effective provisional measures to preserve relevant evidence.' See also CJEU caselaw, where 'it is apparent from settled caselaw that a national court seized of a dispute governed by European Union law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law.' \textit{Križan and Others} (C-416/10) EU:C:2013:8, [107]; \textit{The Queen v Secretary of State for Transport, ex parte Factortrade} (C-213/89) EU:C:1990:257, [21]; \textit{Unibet} (C-432/05) EU:C:2007:163, [67].

\textsuperscript{17} Recurring penalty payments concern a penalty payment, imposed on a recurring basis, when non-compliance continues. For instance, art 11 of the IPR Enforcement Directive provides that 'non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance.' Art 2(1)(c) of the Consumer Injunction Directive provides that 'in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions.' As the CJEU ruled, such an order 'imposing a penalty payment and/or a lump sum is not intended to compensate for damage which may have been caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the infringement that has been established.' \textit{Commission v France} (C-177/04) EU:C:2006:173, [60]; \textit{Commission v France} (C-304/02) EU:C:2005:444, [91].

\textsuperscript{18} Legal costs usually include lawyers’ fees, court fees or costs for involving experts. Those costs deter private parties from initiating legal proceedings. Measures on legal costs can be found in IPR Enforcement Directive, art 14. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment \textsuperscript{[2012]} OJ L26/1 (Environment Impact Assessment Directive), art 11(4) that 'Any such procedure shall be fair, equitable, timely and \textit{not}}
Compared with other measures, the focus on damages actions in EU competition law indicates a compensation-based regime in judicial protection of individual rights that is derived from EU law.  

In practice, victims of EU competition law infringements rarely obtain reparation for the harm suffered. As observed by the Commission, the amount of compensation that these victims forgo is in the range of several billion euros a year.

This failure is attributed mainly to various legal and procedural hurdles in the national rules governing actions for damages before national courts. In lieu of specific EU rules, national rules on civil liability and civil procedure do not work effectively in the specific context of antitrust damages actions. The main difficulties and obstacles concern lengthy proceedings, high legal costs, difficulty in obtaining sufficient evidence, certainty in standard of proof, prohibitively expensive. In a case concerning environmental matters, the CJEU ruled that 'the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.' Edwards and Pallikaropoulos (C-260/11) EU:C:2013:221, [40].

Other national measures may include declarations, unjust enrichment, restitution, and so on. These measures are purely national law issues, and thus will not be included in the present discussions.

Staff Working Paper – GP, para 16. In discussing the various forms of the private enforcement of EU competition rules, the Commission notices that '[d]amages actions are brought against the infringer of the law to seek a monetary award to compensate the victim for the harm he has suffered.' In fact, the path to facilitate actions for damages in private enforcement of EU law shows an enhanced tendency. Under the Procurement Remedies Directives, art 2(1)(c) speaks shortly that Member States shall ensure the power to ‘award damages to persons harmed by an infringement.' Under the IPR Enforcement Directive, art 13 provides that infringers 'who knowingly, or with reasonable grounds to know, engaged in an infringing activity,' shall ‘pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.' The amount of damage calculated could be account ‘appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors.' It could also be set as a lump sum 'on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.' Then, the Damage Directive goes furthest in setting out detailed rules on damages claims. Such rules include disclosure of evidence either from the defendant, a third party or from competition authorities, effect of national decisions, limitation periods, joint and several liabilities, detailed conditions for passing-on and so on.


See the detailed explanation on the estimated amount of compensation that victims of antitrust infringements are currently forgoing ranges from approximately €5.7 billion (via the most conservative assumptions) to €23.3 billion (using the least conservative ones) each year across the EU, in Impact Assessment Report – WP, 14–16.

quantification of damages, and so forth.\textsuperscript{24} With the aim of mitigating these obstacles, the Damage Directive provides detailed rules on disclosure of evidence, effect of national decisions, limitation periods, passing-on defences, and so on, to ensure the right to full compensation.\textsuperscript{25}

Meanwhile, national courts are also under obligation to provide adequate remedies to guarantee this right. ‘The full effectiveness of [art 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [art 101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.’ \textsuperscript{26} The conditions for the exercise of this right to full compensation are, in the absence of applicable EU law, to be determined by national law, subject to the principles of equivalence and effectiveness.\textsuperscript{27}

However, the Damage Directive brings new challenges with regard to the parallel application of both EU law and national laws in damages actions before national courts. Legal scholars have paid considerable attention to such new challenges. Primary issues concern the transposition of the Damage Directive in Member States,\textsuperscript{28} the relationship between private and public

\begin{itemize}
\item \textsuperscript{24} Green Paper, 4–11. See also Staff Working Paper – GP, paras 28–44. For more information on various legal and procedural hurdles in national law, see Ashurst Report, 25–99. For a short conclusion, see Impact Assessment Report – WP, 18–20. See also further discussion in Folkert Wilman (n 9) 259–260.
\item \textsuperscript{25} White Paper, 4–10. See also Impact Assessment Report – WP, 26–51; Staff Working Paper – WP, 13–89.
\item \textsuperscript{26} The Court ruled further that ‘the existence of such a right strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.’ Hence, ‘actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in [EU].’ \textit{Courage v Crehan} (C-453/99) EU:C:2001:465, [26]–[27].
\item \textsuperscript{27} See \textit{Courage v Crehan} (C-453/99), [29] and Staff Working Paper – GP, para 22. For more discussion, see Section 2, Current legal framework, below, concerning national procedural autonomy and the principles of equivalence and effectiveness.
enforcement, and the interplay between leniency documents and damages actions. Moreover, great effort is devoted to substantive aspects, such as umbrella effects, subsidiarity, cross-border effects, indirect purchasers and passing-on defences, and so forth. Such discussion focuses mainly on specific issues, which appear related but fragmentary. It is hardly satisfactory to produce an overall impression of how the Damage Directive as a whole could influence national courts’ practice in damages actions.

As for the procedural aspects in the EU competition law enforcement in general, scholars have provided some analysis into procedural rules in

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Italy’ in Silvia Marino, Lucja Biel, Martina Bajčić, and Vilemmini Sosoni (eds.), Language and Law (Springer 2018), 133–160.


31 See e.g. Carlo Petrucci, ‘Subsidiarity in directive 2014/104/EU on damages actions for breach of EU competition law’ (2017) 23(2) European Public Law 395.


books, published articles and research papers. However, the majority of these articles concentrate on procedural issues in public enforcement, which is in the process of Commission investigations and parties’ appeals to the General Court (‘GC’) and the Court of Justice of the European Union (‘CJEU’ or ‘Court’). Those discussions are relevant, but not the same as the case of private enforcement.

In addition, scholars have discussed procedural rules with a view to discern whether such rules improve or frustrate the right to full compensation, how such rules influence the attribution of liability, and whether such rules impede public enforcement. Take the issue of disclosure as an example. With limited


35 Claudio Lombardi, ‘Causation in Private Enforcement of Competition Law: A Comparative Analysis of Divergent National Approaches.’ (Doctoral thesis) Anno Accademico 2013–2014. University of Degli studi di Trento. Lombardi focuses solely on the issue of causation through a comparative study between EU caselaw and selected national caselaw. As he observed, the issue of causation in competition-law damage actions shows peculiarities that are different from any other tort in either civil or common-law countries. The divergent approaches adopted by different national courts do not impede reaching common aims established by the EU law.


exceptions, many scholars perceive disclosure under the Damage Directive in damages actions before national courts as ineffective, problematic and inconsistent with the goal set out by the Directive. Some scholars resort to arbitration as a more effective way to guarantee the right to full compensation. They draw those conclusions either under specific conditions, such as a leniency programme, or in discussion of specific cases. Even though these studies do not focus solely on procedural aspects, they nevertheless provide conclusions that are interesting for this research.


For example, see Ales Galic, ‘Disclosure of Documents in Private Antitrust Enforcement Litigation’ (2015) 8(12) Yearbook of Antitrust and Regulatory Studies 100. According to Galic, the obligatory transposition of the Directive in disclosure seems positive for Slovenia, under the condition of a reform in disclosure rules in Slovenian civil procedure law.


See Pieter Van Osch, ‘Disclosure of Leniency Documents: Did the Dutch Highest Administrative Court Open Pandora’s Box?’ (2016) 7(10) Journal of European Competition Law & Practice 682; Ingrid Vandenborre, Thorsten Goetz and Andreas Kafetzopoulos (n 36). The latter authors discuss the issue of access to documents through a series of caselaw, such as Heidelberg Cement v Commission (C-247/14 P) EU:C:2016:149; Buzzi Unicem v Commission (C-267/14 P) EU:C:2016:151; AGC Glass Europe and Others v Commission (C-517/15 P) EU:C:2016:21.
1.2 Research questions

This study focuses on the rules of evidence as a part of the procedural aspects of damages actions for EU competition law violations. Traditionally, rules concerning evidentiary issues are a matter of national law. Such procedural rules are more territorially grounded than substantive law.\(^{43}\) They reflect national diversity embedded in long-term judicial practice ‘with strong ideological and historical roots.’\(^{44}\)

The CJEU has clarified that it is for Member States to lay down detailed procedural rules and remedies.\(^{45}\) In practice, it is extremely rare that EU law itself stipulates detailed procedural rules.\(^{46}\) Even if EU law includes certain rules of civil procedure, they are not dependent on the substantive content of the matter. That is, European legal systems usually do not include separate procedural rules for different liability grounds or different types of claims. Thus, for damages actions, in the absence of applicable EU law, it is for the domestic legal system of each Member State to lay down detailed rules of evidence governing damages actions to safeguard the rights derived from arts

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\(^{43}\) Claire Kilpatrick, 'The Future of Remedies in Europe' (n 7) 17–18.

\(^{44}\) Eva Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (OUP 2008), 118. Storskrubb considered evidence as ‘an area of procedural law in which the legal systems are very divergent...One of the crucial differences is the different perspectives, including those with strong ideological and historical roots, as regards the role of the judge and of the parties in collecting evidence.’

\(^{45}\) *Salgoil v Ministero del commercio con l’estero* (C-13/68) EU:C:1968:54, 463. In this case, the CJEU gave those rulings in relation to the issue of jurisdiction. The CJEU ruled that ‘it is for the national legal system to determine which court or tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified.’ See also *Unión de Pequeños Agricultores v Council* (C-50/00 P) EU:C:2002:462, [41]–[42] & [45]. There the CJEU ruled explicitly that ‘it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.’ Moreover, in accordance with the principle of sincere cooperation, national courts are required ‘to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision.’ See the same approach in *Commission v Jégo-Quéré* (C-263/02 P) EU:C:2004:210, [33]–[34].

101 and 102 TFEU, as the principle of national procedural autonomy requires.\(^47\)

However, the CJEU makes it clear that the rules of evidence provided under national law shall not impede the attainment of the objectives of the EU legislation.\(^48\) Moreover, the CJEU has issued rulings in different areas of law and to some extent in the field of competition law relating to rules of evidence based on general principles of EU law.\(^49\) In addition, the Damage Directive provides various types of evidentiary rules to alleviate the burden of proof attributed to the individual claimants. Hence, a careful assessment of those CJEU rulings and of applicable EU law is likely to offer profound insights into the rules of evidence that are applicable in damages actions for private enforcement of the EU competition law.

This study asks which norms of EU law and EU law principles govern evidentiary rules in Member States. Further, it discusses ambiguities and open questions in the entirety of EU law that relate to evidence matters in cases involving breaches of EU competition law. The study also investigates the more general theme of the parallel application of EU and national law, in order to explore how the substance and the goals of EU law affect the application of evidentiary rules in private competition enforcement cases.

1.3 Scope and structure

This study examines evidentiary issues in damages actions involving EU competition law infringement. While both EU competition law and national competition laws are simultaneously applicable, this study analyses EU law in particular. That is to say, it focuses on the application of EU competition law and EU law aspects of damages actions, not on purely national rules. The Damage Directive and its transposition are discussed mainly as matters of EU law.

As a result, this study employs a large quantity of EU caselaw and discusses various evidentiary issues based on the CJEU’s instructions, its rule of reasoning, and its application and interpretation of the EU competition law. Moreover, this study looks beyond competition enforcement caselaw and

\(^{47}\) For more discussion on the principle of national procedural autonomy and its limitations, see Section 2, Current legal framework, below.

\(^{48}\) *H. Gautsch Großhandel* (C-479/12) EU:C:2014:75, [39]–[41]. As the Court ruled, ‘if the issue of the onus of proving ... were a matter for the national law of the Member States, the consequence ... could be that protection would vary according to the legal system concerned.’ As a result, ‘the objective of providing uniform protection with uniform effect throughout the entire territory of the European Union... would not be attained.’ See also *Class International* (C-405/03) EU:C:2005:616, [73]–[74]; *Zino Davidoff and Levi Strauss* (C-414/99 to C-416/99) EU:C:2001:617, [41]–[42].

\(^{49}\) To that effect, see Section 2, Current legal framework, below.
refers to other forms of private enforcement of EU law, such as non-contractual liability of EU and the private enforcement of Intellectual Property (‘IP’) Law. However, caselaw from other fields of EU law has only referential significance.

As to the content, this study limits itself to four main aspects: the current legal framework, the burden of proof, the standard of proof, and access to evidence.

Section 2 discusses the current legal framework. First, it addresses the main principles applicable to antitrust damages actions. Since damages are caused by infringements of EU competition law, EU law principles are applicable and will be relied upon by EU courts to achieve a more coherent application of arts 101 and 102 TFEU. EU law principles, such as the principles of primacy, full effect, direct effect and indirect effect, the principle of national procedural autonomy, the principles of equivalence and effectiveness, and the principle of effective judicial protection, are relevant in the present context. Second, as far as EU competition law is concerned, despite the Damage Directive, other EU laws also come into play, ranging from Treaty provisions and EU caselaw, to Regulation 1/2003, the Damage Directive, the Transparency Regulation, Regulation 773/2004, and various soft law documents.

Section 3 discusses the burden of proof and Section 4 discusses the standard of proof. These two sections are closely intertwined. Section 3 explores the legal burden to prove the infringement and the burden to prove other elements of liability, including the harm and the causal link. Presumptions play a pivotal role in alleviating the overwhelming burden placed on the claimants and increasing judicial efficiency, as well as the balance between efficiency and fairness in enforcement of EU competition law.

While Section 3 addresses who bears the probative onus of adducing evidence, Section 4 concerns the degree of cogency or persuasiveness required of the evidence in order to discharge a burden of proof. Section 4 analyses in detail the constitutive requirements for a damage claim and the level of persuasiveness to which claimants should prove. It includes standards of proof of the infringement (in stand-alone cases only), the harm, and the causal link between the harm and the infringement. The discussion illustrates genuine ambiguities in what those standards of proof are or should be. It remains for the CJEU to issue authoritative interpretations on relevant EU law to clarify these issues.

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Section 5 centres on the crucial issue of access to evidence. This section enquires into the approaches available for claimants to obtain sufficient evidence to support their claims. The claimants have, in principle, two options, either to request direct access from competition authorities or to request access indirectly through national courts. Indirect access might target evidence in the hand of competition authorities, a competent review court, the defendant, or a third party. Concerns arise because many parties are involved and the issue of access to evidence becomes unpredictable and uncertain.

A detailed analysis of how the Damage Directive and other EU rules influence these four aspects in cases heard by national courts answers these research questions. However, the choice of these four aspects neither indicates that the rules of evidence concern only these aspects nor does it mean that the influence of the Damage Directive extends only to these aspects in the sphere of the rules of evidence. Instead, it is merely an intentional choice to have a clearly limited topic in order to produce a sufficiently in-depth analysis.

1.4 Methodology

This study applies a predominantly legal doctrinal approach. This approach gives ‘a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving un-clarities and gaps in the existing law,’\(^{51}\) that is, EU law.

EU law is a *sui generis* legal system and some matters of the theory of EU law need to be observed while carrying out this study. One important matter is the hierarchy of EU law sources. In this supra-national legal order, the Treaties (both the TEU and the TFEU) and general principles of EU law are at the top of the hierarchy,\(^{52}\) and known as primary law.

In the present context, the most important liability grounds for damages actions for EU competition law infringement are arts 101 and 102 TFEU. Art 101 prohibits ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.’ Art 102 prohibits '[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it,' which 'shall be

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\(^{51}\) Jan M. Smits, 'What is Legal Doctrine?' in Rob Van Gestel, Hans-W. Micklitz and Edward L. Rubin (eds), Rethinking Legal Scholarship (CUP 2017) 207.

\(^{52}\) Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU); Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU). Following the entry into force of the Lisbon Treaty on 1 December 2009, the same value was given to the Charter of Fundamental Rights and any international agreements concluded by the EU.
prohibited as incompatible with the internal market in so far as it may affect trade between Member States.’ Only on the basis of either one of these two articles can damages actions for EU competition law infringements be filed.

Notably, some of the fundamental principles of EU law, such as the principle of primacy of EU law and the principle of direct effect were proclaimed by the CJEU without having been codified in the Treaties. Since the Treaties only laid down a limited and open framework, the CJEU clarified the interpretation and general principles of EU law in its rulings, thereby in practice developing EU law further.53

At the next level down in the hierarchy is secondary law, which includes regulations, directives, decisions, recommendations and opinions. 54 Moreover, this study also relies heavily on CJEU caselaw. Under art 267 TFEU, the CJEU holds the supreme authority to interpret EU law. National courts must follow interpretations given by the CJEU in their application of EU law. Hence, such interpretations are of great relevance to this study.

In addition, this study frequently refers to legal scholarship, including books, articles, and working papers. Those works enrich the present discussion, as they communicate various views and arguments on the same or closely related issues.

The legal doctrinal approach views EU law as a system. The system connects its strands with rigorous and comprehensive analysis and develops principles from primary laws.55 Accordingly, the targeted field of law is not only the subject of this inquiry but also provides the normative framework for analysis. This study involves a systematic analysis of the rules of evidence in the existing EU competition law, to ‘clarify ambiguities within rules [and] place them in

53 See e.g. the Sturgeon case, where the Court relied on the general principle of interpretation and the principle of equal treatment to justify its choice of the interpretation of Regulation 261/2004. The Court interpreted this Regulation in view of its objective, which was to strengthen protection for air passengers by redressing damage suffered by them during air travel, situations covered by the regulation must be compared, in particular by reference to the type and extent of the various types of inconvenience and damage suffered by the passengers concerned. Sturgeon and Others (C-402/07) EU:C:2009:716, [40]-[49]. The Court also relied on general principles to review the legality of secondary EU law and international agreements, e.g. Digital Rights Ireland and Seitzinger and Others (C-293/12 and C-594/12) EU:C:2014:238.

54 Art 288 TFEU provides a list of the legal acts. EU institutions may adopt legal acts only when they are empowered by the Treaties. In addition to the powers, the limits of EU’s competences are provided by the principle of conferral, enshrined in art 5(1) TEU, including the principle of subsidiarity and the principle of proportionality.


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logical and coherent structure.\textsuperscript{56} To that end, the legal doctrinal approach does not merely describe EU law in antitrust damages actions. It also explains why procedural rules are provided in the Damage Directive or other EU law and how those rules influence the national judiciary.\textsuperscript{57}

Hence, this analysis not only focuses on the past – how certain rules have been introduced – but also looks into its development and future applications.\textsuperscript{58} Accordingly, this study starts with a well-founded theoretical background, explains the targeted law, traces its interpretations by EU courts, and evaluates its applications in national courts' practices.


\textsuperscript{57} Jan M. Smits (n 51) 8. According to Smits, the doctrinal approach has the function not only to describe law, but also to justify the existence of the law.

2 Current legal framework

2.1 Introduction

Four years after the promulgation of the Damage Directive, all Member States have transposed the rules of the Directive. In dealing with actions for damages, national courts are under obligation to ensure that the EU competition law (arts 101 and 102 TFEU) is effectively applied and enforced in the national legal system. In that regard, ‘when applying [EU law], the national courts are acting as [EU] courts of general jurisdiction.’ In other words, while national courts remain organs of their State, practically ‘they perform functions as if they were, to a limited extent, [EU] institutions.’

Accordingly, national courts must first and foremost respect and comply with all the principles derived from EU law and those established by the CJEU. They must guarantee that arts 101 and 102 TFEU produce a direct effect in relations between contesting parties. Moreover, in the absence of applicable EU law, they must ensure that the principles and obligations related to national procedural autonomy are respected, according to which Member States shall lay down detailed evidentiary rules governing damages actions, respecting the principles of equivalence and effectiveness. Within their judicial power,


60 Damage Directive, recital 1.

61 Tetra Pak Raising SA v Commission (T-51/89) EU:T:1990:41, [42]. The GC elaborated that: ‘They will merely be applying – as they are bound to do by virtue of the primacy and direct effect of the [EU] rules on competition – the principles of [EU] law governing the relationship between [art 101(1) and art 102]. Accordingly, where a national court applies [art 102] to conduct enjoying exemption under [art 101(3)], the uniform application of [EU] law – in this case, [art 101(3)], the provisions implementing it, and [art 102] is fully guaranteed by the procedure for reference of questions of interpretation for a preliminary ruling.’ The role of national courts acting as EU courts refers to their function to apply arts 101 and 102 TFEU. Even when national courts apply national rules based on the Damage Directive, they could still apply arts 101 and 102 TFEU when the EU competition law is infringed.


63 The caselaw of the 1980s establishes that the general principles bind not only EU institutions but also Member States where they apply the EU law. See Klensch v Secrétaire d’État (C-201/85 and C-202/85) EU:C:1986:439, [8]. As to the application of legal principles to national measures, see ERT v DEP (C-260/89) EU:C:1991:254, [43]–[45]. See more discussion in Takis Tridimas, The General Principles of EC Law (OUP 1999), 23.
damages actions as *judicial protection* must be *effective* to achieve corrective justice.\textsuperscript{64}

This section will also discuss applicable EU law in damages actions of EU competition law infringements, with a focus on evidentiary issues. The applicable EU law covers both 'hard law' – which constitutes *jus cogens*, and 'soft law' – which is produced unilaterally by the Commission and is devoid of legally binding force.\textsuperscript{65} In addition, CJEU caselaw also plays an important role.\textsuperscript{66} These legal instruments set out the obligations regarding what national courts shall and shall not do.

2.2 Legal principles

This part discusses the general legal principles of EU law. In the private enforcement of the EU competition law, various legal principles exist to optimise various aims. However, it is impossible to combine all the principles so that each aim would be given full effectiveness. Hence, what is needed is an overall assessment of how a suitable balance among these principles is found.

The result of the balance must ensure the right to full compensation under the Damage Directive and that arts 101 and 102 TFEU achieve full effect. It must also be in accordance with overall EU competition law policy, which guarantees an undistorted market where 'companies compete fairly with each other' and where 'everyone is provided with better quality goods and services at lower prices.'\textsuperscript{67} Meanwhile, the balancing must also ensure that the rights

\textsuperscript{64} To this effect, see Sara Drake, 'Scope of Courage and the Principle of “Individual Liability” for Damages: Future Development of the Principle of Effective Judicial Protection by the Court of Justice' (n 9) 844, 853–855, 858–859. Drake explores the judgement of *Courage v Crehan*, the system of the private enforcement and its applications for the development of the effective judicial protection through CJEU caselaw. She argues that the CJEU’s ruling shall be viewed as authority for a new remedy of a right to damage or individual liability to damage in the EU competition law.

\textsuperscript{65} Zaltina Georgieva, 'Soft Law in EU Competition Law and Its Judicial Reception in Member States: A Theoretical Perspective' (2015) 16(2) German L.J. 223, 226. Identically, Linda Senden defines soft law as 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.' Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112.

\textsuperscript{66} As Tridimas noted, 'It is indicative of the extraordinary influence which the Court of Justice has had on the development of [EU] law that the main principles which define the constitutional structure of the [EU] are not provided for expressly in the Treaty but were 'discussed' by the Court by an indicative process.' According to Tridimas, such principles underlying the constitutional structure of the [EU] include the principles of primacy and direct effect. Takis Tridimas, *The General Principles of EC Law* (n 63) 3.

\textsuperscript{67} Commission, 'Overview: making markets work better' [http://ec.europa.eu/competition/general/overview_en.html].
confferred by EU law to both the claimants and the defendants of damages cases, such as the right to due process, the right to be heard, and the right to impartial trial, must not be undermined. Hence, all the parties must have all the protections required by EU law.

2.2.1 The principles of primacy, full effect, direct effect and indirect effect

Art 3 of Regulation 1/2003 imposes an obligation on the national courts to apply arts 101 and 102 TFEU in parallel with their national competition rules, when infringements have a cross-border effect. The article also introduces a strict supremacy standard: national provisions must comply with the EU interpretations of arts 101 and 102 TFEU when they are applied in parallel with national competition law.68

In a larger sense than just the field of competition law, the parallel application of both EU law and national law as a general EU law matter is governed by the principle of primacy of EU law. This principle means that in case of conflict, EU law prevails over national law.69 It empowers national courts at their own motion to set aside incompatible national rules that might vitiate the full effect of EU law.70 Relevant for competition law cases, the EU law concerns mainly arts 101 and 102 TFEU.

The full effect (or ‘effet utile’) of EU law requires that national courts whose task is to apply the provisions of EU law (here arts 101 and 102 TFEU) must ensure that those rules take full effect and must protect the rights that they confer.71 This principle requires no more than proper application of EU law and adequate remedies for the breach of EU rights. Hence, any national

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69 The Court ruled in Cost a and in subsequent caselaw regarding absolute EU law primacy that all EU law prevails over all national law. See Costa v E.N.E.L. (C-6/64) EU:C:1964:66, [593]–[594]; Amministrazione delle finanze dello Stato v Simmenthal (C-106/77) EU:C:1978:49, [22]–[24]; Factortame (C-213/89), [17]; Lucchini (C-119/05) EU:C:2007:434, [61]; Filippiak (C-314/08) EU:C:2009:719, [81]; Winner Wetten (C-409/06) EU:C:2010:503, [60]. For the principle of primacy on issues concerning damages actions, see Manfredi (C-295/04 and C-298/04) EU:C:2006:461, [39]. However, it is worth noticing that the primacy principle applies in the individual case at hand. It does not affect the validity of the national law provisions in dispute. The national provision in question continues to constitute an integral and valid part of national legal order. This continues as such until it is amended or appealed by competent legislators. To that effect, see Ministero delle Finanze v IN.CO.GE.’90 and Others (C-10/97 to C-22/97) EU:C:1998:498, [21]; Filippiak (C-314/08), [83].

70 See Peterbroeck, Van Campenhout & Gie v Belgian State (C-312/93) EU:C:1995:437, [13]; Lucchini (C-119/05), [21]; Winner Wetten (C-409/06), [56].

71 See Simmenthal (C-106/77), [16]; Factortame (C-213/89), [19]; Courage v Crehan (C-453/99), [19]; Manfredi (C-295/04 to C-298/04), [89]; Donau Chemie and Others (C-536/11) EU:C:2013:366, [22].
provisions or any legislative, administrative or judicial practice that might impair the full effect of EU law must be dis-applied.\textsuperscript{72}

However, the principle of primacy alone is insufficient to provide an efficient enforcement mechanism for EU law in national legal systems. To have primacy only might turn out to be some nominal supremacy but leave the right ‘in practice left outside the gates of national legal order’.\textsuperscript{73} Hence, it needs the principle of direct effect to help justify the penetration of EU law into the national legal order.

The principle of direct effect was established in \textit{Van Gend en Loos}. The C\text{J}EU stated that ‘[i]ndependently of the legislation of Member States, [EU] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. ...These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the [EU].’\textsuperscript{74} Hence, EU law including Treaty provisions are capable by their nature of direct application in national courts of Member States.

Relevant for damages actions, under the principle of direct effect, arts 101 and 102 TFEU produce practical effects: that is, they are a source of directly enforceable rights that may be relied upon by individuals in actions for damages before the national court.\textsuperscript{75} Hence, any individual can rely on the breach of arts 101 and 102 before a national court, no matter if ‘he is a party to a contract that is liable to restrict or distort competition’ or not.\textsuperscript{76} This

\textsuperscript{72} To that effect, see \textit{Simmenthal} (C-106/77), [17] that

\textsuperscript{73} Michal Bobek, ‘The Effects of EU Law in the National Legal Systems’ in Catherine Barnard and Steve Peers (eds.), \textit{European Union Law} (OUP 2014) 159.

\textsuperscript{74} \textit{Van Gend en Loos v Administratie der Belastingen} (C-26/62) EU:C:1963:1, 12. See also \textit{Courage v Crehan} (C-453/99), [19]; \textit{Francovich and Bonifaci v Italy} (C-6/90 and C-9/90) EU:C:1991:428, [31].

\textsuperscript{75} See examples of Treaty provisions used by one individual against another individual or undertaking, so-called ‘horizontal direct effect’: see e.g. art 39 (art 48 ex) concerning the free movement of workers. \textit{Union royale belge des sociétés de football association and Others v Bosman and Others (URBSFA)} (C-415/93) EU:C:1995:463, [93]–[95].

\textsuperscript{76} \textit{Courage v Crehan} (C-453/99), [24]. In this case, the party who seeks damages is also a contractual party to an agreement prohibited under art 101 TFEU.
principle recognizes the inadequacy of the EU enforcement mechanism provided in the Treaty. It proposes a private enforcement mechanism of EU rights before national courts as a vital supplement. As ruled by the Court, ‘[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by [arts 258 and 259 TFEU] to the diligence of the Commission and of the Member States.’

Moreover, the jurisprudence of the CJEU also confirms the direct effect of regulations, such as Regulation 1/2003, the Transparency Regulation, and Regulation 773/2004. They are binding in their entirety and they are directly applicable in all Member States. Such direct applicability requires no implementation or transposition into national legal systems. However, this general application of regulations does not necessarily mean that ‘every provision of every regulation has direct effect in the sense of conferring on private persons rights enforceable by them in national courts.’ Instead, previous CJEU caselaw provides numerous examples where the provisions of regulations confer no direct rights on individuals. Only when regulation provisions are sufficiently clear and unconditional can they be invoked directly against individuals (horizontally) and against Member States (vertically). Such directly effective provisions should receive priority application over conflicting national laws under the principle of primacy of EU law.

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77 See Van Gend en Loos (C 26/62), 13. Accordingly, the Treaty must be interpreted as ‘producing direct effects and creating individual rights’ which national courts must guarantee. See also Courage v Crehan (C-453/99), [23]; Guérin Automobiles v Commission (C-282/95 P) EU:C:1997:159, [39].

78 See art 288 TFEU. ‘To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.’

79 Fratelli Variola Spa v Amministrazione delle finanze dello Stato (C-34/73) EU:C:1973:101, [9]–[11]. Notably, there is a difference between ‘direct applicability’ and ‘direct effect’. Regulations take immediate effect in domestic courts without further transposition (direct applicability), as long as the provisions of the regulation also satisfy other criteria for direct effect (that is, they are sufficiently precise and unconditional). See CJEU caselaw on direct applicability, e.g. Commission v Italy (C-39/72) EU:C:1973:13, [17]. ‘Regulations are, as such, directly applicable in all Member States and come into force solely by virtue of their publication in the Official Journal of the [EU], as from the date specified in them, or in the absence thereof, as from the date provided in the Treaty.’


81 The CJEU has established the criteria for direct effect. The provisions of the Treaty or Regulations must be ‘self-executing’, that is, (a) clear; (b) unconditional in the sense that the provision in dispute does not allow any reservation on the part of states and (c) its implementation requires no further legislative intervention or implementation measures to be adopted by the states. See e.g. Van Gend en Loos (C-26/62), 13.
In addition, in the present context, the direct effect of directives is worth attention. As ‘[a]ll Member States have now transposed the rules of the Directive’ into national legal systems, the quality of implementation matters.

In the case of a clear failure to implement a directive provision into national legislation, national courts may preclude the application of national provisions that are incompatible with the Damage Directive. In that regard, direct effect of the suitable provisions of the Damage Directive could be relied on in order to achieve the goals of the Directive in a concrete dispute. However, this ‘disapplication’ is not obligatory. National courts that hear a dispute between private parties may also choose not to dis-apply the provision of national law, even though that provision is a result of incorrect transposition of the Damage Directive.

In any event, national courts are required to interpret national law, ‘so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.’ This is called the principle of indirect effect, also known as the principle of consistent interpretation.

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82 See original sentence ‘All Member States have now transposed the rules of the Directive.’ on Commission’s official website: <http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html>. As listed on the website, 28 Member States have fully communicated the transposition. The adopted legislation, draft legislation, consultation documents, proposals and so on are publicly available at the national level.

83 Sometimes, the non-application of national law is known as a ‘shield’ against conflicting national law or against conflicting national norms. As a ‘shield’, EU law excludes the application of conflicting national evidentiary rules, but it does not create any new rights. In contrast with the ‘shield’, the principle of direct effect may also function as a ‘sword’, when EU law takes the place of the national law that would otherwise be applicable. See Paul Craig and Gráinne de Búrca, The Evolution of EU Law (2nd edn, OUP 2011), 330–331. The ‘sword and shield’ metaphor is commonly used in the literature to describe the direct effect doctrine. See Tony Downes and Chris Hilson, 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 E.L. Rev. 121. The boundary between these two cases are defined vaguely by the CJEU, as they share the same terminology on a general scale.

84 This ruling was given by a recent caselaw, in Smith (C-122/17) EU:C:2018:631, [49].

85 The principle of direct effect, however, may not always be relevant. When EU law provisions are not clear enough, that is, not ‘self-executing’, this may allow reservation or may require further legislative intervention or implementation measures. To that effect, see Von Colson and Kamann v Land Nordrhein-Westfalen (C-14/83) EU:C:1984:153, [28].

86 Pfeiffer and Others (C-397/01 to C-403/01) EU:C:2004:584, [110]–[114]. See more CJEU caselaw on national courts’ obligation to interpret national law in conformity with EU law, e.g. BMW (C-63/97) EU:C:1999:82, [22]; Océano Grupo Editorial and Salvat Editores (C-240/98 to C-244/98) EU:C:2000:346, [30]; Adidas-Salomon and Adidas Benelux (C-408/01) EU:C:2003:582, [21]; Angelidakis and Others (C-378/07 to C-380/07) EU:C:2009:250, [197]–[198]; Kückkedeveci (C-555/07) EU:C:2010:21, [48]; Dominguez (C-282/10) EU:C:2012:33, [24]; more recently Dl/C-441/14 EU:C:2016:278, [43].

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CJEU caselaw develops this principle further to impose higher requirements on the national courts’ interpretation of relevant national law. In Pfeiffer, the CJEU ruled that national courts must consider not only national law that implements the directive, but also ‘the whole body of rules of national law’ – the entire national legal system.\(^87\) including national caselaw.\(^88\) Therefore, the interpretive obligation requires national courts to read national rules in the entirety of the national legal system, to see whether a particular provision – which may or may not be read in conjunction with other national rules – reaches the same level of protection required by the content and the purpose of the Damage Directive.\(^89\)

Additionally, the principle of interpreting national law in conformity with EU law applies to national laws adopted prior to the Damage Directive.\(^90\) However, no such duty of consistent interpretation is required before the lapse of the implementation period of the Damage Directive.\(^91\)

\(^87\) *Pfeiffer* (C-397/01 to C-403/01), [115]–[119]. See also Adeneler and Others (C-212/04) EU:C:2006:443, [111]; Angelidaki (C-378/07 to C-380/07), [200]; Domínguez (C-282/10), [27]; *Association de médiation sociale* (C-176/12) EU:C:2014:2, [38]; *DI* (C-441/14), [44].

\(^88\) There is only limited CJEU caselaw: *Centrosteel* (C-456/98) EU:C:2000:402, [17]; *DI* (C-441/14), [44].

\(^89\) This also refers indicatively to the limitations of national courts’ interpretations. ‘[T]he obligation on a national court to refer to the content and purpose of a directive when interpreting and applying the relevant rules of domestic law ‘is limited by the general principles of law, particularly [that] of legal certainty ... and that obligation cannot serve as the basis for an interpretation of national law contra legem’. See Kolpinghuis Nijmegen (C-80/86) EU:C:1987:431, [13]; *Adeneler* (C-212/04), [110]; Angelidaki (C-378/07 to C-380/07), [199]; *Impact* (C-268/06) EU:C:2008:223, [100]; *Mono Car Styling* (C-12/08) EU:C:2009:466, [61]; *Association de médiation sociale* (C-176/12), [39]; *DI* (C-441/14), [49].

\(^90\) *Marleasing v Comercial Internacional de Alimentación* (C-106/89) EU:C:1990:395, [8]. However, the possibility to review national law enacted prior to a directive for the purpose of conformity raises difficult questions in terms of legal certainty and non-retroactivity. Private parties who prepare their case based on previous national law must be ensured that national law will not change suddenly or be reinterpreted to their detriment, under the principle of the protection of legitimate expectation. John Tillotson and Nigel Foster, *Text, Cases and Materials on European Union Law* (4th edn, OUP 2003) 177.

\(^91\) *Adeneler* (C-212/04) [115]. The Court ruled that ‘where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired.’ Moreover, the CJEU caselaw in *Inter-Environment Wallonie* shows that even before the implementation period lapses, Member States should not take measure that would seriously compromise the attainment of the objective pursued by the directive. This is the ‘blocking effect’ of directives. See *Inter-Environment Wallonie* (C-129/96) EU:C:1997:628, [45]; *Rieser Internationale Transporte* (C-157/02) EU:C:2004:76, [66]; *Commission v Belgium* (C-422/05) EU:C:2007:342, [62].
2.2.2 The principle of national procedural autonomy

There has been no European code of civil procedure. The default procedures remain national, to which EU law randomly harmonizes certain questions or segments of national procedures. The principle of national procedural autonomy as a general EU law stipulates that it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness).

Relevant for antitrust damages actions, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the exercise of the right to claim compensation for the harm caused by EU competition law infringements. This principle ensures that national

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92 The classic articulation of this principle can be found in the CJEU ruling in *Rewe v Landwirtschaftskammer für das Saarland* (C-33/76) EU:C:1976:188, [5]. Applying the principle of [sincere] cooperation laid down in [art 4(3) TEU], ’it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of [EU] law. ...Accordingly, in the absence of [EU] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.’ Hence, Member States in principle have autonomy in choosing the remedies and relevant procedures to enforce EU law in national courts. To that effect, see also *Comet BV v Produktschap voor Siergewassen* (C-45/67) EU:C:1976:191, [13]; *BRT v SASAM* (C-127/73), [13]–[14]; *Peterbroeck* (C-312/93), [12]; *Courage v Crehan* (C-453/99), [29]; *Safáler* (C-13/01) EU:C:2003:447, [49]. For more discussion, see Alison Jones and Brenda Sufrin (n 3) 1083.

93 Michal Bobek ‘The Effects of EU Law in the National Legal Systems’ (n 73) 165.

94 *Courage v Crehan* (C-453/99), [29]. See also *Rewe* (C-33/76), [5]; *Comet* (C-45/76), [13]–[16]; *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* (C-430/93 and C-431/93) EU:C:1995:441, [17]; *Peterbroeck* (C-312/93), [12]; *Unibet* (C-432/05), [39] & [43]; *Palmisani v INPS* (C-261/95) EU:C:1997:351, [27]; *Commission v Italy* (C-129/00) EU:C:2003:656, [25]; *van der Weerd and Others* (C-222/05 to C-225/05) EU:C:2007:318, [28]; *Impact* (C-268/06), [44] & [46]; *Alassini and Others* (C-317/08, C-318/08, C-319/08 and C-320/08) EU:C:2010:146, [47].

95 See e.g. *Skanska Industrial Solutions and Others* (C-724/17) EU:C:2019:204, [27]; *Kone and others* (C-557/12) EU:C:2014:1317, [24]. It is in *Courage v Crehan* that the Court for the first time acknowledged a right for anyone harmed to claim damages on the basis of the direct effect of arts 101 and 102 TFEU. The CJEU ruled that in the absence of applicable EU rules, it is for the national legal systems to lay down detailed procedural rules governing actions for
authorities in damages actions are consistent with ‘their own jurisdiction whether they apply [EU] rules or their own domestic competition laws.’

In regard specifically to the rules of evidence governing antitrust damages actions, the relevant national rules must neither obstruct initiations of damages claims before national courts, nor impede the right to full compensation as pursued by the Damage Directive. Problematic national rules must be dis-applied in a given dispute. National courts must decide whether the relevant national evidentiary rules are compatible with the principles of equivalence and effectiveness. They must always guarantee that the fundamental rights under EU law are not vitiates.

Despite this, the Court holds the ultimate authority to interpret the principles and to carve out the scope of national rules of evidence. This is achieved through a preliminary ruling mechanism. In case of genuine ambiguities, national courts may request preliminary references regarding how evidentiary rules governing actions for damages should fall into place. The Court then responds by interpreting the principles of equivalence and effectiveness from an EU law perspective.

The fact that actions for damages are initiated based on infringements of EU competition law, or national laws that pursue the same objective as arts 101 and 102 TFEU, renders such actions a matter of EU law. Hence, in the preliminary ruling mechanism, the CJEU is the authority on how civil liability as a breach of the EU competition law or equivalent national provisions would fall into place and under what circumstances it could be said that the right to full compensation under national procedural rules is guaranteed, or otherwise vitiates.

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safeguarding rights that individuals enjoy under the EU law. See Courage v Crehan (C-453/99), [29].


98 Ibid, 102. See art 267 TFEU.

99 As the AG Kokott stated in Kone, recent caselaw shows that as the right to claim compensation has been recognized among Member States, the focus now has shifted from the question of whether compensation is to be granted to the question of how compensation shall be granted as dictated by national law under this principle, in particular concerning jurisdiction, procedure, rules of evidence, time limits and the furnishing of proof. Opinion of AG Kokott in Kone (C-557/12) EU:C:2014:45, [23]. See also Courage v Crehan (C-453/99), [29]; Manfredi (C-295/04 to C-298/04), [62], [64] and [77]; Pfeiderer (C-360/09) EU:C:2011:389, [30]; Donau Chemie (C-536/11), [25].
This mechanism provides the Court with opportunities to intervene in and regulate the choices of national evidentiary rules. The scope of this intervention depends on how the questions are phrased.\textsuperscript{100} Generally, the answer is that certain national evidentiary rules are either compatible or incompatible with the principle of equivalence or the principle of effectiveness. In case of incompatibility, the Court precludes certain evidentiary rules, to the extent that they must be dis-applied in actions for damages for EU competition law violations.\textsuperscript{101} Subsequently, national courts must apply alternative national evidentiary rules or at least interpret the existing rules in a different way that is compatible with the principles.

In principle, the CJEU’s responses are addressed solely to the referring court and are binding on a case-specific basis. These rulings nevertheless become applicable EU law on similar questions for courts in national jurisdictions.\textsuperscript{102} This further reinforces the judicial power of the Court’s intervention.

However, the Damage Directive itself only covers some issues concerning the rules of evidence, and the preliminary ruling system is by its nature not a system that can be relied on in order to develop comprehensive and detailed law quickly.\textsuperscript{103} There are already various constraints on the working of the preliminary reference system. For example, in the procedure before the Court, parties have no chance to comment on others’ observations and on the opinion of the Advocate General (‘AG’). More problematic is the Court’s language

\textsuperscript{100} Pieter Van Cleynenbreugel, ‘Embedding Procedural Autonomy: The Directive and National Procedural Rules’ (n 97) 102. According to Van Cleynenbreugel, to what extent the CJEU may intervene depends on the ways in which questions have been phrased or on the extent to which the Court decides to rephrase the questions from those submitted by the national courts. See similar arguments in Michal Bobek, ‘Why There is No Principle of “Procedural Autonomy” of the Member States’ in Hans-W. Micklitz and Bruno De Witte (eds.), \textit{The European Court of Justice and the Autonomy of the Member States} (Intersentia Publishing 2012), 315.

\textsuperscript{101} The ‘disapplication’ or so-called ‘negative obligations’ are different from ‘positive obligations’ construed under the principle of effective judicial protection. According to Pieter Van Cleynenbreugel, positive obligations imposed on national courts/judges/legislatures are specific obligations to act in certain way and to replace the former incompatible rules. Such obligations are construed on the basis of the \textit{principle of effective judicial protection} rather than the \textit{principle of effectiveness}. To that effect, see Walter Van Gerven (n 37). ‘Negative obligations’ imply a transformation of national law and therefore require some actions from national legal order to find ‘alternative’ measures that comply with EU law requirements. See Pieter Van Cleynenbreugel, ‘The Confusing Constitutional Status of Positive Procedural Obligations in EU Law, Observations on Effective Judicial Protection and National Procedural Autonomy in the Wake of Bockus’ (n 37) 103.

\textsuperscript{102} See e.g. \textit{Milac v Hauptzollamt Freiburg} (C-28/76) EU:C:1976:155.

\textsuperscript{103} Pieter Van Cleynenbreugel, ‘Embedding Procedural Autonomy: The Directive and National Procedural Rules’ (n 97) 103. Cleynenbreugel argues that the Court has intended to, but has failed to develop a clear, coherent and predictable private enforcement system across Member States’ legal orders almost 15 years after \textit{Courage v Crehan}.
regime, where all languages are treated as being equal.\textsuperscript{104} As a result, translation is required at five separate stages of the procedure before the Court: the reference, the written observation, the report for the hearing, the AG’s opinion, and the judgment.\textsuperscript{105} Such inherent deficiencies must also be considered.

Nonetheless, it remains important that the Court’s interpretations of EU law and general principles are coherent, to ensure the intended objectives of the Damage Directive and the full effect of arts 101 and 102 TFEU. So far, the Court’s attempts at harmonization by means of EU legislative activities remain selective and piecemeal.\textsuperscript{106} How and to what extent the Court’s responses could shape the application of national evidentiary rules is yet to be seen.

2.2.3 The principles of equivalence and effectiveness

As previously discussed, EU law does not offer a set of ‘specific’ rules of evidence in private enforcement of EU competition law. The Damage Directive \textit{per se} does not determine what evidentiary rules and considerations are sufficient to safeguard the objectives of the Damage Directive. According to the principle of national procedural autonomy, it is for the national legal system to designate relevant courts and to lay down detailed evidentiary rules governing damages actions to safeguard rights derived directly from EU law.\textsuperscript{107} However, these designated rules shall not be ‘less favourable than those governing similar domestic actions (principle of equivalence) and [shall] not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).’\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{104} See the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012, arts 36–42.
\item \textsuperscript{105} In addition, there are further practical constraints of time, labor, budget, and technical resources. For more discussion, see David Edward, ‘The Preliminary Reference Procedure: Constraints and Remedies’, a paper delivered at the CCBE/College of Europe Colloquium, \textit{Revising the European Union’s Judicial System, Assessing the Possible Solutions, Revising the Preliminary Ruling Mechanism}, Bruges, 19–20 November 1999. As to the timing, the form and content, judicial cooperation of preliminary ruling system, see Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings [2016] OJ C439/1, (Preliminary Ruling Recommendation).
\item \textsuperscript{106} See further discussion in Nina Bućan Gatta, \textit{The Enforcement of EU Competition Rules by Civil Law} (Maklu 2013), 31. See also Bernhard Hofstötter, \textit{Non-Compliance of National Courts, Remedies in European Community Law and Beyond} (T.M.C. Asser Press 2005) 20.
\item \textsuperscript{107} \textit{Courage v Crehan} (C-453/99), [29].
\item \textsuperscript{108} \textit{Courage v Crehan} (C-453/99), [29] and the caselaw cited. See also Opinion of AG Mazák in \textit{Pfeifferer} (C-360/09) EU:C:2010:782, [23]; \textit{Unibet} (C-432/05), [42]. Such designed rules include rules concerning the admissibility of the evidence. See e.g. \textit{Met-Trans and Sagpol} (C-310/98 and C-406/98) EU:C:2000:154, [29], where any type of evidence admissible under national law in similar proceedings is in principle admissible under cases concerning
\end{itemize}
The principle of equivalence

This principle stipulates that ‘the provisions concerned are not less favourable than those governing actions for damages based on an infringement of national competition rules.’ Compliance with this principle requires that national law shall apply to EU competition law infringements in the same manner as it does to national infringements ‘having a similar purpose and cause of action.’ While the principle itself and its rationale are quite clear, the difficulty lies in its application.

There are usually pre-existing national evidentiary rules governing damages actions in domestic competition law. Under the principle of equivalence, national courts shall at least apply those rules to damages actions of EU competition law infringements.

Moreover, the Damage Directive also provides evidentiary rules that provide a minimum level of protection for individual claimants. When those rules are incorporated into national laws, national courts must ensure the correct application of national law and ensure at least the minimum level of protection intended by the Damage Directive. It follows that national courts shall not apply national rules governing damages actions for EU competition law violations of the EU competition law. See also Rubach (C-344/08) EU:C:2009:482, [28]; Budějovický Budvar (C-478/07) EU:C:2009:521, [86]-[89; Speranza (C-35/09) EU:C:2010:393, [41]-[48]. Thus, ‘witness evidence is admissible only in exceptional cases, provided that such a provision applies also to similar domestic actions and that it does not prevent individuals from asserting rights which they derive from the direct effect of Community law.’ Charalampos Dounias v Ypourgio Oikonomikon (C-228/98) EU:C:2000:65, [68]-[72].

109 Manfredi (C-295/04 to C-298/04), [72]; Dounias (C-228/98), [70].

See Opinion of AG Jääskinen in Donau Chemie (C-536/11) EU:C:2013:67, [32]. See also Levez v Jennings Ltd (C-326/96) EU:C:1998:577, [41]; Preston and Others (C-78/98) EU:C:2000:247, [49] & [55]; Pontin (C-63/08) EU:C:2009:666, [45]; Rosado Santana (C-177/10) EU:C:2011:557, [90]; Littlewoods Retail (C-591/10) EU:C:2012:478, [31]. At the EU level, when cases are brought before EU courts for a preliminary ruling or an appeal regarding whether certain rules of evidence do not comply with EU law on the basis of the principle of equivalence, EU caselaw establishes that account must be taken of ‘the role of the provision in the procedure, viewed as a whole, of the content of that procedure and of its special features.’ See Opinion of AG Jääskinen in Donau Chemie (C-536/11), [33], citing Rosado Santana (C-177/10), [90] and the caselaw cited therein. At the national level, when cases are brought before national courts concerning actions for damages in the breach of EU competition law, national courts must consider ‘whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics’ Littlewoods (C-591/10), [31].

infringements, if they are less favourable than those governing damages actions for national competition law are.\textsuperscript{112} 

As a result, national courts must apply whichever rules are more favourable to the party claiming the right to full compensation, but still observe the EU law in terms of the position of defendants. This principle improves the overall level of protection among various Member States. Meanwhile, national courts are not prevented from adopting evidentiary rules that offer a higher level of protection to claimants to ensure their right to claim full compensation and other procedural rights.\textsuperscript{113} 

However, this principle cannot be interpreted ‘as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions ... in breach of [EU] law.’\textsuperscript{114} The Court leaves to national courts the interpretive obligation to determine whether the principle of equivalence has been observed and complied with in a given dispute, because the national court ‘alone has direct knowledge of the procedural rules governing actions’ in a specific field.\textsuperscript{115} It follows that a degree of discrepancy in treatments between EU and national damages actions is tolerable, to the extent that such discrepancy is objectively justified.\textsuperscript{116} 

\textsuperscript{112} This is the case in \textit{Manfredi}, where the CJEU referred to this principle by saying that it must be possible to award exemplary or punitive damages for damage actions founded on EU competition rules, if such awards are available in similar domestic actions. \textit{Manfredi} (C-295/04 to C-298/04), [99]. 


\textsuperscript{114} \textit{Edilizia Industriale Siderurgica Srl v Ministero delle Finanze} (C-231/96) EU:C:1998:401, [36]; \textit{Ministero delle Finanze v Spac SpA} (C-260/96) EU:C:1998:402, [20]. These two cases concern actions for repayment of charges or levies in breach of EU law. See the identical interpretation of this principle in the context of employment law in e.g. \textit{Levez v Jennings} (C-326/96), [41]–[42]; \textit{Pontin} (C-63/08), [45]. 

\textsuperscript{115} \textit{Levez v Jennings} (C-326/96), [43]–[44]. While leaving the interpretive obligation to national courts, the Court merely notes that ‘the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.’ Here leads back to the principle of indirect effect (i.e. consistent interpretation). 

\textsuperscript{116} \textit{Jensen and Korn- og Foderstofkompagniet v Landbrugsministeriet} (C-132/95) EU:C:1998:237, [50]–[51].
As a result, setting the Damage Directive as the bottom line, national legislators still enjoy plenty of leeway to incorporate the evidentiary rules provided in the Damage Directive as long as the right to full compensation is guaranteed. This has a double meaning. For rules favouring damages claimants, the higher level of protection offered by the national courts shall not 'lead to unjust enrichment,'\(^{117}\) or 'lead to victims receiving damages higher than the entire loss suffered.'\(^{118}\) For rules favouring defendants, national legislators shall not grant overly broad protection to defendants so that it is virtually impossible or excessively difficult for claimants to adduce sufficient evidence. These two outcomes shall be guaranteed at the same time.

**The principle of effectiveness**

In addition to the principle of equivalence, national evidentiary rules must not make it virtually impossible or excessively difficult to exercise the rights guaranteed to the individuals by EU law\(^{119}\) in damages actions.\(^{120}\) Therefore,

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\(^{117}\) See **Courage v Crehan** (C-453/99), [30]. In the context of competition law, 'unjust enrichment' was discussed by noting that '[E]U law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.' See also **Manfredi** (C-295/04 to C-298/04), [94]. In other areas of law, unjust enrichment has been defined as a part of discussion concerning charges unduly levied to the undertaking. See e.g. **Just** (C-68/79) EU:C:1980:57, [26]. Similarly, the notion of unjust enrichment has been described as 'to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge' in **Lady & Kid A/S and Others v Skatteministeriet** (C-398/09) EU:C:2011:540, [19]. However, in the end, what constitutes unjust enrichment in the competition law context can still be open to interpretation.

\(^{118}\) Impact Assessment Report – WP, 23. This would be the situation stated in the Damage Directive, art 3(3), in which the full compensation 'shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.'

\(^{119}\) In **Rewe** the Court established that '[t]he position would be different only if the conditions ... made it impossible in practice to exercise the rights which the national courts are obliged to protect'. See **Rewe** (C-33/76), [5]. See also **Amministrazione delle finanze dello Stato v San Giorgio** (C-199/82) EU:C:1983:318, [12] and [14]. This has been further confirmed in **Francovich** (C-6/90 and C-9/90), [43]. The Court applied this principle in case of procedural conditions for damages provided by national law that were so stringent such that they held 'the substantive and procedural conditions for ... damage laid down by the national law of the Member States ... must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.' Hereby, the damage claims for the breach of EU law provided under national law must at least be operable for the rights conferred by the EU law to be exercisable.

\(^{120}\) For instance, in **Manfredi**, the CJEU ruled that the **limitation period** for seeking compensation for harm caused by competition law infringements should not render it practically impossible or excessively difficult for claimants to exercise the right. (C-295/04 to C-298/04), [82]. Moreover, the CJEU ruled again that the principle of effectiveness should applied to the **determination of the extent of the damages**, which shall include not only actual
restrictions on evidence that are “critical to the claimant’s case” are incompatible with *effet utile*”. In other words, a sufficient amount of evidence must be available to private parties in order to facilitate damages actions and guarantee the full effect of EU competition law.

In terms of evidentiary issues, CJEU caselaw has relied on this principle to preclude national rules that exclude all evidence other than documentary evidence that establish presumptions to the applicants’ disadvantage, shift the burden of proof onto the person bringing the action to prove the condition of causality, and so on. The Court further indicates that, in

loss (*damnum emergens*) but also loss of profit (*lucrum cessans*) plus interest. *Manfredi* (C-295/04 to C-298/04), [95]. According to the Court, in the context of economic or commercial litigation, to exclude loss of profit would render the reparation of damage practically impossible. (C-295/04 to C-298/04), [96] and the caselaw cited therein. Despite various issues, the CJEU’s rulings clearly confirm the necessity to provide such a mechanism, namely actions for damages, to enable private parties to bring their claims directly before national courts. However, that does not in any case create a new remedy to ensure the observance of the EU competition law. Rather, this action intends to bolster those already laid down in national law. Thus, the principle of effectiveness creates no new remedy and private parties must rely on the framework established in the Member States.

121 Opinion of AG Jääskinen in *Donau Chemie* (C-536/11), [49] and the caselaw cited therein. The principle of ‘*effet utile*’ is discussed problematically in connection with the principle of effectiveness in *Donau Chemie*. The ‘*effet utile*’ principle guarantees the full effectiveness of the EU law. The principle of effectiveness, however, concerns more than just the context of procedural rules under the EU competition law. In the present context, ‘*effet utile*’ refers to the effectiveness of the EU competition law and that of the Damage Directive itself. ‘Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [EU] law ... are incompatible with those requirements which are the very essence of Community law’. *Simmenthal* (C-106/77), [22]. This rule of reason applies here. If national procedural rules are incapable of equipping individual claimants with a sufficient amount of evidence to initiate a case, it substantively denies the right to the court as part of effective judicial protection. As a result, such procedural rules actually prevent national courts from having jurisdiction on actions for damages in EU competition law infringements. This further impairs the ‘*effet utile*’ of the EU competition law and the ‘*effet utile*’ of the Damage Directive.

122 *San Giorgio* (C-199/82), [11]–[15]. See also *Dounias* (C-228/98), [71]. The Court ruled in the latter case that if the national court prevents the party to benefit from *witness evidence* that is essential in the case to prove the existence of the damage, the principle of effectiveness is vitiates.

123 *Weber’s Wine World and Others* (C-147/01) EU:C:2003:533, [113]–[114]; *Italy* (C-129/00), [35]–[40].

124 *Gemeinde Altrip and Others* (C-72/12) EU:C:2013:712, [52]. In this case, the CJEU interpreted art 11(1) of the Environment Impact Assessment Directive that the impairment of a right could not be excluded unless the authority hearing the case relies on evidence provided by the developer or the competent authorities and, more generally, on the casefile documents submitted to that authority and that the contested decision would not have been different without the procedural defect invoked by that applicant. This effect should be achieved without making the burden of proof fall on the applicant to prove the condition of causality. The condition of causality is between the procedural defect invoked and the content of the final contested decision. See *Gemeinde Altrip* (C-72/12), [47]–[53].
compliance with this principle, the challenged national evidentiary rules shall be analysed ‘by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.’

In addition, ‘considerations such as legal certainty, sound administration of justice, and the orderly conduct of proceedings by the court,’ shall also be taken into account. In the national legal context, this balance of interests between, on one hand, the enforceability of the EU competition law and, on the other, procedural safeguards under national evidentiary rules, must be carried out by national courts on a case-by-case basis.

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125 van Schijndel (C-430/93 and C-431/93), [19]; Peterbroeck (C-312/93), [14]. These two cases, addressing identical words in both rulings, are in fact quite different. In van Schijndel, earlier instances already prove the opportunity for individuals to apply EU law of their own motion. In Peterbroeck, the Belgian procedural rules denied the possibility for Belgian courts to apply EU law of their own motion. Notably, national courts are the authority to say whether a national procedural rule offers such a possibility and whether in a given context it is ‘excessively difficult’ or ‘virtually impossible’ to exercise EU law rights.

126 George Cumming and Mirjam Freudenthal, Civil Procedure in EU Competition Cases before the English and Dutch Courts (Kluwer Law International 2010) 9. See the weighting of these considerations in Donau Chemie: The applicant (the Verband Druck & Medientechnik) lodged an application seeking access to the file relating to judicial proceedings brought by the Bundeswettbewerbsbehörde (Austrian Federal Competition Authority) against Donau Chemie AG and other defendants. In considering whether to grant access to the file, the Court addressed the importance of weighting the factors: ‘the national courts must weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information’. In addition, the result of the weighting must not undermine the effective application of art 101 TFEU and the rights conferred by competition law provisions. Donau Chemie (C-536/11), [30]–[31]. This approach remains in line with Peterbroeck (C-312/93), [14] and Pfeiderer (C-360/09), [30], and what lies behind the weighing-up of each competing interest is the moderation of competition policy in terms of private enforcement. The Court continued to interpret a condition that renders it impossible or, at the very least, excessively difficult to guarantee the right to compensation, is when ‘parties have no other way of obtaining that evidence’ and a refusal to grant would render the right to compensation nugatory. Donau Chemie (C-536/11), [32]. Moreover, except for the consideration of interests justifying disclosure of information, the Court also considered the protection of information. The Court clearly rejected a rule of generalized access that would adversely affect public interests such as the effectiveness of anti-infringement policies or the effectiveness of leniency programme. Donau Chemie (C-536/11), [33], [47]–[48]. For more discussion on access to files, see Section 5, Access to evidence.

127 Donau Chemie (C-536/11), [34]–[35]. Similarly, the principle of effectiveness has been applied to national rules on limitation periods. The Court ruled that the limitation periods must be reasonable. Recheio – Cash & Carry (C-30/02) EU:C:2004:373, [17]–[22]; i-21 Germany (C-392/04 and C-422/04) EU:C:2006:586, [58]–[64]. Moreover, the reasonableness shall be examined in light of the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration.’ Sopropé (C-349/07) EU:C:2008:746, [40]; see also Pontin (C-63/08), [48]; Rosado Santana (C-177/10), [93].
2.2.4 The principle of effective judicial protection

The right to effective judicial protection is enshrined in EU law both as an obligation for Member States (art 19(1) TEU) and as a right guaranteed to individuals (art 47 of the Charter). In practice, the CJEU has consistently held that the principle of effective judicial protection is a general principle of EU law. The principle provides that 'while it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, EU law requires that ‘the national legislation does not undermine the right to effective judicial protection.’ What's more, it is for

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128 Art 19(1) TEU reads, ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’ In terms of it being an obligation for Member States, see e.g. Francovich (C-6/90 and C-9/90), [33]–[37]. In the judgment, the Court created a ‘universal civil obligation’ that ‘it is a principle of [EU] law that the Member States are obliged to make good loss and damage caused to individuals by breaches of [EU] law for which they can be held responsible.’ See also Veljko Milutinovic, The ‘Right to Damages’ under EU Competition Law: From Courage v. Crehan to the White Paper and Beyond (Kluwer Law International 2010), 62.

129 Art 47 of the Charter provides that ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article’. Charter of Fundamental Rights of the European Union [2012] OJ C326/391. See CJEU case-law, e.g. DEB (C-279/09) EU:C:2010:811, [30]–[31]; Order of Chartery (C-457/09) EU:C:2011:101, [25]; Samba Diouf (C-69/10) EU:C:2011:524, [49]; Sotage and Others (C-439/14 and C-488/14) EU:C:2016:688, [46]; Sacko (C-348/16) EU:C:2017:591, [31].


131 Unihet (C-432/05), [42]. See also Verhollen and Others v Sociale Verzekeringbank Amsterdam (C-87/90, C-88/90 and C-89/90) EU:C:1991:314, [24]; Safaleru (C-13/01), [50]. However, the definition of the principle of effectiveness judicial protection has never been agreed on. It agreed to the extent that this principle shall ensure effective legal protection in the fields covered by EU law. Instead of pursuing a clear definition, legal scholars have widely discussed the generation typology. See e.g. Sara Drake, ‘Scope of Courage and the Principle of “Individual Liability” for Damages: Future Development of the Principle of Effective Judicial Protection by the Court of Justice’ (n 9) 845–847. Monica Claes (n 62) 11. These two documents refer to Deirdre Curtin and Kamil Mortelmans, ‘Application and Enforcement of Community Law by Member States: Actors in Search of a “Third Generation Script”’ in Deirdre Curtin and Ton Heukels (eds.), Institutional dynamics of European integration: Essays in honour of Henry G. Schermers Vol 2, (Dordrecht, Nijhoff 1994) 423, who in turn refer to J Mertens de Wilmars, ‘L’efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers’

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the Member States ‘to establish a system of legal remedies and procedures which ensure respect for that right.’

The CJEU has extended the application of this principle to the protection of individuals in general, and in EU competition law cases. The principle enables the Court to impose positive procedural obligations on national legal orders. This positive requirement reveals a more demanding protection than the classical formula of practical impossibility or excessive difficulty.

(1981) CDE 379. According to these scholars, the ‘first generation’ caselaw confirms the principle of direct effect and the principle of supremacy, which lays the foundation for the EU legal order. The ‘second generation’ concerns the principle of national procedural autonomy, subject to the principles of equivalence and effectiveness. Cases of this generation are those relating to the procedural and remedial rules. The Court’s approaches based on the principle of national procedural autonomy provided that the principles of equivalence and effectiveness be observed. The parameters were laid down in *Rewe* (C-33/76) and *Gomet* (C-45/76). The ‘third generation’ embraces a wider scope, where the Court introduces a new remedy or seeks to lay down ‘uniform Community rules.’ In this generation, key features of the principle of effective judicial protection are introduced, including the right to defence, the right to interim relief, and an action for damages where there is state liability. The ‘action for damage for state liability’ was introduced in *Francovich* (C-6/90 and C-9/90), [33]–[34]. The Court created a new remedy to ensure the rights conferred under EU law. Some scholars argue that the *Francovich* judgment indicates a new phrase, ‘selective deference’, as being selective as to when the Court intervenes radically by its own initiative. See Takis Tridimas, ‘Liability for Breach of Community Law: Growing Up and Mellowing Down?’ (2001) 38 CMLR. 301, 303. Anthony Arnull, *The European Union and its Court of Justice* (OUP 1999) 143–189. However, the existence of this ‘fourth generation’ remains in debate.

132 *Uniibet* (C-432/05), [42]. See also *Pequeños* (C-50/00 P), [41].


134 In *BRT v. SABAM*, the Court established a ‘horizontal direct effect’ of the competition rules, where arts 101 and 102 TFEU can be relied upon by individuals directly before national courts, not only against Member States, but also against other individuals. Even though the Court stated the possibility for private parties to come under the provision on the condition that they must be entrusted with the operation of... by an act of the public authority’, it nonetheless paves the way for the beginning of private enforcement of the EU competition law. *BRT v. SABAM* (C-127/73), [20].


136 Opinion of AG Jääskinen in *Donau Chemie* (C-536/11), [48]. In the AG’s opinion, national remedies must be accessible, prompt, and reasonably cost effective. However, the principle of effectiveness essentially addresses negative obligations that incompatible national rules must be dis-applied. Apparently, an accessible, prompt and reasonably cost-effective remedy demands more than dis-application under the principle of effectiveness. See also Sacha Prechal and Rob Widdershoven (n 133) 39–40. In fact, recent CJEU caselaw on the relationship between the principle of effectiveness and the principle of effective judicial protection is rather unclear. For instance, in some cases, the Court repeatedly held that ‘the requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure effective judicial protection of an individual’s rights under [EU] law.’ See *Alassini* (C-
In this regard, national evidentiary rules must not jeopardize private parties’ right to an effective remedy,\(^{137}\) and what is more, they ‘should be capable of being effectively relied upon by the persons concerned before national courts.’\(^{138}\) The reliability guarantees ‘an actual or potential effect on the existence, degree and enforceability of remedies’ to enforce rights arising from EU law in compliance with EU competition law requirements.\(^{139}\)

Evidentiary rules governing damages cases must guarantee the right of defence under the principle of effective judicial protection.\(^{140}\) The guarantee of the right of defence requires that both parties be afforded the opportunity to effectively make known their views on the truth and the relevance of the facts and circumstances alleged, as well as the documents used to support their

317/08, C-318/08, C-319/08 and C-320/08), [49]; similarly, Impact (C-268/06), [47]. Such rulings seem to indicate that the principle of effectiveness is ‘absorbed’ by the principle of effective judicial protection. However, the Court also ruled that ‘for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection.’ Mono Car Styling (C-12/08), [49]; Sañadero (C-13/01), [50]; Verhollen (C-87/90, C-88/90 and C-89/90), [24].

\(^{137}\) Opinion of AG Mazák in Pfeiderer (C-360/09), [37]. AG Mazák stated that ‘it should not ... deny an allegedly injured party access to documents in its possession which could be produced in evidence in order to assist the latter in establishing a civil claim ... as this could de facto interfere with and diminish that party’s fundamental right to an effective remedy’. Thus, this principle sets out to control whether a particular national remedy is appropriate to provide adequate protection of the rights prescribed under a directive.

\(^{138}\) Marshall v Southampton and South West Hampshire Area Health Authority (‘Marshall II’) (C-271/91) EU:C:1993:335, [22]. As confirmed by the CJEU, national legislatures are under an obligation to establish a system of legal remedies and procedures respecting that right.


\(^{140}\) Otis and Others (C-199/11) EU:C:2012:684, [48]. As confirmed by the CJEU in Otis, the right to defence forms an essential part of the principle of effective judicial protection. The following aspects of the right to defence (in the main text) are discussed in association with the rules of evidence in the private enforcement of the EU competition law. Other aspects may include e.g. a right to be heard, which is required in arts 2 and 3 of Regulation 2842/98. For example, in Transocean Marine Paint, the Court required ‘an undertaking be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission.’ Transocean Marine Paint Association v Commission (C-17/74) EU:C:1974:106, [15]. Similarly in Hoffmann-La Roche, the Court ruled that ‘in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity ... to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim.’ (C-85/76) EU:C:1979:36, [11]. See also National Panasonic v Commission (C-136/79) EU:C:1980:169, [21]; Moch Domsjo v Commission (T-352/94) EU:T:1998:103, [63], [73]–[74]; ThyssenKrupp v Commission (C-65/02 P and C-73/02 P) EU:C:2005:454, [92]; Dalmine v Commission (C-407/04 P) EU:C:2007:53, [44].
claims regarding the infringement and the harm. In antitrust damages actions, this guarantee may extend to the protection of confidential information, access to the file, the right to evidence, as well as the privilege against self-incrimination. These issues will be discussed extensively in the following sections where relevant.

In addition to the right of defence, evidentiary rules in damages actions shall also guarantee the principle of equality of arms, which manifests itself as a corollary of the right to a fair trial. It implies that each party must be provided with a reasonable opportunity to present their case, including their evidence, before national courts, without being placed at a substantially disadvantaged position vis-a-vis the other party. This equal opportunity must be embodied in various aspects of the rules of evidence in national law. This guarantee is of crucial importance when a private party bears an overwhelmingly heavy burden of proof that prohibits him from providing adequate evidence to establish a damage claim. That places him at a substantial disadvantage compared with his opponent, who usually has all the relevant evidence on hand and who is capable of anti-competitive behaviour affecting trade between Member States.

141 Hoffmann-La Roche (C-85/76), [14], and Toshiba v Commission (C-180/16 P) EU:C:2017:520, [30]. Art 27(2) of Regulation 1/2003 provides that ‘the rights of defence of the parties concerned shall be fully respected in the proceedings.’


146 Sweden and Others v API and Commission (C-514/07 P, C-528/07 P and C-532/07 P) EU:C:2010:541, [88] and the caselaw cited therein.

147 See e.g. Katz (C-404/07) EU:C:2008:553, [49]; Eurofood IFSC (C-341/04) EU:C:2006:281, [66].

148 This has been noticed for instance in Otis. AG Cruz Villalón observed that the aim of this principle intends to 'ensure a balance between the parties to the proceeding, thus
In the Damage Directive, rules addressing the principle of equality of arms are set out to achieve the objectives of the Directive. Evidently, disclosures of evidence from the opposing party, from third parties, and from competition authorities have been provided to compensate for the imbalance between contesting parties and to help establish damages claims. Such rules not only ensure a more level playing field among contesting parties but also create a harmonized level of protection among Member States. This fosters undistorted competition and removes obstacles to the proper functioning of the internal market.\textsuperscript{149}

2.2.5 Intermediate remarks

In damages actions for EU competition law infringements, Member States are required to incorporate the rules provided in the Damage Directive into their national legal systems. These Directive-based national rules are mandatory when the case at hand falls within the scope of arts 1 and 2(4) of the Damage Directive. Only in the absence of mandatory EU law does the principle of national procedural autonomy apply. However, the CJEU may still limit procedural autonomy by interpreting the principles of equivalence and effectiveness.

At least in damages actions for EU competition law violations, national courts must apply national evidentiary rules in compliance with those principles and relevant rulings established by the CJEU. Such compliance draws the boundary between damages actions for EU competition law violations and other damages actions. In other words, national courts are under specific obligation to observe EU law and CJEU caselaw and to ensure the full effect of arts 101 and 102 TFEU when competition infringements have a cross-border effect.

2.3 EU law and EU caselaw on actions for damages

Various EU-level legislative documents and soft-law documents exist that are relevant to damages actions for EU competition law infringement. To start with, the most important EU law applicable to damages actions are arts 101 and 102 TFEU. These two articles produce a direct effect in relations between individuals and create rights and obligations that national courts must enforce.\textsuperscript{150} These two articles form the legal basis for damages claims caused by EU competition law infringements.

\textsuperscript{149} Damage Directive, art 1.

\textsuperscript{150} Damage Directive, recital 3.
Moreover, hard law,¹⁵¹ such as Regulation 1/2003, the Damage Directive and the Transparency Regulation, addresses different issues relevant to antitrust damages actions.¹⁵² These legal instruments are binding and they provide uniform treatment for specific issues. They are applicable EU law and thus must be complied with.

In addition, soft-law documents are also introduced to provide guidance on specific aspects that may be relevant to antitrust damages actions. Such documents include recommendations, guidelines, notices, and communications. These documents are not binding and do not provide predictability or a reliable framework for actions. They are merely of reference value.

**EU caselaw**

Whilst it is for national courts to apply and to enforce EU competition law, doubts and confusions may arise in practice. National courts may refer the issue to the CJEU to clarify genuine ambiguities by interpreting relevant EU law. Notably, national courts exclusively exercise the initiation to submit a preliminary reference.¹⁵³ It is for the national court to determine the content of the questions referred, with the necessary factual and legal information.¹⁵⁴

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¹⁵¹ Hard law refers to legal instruments that have binding force. As provided in art 288 TUE, ‘[t]o exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.’

¹⁵² As to the hard law, it also includes Rome II Regulation. Rome II Regulation provides rules on the law applicable to non-contractual obligations, including those of competition law. Therefore, the issue of applicable law for damages actions for the breach of the EU competition law should be reviewed in the light of the general rules set out in this regulation. However, the regulation only contains a very limited portion relevant to the rules of evidence. Thus, it will not be discussed extensively in this section and will be only briefly mentioned in this work.

¹⁵³ See Preliminary Ruling Recommendation, para 3. Hence, it is for the national court to assess the relevance of EU law and decides what questions to refer and when to refer them. Telemariscabruzzo and Others v Circostel and Others (C-320/90, C-321/90 and C-322/90) EU:C:1993:26, [9].

¹⁵⁴ See CJEU Rules of Procedure, art 94. It is settled CJEU caselaw that ‘the presumption of relevance (attached to the national court) cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts ... the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject-matter of those proceedings depend.’ Cipolla and Others (C-94/04 and C-202/04) EU:C:2006:758, [21]; van der Weerd (C-222/05 to C-225/05), [23]. For more information on the content of a request for preliminary rulings, see Albertas Milinis and Kristina Pranevičienė, ‘Conditions and
One question emerges as to whether NCAs that are responsible for settling disputes concerning EU law are capable of referring questions for a preliminary ruling. In other words, can they be regarded as ‘tribunals’ under art 267 TFEU? If NCAs are ‘tribunals’ under art 267 TFEU, they could refer questions to the CJEU directly in their finding (or investigation) of an infringement. These preliminary rulings may then also affect the application of evidentiary rules in Member States.

The CJEU caselaw once established the Vaassen criterion to identify a ‘court or tribunal’ under art 267 TFEU.\(^{155}\) However, the Court is not consistent in applying this criterion, and in a later case, it has rejected the NCA’s submission of a preliminary ruling.\(^{156}\) Hence, as this question continues to exist, it remains for the CJEU to give authoritative interpretation on the concept of a ‘court or tribunal’ under art 267 TFEU.\(^{157}\)

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\(^{155}\) The Vaassen criteria was found in Vaassen-Goebbels v Beambtenfonds voor het Mijnbedrijf (C-61/65) EU:C:1966:39, [273]. Under this criteria, a ‘court or tribunal’ under art 267 TFEU is (1) a body (2) which is established by law, (3) permanent and independent; and (4) charged with the settlement of disputes defined in general terms (5) which is bound by rules governing inter partes proceedings similar to those used by the ordinary courts of law, (6) insofar as it acts as the ‘proper judicial body’ for the disputes in question, which means that parties must be required to apply to the court or tribunal for the settlement of their dispute and its determination must be binding, and (7) is bound to apply rules of law. See more discussion on these criteria in Koen Lenaerts, Ignace Maselis and Kathleen Gutman, \textit{EU Procedural Law} (OUP 2015) 53.

\(^{156}\) For inconsistencies in the CJEU’s approach, see e.g. Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada y Other (‘AEB’) (C-67/91) EU:C:1992:330. The AG Jacob in the opinion employed the \textit{Vaassen} criteria to justify the ruling. Opinion of AG Jacob in \textit{AEB} (C-67/91) EU:C:1992:256, [10]–[12]. However, in a later case, the Court took a rather restrictive approach and denied a national competition authority (NCA) from submitting a preliminary ruling. In Syfait and Others, the Court found that the Epitropi Antagonismou (the NCA) is not a clearly distinct third party in relation to the State body, which, by virtue of its role, may be akin to a party in the course of competition proceedings. Moreover, due to the close relationship between an NCA and the Commission, the Court considered that whenever the Commission relieves an NCA such as the Epitropi Antagonismou of its competence, the proceedings initiated before that authority would not lead to a decision of a judicial nature. As a result, the submissions were declared inadmissible, as the Epitropi Antagonismou is not a court or tribunal within the meaning of art 267 TFEU. \textit{Syfait and Others} (C-53/03) EU:C:2005:333, [29]–[37].

\(^{157}\) See, however, views adopted by legal scholars that the question whether a decision maker is a ‘court or tribunal’ under art 267 TFEU is a question of EU law, to be decided with reference...
Moreover, while national courts exclusively exercise the initiation to submit a preliminary ruling request for the interpretation or the validity of EU law to the CJEU, there may be negative consequences if national courts fail to do so. Failure to submit a preliminary reference when the national court is under obligation to do so may constitute a violation of EU law and thus lead to proceedings against the Member State based on art 258 TFEU.\textsuperscript{158} For instance, in Köbler, the Court considered that the applicant who suffered loss, as the result of the national court’s failure to submit an obligatory preliminary reference, had been denied access to justice and thus could claim damages from the Member State.\textsuperscript{159}

Once the Court gives its ruling, it is binding on the national court that submits the question. CJEU caselaw constitutes an important source of EU law, which puts into effect the sometimes imprecise, incomplete or excessively general provisions of EU law, and which offers the CJEU an opportunity to develop the law in an up-to-date manner.\textsuperscript{160}

In the procedure laid down by art 267 TFEU, the functions of the CJEU and national courts are clearly distinct. While the CJEU interprets EU law, national courts apply EU law, along with national law.\textsuperscript{161} They ‘fulfil complementary

\textsuperscript{158} See art 258 TFEU.

\textsuperscript{159} Köbler (C-224/01) EU:C:2003:513, [30]–[39]. In this case, the referring court asked ‘whether the principle according to which Member States are obliged to make good damage caused to individuals by infringements of [EU] law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance.’ The Court first confirmed the principle of liability on the part of a Member State for damage caused to individuals because of breaches of EU law. The Court considered that ‘the protection of [the rights derived from EU rules] would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of [EU] law attributable to a decision of a court of a Member State adjudicating at last instance.’ Moreover, the Court ruled clearly that ‘it is, in particular, in order to prevent rights conferred on individuals by [EU] law from being infringed that under the third paragraph of [art 267 TFEU] a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.’ See also Traghetto del Mediterraneo (C-173/03) EU:C:2006:391, [42]–[46].


\textsuperscript{161} See art 267 TFEU: ‘The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and
and separate roles’. This indicates jurisdictional exclusivity rather than hierarchical superiority. The interpretation given by the CJEU not only binds contesting parties (inter partes effect) but also binds de facto all administrative and judicial authorities in the Member States (erga omnes effect). Hence, national courts are under the obligation to follow precedent-setting CJEU caselaw.

In actions for damages, the questions submitted to the CJEU may relate to interpretations of arts 101 and 102 TFEU, of general principles of EU law, of the Damage Directive or of any other relevant EU law. As the Court has illustrated, it is clearly in the interests of the EU that ‘in order to forestall future differences of interpretation, provisions taken from [EU] law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.’

Aside from the system of preliminary rulings, this study also relies on EU caselaw generated by public enforcement of the EU competition law, also known as judicial review by EU Courts.

In terms of public enforcement, the Commission is empowered by the Treaty to apply arts 101 and 102 and has a number of investigative powers to that end. Parties may dispute the Commission's decisions, and they have the right

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162 Piaggio (C-295/97), [30]; SFEI and Others v La Poste (C-39/94) EU:C:1996:285, [41]; Kržan (C-416/10), [58]; Corporación Dermoestética (C-500/06) EU:C:2008:421, [21].

163 Monica Claus (n 62) 433.

164 See both effects in e.g. CILFIT v Ministero della Sanità (C-283/81) EU:C:1982:335, [13]; IN.CO.GE. 90 (C-10/97), [23]. In Denkavit the Court ruled that ‘The interpretation which, ... the Court of Justice gives to a rule of [EU] law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force.’ Amministrazione delle finanze dello Stato v Denkavit italiana (C-61/79) EU:C:1980:100, [15];–[16]. See also more recently, Kühne & Heitz (C-453/00) EU:C:2004:17, [22] and [28].

165 Salahadin Abdulla and Others (C-175/08, C-176/08, C-177/08 and C-179/08) EU:C:2010:105, [48]. See also Poseidon Chartering (C-3/04) EU:C:2006:176, [15];–[16]; Kofisa Italia (C-1/99) EU:C:2001:10, [32].
to appeal to the GC to amend or to annul its decisions.\footnote{See art 256 TFEU. The purpose for establishing the GC in 1989 was to maintain and improve the quality and effectiveness of judicial protection in the EU legal order. It relieves the CJEU from an appraisal of complex facts, so that the Court could continue providing the same high quality of judicial protection that it be originally called upon to do. Koen Lenaerts, Ignace Maselis and Kathleen Gutman (n 155) 32. For more commentaries on the role of the GC, see Bo Vesterdorf, ‘The European Legal Order and the Court of First Instance’ (2006) ERPL/REDP 91S; Koen Lenaerts, ‘The Development of the Judicial Process in the European Community After the Establishment of the Court of First Instance’ in Nehal Bhuta, Claire Kilpatrick and Joanne Scott (eds), Collected Courses of the Academy of European Law, Vol 1 (Book 1, Florence/Dordrecht, European University Institute, Martinus Nijhoff 1991) 53–113.} Many such appeals concern the subject matter of this study, including the standard of proving an infringement, access to evidence held by the Commission, protection of confidential information and so on. Insofar as the party appeals, the GC may assess ‘whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.’\footnote{Microsoft v Commission (T-201/04) EU:T:2007:289, [87]; Kish Glass v Commission (T-65/96) EU:T:2000:93, [64], upheld on appeal by order of the CJEU in Kish Glass v Commission (C-241/00 P) EU:C:2001:556, [34].}

Moreover, the unsuccessful party can further appeal judgments of the GC before the CJEU, and that party includes the Commission. However, such appeals to the CJEU are limited to points of law only.\footnote{Commission, ‘ Procedures in Anticompetitive Agreements (Articles 101 TFEU Cases)’ <http://ec.europa.eu/competition/antitrust/procedures_101_en.html>.} Compared with the CJEU rulings, GC rulings relate more closely to factual issues, and thus are mostly useful in discussions about the evaluation of evidence.\footnote{The CJEU ruled that ‘it is for the General Court alone to assess the value which should be attached to the evidence produced to it.’ E.ON Energie v Commission (C-89/11 P) EU:C:2012:738, [101]; SGL Carbon v Commission (C-328/05 P) EU:C:2007:277, [41] and the caselaw cited therein; Montecatini v Commission (C-235/92 P) EU:C:1999:362, [119]. Such issues once appealed before the CJEU would be inadmissible. The CJEU’s task is limited to examining whether the GC made an error of law, to the exclusion of any appraisal of the facts. See art 256 TFEU and art 51 of the Statute of the Court of Justice. See e.g. Aalborg Portland (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [47]–[50]. Meanwhile, the GC has exclusive jurisdiction, first to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second to access those facts. As the GC has stated, in its own judgment, the applicants may call upon it ‘to undertake an exhaustive review of both the Commission’s substantive findings of facts and its legal appraisal of these facts.’ Cement (T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-89/95, T-103/95 & T-104/95), [719].}
While both the CJEU and the GC interpret EU competition law, the CJEU has the final and most authoritative word.\(^\text{170}\) Besides these, the opinion of the AG may also shed some light on the interpretation of the EU competition law and all other relevant issues.\(^\text{171}\)

### 2.3.1 Regulation 1/2003

Promulgated on 1 May 2004, Regulation 1/2003 modernizes the procedural rules implementing arts 101 and 102 TFEU, as the result of a comprehensive reform of procedures that deal with both public and private dimensions of EU competition law enforcement.\(^\text{172}\) As to the private dimension of EU competition law enforcement, the regulation merely refers generally in preamble that ‘[n]ational courts have an essential part to play in applying the [EU] competition rules’ and that ‘[w]hen deciding disputes between private individuals, they protect the subjective rights under [EU] law, for example by awarding damages to the victims of infringement.’\(^\text{173}\) It does not address further practical issues in private actions, let alone the rules of evidence. This regulation, nonetheless, eliminates one important bottleneck for private enforcement, where national judges have the power to adjudicate on the lawfulness of agreements under art 101(1), without ‘consulting’ the Commission on a decision of art 101(3).\(^\text{174}\) Thus, the national courts are

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\(^\text{170}\) This ‘final authority’ of the CJEU is also reflected in its unlimited jurisdiction to review fines or periodic penalty payments imposed by the Commission. By virtue of art 31 of Regulation 1/2003, the CJEU can cancel, reduce or increase the fine or periodic penalty payment imposed. Moreover, in accordance with art 264 TFEU, the CJEU can also declare the Commission decision to be void when an action for annulment is well founded. In certain circumstances, the Court may declare partial annulment when the annulled part can be severed from the whole decision. See for example *Compagnie Maritime Belge Transports* (C-395/96 P and C-396/96 P), [149].

\(^\text{171}\) Art 252 TFEU provides that the Advocate General, acting with complete impartiality and independence, should make, in open court, reasoned submissions on cases, which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement. AG’s opinion is not binding on the CJEU. While that opinion is a helpful aid, there is no obligation for the CJEU to follow it. As to how and when the CJEU will follow the AG’s opinion, see for instance Cyril Ritter, ‘A New Look at the Role and Impact of Advocates-General—Collectively and Generally’ (2006) Col. J.E.L. 751. However, despite the non-binding nature of AG’s opinion, it often plays a vital role in EU jurisprudence. It sometimes reflects the legal reasoning of establishing judgements, such as that of effective judicial protection for individuals. See e.g. Opinion of AG Jacob in *Pequeños* (C-50/00 P) EU:C:2002:197, [59]–[81].


\(^\text{173}\) Regulation 1/2003, recital 7.

\(^\text{174}\) Before the enactment of Regulation 1/2003, the Commission has the exclusive competence to apply art 101(3). Art 1(2) of Regulation 1/2003 provides that ‘[a]greements, decisions and concerted practices caught by [art 101(1) TFEU] which satisfy the conditions of [art 101(1) TFEU] shall not be prohibited, no prior decision to that effect being required.’
The regulation relies primarily on official bodies, in particular the Commission and the NCAs, to fight EU competition law violations, and on the powers and obligations of national courts. The regulation encourages a decentralized enforcement system of the EU competition law and sets up a European Competition Network (‘ECN’). The establishment of the ECN under Regulation 1/2003 serves to ‘ensure an efficient division of work and an effective and consistent application of [EU] competition rules.’ To achieve this, the regulation lays down rules to prevent contradictory decisions among ECN members, to coordinate investigations when necessary, to allow cases to be allocated among NCAs and to improve cooperation in areas such as exchange of information. It is worth noting that the ECN plays an important role in facilitating the private enforcement of competition law violations affecting trade among Member States, without which NCAs and national courts could not access evidence from the Commission or from NCAs located in other Member States, and could only deal with infringements within the Member State.

The advantage of the ECN in private actions can be seen, for instance, in art 15 and art 16 of Regulation 1/2003. According to art 15, national courts have the power to request relevant information in the possession of the Commission and the Commission’s opinion regarding the implementation of arts 101 and 102 TFEU. Detailed guidance regarding transmission of information between the Commission and national courts is provided under Commission Notice on the co-operation between the Commission and the courts of the EU Member States, when national courts are ‘called upon to apply [arts 101 and 102 TFEU] in a lawsuit between private parties, such as actions relating to contracts or actions for damages.’ Consequently, national courts may request that the Commission transmit information ‘to discover whether a certain case is pending before the Commission’ and to wait for the Commission’s decision, or to fulfil their obligation to adjudicate a follow-on

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177 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2016] OJ L127/13 (Cooperation Notice).

178 Cooperation Notice, para 2.

179 Cooperation Notice, para 21.
damages action. Meanwhile, the Commission must equally ‘assist national courts when they apply’ [EU] law, as required under art 4 TFEU.\textsuperscript{180}

Moreover, art 16 of Regulation 1/2003 imposes obligations on national courts to apply EU competition law uniformly. As discussed above, national courts may ask the Commission for information of a procedural nature to discover whether a particular case is pending before the Commission, whether the Commission has initiated an investigation or whether it has already taken a position. It follows that when a national court comes to a decision before the Commission does, the court must ensure that its decision does not conflict with that of the Commission.\textsuperscript{181} In the same vein, if the Commission has reached a decision, the national court cannot take a decision, running counter to that of the Commission.\textsuperscript{182} This justifies the Commission’s decision as binding evidence that proves the existence of infringement in follow-on damages actions.

2.3.2 The Damage Directive

2.3.2.1 CJEU caselaw prior to the Damage Directive

Well before the promulgation of the Damage Directive, the CJEU had already addressed the possibility of private parties taking action in EU competition law cases for the harm they had suffered as a result of the infringement. The right to full compensation for a breach of EU competition law had been confirmed in CJEU cases \textit{Courage v Crehan}, \textit{Manfredi} and \textit{Pfleiderer}.\textsuperscript{183}

In \textit{Courage}, the plaintiff brought an action for damages for a 20-year lease agreement that imposed an obligation on Crehan to purchase a fixed amount of specified beers exclusively from \textit{Courage}.\textsuperscript{184} The Court of Appeal stayed the proceeding and referred the case to the CJEU essentially asking ‘whether a party to a contract liable to restrict or distort competition within the meaning of [art 101 TFEU] can rely on the breach of that provision before a national court to obtain relief from the other contracting party.’\textsuperscript{185} The CJEU ruled that in order to ensure the full effectiveness of art 101, it should be ‘open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition’, no matter whether the claimant was a

\begin{itemize}
\item \textsuperscript{180} Cooperation Notice, para 15. Art 4(3) provides that the EU and the Member States ‘shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.’
\item \textsuperscript{181} Cooperation Notice, para 12.
\item \textsuperscript{182} Cooperation Notice, para 13.
\item \textsuperscript{183} \textit{Courage v Crehan} (C-453/99); \textit{Manfredi} (C-295/04 to C-298/04); \textit{Pfleiderer} (C-360/09).
\item \textsuperscript{184} \textit{Courage v Crehan} (C-453/99), [3]–[6].
\item \textsuperscript{185} \textit{Courage v Crehan} (C-453/99), [17].
\end{itemize}
contracting party or not.\(^{186}\) Positively viewed by the CJEU, the existence of such a right would contribute significantly to effective competition in the internal market.\(^{187}\) However, *Courage* mainly mirrors the approach taken in the state liability case, *Francovich*, where a State must be liable for losses and damages caused to individuals as a result of breaches of EU law.\(^{188}\) In *Courage*, practical issues including those concerning the rules of evidence, were not addressed and thus need further clarification.

Later in *Manfredi*, the right to claim compensation in damages actions was reinforced and extended. In the case, the claimant sought compensation for increased auto insurance policy premiums due to an agreement declared unlawful by an Italian NCA (‘the AGCM’).\(^{189}\) Considering this, quoting the identical words used in *Courage*,\(^{190}\) the CJEU expressed explicitly that ‘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 [art 101 TFEU].’\(^{191}\) If it were not the case, the full effectiveness of art 101 would be undermined, and the practical effect of the prohibition laid down in the article would be jeopardized. Whereas no EU law governed actions for damages at the time the case was brought before the national court, it was therefore a matter for the national legal system of Italy to lay down procedural rules to safeguard the right to claim compensation. Unfortunately, the case *per se* did not concern itself with the rules of evidence in damages actions in detail, but merely confirmed that the full compensation encompassed loss of profit, plus interest, in addition to actual loss.\(^{192}\) In other words, it was for the relevant Italian authority to provide the rules of evidence governing the exercise of the right to full compensation.

Progressively in *Pfleiderer*, the Court discussed essential elements in procedural and evidentiary aspects in bringing private actions that is access to files. Again, the Court confirmed the individual’s right to claim damages and ruled that ‘actions for damages before national courts can make a significant contribution to the maintenance of effective competition.’\(^{193}\) As to access to documents relating to the leniency programme with a view to preparing for civil damages actions, the Court regarded national courts to be in the most

\(^{186}\) ibid, [26].

\(^{187}\) ibid, [27].

\(^{188}\) *Francovich* (C-6/90 and C-9/90), [33]–[35].

\(^{189}\) *Manfredi* (C-295/04 to C-298/04), [2].

\(^{190}\) ibid, [60]. See also in *Courage v Crehan* (C-453/99), [26].

\(^{191}\) *Manfredi* (C-295/04 to C-298/04), [61].

\(^{192}\) ibid, [95].

\(^{193}\) *Pfleiderer* (C-360/09), [29].
appropriate position to balance different interests on a case-by-case basis.\textsuperscript{194} This ruling, albeit controversial, opens the discussion on procedural issues in actions for damages. These three cases demonstrate a judicial progression in recognizing and developing private enforcement of EU competition law.

Thus, any individual has the right to claim full compensation for the harm suffered where there is a causal link between the harm and the breach of arts 101 and 102 TFEU. The meaning of the causal link should be determined based on national laws, observing the principles of equivalence and effectiveness. The notion of the harm should include actual loss, loss of profit, and payment of interest. In the pre-Directive cases, however, issues of establishing the harm, of establishing the conditions for liability, and all other evidentiary matters were for national courts to decide under their respective national legal systems.

2.3.2.2 The Directive and its objectives

Despite a coherent recognition of the right to claim compensation in civil actions for damages in CJEU caselaw, the Commission’s endeavour to reform the private enforcement of the EU competition law encountered considerable hurdles.\textsuperscript{195} At that time, damages actions were found to be in ‘total under-development’ and the approaches taken in Member States exhibited ‘astonishing diversity’,\textsuperscript{196} Thus, there was an urgent need to harmonize the private enforcement of EU competition law in order to guarantee the right to full compensation. A series of legislative activities followed, and after the

\textsuperscript{194} Pfleiderer (C-360/09), [30]–[31]. This is a controversial ruling. Later, the Damage Directive puts leniency statements in the black-list, which together with settlement documents will not be disclosed under the Directive.


\textsuperscript{196} Impact Assessment Report – WP, para 35.
introduction of several legislative documents, the Damage Directive was born.

Art 1(1) declares the first objective of the Directive, to ‘ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation.’ Thus, the Directive imposes on every Member State a general obligation to ensure the right to full compensation. Thus far, the meaning of ‘full compensation’ places the victim in the position as if the infringement has never occurred. The Directive stipulates further

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198 Damage Directive, art 1(1). In EU law, the right to damage was established in Francovich, where the Court created a new remedy – actions for damages for state liability. Francovich (C 6/90 and 9/90). The introduction of damages actions has brought about a debate on whether the CJEU should also recognise the right to damages between private parties. See Rose M D'Sa, European Community Law and Civil Remedies in England and Wales (London: Sweet and Maxwell 1994) 174. Elspeth Deards, “Curiouser and Curiouser”? The Development of Member State Liability in the Court of Justice’ (1993) 3 EPL 117, 143. The initial opportunity for the Court to establish the principle of individual liability was in the early 90 in Banks v British Coal (C-128/92) EU:C:1994:130, [21]. In Banks, the court found that the Commission had the sole jurisdiction to find that the provisions in dispute have been infringed, thus the national courts might not entertain an action for damages in the absence of a Commission decision. However, AG Van Gerven revealed a more comprehensive analysis on this issue. Adopting the ‘third generation’ approach, he confirmed that the general principle introduced in the Francovich judgment for state liability ‘also applies where an individual infringes a provision of Community law to which he is subject, thereby causing loss and damage to another individual.’ Moreover, ‘the full effect of [EU] law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of [EU] law.’ The direct effect of such provisions (arts 101 and 102 TFEU explicitly pointed out in this opinion) ‘imposes a duty for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under [EU] law.’ To that effect, see also Opinion of AG Van Gerven in Banks (C-128/92) EU:C:1993:860, 1249–1250.


200 Damage Directive, art 3(2), provides that ‘[f]ull compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.’
that full compensation ‘shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.’

Art 1(2) declares the second objective to be to coordinate between private and public enforcement and to guarantee a coherent competition law enforcement regime. This coordination determines the degree to which private enforcement is limited, so as to safeguard the effectiveness of the existing public enforcement mechanism. One example of such limitation would be private parties seeking access to the documents of EU institutions. Such access would potentially cause legal uncertainty and negative consequences for public enforcement, and leniency programmes in particular. As a result, leniency statements are prohibited from being disclosed under any circumstances.

As provided in Recital 6,

[t]o ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market.

While public enforcement aims at deterrence, private enforcement aims at compensation. Therefore, while public authorities impose sanctions such as fines on alleged infringers, private parties can recoup money as part of the award of compensation if they claim damages successfully. According to the Commission, both the awarding of damages and the imposition of fines contribute to the maintenance of effective competition and to the maximum efficacy of the system of EU competition law enforcement.

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203 Damage Directive, arts 6 and 11. See further discussion on this coordination in Folkert Wilman (n 9) 222.


Meanwhile, the Commission continues to play a critical role in detecting anti-competitive practices such as cartels and abuses of dominant position, which private litigation is not able to deal with due to resource constraints and prioritization of other needs.\textsuperscript{206} Clearly, under EU law, public enforcement remains the main mechanism for enforcing EU competition law. Hence, private actions before national courts are largely a complement to the public enforcement of EU competition rules.\textsuperscript{207}

Notably, in both arts 1(1) and 1(2) of the Damage Directive, which set out the above-mentioned objectives, the Commission discusses an infringement of ‘competition law’ and the enforcement of ‘the competition rules’. It indicates that the scope of the Damage Directive covers both EU competition law and national competition law.\textsuperscript{208} However, not all rules of national competition law are covered. The Damage Directive only covers provisions that predominantly pursue the same objectives as arts 101 and 102 TFEU and that are applied to the same case and in parallel with EU competition law pursuant to art 3(1) of Regulation 1/2003. It excludes provisions of national law that impose criminal penalties on natural persons, ‘except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced.’\textsuperscript{209}

Recital 10 of the Damage Directive explains the appropriateness of the extension to the infringement of national competition law. It claims that applying different rules on civil liability incurred by infringements of EU and national competition law would ‘adversely affect the position of claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market.’ Moreover, the legal uncertainty for all parties implied herein would ‘make it unworkable for judges to handle the case’, and ‘lead to conflicting results depending on whether the national court considers the case as an infringement of EU or of


\textsuperscript{207} Staff Working Paper – GP, para 13. See also Damage Proposal, 3; Niamh Dunne, ‘The Role of Private Enforcement within EU Competition Law’ (n 12) 145.

\textsuperscript{208} Folkert Wilman (n 9) 223.

\textsuperscript{209} Damage Directive, art 2(3). In fact, there is no sign of the inclusion of equivalent national law provisions in the Green Paper or the White Paper. These two documents only concern the private enforcement of ‘the EU competition law’. There has been no suggestion about this inclusion in relevant EU caselaw. The Damage Proposal, however, refers to damage actions for ‘an infringement of Article 101 or 102 of the Treaty or of national competition law’. Accordingly, in the Damage Directive, it says that ‘This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law.’
national competition law, thus hampering the effective application of those rules.\textsuperscript{210}

The above considerations justify why the rules of evidence look as they do in the Directive. Hence, a deeper look into the Directive and its objectives, as is done in the following paragraphs, not only provides insight into the law-making process, but also offers a thorough understanding of the rules.

2.3.2.3 Disclosure of evidence

The Commission noted that information asymmetry is a huge barrier to private damages actions. Infringing conduct is often by its very nature secretive, and the evidence necessary to prove damages claims is often held 'exclusively by the opposing party' and 'not sufficiently known by, or accessible to, the claimant.'\textsuperscript{211} Because of this, the evidentiary burden on the potential litigant is particularly high.\textsuperscript{212} Meanwhile, in the aftermath of the \textit{Pfleiderer} judgment, \textsuperscript{213} another concern caught the attention of the Commission: damages actions should not jeopardize the effectiveness of public enforcement, in particular leniency programmes and settlement procedures. To address these concerns, the Directive relies on the central function of the national court to order disclosure, subject to strict and active judicial control as to its necessity, scope, and proportionality.

Art 5(1) provides that Member States shall ensure that national courts are able, upon the request of the claimant, to order the defendant or a third party to disclose relevant evidence, and so may the defendant. However, that request must be subject to a reasoned justification 'containing reasonably available facts and evidence sufficient to support the plausibility' of the request.\textsuperscript{214} Art 5(1) emphasizes the plausibility of the disclosure requests. The court must assess whether the disclosure is plausible to support the allegations in fact pleading, so as to examine the necessity of the disclosure.

Art 5(2) further provides that disclosure shall be subject to 'specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible.' This implies that the claimants should have a clear idea of what evidence they are looking for. It imposes on claimants a relatively

\textsuperscript{210} Damage Proposal, 10–13.

\textsuperscript{211} See Damage Directive, recital 14. For more discussion, see Ioannis Lianos, Peter Davis and Paolisa Nebbia, (n 172) para 3.19. In fact, for claimant who participates in an infringement itself, but only plays a minor role, it is still unlikely that they will have sufficient evidence to prove the entire infringement on their own.

\textsuperscript{212} Impact Assessment Report – Proposal, para 52.

\textsuperscript{213} \textit{Pfleiderer} (C-360/09).

\textsuperscript{214} Damage Directive, art 5(1).
higher burden to identify the precise categories of evidence or even precise pieces of evidence, such as the minutes of which meeting, or the contents that were agreed on such and such date and at such and such place.

Moreover, read in conjunction with art 5(1), disclosure requests shall be supported by reasoned justification, e.g. where claimants know the existence of the requested evidence but have no access to it, and the requested evidence is relevant to support damages claims. It prevents fishing expeditions where claimants search for non-specific or overly broad information that is unlikely to be relevant to the parties to the proceedings.\textsuperscript{215} Instead, they must assert in detail what is included in that evidence and why that evidence is relevant to the present case.

However, in practice, it seems unlikely that the claimant would be able to specify individual documents, as ‘this party will often simply have no knowledge of the existence of particular documents, let alone be able to specify them in a sufficiently detailed manner.’\textsuperscript{216} Even courts might have difficulties in performing such identification.\textsuperscript{217} As to the categories of evidence, the request ought to identify the category by ‘reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria’, within the meaning of this Directive.\textsuperscript{218}

Moreover, the claimants’ request to disclose evidence must be reviewed by national courts under the test of proportionality.\textsuperscript{219} Art 5(3) lays down considerations, including the extent to which the claim is supported by available facts and evidence justifying disclosure, the scope and cost of disclosure and whether an eventual disclosure concerns confidential information. These considerations reflect an approach that weighs up the legitimate interests of all parties and third parties concerned. The weighing-up must be carried out between ‘the respective interests in favour of disclosure of such documents and in favour of the protection of those documents.’\textsuperscript{220}

The proportionality test shall be carefully applied when disclosure might pose the risk of ‘unravelling the investigation strategy of a competition authority by revealing which documents are part of the file’ or the risk of ‘having a negative effect on the way in which undertakings cooperate with the competition

\begin{footnotesize}
\textsuperscript{215} For ‘fishing expeditions’, see Damage Directive, recital 23.

\textsuperscript{216} Staff Working Paper – WP, para 80.

\textsuperscript{217} Staff Working Paper – WP, para 80.

\textsuperscript{218} Damage Directive, recital 16.

\textsuperscript{219} Damage Directive, art 5(3).

\textsuperscript{220} Commission v EnBW (C-365/12 P) Eu:C:2014:112, [106]–[108].
\end{footnotesize}
authorities.' In addition, special attention shall be paid to prevent an overly broad disclosure of evidence and to address potential problems, such as ‘fishing expeditions’, discovery blackmails, or other procedural abuses. The weighing-up process is further addressed in art 5(4). It empowers national courts to disclose evidence containing confidential information if they consider it necessary. Meanwhile, national courts must have at their disposal effective means to protect the information from disclosure during the proceedings. Those measures shall include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.

Furthermore, art 6 of the Damage Directive lays down practical rules regarding the disclosure of evidence included in the file of a competition authority. This article classifies evidence into three categories. Art 6(6) provides a black-list exemption, where national courts cannot at any time order the disclosure of leniency statements and settlement submissions. The exemption addresses the tension between the right to access to evidence under private enforcement and the effectiveness of the leniency programme under public enforcement. Art 6(6) clears up the confusion created by the *Pfleiderer* case and confirms the need to ensure the efficacy of the public enforcement. As confirmed by the Commission, the likelihood of being found out due to leniency applications and the strength of both public and private enforcement serve to deter undertakings from conducting anti-competitive behaviour and to drive the number of cartels down. If such self-incriminating documents were disclosable, undertakings might be deterred from co-operation under leniency programmes and settlement procedures.  

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221 Damage Directive, recital 23.

222 The ‘fishing expedition’ is specified in recital 23 of the Damage Directive.

223 See Ioannis Lianos, Peter Davis and Paolisa nebbia (n 172) para 3.23 and footnote 29, that the term ‘discovery blackmail’ describes a strategy to request very broad discovery measures entailing high costs with intention of compelling the other party to settle rather than to continue the litigation, although the claim or the defence may possibly be weak or even unmeritorious.


Indeed, ensuring the effectiveness of leniency programmes brings benefits to actions for damages. First, a valid leniency application can only give rise to immunity or reduction in fines, which ‘cannot protect an undertaking from the civil law consequences of its participation in an infringement of [art 101 TFEU].’\textsuperscript{229} Just as public enforcement and private enforcement complement each other, the leniency programme and actions for damages could form an integral part of a better enforcement system. Moreover, the existence of the leniency programme could make damages actions more frequent.\textsuperscript{230} The potential increase in damages actions is based on an increased exposure of secret cartels. Thus, this is more likely to happen in follow-on cases and in cases where leniency programmes exist. Under the circumstances, the blacklist exemption works as a shield against the disclosure of sensitive information, in particular corporate statements. It protects the position of leniency applicants regardless of whether they are a defendant or a third party. Thus, they will continue to approach competition authorities with leniency statements or settlement submissions.

Art 6(5) of the Damage Directive provides a grey-list of documents that are temporarily exempted from disclosure before a competition authority, by adopting a decision or otherwise, has closed its proceedings. This category includes: (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (c) settlement submissions that have been withdrawn. Under this clause, information prepared in the proceeding of public enforcement, no matter from the institutions (such as the statement of objections’) or from the parties (such as replies), should only be disclosable after the proceeding closes. This prevents undue interference with an ongoing investigation and protects the decision-making process of a competition authority.\textsuperscript{231}

However, paradoxically, this category of evidence seems to lose its significance in follow-on damages actions. Competition proceedings do not close before the last judicial appeal is decided.\textsuperscript{232} In this regard, in the context of a follow-on action for damages, a decision becomes final and limitation periods for bringing the action are no longer suspended or interrupted for claims against an infringer who decides not to appeal the final decision, or where the appeal decisions have already been made. In these cases, grey-list documents are fully accessible regardless of any pending action seeking the annulment of the final

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\textsuperscript{229} Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ L298/17, para 39.

\textsuperscript{230} Staff Working Paper – GP, para 227.

\textsuperscript{231} Damage Directive, recital 25.

decision by a co-infringer. Strictly speaking, the restriction on the disclosure of grey-list documents is not a restriction on disclosure, but a delay on disclosure. Whereas, according to Regulation 1/2003, civil proceedings shall nevertheless be delayed, since national courts cannot take decisions running counter to those of the Commission.\footnote{Regulation 1/2003, art 16.} As a result, national courts usually stay their proceedings and wait for the decision of the Commission or the EU Courts.

As to the white-list, it refers to documents that fall out of the black-list and the grey-list.\footnote{Damage Directive, art 6(9).} Thus, rules regarding this category of documents ensure that private parties can access sufficient evidence to prepare for their actions for damages. While wide access has been granted to private parties, the question of whether to order the disclosure must be decided by national courts on a case-by-case basis. In this way, the black-list, grey-list and white-list together form the framework on access to evidence in the hand of a competition authority.

In order to ensure equality of arms, the rules provided in arts 5 and 6 of the Damage Directive are available to both claimants and defendants in damages actions. Hence, both parties should better estimate their probability of winning the case and the reward from settlement of litigation. Both parties should be better off. Therefore, to some extent, these rules neither increase nor decrease the chances of winning the case but do reduce the cost of making mistakes or undertaking unnecessary legal activity.\footnote{Sebastian Peyer, ‘Compensation and the Damage Directive’ (n 204) 102–103.} When the information asymmetry is remedied to certain extent, parties know better their advantages and disadvantages in pursuing litigation. They may choose to negotiate and reach consensual settlements or alternative dispute resolutions.\footnote{Damage Directive, arts 18–19 and recitals 48, 51 and 52. The Damage Directive encourages consensual settlements and other consensual dispute resolution mechanisms.}

In addition, when the evidence is held by a competent review court,\footnote{Here ‘a competent review court’ falls within the meaning of art 2(10) of the Damage Directive. It means ‘a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law.’} national courts could also take evidence from the courts of other Member States under Regulation 1206/2001.\footnote{Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1 (Regulation 1206/2001).} The regulation considers the necessity in cross-border cases for national courts to gain access to evidence in other countries. The judicial cooperation between courts of Member States,
as viewed by the legislators, could improve the proper functioning of the internal market.

The above provisions ensure that both parties to damages actions are able to acquire sufficient evidence from the Commission, NCAs, the defendant, third parties and other national courts. The various approaches guarantee the parties’ right to claim full compensation.239 It follows that the national court hearing the case would be best equipped with sufficient information to adjudicate a dispute and ideally to ascertain ‘the truth’ in private actions,240 particularly regarding the calculation of actual loss.241

In addition, with a chance to disclose evidence, the claimant would be incentivized to file and relatively optimistic in their chances of success. It is true that whether the claimant could actually win the case depends on the disclosed evidence, together with all other evidence. Nonetheless, without an attempt to bring the case to the court and to the public, victims would never have a chance to remedy their losses. Once a competition infringement has been decided by the court, such a decision could benefit more victims who have also suffered losses and warn potential victims.

In fact, disclosure rules under the Damage Directive only guarantee a minimum level of harmonization regarding access to evidence in private enforcement. It ensures a more level playing field in the internal market, where businesses across EU compete equally and EU citizens and undertakings enjoy a legitimate right to full compensation. This increases the legal certainty for businesses operating in the EU, with a level of warning and deterrence against EU competition law infringements. Meanwhile, the minimum level of protection only guarantees the baseline for protection, leaving detailed rules of evidence to be designated by national laws. Thus, it does not rule out the potential for Member States to introduce wider disclosure rules. Hereby, while national legal traditions are respected under the principle of national procedural autonomy, Member States shall in all cases observe the principles of equivalence and effectiveness in the transposition of those disclosure rules.

Art 8 then provides penalties as a punitive measure in case of failure or refusal to disclose, destruction of evidence, failure or refusal to protect confidential information and breach of limits on the use of evidence.


240 Competition law cases are complex and fact intensive. The ‘facts’ as finally ascertained by the courts may actually be different from what actually happened among the infringers and from the initial details provided in the infringement action.

2.3.2.4 Binding effect of national decisions

In order to facilitate follow-on damages actions, art 9 of the Damage Directive provides the legal basis for the binding effect of a final infringement decision of a national competition authority (or of its review court)\(^{242}\) regarding EU and national competition laws. According to the rule, national judges deem an infringement proven if it was found by the NCA of the same Member State. If it was found to be such by NCAs of other Member States, the decision must at least be acknowledged as \textit{prima facie} evidence of an infringement of competition law.\(^ {243}\)

Even when an infringement decision has binding effect, its application in damages actions may not always be straightforward. Such a decision should have a clear outline of the infringement – a description of the undertakings involved, detailed operations or arrangements, the duration, geographical scope and so on.\(^ {244}\) However, the question of which elements are binding or have probative value in damages actions may raise practical difficulties.

As a rule, that binding effect should ‘cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction;’\(^ {245}\) It extends to subsequent damages actions against the same undertakings and the same infringement found by the decision. The avoidance of re-litigation should provide better legal certainty, improve consistency in the application of arts 101 and 102 TFEU, increase the effectiveness and procedural efficiency in damages actions, and foster the functioning of the internal market.\(^ {246}\)

Despite all these potential benefits, the binding effect requires national courts to accept, in follow-on cases in particular, ‘a prohibited agreement or practice exists’\(^ {247}\) when an infringement decision cannot be or can no longer be appealed.\(^ {248}\) As a result, a national court must accept, in a case before it, both the existence of illegal conduct and the identification of a perpetrator as a given result, not as a rebuttable presumption. Art 9 of the Damage Directive thus endows final decisions with a binding force they usually do not have. The


\(^{243}\) Damage Directive, art 9(2).

\(^{244}\) OECD, ‘Relationship between Public and Private Enforcement’ (n 12) 18–19.

\(^{245}\) Damage Directive, recital 34. See also Emmanuela Truli, ‘Will Its Provisions Serve Its Goals?’ (n 39) 305.

\(^{246}\) Damage Directive, recital 34.

\(^{247}\) \textit{Otis} (C-199/11), [65].

\(^{248}\) Damage Directive, art 9(1) and art 2(12), the meaning of ‘final infringement decision’.
effect then turns national courts into ‘mere assessors of damages’, which vitiates the independence of the judiciary. This effect is limited to follow-on cases. As to stand-alone cases, the competence of national courts is unfettered.

However, how these decisions could actually bind in practice is ambiguous. For instance, what is the effect of an infringement decision, if private parties bring the case in a Member State outside the geographical area where the infringement was found, or claim damages for a period of time that stretches before or after the duration identified in the decision? In such cases, national courts could find that some of the issues have already been confirmed by the public enforcement decision, including the material or the personal scope of the infringement, its nature, and related facts attached to the finding. Whereas some issues such as the geographical areas, the length of the infringement in this particular area, or the weight of undertakings involved are still to be ‘fully litigated’ in civil proceedings. Thus, some issues of damages actions are like follow-on cases, while some are almost stand-alone cases.

Such situations are not purely imaginary. There have already been cases that sought to ‘expand’ public enforcement decisions, for instance, concerning the defendant, who was not the addressee of the public enforcement decision, but belonged to a wider corporate group. In practice, it remains unclear what findings of facts a public enforcement decision actually contains and that can be used by national courts in follow-on cases, other than a finding that there was an infringement. This might be particularly confusing when the requirement of ‘fault’ is involved. Some of these difficulties may be eased

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249 Assimakis P. Komninos, ‘Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight’ (2007) 44 Common Market Law Review 1387, 1404 and 1428. See also Veljko Milutinovic, ‘The “Right to Damages” in a “System off Parallel Competences”: A Fresh Look at BRT v SABAM and its Subsequent Interpretation’, in Philip Lowe, Mel Marquis (eds.) European competition law Annual 2011: Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies (Hart Publishing 2014), 352. Milutinovic develops further to see the binding effect as the EU’s attempt to ‘be a supernatural legal order of limited sovereignty, which tends, as its name suggests, towards creating something more akin to the classical model of a legal order.’ The establishment of ECN is a clear evidence revealing such attempt.

250 See e.g. Emerson Electric Co v Morgan Crucible Co PLC [2011] CAT 4. In this case, the application to dismiss the damage claims was successful. See further discussion in Barry J. Rodger, ‘Why not Court? A Study of Follow-on Actions in the UK’ (2013) 1(1) Journal of Antitrust Enforcement 104.


252 The Damage Directive does not provide the requirement of fault, but as stated in the Damage Proposal, this requirement has been discarded for the purposes of the proposal. See Damage Proposal, 12. Thus, national courts have full discretion to rule the fault requirement under national law, as long as the principles of equivalence and effectiveness and the full effect
through CJEU caselaw, which may, through interpretation of relevant EU law, establish that expansion of certain elements may be problematic.\textsuperscript{253}

Even when legal provisions have set out the elements of an infringement decision that are binding in follow-on damages actions, these are only part of the evidence that national courts take into account. They still enjoy the discretion to ignore findings in a public enforcement with regard to causation and damage calculation.\textsuperscript{254}

Additional concerns arise in terms of the scope of the binding effect. It was once disputed whether the binding effect should be extended to the EU level. Initially, the 2013 draft version of the Directive proposed an EU-wide binding effect of final competition authorities’ decisions or their review courts,\textsuperscript{255} which already existed in the German Competition Act.\textsuperscript{256} Apparently, the Commission made a great compromise in that respect. Consequently, the binding effect is limited to national decisions, but foreign decisions are given the status of \textit{prima facie} evidence. This seems a bit late, since that effect has already been put in place in many jurisdictions.\textsuperscript{257}

Moreover, even though the Damage Directive regards a foreign infringement decision as \textit{prima facie} evidence, how the notion of \textit{prima facie} proof is understood in different Member States may vary. Hence it is not completely clear how this rule will be applied. In case of genuine ambiguities, national

\begin{footnotesize}
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\item of arts 101 and 102 TFEU are observed. See e.g. \textit{W.H. Newson Holding Limited and others v IMI plc and others} [2013] EWCA Civ 1377. There the Court of Appeal rejected the ’intent to injure’ in the Commission’s decision and considered that the claimant could not rely on material facts that were not within the Commission’s findings but were merely consistent with the findings. See further discussion in Ioannis Lianos, Peter Davis and Paolisa Nebbia (n 172) 47–48.

\textsuperscript{253} See e.g. \textit{Inntrepreneur Pub Company (CPC) v Crehan} [2006] UKHL 38, [64] that the binding effect ‘does not apply to other agreements, decisions or practices in the same market.’


\textsuperscript{255} See art 9 of the draft Directive of 1 June 2013, COM(2013) 404.


\textsuperscript{257} Barry J. Roger, \textit{Competition Law: Comparative Private Enforcement and Collective Redress across the EU} (Kluwer Law International 2014), 34–43. However, a number of countries only establish it as a rebuttable presumption of an infringement or as merely an element that national courts shall consider. See Paolo Buccirossi and Michele Carpagnano, ‘Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and How)?’ (2013) 4 Journal of European Competition Law & Practice 3, 3–5.
\end{itemize}
\end{footnotesize}
courts can always refer to the CJEU and request preliminary rulings to clarify
the notion of *prima facie* evidence or the expansion of public enforcement
decisions.

Notably, the binding effect only applies to national decisions that find
infringement. Thus, non-infringement decisions, such as ‘findings of
inapplicability’ defined under art 10 of Regulation 1/2003,258 do not enjoy the
same binding legal effect.

2.3.2.5 Brief remarks

The Damage Directive ensures a minimum level of harmonization in terms of
access to documents needed by parties to pursue their claims. The minimum-
level approach echoes the Commission’s insistence on harmonizing private
antitrust litigation. As noted by the Commission, harmonization *per se* shall ‘be
based on a genuinely European approach’ and shall consist of ‘balanced
measures that are rooted in European legal culture and traditions.’259 This is
certainly not wrong, but implementation is far more complicated. Minimum-
level intervention results in a scattered and non-systematic set of evidentiary
rules. As argued in *Emmanuela Trulì*, ‘the Directive contains some useful
procedural rules but is mostly characterized by general and vague goal-setting
provisions... which cannot be incorporated in the national compensation
systems without further specification.’260 As expected, there is astonishing
diversity regarding how courts order disclosure and on what basis they make
the decision.261

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interest relating to the application of Articles 81 and 82 of the Treaty so requires, the
Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is
not applicable to an agreement, a decision by an association of undertakings or a concerted
practice, either because the conditions of [art 101 TFEU] are not fulfilled, or because the
conditions of [art 101(3) TFEU] are satisfied.’ The Commission may likewise make such a
finding with reference to art 102 TFEU.

259 White Paper, 3

Rules Governing Actions for Damages for Competition Law Infringements’ (n 39) 301.

261 For example, regarding the ‘binding effect’ of national decisions, rules in Member States
diverge considerably. German recognizes the binding effect of final NCA decisions of both
domestic and other European NCAs in the 7th Amendment of the German Act Against
Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*), which
entered into force on 1 July 2015. Some 10 Member States only recognize the final decision of
domestic NCA binding on national courts. As to the other 16 Member States, NCA decisions do
not have binding effect and their value varies from a rebuttable evidentiary presumption of an
infringement to a normal, baseline evidential value. See Ioannis Lianos, Peter Davis and Paolisa
nebbia (n 172) para.3 45.
2.3.3 The Transparency Regulation

The Transparency Regulation concerns public access to European Parliament, Council and Commission documents. 'In principle, all documents of the institutions should be accessible to the public,'\textsuperscript{262} The regulation is intended to guarantee individuals’ right of public access and to improve the transparency of the decision-making process. The regulation seeks to 'increase openness and accountability of the work of the EU institutions.'\textsuperscript{263} To ensure wide public access, such access shall not only be granted to documents drawn up by the institutions but also to those received by the institutions.\textsuperscript{264}

However, access is not absolute. It must be subject to certain public and private interests that overcome the importance of a transparent decision-making process. Art 4(1)(a) of the Transparency Regulation provides that access shall be refused if the disclosure would undermine the public interest, such as public security, defence and military matters, international relations and so on. Also, the privacy and the integrity of the individual shall be a basis for denying an access request for personal data.\textsuperscript{265} Moreover, art 4(2) stipulates that access might not be granted if the disclosure would undermine the protection of certain commercial interests, the court proceedings themselves and legal advice, and the purpose of inspections, investigations and audits. Nevertheless, this regulation provides special support for private parties to gather evidence in the hands of EU institutions, which is of important relevance in follow-on damages actions for EU competition law infringements found by the Commission.

2.3.4 Soft-law documents

Soft-law documents have been created to provide guidance regarding specific issues. As regards pieces of soft law that are relevant to evidentiary issues in the private enforcement of competition law, the majority of them are Commission Notices and Guidelines.\textsuperscript{266} In general, EU legislature adopts soft-law as a more flexible legal instrument to exert persuasive influence in practice and to achieve policy objectives. Often, when Member States are unable to agree to legally binding measures, or when the EU lacks the competence to enact a hard law, soft laws such as guidelines, notices, and recommendations

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\textsuperscript{262} Transparency Regulation, recital 11.
\textsuperscript{263} Staff Working Paper – GP, para 73.
\textsuperscript{264} Transparency Regulation, recital 10.
\textsuperscript{265} Transparency Regulation, art 4(1)(b).
\textsuperscript{266} According to art 17(1) TEU, the Commission is empowered to produce various soft-law guidance documents, in order to ‘promote general interest of the Union and take appropriate initiatives to that end.’ See also Hakon Cosma and Richard Whish, ‘Soft Law in the Field of EU Competition Policy’ (2003) 14 EBLR 25, 50.
are adopted to address the legislative purpose and policy proposals. Those documents have no effect on Member States’ judicial autonomy.

This study discuss various soft-law documents, including the Commission Notice on rules for access to the Commission file,267 the Cooperation Notice, the 2006 Leniency Notice,268 and so on. They are mostly of reference value.


3 Burden of proof

3.1 Introduction

The term burden of proof refers to the obligation to adduce evidence to prove an assertion. The party who bears the burden of proof also ‘bears the risks of facts remaining unresolved or allegations unproven.’\(^{269}\) Thus, failure to provide evidence might result in losing the contention made on a case or even the whole case.\(^{270}\) In fact-intensive competition law cases, it is vital to know which party bears the burden of proving what.

CJEU caselaw, developed by preliminary rulings or generated from public enforcement cases, elucidates issues with the burden of proof. These rulings constitute interpretations of EU law and must be observed as a whole in deciding what national rules or national court decisions comply with EU law. Where the CJEU has clarified some point concerning the burden of proof as a part of interpreting relevant EU articles or general legal principles, there is no room for national variation as regards that detail.

Starting from the early 1990s, a series of CJEU judgments has addressed the legal rules and general principles relating to such issues as the burden of proof,\(^{271}\) the presumption of innocence and other procedural aspects in Commission proceedings.\(^{272}\) These cases reflect the Court’s effort to ‘create normative standards for the evaluation of the evidence.’\(^{273}\) Most of these judgments ruled on appeals against decisions of the GC and they were to find out whether the GC had observed ‘the rules and general principles of law relating to the burden of proof’.\(^{274}\)

\(^{269}\) Opinion of AG Kokott in *Akzo Nobel* (C-97/08 P) EU:C:2009:262, footnote 64.


\(^{272}\) See e.g. *Technische Unie v Commission* (C-113/04 P) EU:C:2006:593, [111] & [161]. This case examines ‘the duration of the collective exclusive dealing arrangement in which it accused TU of having taken part.’

\(^{273}\) Fernando Castillo De La Torre and Eric Gippini Fournier (n 34) para 2.003. The CJEU confirmed that ‘inasmuch as they relate to the assessment by the [GC] of the evidence adduced ... in making that assessment, the [GC] committed an error of law by infringing the general principles of law, such as the presumption of innocence and the applicable rules of evidence, such as those concerning the burden of proof.’ See *Hils* (C-199/92 P), [65].

\(^{274}\) See e.g. *Brazzelli Lualdi*, where ‘[s]ince the evidence was duly obtained and the rules and general principles of law relating to the burden of proof were observed, as also were the rules
Subsequently, the CJEU caselaw has developed rules and general principles specific to competition law cases heard by national courts. The CJEU confirms that where no EU law governs the relevant issues, ‘it is for the domestic legal system of each Member State ... to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU] law.’275 Thus, Member States are free to apply national rules on the burden of proof and on presumptions or to designate special rules concerning damages actions for EU competition law infringements, provided that the principles of equivalence and effectiveness are observed and that the full effect of arts 101 and 102 TFEU is guaranteed.276

In practice, the CJEU has imposed certain requirements on national law concerning the burden of proof, in compliance with the principle of effectiveness. In Laboratoires Boiron, the applicant bore the burden to prove that ‘ wholesale distributors are overcompensated, and thus that the tax on direct sales amount to State aid.’277 The Court held that if the applicant’s burden of proof was virtually impossible or excessively difficult to meet, a national court shall ‘use all procedures available to it under national law,’ to order the other party or a third party to produce a particular document.278 It follows that the national court may, ‘where appropriate, apply rules of national law which provide for the burden of proof to be adjusted or lightened.’279

In fact, Laboratoires Boiron was a damages liability case between a Member State and an individual. Even though, in this case, the CJEU analysed the burden of proof in relation to the principle of effectiveness in a context different from

of procedure in relation to the taking of evidence, it is for the [GC] alone to assess the value which should be attached to the items of evidence produced to it.’ Brazzelli Lualdi(C-136/92), [66]. See also San Marco (C-19/95 P), [40]; Deere (C-7/95 P), [22]; Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission (‘FEG’) (C-105/04 P) EU:C:2006:592, [70].

275 Courage v Crehan (C-453/99), [29]. The CJEU has also dealt with the issue of the ‘burden of proof’ in cases concerning, for instance, rates for unbundled access to the local loop. The Court considered, first whether relevant EU law ruled on this issue and second whether the claimant alone was capable of providing sufficient information. The Court concluded that in the absence of relevant EU law on this issue, ‘it is the task of the Member States to establish in accordance with their rules of procedure, ... the rules of evidence applicable, including the allocation of the burden of ...’ See Arcor(C-55/06) EU:C:2008:244, [179]–[192].

276 See Direct Parcel Distribution Belgium (C-264/08) EU:C:2010:43, [33]. It followed that ‘[t]he considerations also apply with regard, specifically, to evidential rules – and in particular the allocation of the burden of proof applicable to actions relating to a breach of [EU] law.’ See also Laboratoires Boiron (C-526/04) EU:C:2006:528, [51]; Budějovický Budvar (C-478/07), [88]; Kemptner (C-2/06) EU:C:2008:78, [57]; Unibet (C-432/05), [43]; van der Weerd (C-222/05 to C-225/05), [28].

277 Laboratoires Boiron (C-526/04), [55].

278 Laboratoires Boiron (C-526/04), [55]. See also Direct Parcel (C-264/08), [31]–[36].

279 H. Gautzsch Großhandel (C-479/12), [44].
competition damages actions, rulings like *Laboratoires Boiron* and the idea of adjusting the burden of proof to comply with the principle of effectiveness are potentially relevant in private damages claims related to competition law infringements. Even though the CJEU would not expressly discuss the applicability of its guidance to other areas, it can be assumed that the guidance given regarding general EU law principles is generally applicable if there are no clear indications pointing to an opposite conclusion.

This section deals with the issue of the burden of proof, which comprises an essential part of the rules of evidence. The issue is discussed through a systematic analysis of EU caselaw based on Regulation 1/2003, the Damage Directive, and other relevant EU law. The discussions concern the legal burden to prove infringement and the evidential burden to prove harm and causation. Moreover, various presumptions apply to alleviate the evidential burden as regards specific allegations, which contribute to a more level playing ground between the contesting parties. Besides, the application of various presumptions and the burden of proof provided in relevant EU law and CJEU caselaw must not conflict with the principle of the presumption of innocence. Hence, even though Member States are free to lay down detailed rules governing the burden of proof in the absence of EU law, national courts must in any event respect CJEU’s interpretations of EU law and of general principles. National courts must also guarantee all the rights conferred by EU law to the claimants as well as to the defendants, so that all the parties have access to all the protections required by EU law.

3.2 Legal burden of proving competition infringement

Art 2 of the Regulation 1/2003 provides a legal burden of proof such that

In any national or [EU] proceedings for the application of [arts 101 and 102 TFEU], the burden of proving an infringement of [art 101 (1) or art 102 TFEU] shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of art 101(3) TFEU] shall bear the burden of proving that the conditions of that paragraph are fulfilled.

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280 See *Eturas and Others* (C-74/14) EU:C:2016:42, [38].

281 The use of the term ‘legal burden of proof’ can also be found in Fernando Castillo da la Torre and Eric Gippini Fournier (n 34) 29, referring to Mark Brealey, ‘The Burden of Proof before the European Court’ (1985) 10 ELR 250, 255. Mark Brealey notes that ‘the legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved to the satisfaction of the court.’ See further Adrian Keane, *The Modern Law of Evidence* (7th edn, OUP 2008), 79, who states that the ‘legal burden of proof’ is defined as an obligation by a rule of law as which party has the duty to prove a fact in issue.

282 Before the Regulation 1/2003, this issue of burden of proof was left to national law. See e.g. *GT-Link* (C-242/95) EU:C:1997:376, [27].
Art 2 codifies settled CJEU caselaw that the burden to prove a competition infringement falls on whoever alleges the infringement. In the same vein, it should be for the undertaking accused to invoke the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying the defence are satisfied. Thus, art 2 simply stays in line with the general principle that ‘he who asserts must prove’ (ei incumbit probatio qui dicit, non qui negat).

In public enforcement of EU competition law, it is incumbent on the Commission ‘to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.’ The Commission must provide all the facts to establish that an undertaking has participated in an infringement and that it is responsible for the anti-competitive consequences. In short, the Commission, who claims the existence of an infringement, bears the burden of proof.

As for appeal cases before the EU Courts, ‘it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.’

Moreover, previous public enforcement cases require that the evidence that parties adduce to support the finding of an infringement shall be

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283 This principle has long been accepted in early CJEU caselaw, before the promulgation of Regulation 1/2003. See e.g. Amylum v Council and Commission (C-116/77) EU:C:1979:273, [14]; Blackspur v Council and Commission (C-362/95) EU:C:1997:401, [19]-[22]; Aalborg Portland, (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [79]; GT-Link (C-242/95), [27].

284 Regulation 1/2003, recital 5.


287 Regulation 1/2003, art 5 and recital 5.

288 KME Germany (C-272/09 P), [104]; Chalkor v Commission (C-386/10 P) EU:C:2011:815, [64]; Kone (C-510/11 P), [30].
On the one hand, this substantive requirement applies to elements constituting an infringement. For instance, the Court has held repeatedly in assessing complex economic matters that the evidence relied upon shall be ‘factually accurate, reliable and consistent’ and ‘capable of substantiating the conclusions drawn from it.’

On the other hand, to challenge an infringement decision, the applicant should formulate grounds of challenge with sufficient evidence, direct or substantial, to demonstrate well-founded objections. Previous CJEU caselaw has applied this requirement to efficiency gains under art 101(3) TFEU, where the defendant must substantiate the allegation that consumers benefit from the retroactive rebate scheme.

It reflects that ‘[a] substantiated submission can be overturned only by an at least equally substantiated submission by the parties. The rules governing the burden of proof are in practice truly relevant only where both parties provide sound, conclusive arguments and reach different conclusions.’ This requirement to substantiate allegations improves the quality of evidence and the quality of arguments put before the Court. Hence, if a party fails to provide ‘sufficiently precise and substantiated’ arguments to support their appeal, the Court may declare the appeal inadmissible.

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289 Tomra and Others v Commission (C-549/10 P) EU:C:2012:221, [24]. In this case, the CJEU confirmed the GC ruling that the Commission could not rely exclusively on the undertaking’s intention or policy in order to substantiate the finding of an infringement.

290 KME Germany (C-272/09 P), [94]; Commission v Tetra Laval (C-12/03 P) EU:C:2005:87, [39]; Spain v Lenzing (C-525/04 P) EU:C:2007:698, [56]–[57]; Industrias Químicas del Vallés v Commission (C-326/05 P) EU:C:2007:443, [76]; Nölle v Hauptzollamt Bremen-Freihafen (C-16/90) EU:C:1991:402, [12].

291 KME Germany (C-272/09 P), [105]; Chalkor (C-386/10 P), [65]; Kone (C-510/11 P), [31].

292 See e.g. Post Danmark (C-23/14) EU:C:2015:651, [13].

293 Opinion of AG Kokott in FEG (C-105/04 P) EU:C:2005:751, [73]. In FEG, the Commission established the conclusion based on ‘objectively verifiable evidence from stated sources, while the undertakings concerned cannot refute those establishments simply by unsubstantiatedly disputing them.’ Thus, AG Kokott pointed out that the undertakings should show in detail ‘why the information used by the Commission is inaccurate, why it has no probative value, if that is the case, or why the conclusions drawn by the Commission are unsound.’ That was not a ‘reversal of the burden of proof assumed by the FEG but the normal operation of the respective burdens of adducing evidence.’ See Opinion of AG Kokott in FEG (C-105/04 P), [74]–[75].

In private enforcement cases, claimants have the obligation to prove a breach of art 101 or 102 TFEU, or the defendant shall prove the conditions under art 101(3) to claim the benefit of exemption.\textsuperscript{295} As confirmed in CJEU caselaw, ‘a person who relies on that provision must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied.’\textsuperscript{296} More concretely, the undertaking concerned must prove that the agreement or concerted practice ‘contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.’\textsuperscript{297} This defence must not be speculative, but materialized. Lack of strong evidence proving the condition under art 101(3), it is permissible to conclude that the burden of proof has been discharged.\textsuperscript{298}

Art 2 of Regulation 1/2003 only concerns the legal burden to prove the infringement. There is no comprehensive and detailed EU law on proving other elements, including the harm and the causal link.\textsuperscript{299} In the absence of applicable EU law, it falls on Member States to lay down the rules of and the

\textsuperscript{295} \textit{Peroxidos Organicos v Commission} (T-120/04) EU:T:2006:350, [50].

\textsuperscript{296} \textit{GlaxoSmithKline Services and Others v Commission and Others} (C-501/06 P, C-513/06 P, C-515/06 P) EU:C:2009:610, [83]; \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [279] & [78]; \textit{Baustahlgewebe} (C-185/95 P), [58]. See also the GC ruling in \textit{Coats Holdings} (T-439/07), [160].

\textsuperscript{297} See art 101(3) TFEU. CJEU caselaw has established four cumulative conditions to claim the benefit of art 101(3). First, the agreement must contribute to improving the production or distribution of goods or promoting technical or economic progress. Second, consumers must be allowed a fair share of the resulting benefit. Third, the agreement must not impose on the undertakings concerned restrictions, which are dispensable to the attainment of those objectives. Fourth, it must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. See e.g. \textit{Slovenská sporiteľňa} (C-68/12) EU:C:2013:71, [29]–[35]; \textit{Unichem Laboratories v Commission} (T-705/14) EU:T:2018:915, [410].

\textsuperscript{298} \textit{GlaxoSmithKline Services} (C-501/06 P, C-513/06 P, C-515/06 P), [83] and the caselaw cited therein.

\textsuperscript{299} See e.g. \textit{Manfredi} (C-295/04 to C-298/04), [61]. ‘It follows that 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 [art 101 TFEU].’ Hence, to establish a damage claim, claimants must prove the infringement, harm, and causation between that harm and the infringement. See further discussion in Ashurst Report, 52 and 106. Initially, there are five aspects for claimants to prove: violation of competition law, fault, damage, causation and that the violated rule was there for the protection of the plaintiff. However, until the promulgation of the Damage Directive, the requirement of proving fault seems unnecessary in the context of private EU competition law enforcement in national proceedings. In addition, as the harmonization process goes on, the task to prove the last element that the violated rule was there for the protection of plaintiffs has naturally been accomplished. To that effect, see also Raymond Emson, \textit{Evidence} (4th edn, Palgrave Macmillan 2008) 374.
concept of the burden of proof, observing the principles of equivalence and effectiveness, and ensuring the full effect of arts 101 and 102 TFEU.

3.3 Evidential burden to prove damages claims

3.3.1 Definition of evidential burden

The evidential burden has often been referred to as the burden of adducing evidence and the duty of convincing the judge that it should be entered. The burden falls on whoever proposes an allegation, and shifts between contesting parties based on ‘factual presumptions and similar evidentiary mechanisms.’

While the initial onus of proof lies with the claimant, the defendant may argue that either there is no harm at all or the harm is caused by reasons other than the anti-competitive conduct. In case of the latter, the harm may be attributed to an economic slump in the relevant market or the emergence of new competitors. Those defences should also meet the required legal standard. In addition, if the undertaking accused has any difficulty defending itself, it must prove that as well. By doing so, the defendant kicks the ball back to the party alleging a damage claim. It is again the claimant’s turn to adduce evidence and to prove the contrary. Ultimately, this will only end, ‘once one

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301 Paul Lasok, The European Court of Justice, Practice and Procedures (Butterworths 1994) 421. Lasok states that ‘[t]he evidentiary burden, on the other hand, can be said to exist wherever there are facts to be proved and whatever the nature of the proceedings...’ In this sense, it differs fundamentally from the ‘legal burden of proof’ as the legal burden is provided in the law.

302 Fernando Castillo de la Torre and Eric Gippini Fournier (n 34) 29.

303 Usually, the defendant tries to rebut the causal relationship between the evidence provided and the assertion made. The defendant interrupts the causal link not by falsifying the evidence given, but by weakening the probative value of the evidence provided to the extent that the evidence could not support the assertion. To that effect, see e.g. Istituto Chemioterapico Italiano and Commercial Solvents v Commission (C-6/73) EU:C:1974:18, 269.

304 See e.g. SKW stahl-Metallurgie GmbH and SKW Stahl-Metallurgie Holding AG v Commission (C-154/14 P) EU:C:2016:445, [69]. The CJEU ruled that ‘it is the Court’s settled case-law that an infringement of the rights of the defence results in the annulment of the contested measure only if, without such an irregularity, the outcome of the procedure might have been different... which it is for the undertaking concerned to show.’ See also Kaminio International Logistics and Datema Hellmann Worldwide Logistics (C-129/13) EU:C:2014:2041, [79]; G and R (C-383/13) EU:C:2013:533, [38]; Foshan Shunde Yongjian Housewares & Hardware v Council (C-141/08 P) EU:C:2009:598, [94]. See also the earlier case-law, France v Commission (C-301/87) EU:C:1990:67, [31]; Germany v Commission (C-288/96) EU:C:2000:537, [101]. See also GC ruling in GEA Group v Commission (T-45/10) EU:T:2015:507, [297].
party fails to provide an explanation or justification on the factual evidence alleged by the other party.\textsuperscript{305}

A process as such may happen in every action for damages. From the point of view of the AG Kokott, the oscillation of the burden of proof merely represents ‘the normal operation of the respective burdens of adducing evidence.’\textsuperscript{306} It is the nature of the evidence being circumstantial that compels the relevant court to adopt a contextual approach to evidence, to simultaneously evaluate evidence provided by both contesting parties in order to get close to a coherent chain of evidence,\textsuperscript{307} and to adjudicate the dispute in a logical and reasonable way.

In addition, the shift of the evidential burden of proof is intrinsically related to the standard of proof.\textsuperscript{308} The standard of proof determines the requirements which must be satisfied for facts to be regarded as proven.\textsuperscript{309} The supporting evidence the party relies on ‘may be such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.’\textsuperscript{310} In short, the burden of proof is discharged when the standard of proving one contention is satisfied. The functional link between these two is that the stricter the standard of proof is, the less easy it is to discharge the burden of proof. Likewise, a loose standard of proof would give rise to a more easily discharged burden of proof.

\begin{footnotes}
\footnotetext[305]{Andreas Scordamaglia-Tousis (n 270) 288. Andreas Scordamaglia-Tousis quotes the observation made by Lenaerts, who notices that such a process \textit{de facto} compels the undertaking involved to provide an explanation or a justification. Otherwise, the burden of the opposing party may have been satisfied. See Koen Lenaerts, \textit{Some Thoughts on Evidence and Procedure in European Community Competition Law} (2007) 30(5) Fordham International Law Journal 1463, 1473.}

\footnotetext[306]{Opinion of AG Kokott in \textit{FEG} (C-105/04 P), [73]–[74]. The burden of proof discussed by AG Kokott is evidential burden of proof, which shifts between contesting parties.}


\footnotetext[308]{Andreas Scordamaglia-Tousis discusses the unclear boundary between the standard of proof and the burden of proof in English law. He points out the CAT’s view that the participation in adducing evidence does not reverse the burden of proof or set aside the presumption of innocence. The impossibility to distinguish the burden of proof from the standard of proof renders any traditional legal analysis of the burden of proof inadequate. However, he does not explain why these two concepts are so intrinsically related and what influences they have on each other. Therefore, he indeed inspired the author in this discussion. See Andreas Scordamaglia-Tousis (n 270) 289.}

\footnotetext[309]{Opinion of AG Kokott in \textit{T-Mobile} (C-8/08) EU:C:2009:110, footnote 60. For more discussion on the standard of proof, see Section 4, Standard of proof, below.}

\footnotetext[310]{Opinion of AG Kokott in \textit{T-Mobile} (C-8/08), [89]. See also in \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [79].}
\end{footnotes}
3.3.2 Burden to prove the harm

To win the lawsuit, claimants bear the burden of proving the existence of any relevant harm. Infringements of arts 101 and 102 TFEU cause great harm to consumers and to undertakings. At this stage, claimants may need to consider what type of competition law infringement has caused what type of harm. Claimants may be direct purchasers, who pay an overcharge for their inputs or final products. Claimants may be indirect purchasers, who pay inflated prices for products that contain the cartelized input, if the overcharge has been passed on to them. Claimants may also be consumers, who pay higher prices from fringe firms who are outside the cartel but who enjoy the benefit of the umbrella effect of the cartel. The existence of relevant harm identifies genuine victims and forms the pre-condition for any compensation.

In addition, claimants also bear the burden to prove the extent of harm. Quantification of harm is a major obstacle to effective damages actions. Claimants would have to establish the exact amount, or at least a persuasive amount, of the harm they have suffered from the infringement. That may incur complex legal and economic issues, which makes quantification costly and difficult.

The general approach towards quantification is to compare ‘the actual position of claimants with the position they would find themselves in had the infringement not occurred.’ This refers to the non-infringement scenario or counterfactual scenario. It also involves converting the factual and counterfactual into a final damages value.

This general approach ensures that parties injured by infringements of directly effective EU law should have the full value of their losses restored. It reflects the nature of damages in private antitrust enforcement as compensatory. Based on that rationale, full compensation under the Damage Directive ‘should not lead to overcompensation, whether by means of punitive,}

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311 Quantification Communication, para 2.
313 Quantification Communication, para 3.
315 Quantification Communication, para 6.
317 Quantification Communication, para 6.
multiple or other damages.’318 It is added that victims shall be able to ‘claim compensation for actual loss (damnum emergens), for gain of which that person has been deprived (loss of profit or lucrum cessans), plus interest, irrespective of whether those categories are established separately or in combination in national law.’319

Hence, the burden of proving both the existence of harm and the extent of harm rests on the claimant, who is in the best position to adduce relevant evidence and who must have known how anti-competitive behaviours have caused specific harm to them.

3.3.3 Burden to prove the causal relationship

The burden to prove a causal relationship lies with whomever is alleging the claim.320 The claimant, having adduced sufficient evidence to support the existence of harm, must establish that the harm was caused by the infringement of EU competition law.

To remedy the information asymmetry and to ensure the effectiveness of damages actions, art 17 of the Damage Directive presumes that ‘cartel infringements cause harm.’321 Meanwhile, infringers shall have the right to rebut that presumption. This presumption relies heavily on the finding that more than nine out of ten cartels cause illegal overcharges.322 It presumes the causal link between the cartel and an effect on price.

However, slight confusions arise if one misconceives that art 17 discharges the claimant’s burden to prove the harm, or that the causal link between the harm and the infringement is naturally established. This is not the case.

Art 17, based on previous experience of EU competition law infringement, declares a general condition that cartel infringements cause harm. However, art 17 does not clarify further, for instance, what harm is caused by the infringement, to whom the harm is caused or where the harm occurs. Hence, the presumption provided in art 17 is roughly correct only in general terms. The claimants must prove with certainty that a specific EU competition law infringement caused a specific quantity of harm to specific claimants in a

320 Manfredi (C-295/04 to C-298/04), [61].
321 See Damage Directive, art 17(2) and recital 47.
specific geographical or product market. The lack of any single specific element makes the argument insufficient to establish the causal link.323

However, this presumption may be of greater utility in follow-on damages cases. In a follow-on case, a competition authority has already found the existence of an EU competition law infringement. Such a decision clearly provides the outline – a description of the undertakings involved, detailed operations or arrangements, the duration, geographical or material scope, and so on.324 Such a description demonstrates clearly how the geographical or product market is influenced. Claimants who also operate in the influenced market can establish the causal link more easily under art 17(2) of the Damage Directive.

To illustrate, imagine one claimant operates in the adversely influenced product market. Art 17(2) presumes that the infringement causes harm to the product market. It follows that whoever operates in this market will be adversely influenced. Thus, claimants only need to prove that they operate in the influenced product market and then the causal link is established. If this were not the case, the establishment of causation would require each claimant to prove that the geographical or product market he operates in has been adversely affected, which involves cumbersome economic analysis.

In addition to causation as a condition for damages liability, causation has also been observed by CJEU in other aspects in competition law cases. ‘Anic presumption’ is one example:325 where firms remain active on the market, it is presumed that they have taken account of the information exchanged with competitors in previous meetings for the purposes of determining their conduct on that market.326 Once this presumption applies, subject to proof to the contrary, it is for the defendant to adduce evidence to prove that the causal

323 Lack of any single specific element, questions rise as to whether it is this infringement that causes the harm, whether this infringement causes harm to those claimants or whether there is any quantifiable damage at all.

324 OECD, ‘Relationship between Public and Private Enforcement’ (n 12), 18-19.

325 See e.g. Anic Partecipazioni (C-49/92 P), [121]. This presumption was first established in Anic Partecipazioni, and thus it is called the ‘Anic presumption’.

326 Anic Partecipazioni (C-49/92 P), [121]. See also Huls (C-199/92 P), [162]; T-Mobile Netherlands and Others (C-8/08) EU:C:2009:343, [58].

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link has been interrupted.\textsuperscript{327} The burden shifts to the defendant to rebut the presumption by proving a public distancing or a report to an authority.\textsuperscript{328}

As acknowledged by the Commission, the burden of proving causation remains a difficulty in competition law cases, especially in cases where several infringers are involved.\textsuperscript{329} The Damage Directive does not deal specifically with the issue of causation nor does it include any harmonized rules concerning a causation test. Even though the CJEU had the opportunity to discuss causation in detail as a matter of EU law in \textit{Kone},\textsuperscript{330} it only very narrowly answered the preliminary ruling questions submitted to it and left many issues concerning causation still open. The CJEU judgment in \textit{Kone} follows its previous approach in \textit{Manfredi} that ‘it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right.’\textsuperscript{331} That includes the application of the concept of a causal relationship. In any event, in case of genuine ambiguities, a national court could always request a preliminary ruling from the CJEU to interpret EU law and to clarify causation-related issues.

3.4 Presumptions applicable to damages actions

There has never been an agreed definition for presumption.\textsuperscript{332} The introduction of presumptions aims at obviating the need of evidence to

\textsuperscript{327} \textit{T-Mobile} (C-8/08), [53]. See also \textit{GlaxoSmithKline Services} (T-168/01), [B6]; \textit{Aalborg portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P & C-219/00 P), [B1]; \textit{Bayer} (C-2/01 P & C-3/01 P), [63]; \textit{Huls} (C-199/92 P), [155]; \textit{Anic Partecipazioni} (C-49/92 P), [96].

\textsuperscript{328} \textit{Eturas} (C-74/14), [46]. See also \textit{Total Marketing Services v Commission} (C-634/13 P) EU:C:2015:614, [23]–[24]. See more discussion on defence of non-participation in concerted practice in Section 4, Standard of Proof.

\textsuperscript{329} Commission Staff Working Paper – WP, para 74.

\textsuperscript{330} \textit{Kone} (C-557/12). For a more detailed examination on \textit{Kone} case, see Section 4, Standard of Proof, below.

\textsuperscript{331} \textit{Manfredi} (C-295/04 to C-298/04), [64].

\textsuperscript{332} The Oxford English Dictionary defines ‘presumption’ as ‘[t]he action of taking for granted or presuming something: assumption, expectation, supposition; an instance of this; a belief based on available evidence.’ Available at: ‘Oxford English Dictionary Online’, <http://www.oed.com/view/Entry/1509037?redirectedFrom=presumption#eid>. The attempt to define ‘presumption’ in a legal sense has been quite a long one. For instance, in Sir Courtenay Peregrine Ilbert, ‘Evidence’ in \textit{Encyclopedia Britannica} Vol. 10, (11\textsuperscript{th} edn, Cambridge, 1910), 15, that ‘[a] presumption in the ordinary sense is an inference. … The subject of presumptions, so far as they are mere inferences or arguments, belongs, not to the law of evidence, or to law at all, but to rules of reasoning.’ Legal scholars have attempted to draw classifications that are more accurate on the reason for presumption, or on the consequence for presumption. Such attempts are far from successful or commonly acknowledged. See e.g. David Bailey, ‘Presumptions in EU Competition Law’ (2010) 31 E.C.L.
establish a proposition. They allow 'an inference of an unknown hypothetical fact' and shift the burden to 'require the other party to provide an explanation or justification.'

The use of presumptions in EU competition law in general leads to a more cost-efficient judicial procedure. Through allocating the burden of proof on the party that is better situated or to whom the evidence is available, it 'conserves resources of competition authorities and the judicial system.' It also creates legal certainty when presumptions are straightforward to implement in practice.

In competition law cases, an efficient procedure is of particular importance when presumptions incorporate insights from mainstream economic theory

Rev. 362–369. Bailey classifies presumptions as evidential presumptions, substantive presumptions and procedural presumptions. According to him, a fact or conclusion may be presumed because of three reasons, namely: self-evidence experience, public policy and procedural convenience. To him, evidential presumptions are used to discharge the legal burden of proof, through adducing a set of facts from which another fact may be inferred. The application of evidential presumption by national authorities is a matter for national law. If the presumption stems from arts 101 and 102 TFEU, as interpreted by the Court, the presumption helps form the integrity of applicable EU law. Substantive presumptions are an expression of mainstream economic theory, grounded in administrative or judicial experience in applying the law. They can be either rebuttable or conclusive, and the latter are called a 'per se rule' in some jurisdictions, such as United States. Procedural presumptions are obviously made for procedural reasons. See relevant discussion in Ginevra Bruzzone and Marco Boccaccio, 'Impact-based Assessment and Use of Legal Presumptions in EC Competition Law: The Search for the Proper Mix' (2009) 32 World Comp. 465–484; Okeoghene Odudu, The boundaries of EC competition law – The scope of Article 81 (OUP 2006) 113–127. Also, Deysen Heydon, Cross on Evidence (9th edn, LexisNexis Butterworths 2013) 299. Deysen Heydon describes presumptions as 'frequently recurring examples of circumstantial evidence', which apparently is more a description than a definition.

Cristina Volpin (n 307) 1164. See also Christopher Decker, Economics and the Enforcement of European Competition Law (Edward Elgar Publishing 2009), 193–194. Decker identifies information asymmetry as one of the main reasons why to create and to adopt presumptions. Presumption thus equalizes the position of contesting parties and intends to reach a balanced condition, when the defendant possesses the evidence.

Fernando Castillo de la Torre and Eric Gippini Fournier (n 34) 58. The Court made a clear perception of the link between the known and unknown fact. While the former is presented before the Court, the latter is inferred based on experience or causation.

Aalborg Portland (C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00), [79].

See Opinion of AG Kokott in T-Mobile (C-8/08), [43].

Opinion of AG Kokott in Akzo Nobel (C-97/08 P), [71]. AG Kokott explained that '[t]he effective enforcement of competition law requires clear rules. A presumption rule such as that recognised by the Court in AEG and Stora, which allows the Commission as the competition authority to attribute to a parent company the responsibility for the cartel offences of its wholly-owned subsidiaries, creates legal certainty and is straightforward to implement in practice.'
and practical experience. Avoiding burdensome economic analysis, on sound economic principles, saves human and economic resources.\textsuperscript{338}

Moreover, the use of presumptions addresses the balance between efficiency and fairness in damages action, also ensuring the full effect of the EU competition law. As the CJEU noted:

The purpose of the presumption of actual exercise of decisive influence is, in particular, to strike a balance between, on the one hand, the importance of the objective of combatting conduct contrary to the competition rules, in particular to [art 101] TFEU, and of preventing a repetition of such conduct, and, on the other hand, the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms.\textsuperscript{339}

Presumptions are just one possible way to overcome information asymmetries and to address other evidentiary issues. In addition to presumptions, the Damage Directive also provides other measures, such as disclosure of evidence from the defendant or a third party, and disclosure of evidence in the hand of competition authorities.\textsuperscript{340} Furthermore, failure or refusal to comply with the disclosure orders of national courts, or destruction of relevant evidence may result in the imposition of penalties.\textsuperscript{341} Such penalties may include the

\textsuperscript{338} Philip Lowe, ‘Remarks on Unilateral Conduct’, Speech at the Federal Trade Commission and Antitrust Division Hearings on Section 2 of the Sherman Act, (2006) September 11, 6. [http://101.96.10.64/ec.europa.eu/competition/speeches/text/sp2006_019_en.pdf]. For example, the CJEU’s view on predatory pricing is founded on the economic theory of a recoupable sacrifice by a dominant firm to exclude or to deter competitors. According to Lowe, both for safe harbours and presumptions, and for legality and illegality, the sound economic principle basis is necessary to ensure the practicality of the effect-based approach. [http://ec.europa.eu/competition/speeches/]. In fact, ‘sound economic principles’ are frequently used to assume for instance market players’ conduct in the relevant market, their intelligent adaptation to the market conditions, their choice-making processes, etc. The most significant example would be the CJEU’s view on predatory pricing, which is founded on the economic theory of a recoupable sacrifice by a dominant firm to exclude or deter competitors. See \textit{Akzo Nobel and Others v Commission} (C-97/08 P) EU:C:2009:536, [71]. That presumption is indeed rebuttable if the defendant can justify the pricing.

\textsuperscript{339} \textit{Elf Aquitaine v Commission} (C-521/09 P) EU:C:2011:620, [59].

\textsuperscript{340} Damage Directive, arts 5–7 provide that parties can request the national court hearing the case to disclose evidence from the other party or a third party as well as disclose evidence in the file of a competition authority. For more discussion, see Section 5, Access to evidence.

\textsuperscript{341} See Damage Directive, art B(1). It also includes the conditions where the opponent or third party fails or refuses to comply with the obligations imposed by national courts to protect confidential information, and where they breach the limits on the use of evidence provided for in the Damage Directive, e.g. art 7. See also GC caselaw, where the Commission’s failure to produce documents that are of direct concern will deprive the GC of the possibility of
possibility to draw adverse inferences, presuming the relevant issue to be proven or dismissing claims and defences in whole or in part.\textsuperscript{342} In that regard, such penalties function like presumptions.

To have a better understanding of presumptions in the EU competition law, it is necessary to look at possible classifications of presumptions. To start with, presumptions are either rebuttable or irrefutable. Presumptions are rebutted when the opponent proves the contrary. It is not sufficient to offer evidence that merely gives reasons for doubt. Refutation must be substantiated. Irrefutable presumptions, on the other hand, can never be rebutted.\textsuperscript{343} In private antitrust cases, relevant EU law does not involve irrefutable presumptions.

Further, presumptions can be classified as either presumptions of fact or presumptions of law. A presumption of fact is described as the process of ascertaining one fact from the existence of another without engaging any rule of law. A presumption of law is defined as a deduction that the law expressly directs to be made from particular facts.\textsuperscript{344} While the former derives logically from the circumstances of a particular case, the latter fixes the rules of law to compel a certain inference to be drawn from particular facts.

The following paragraphs first examine presumptions of fact that have been recognized and analysed in CJEU caselaw. Further, the following paragraphs clarify that no ‘proof-proximity principle’ applies to presumptions of fact in EU competition law cases. Second, presumptions of law are discussed to see what presumptions are provided by EU rules that national courts must consider in private damages actions.

3.4.1 Presumptions of fact

Presumptions of fact provide presumed facts based on experience, or common sense.\textsuperscript{345} To ascertain one fact based on another is more of a logical process than of a legal nature. The establishment of presumptions of fact would ‘require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.’\textsuperscript{346}

\textsuperscript{342} See Damage Directive, art 8(2) and recital 33, referring to sufficiently deterrent penalties.

\textsuperscript{343} Such presumptions would be e.g. a presumption that children under certain age are incapable of committing a crime.


\textsuperscript{345} Raymond Emson (n 299) 407. See also related discussions in Cristina Volpin (n 307) 1166.

\textsuperscript{346} \textit{Aalborg Portland} (C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00), [79]. See also in \textit{Knauf Gips} (C-407/08 P) EU:C:2010:389, [80].
Such presumptions in damages actions are no more than commonly occurring examples of inferences drawn based on circumstantial evidence.\textsuperscript{347}

One classic example is the presumption of parental liability, also known as ‘Stora presumption’.\textsuperscript{348} According to this presumption, parent companies are liable for any infringement committed by a wholly (or virtually wholly) owned subsidiary, presuming that the parent exercises a decisive influence over the commercial policy of the subsidiary.\textsuperscript{349} In consequence, this presumption shifts the evidential burden of proof to the undertaking accused to rebut the presumption of parental liability.\textsuperscript{350} The presumption here defines the parameters of the undertaking.

To rebut any presumption of fact, the defendant must adduce ‘cogent evidence to the contrary’.\textsuperscript{351} It is insufficient if the party only provides evidence that may shed serious doubt on the presumption. The party also needs to adduce sufficient evidence either to prove that the presumption is wrong or to prove that the presumption does not apply in the current situation.

\textsuperscript{347} James Griffiths, Paul McKeown and Robert McPeake, \textit{Evidence} (16\textsuperscript{th} edn, OUP 2012) 36. To that effect, see also Opinion of AG Kokott in \textit{T-Mobile} (C-8/08), [93]–[94] that ‘the presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience and the undertakings concerned are at liberty to refute those conclusions.’

\textsuperscript{348} This presumption was first established in \textit{Stora Kopparbergs Bergslags AB} (C-286/98 P) EU:C:2000:630, [29]. According to the CJEU, for a subsidiary wholly owned by a parent company, ‘the parent company in fact exercised decisive influence over its subsidiary’s conduct’. In that case, the undertaking concerned sits at a better place to rebut that presumption. Later, this presumption was confirmed in \textit{Akzo Nobel}, where the Court held that it is sufficient for the Commission to prove that the subsidiary is wholly owned by a parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. Then the parent company must bear the evidential burden of rebutting that presumption by adducing evidence to show that its subsidiary acts independently on the market. \textit{Akzo Nobel} (C-97/08 P), [58]–[65]. This, according to the AG Kokott is perfectly rational and consistent with the due process requirements. See Opinion of AG Kokott in \textit{Akzo Nobel} (C-97/08 P), [75].

\textsuperscript{349} A virtually wholly owned subsidiary refers to the situation where the parent company owns 99\% or 98\% of the subsidiary, but the parent company does in fact exercise such a decisive influence. See e.g. \textit{Arkema} (C-520/09 P), [42]. See similar percentages in e.g. \textit{Legris Industries} (C-289/11 P) EU:C:2012:270, [48] (99.99\% ownership of shares); \textit{Eni v Commission} (C-508/11 P) EU:C:2013:289, [49] (99.97\%); \textit{GEA Group} (T-45/10), [141]–[142] (99.5\% indirect shareholding); \textit{Michelin v Commission} (T-203/01) EU:T:2003:250, [290] (more than 99\%); \textit{Elf Aquitaine} (C-521/09 P), [63] (98\% shareholding, annulled on other grounds); \textit{Elf Aquitaine} (T-299/08) EU:T:2011:217, [57] (97\%).

\textsuperscript{350} See also \textit{Arcelor Mittal v Commission} (T-405/06) EU:T:2009:90, [86]–[104]; \textit{Akzo Nobel} (C-97/08 P), [60]–[64].

\textsuperscript{351} Opinion of AG Kokott in \textit{T-Mobile} (C-8/08), [89]–[90] & [94].
It shall be mentioned beforehand that the presumptions of fact discussed in the following paragraphs are public enforcement presumptions. They are developed in the context of discussions finding an infringement (i.e. in judicial reviews of the Commission’s decisions by EU Courts). When the CJEU in its judgments clearly acknowledges that certain public enforcement presumptions are interpretations of art 101 or 102 TFEU or constitute an integral part of arts 101 and 102 TFEU, these public enforcement presumptions are in principle applicable in private damages actions. As to those not yet expressly confirmed by the CJEU as interpretations of art 101 or 102 TFEU, it is unknown whether they must be applied to private damages actions or not.

Presumptions of fact under art 101 TFEU

Many presumptions of fact are provided in CJEU caselaw relating to infringements of art 101. For example, in GlaxoSmithKline Service case, the CJEU rules on parallel trade, stating that ‘in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition.’ While applying the lessons of experience, it is presumed

352 See e.g. the presumption of cartel participation in following paragraphs discussing ‘Presumptions of facts under art 101 TFEU’. For another example of ‘public enforcement presumptions’, see e.g. the presumption of continuous infringement. Under this presumption, the lack of evidence to prove the cartel implementation within a long period does not preclude the infringement from being regarded as a ‘single and continuous infringement’. See e.g. Ahlström Osakeyhtiö and Others v Commission (C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85) EU:C:1988:258, [71]; FEG (C-105/04 P), [98]; Commission v Verhuizingen Coppens (C-441/11 P) EU:C:2012:778, [70]–[71]; Total Marketing Services (C-634/13 P), [27].

353 Regulation 1/2003, art 31. The Court 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 imposed.


355 Presumptions regarding restriction by object are characterised as applying the lessons of experience. See Antonio Capobianco, ‘OECD Roundtable on Safe Harbours and Legal Presumptions in Competition Law’, paras 18–19. <https://one.oecd.org/document/DAF/COMP/WD(2017)64/en/pdf/>. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardize the objectives pursued by the Community competition rules. The best example to demonstrate the power of experience is the rationale behind ‘predatory pricing’. In the Akzo Chemie case, the CJEU ruled that ‘[p]rices below average variable costs ... 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,
that anti-competitive agreements that intend to limit parallel trade 'deprive final consumers of the advantages of effective competition.' This presumption then discharges the claimant’s burden to prove an anti-competitive object.

The most important presumption of fact in the EU competition law is the presumption of cartel participation. It is established in CJEU caselaw that participating in meetings with an anti-competitive object discharges the claimant’s burden to prove the undertaking’s participation in a cartel. This shifts the evidentiary burden to the undertaking concerned to prove that it has 'publicly distanced itself from that practice or reported it to the administrative authorities.' This presumption stems from art 101(1), draws from previous experience, and forms an integral part of applicable EU law.

However, it seems that this presumption would only be referred to in case of horizontal concerted practices. For horizontal agreements, the existence of an

since each sale generates a loss, namely the total amount of the fixed costs ... and, at least, part of the variable costs relating to the unit produced.' 

GlaxoSmithKline Services (C-501/06 P, C-513/06 P, C-515/06 P), [62].

For example, see Montecatini (C-235/92 P), [22]–[23]. The GC ruled that the undertaking concerned (namely Montecatini SpA) had participated in meetings with anti-competitive intention (price initiatives), and it could not assert that it did not support intentions that were decided on, planned and monitored at those meeting. It now turned to the undertaking concerned to adduce sufficient evidence to corroborate the assertion. This presumed link establishes that defences such as taking no account of the meeting outcomes or not subscribing to the intention do not constitute equivalent counterevidence. See also Total Marketing Services (C-634/13 P), [21]; Comap v Commission (C-290/11 P) EU:C:2012:271, [74]–[76] and the caselaw cited therein.

Eturas (C-74/14), [46]. The notion of 'distancing' shall ‘clearly indicated to its competitors’ that it is not going to join the collusion or follow the anti-competitive intention. See also Hüls (C-199/92 P), [155] and Anic Partecipazioni (C-49/92 P), [90]. However, this ‘distancing’ may not necessarily be made known to every co-infringer and it would be too difficult to be made known to every co-infringer. Such as the case in Eturas, where the E-TURAS system was hardly known to every participant to that online platform. When the defendant is unable to prove a clear rejection, the 'distancing' must be far away enough that the undertaking could prove that it is unable to receive any collusive message. In practice, the notion of 'public distancing' must be interpreted narrowly. See e.g. Westfalen Gassen Nederland v Commission (T-303/02 EU:T:2006:274, [103]; Voestalpine and Voestalpine Wire Rod Austria v Commission (T-418/10) EU:T:2015:516, [125]–[129]; Kühn & Nagel International and Others v Commission (T-254/12) EU:T:2016:113, [167]–[177]. Moreover, in Total Marketing Services, the Court ruled further that 'a public distancing as a necessary proof' to rebut the presumption of cartel participation is only required in in the case of an undertaking that participated in anti-competitive meetings. In other words, it may not be required in all circumstances, such as those where no anti-competitive meeting happened at all. See Total Marketing Services (C-634/13 P), [23]–[24].

T-Mobile (C-8/08), [49]–[52]. See also Opinion of AG Szpunar in Eturas (C-74/14) EU:C:2015:493, [33]; Anic Partecipazioni (C-49/92 P), [118] & [121]; Hüls (C-199/92 P), [161]–[162].
agreement with anti-competitive object is already sufficient for finding an infringement of art 101(1). As to vertical schemes, the conditions are more complicated. In a complex vertical supply chain, ‘frequent contacts and strategic coordination are inherent’ in such a commercial relationship, which can barely be used as solid evidence to prove collusion. The details of those contacts are almost inaccessible to private claimants. As confirmed by CJEU caselaw, without evidence of tacit participation, such as ‘specific sales condition, imposition of service fees on certain sales, selective distribution’, and so on, it is extremely hard to find a vertical arrangement liable for anti-competitive results.\footnote{Cristina Volpin (n 307) 1169}

Moreover, the presumption of cartel participation implies that the undertaking concerned is in a better position to collect evidence and to disengage itself from anti-competitive arrangements.\footnote{See Bayer (C-2/01 P and C-3/01 P), [141]. In Bayer, the CJEU ruled that ‘the mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for finding that such an agreement exists.’ See also Volkswagen v Commission (T-208/01) EU:T:2003:326, [45]–[46]. For other legal presumptions applying to vertical restraints, see Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.} This is now referred to as ‘the proof-proximity principle’ emerging in EU competition law.\footnote{Cristina Volpin (n 307) 1169.} The principle allocates the burden of proof to the party in whose hands evidence is more likely to be available. However, there are crucial problems that emerge simultaneously with this principle, particularly its compatibility with ‘he who asserts must prove’.

\footnote{Cristina Volpin (n 307) 1173–1177. Volpin has extensively discussed this principle, about the interplay between this principle and the principle of innocence. Volpin explains that the proof-proximity principle allocates the evidential burden of proof on the party to whom the evidence is available or who is better situated to furnish it easily and promptly. This ensures the effectiveness of the fact-finding process in both public and private enforcement, while still guaranteeing art 2 of Regulation 1/2003. Even though this principle has not been explicitly affirmed in relevant EU caselaw, reference has been made to a more general principle of ‘sound administration of justice.’ According to Volpin, this principle balances the power of the parties in a quest for fairness and justice. Volpin made particular reference to art 101(3) as an expression of this principle, where colluding parties have access to data that establishes the objective economic benefits of the information and to information that shows that agreement produces efficiencies and benefits consumers. To that effect, see also Jonathan Faull and Ali Nikpay (eds.) The EC Law of Competition (2nd edn, OUP 2007) 94–95.}
With regard to this question, Cristina Volpin argues that presumptions only affect the evidential burden of proof, not the legal burden of proof. Thus, compatibility lies in the fact that the proof-proximity principle acts as a rule of interpretation for a dynamic evidential burden of proof and as a limit to the use of evidential presumptions, while ‘he who asserts must prove’ is mainly reflected in art 2 of Regulation 1/2003 as the legal burden of proof.

However, Volpin’s over-simplified categorization has not been carried out on a matched comparison. In other words, the legal status of the proof-proximity principle has been overestimated. Rather, this principle shall not be conceived as a general legal principle, but as a sui generis methodology for the allocation of the burden of proof.

There is currently no EU law or CJEU caselaw explicitly confirming the proof-proximity principle as a general legal principle. One might argue that this principle is recognized when the Damage Directive provides that claimants could request national courts to disclose evidence either in the hand of the opponent or a third party, or in the hand of competition authorities. However, it should first be noted that such requests are not submitted unconditionally. All requests should be submitted in terms of ‘specified items of evidence or relevant categories of evidence circumscribed’, ‘as precisely and as narrowly as possible’ and ‘on the basis of reasonably available facts in the reasoned justification’. Second, it is under the national courts’ discretionary power to decide whether such disclosure will be granted or not. These limitations imposed on disclosure requests show that there has not been a general principle that whoever sits in a better position to produce certain evidence in principle shall bear the burden to provide it. The proof-proximity principle is more of an ancillary tool to ensure that certain rights, such as the right to defence or the right to fairness, are not compromised under ‘he who asserts must approve’.

So far, CJEU preliminary ruling cases have discussed some presumptions of fact such as the presumption of cartel participation as interpretation of art 101. These presumptions are binding in damages actions for EU competition law infringements. For presumptions that are only provided in public enforcement cases, only when CJEU recognizes explicitly that they are interpretations of art 101 or when they constitute an integral part of art 101, it is known for sure that they are automatically applicable to damages claims. As to other presumptions of fact in public enforcement cases, they are merely of reference.

364 Cristina Volpin (n 307) 1177.
365 ibid, 1179.
367 Damage Directive, art 5(2).
368 Damage Directive, art 5(4).
value, and national courts hearing the damage claim may consider them within their discretionary power.

*Presumption of fact under art 102 TFEU*

The treatment of presumptions of fact under art 102 makes no difference to presumptions under art 101. For instance, in *Hoffmann-La Roche*, the CJEU held that, save in exceptional circumstances, very large market shares proved that a firm had a dominant position.\(^{369}\) Later in *Akzo*, this presumption was confirmed in the case of a market share over 50%.\(^{370}\) Market share is an important indicator of market power, in particular in dominant position cases. However, market share itself merely provides a useful indication regarding the market structure and the gravity of various undertakings active on the market.\(^{371}\) Thus, other elements constituting art 102 shall also be considered.

To render an undertaking liable for violating art 102, abuse must also be established.\(^{372}\) In establishing abuse, presumptions of fact also apply. For instance, a dominant firm charging prices below average variable costs is presumed to be guilty of an abuse of its dominant position.\(^{373}\) This is because the dominant company ‘has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market.’\(^{374}\) Hence, ‘[i]f it is shown that the object pursued by the conduct of an undertaking in a

\(^{369}\) *Hoffmann-La Roche* (C-85/76), [41].

\(^{370}\) *Akzo Chemie* (C-62/86), [60].


\(^{372}\) It is true that the commercial behaviour of the undertaking in a dominant position may not always distort competition on the relevant market. The existence of an abuse must be established in order to render an undertaking liable for infringements of art 102 TFEU. See e.g. *British Airways v Commission* (C-95/04 P) EU:C:2007:166, [143]; more recently, *Meo – Serviços de Comunicações e Multimédia* (C-525/16) EU:C:2018:270, [24]. From the Court’s perspective, it is in no way the purpose of art 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position in a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. See *Intel v Commission* (C-413/14 P) EU:C:2017:632, [133].

\(^{373}\) See *Tetra Pak v Commission* (C-333/94 P) EU:C:1996:436, [41]-[44]. See also in *Autoritātes un komunikācijas konsultēšanās konsultāciju āģentūra/Latvijas Autoru apvienība* (C-177/16) EU:C:2017:689, [53]. The Court ruled that ‘when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in the other Member States, that difference must be regarded as indicative of an abuse of a dominant position’.

\(^{374}\) *Intel* (C-413/14 P), [135]. See also *Post Danmark* (C-209/10) EU:C:2012:172, [23].
dominant position is to limit competition, that conduct will also be liable to have such an effect.\textsuperscript{375}

Such presumptions are of particular importance for private claimants, since under infringements in art 102 the dominant firm usually holds the majority of the key evidence. While the dominance might be easier to demonstrate, the evidence for abuse is by no means easily accessible. Therefore, it is more beneficial for private claimants when they only need to prove, for instance, an abnormal increase in price for consumers or an exclusionary effect for competitors.\textsuperscript{376}

Similar to presumptions of fact under art 101, presumptions of fact provided under art 102 are also public enforcement presumptions. Whether they are automatically applicable in private damages actions depends on whether the CJEU has explicitly recognized them as interpretations of art 102 or an integral part of art 102, either through preliminary rulings,\textsuperscript{377} or in its own public enforcement judgments.

In practice, it is often hard to tell which parts of the Court’s judgment have significant general implications such that the Court is actually talking about interpretations of the EU competition law. So far, only when the Court actually uses the statements such as ‘interpretation of art 101’, ‘interpretation of art 102’ or ‘an integral part of art 101 or 102’ is it clear that such presumptions of fact are automatically applicable in civil proceedings where relevant. As to other public enforcement presumptions not yet recognised by the CJEU, it is for national courts to consider their applicability in a given dispute within the courts’ discretion. National courts shall always observe the principles of equivalence and effectiveness, ensure the full effect of arts 101 and 102 TFEU, and guarantee all the rights conferred by EU law, in particular the right to full compensation.

\textsuperscript{375} Michelin (T-203/01), [241].

\textsuperscript{376} The exclusionary effect is also one important anti-competitive consequence of a dominant undertaking’s abusive conduct. The CJEU ruled that art 102 TFEU ‘prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits.’ See Intel (C-413/14 P), [136].

\textsuperscript{377} See e.g. Post Danmark, where the CJEU has established that ‘a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market.’ Post Danmark (C-209/10), [23]. Moreover, the Court interprets art 102 TFEU in a way that ‘it is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition. ...In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary ... or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.’ See Post Danmark (C-209/10), [39]–[42].
3.4.2 Presumptions of law

Presumptions of law refer to presumptions that are provided in law, irrespective of what reasons they are provided for. Thus, the inference is imposed by law. Presumptions of law might be irrefutable in some cases, but in case of EU competition law infringements, almost all presumptions are rebuttable.

The presumptions of law discussed in the following paragraphs consist mainly of public enforcement presumptions applicable to public enforcement proceedings (i.e. to prove the infringement) and those provided by the Damage Directive for damages actions (i.e. to prove harm and causation).

In terms of public enforcement presumptions (i.e. to prove the infringement), the most obvious examples are those hardcore restrictions stated in arts 101 and 102 TFEU. Art 101 prohibits conduct such as price-fixing, predatory pricing, output-limiting, market-sharing, and so on. Art 102 prohibits unfair trading, output-limiting, and so on. Some of these forms of collusion are regarded, by their very nature, as being injurious to the proper functioning of normal competition. Such ‘infringements by object’, once proved, violate EU competition law regardless of their effects. Even though they might escape liability under art 101(3), the judge must at first glance presume them to be preventing, restricting or distorting competition.

However, like presumptions of fact, not all such public enforcement presumptions of law are automatically applicable in private damages actions. So far, it is clear that the presumptions provided in EU law must be applied by national courts in civil proceedings when they are called upon to decide damages caused by infringements of arts 101 and 102 TFEU or of national competition law that falls within art 2(3) of the Damage Directive. As to those provided by other non-binding legal sources, they do not require compulsory application in private damages actions, but are of some reference value for national courts hearing damages claims.

One example of such non-binding public enforcement presumptions concerns market-share thresholds. The Commission uses market-share thresholds in the De Minimis Notice to presume the existence of an appreciable restriction

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379 Such presumptions of law see e.g. presumptions of child under certain age as no legal capacity. See e.g. age 10 in Section 13(1) of the Civil Evidence Act 1986 in UK.

380 Regarding the CJEU caselaw, see e.g. *Beef Industry Development and Barry Brothers (‘BIDS’) (C-209/07)* EU:C:2008:643, [17].

381 To that effect, see e.g. *IFE Engineering (T-67/00, T-68/00, T-71/00 and T-78/0)*, [183].

382 See Damage Directive, art 2(3).
of competition within the meaning of art 101 TFEU. According to the Notice, the restriction effect is not appreciable if the aggregate market share for competitors does not exceed 10%, and for non-competitors does not exceed 15%.

In practice, that number is indeed difficult to rebut. Despite the difficulties already entailed at technique level in defining a relevant market, 'special national or regional competition problems in various markets', as well as objective differences regarding the enforcement practices among various authorities, also add to the predicament. Those difficulties can by no means be addressed by the simple 10% or 15% threshold. Thus, even with this presumption, national courts must always carry out detailed analysis on the anti-competitive effect of certain conduct on a case-by-case basis.

As to an appreciable restriction of competition, according to the De Minimis Notice, the restriction of competition in principle must be appreciable in the case of both restriction by object and restriction by effect. However, once a restriction by object is proved, the claimant will be discharged of the burden to further prove an adverse effect on competition. The restriction by object alone contributes a violation under art 101, regardless of whether the 10% threshold is met or not. Consequently, as admitted by AG Kokott in Expedia, where restrictions of competition from agreements with anti-competitive object are appreciable, the market share threshold in the De Minimis Notice may be irrelevant.

However, unlike the hard law, the De Minimis Notice does not have a binding effect. Presumptions provided therein do not require compulsory application.

384 Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/1, (De Minimis Notice), para 8(a) and (b).
386 De Minimis Notice, para 42.
387 De Minimis Notice, para 47.
388 To that effect, see e.g. JFE Engineering (T-67/00, T-68/00, T-71/00 and T-78/0), [382]. In that case, the GC rejected the JFE-Kawasaki's argument that the de minimis notice applied whatever the nature of the agreement in issue and replied that this notice could not apply due to the fact that the agreement alleged had as its object the restriction of competition. See also Ferriere Nord v Commission (T-143/89) EU:T:1995:64, [30]; Thyssen Stahl v Commission (T-141/94) EU:T:1999:48, [277].
389 Opinion of AG Kokott in Expedia (C-226/11), [53].
in civil proceedings. As a result, practical difficulties remain for claimants to define a relevant market and to adduce sufficient evidence to prove an object or an appreciable effect of competition restriction.

The market-share thresholds provided in the De Minimis Notice are introduced as an example of non-binding legal presumptions. Such legal presumptions as the De Minimis Notice have been adopted to reflect recent developments in the jurisprudence in application of arts 101 and 102 TFEU. Even if such presumptions are not binding, they reflect the reasoning of CJEU in recent caselaw. Therefore, non-binding legal presumptions are more or less relevant, when national courts apply arts 101 and 102 TFEU. Meanwhile, competition authorities and national courts continue to enjoy the discretion to proceed against infringements either above or below the thresholds, if ‘they have taken due account of the notice’ or if they could prove with sufficient evidence that anti-competitive effective is appreciable.\footnote{Opinion of AG Kokott in Expedia (C-226/11), [43].}

For private antitrust cases, in addition to public enforcement presumptions that are useful in proving the infringement, the Damage Directive offers three presumptions of law that have referential significance to prove other elements of damages actions – harm and causation. Because EU law provides these three presumptions, they are automatically applicable in private damages actions.

The first and the most important is the rebuttable presumption that cartels cause harm, as enshrined in art 17(2).\footnote{This presumption did not appear in the Green Paper for antitrust damages actions. It was only discussed generally as a potential way to alleviate claimants’ burden of proof based on infringement decisions of the Commission or NCAs. It did not appear in the White Paper either. In White Paper, the Commission only concerned that there might be presumed negative effects of cartels and other EU competition law violations by object. See White Paper, para 88. It later appeared in the Draft Directive, Explanatory Memorandum s 4.5. Finally, the preamble of the Directive suggests the inclusion of that presumption intended to remedy information asymmetry between claimants and defendants, due to the secrecy of a cartel. See Damage Directive, recital 47.} As discussed previously,\footnote{See in above section 3.3.3 Burden to prove the causal relationship.} the application of this presumption is vague and needs further clarification in terms of the existence of the harm and the attribution of the harm to specific victims.

Second, the Damage Directive requires national courts to presume the common commercial practice in competition law infringements that price increases are passed on down the supply chain.\footnote{Damage Directive, art 14(1).} For indirect purchasers, they only need to prove that (a) the defendant has committed an infringement of competition law; (b) the infringement has resulted in an overcharge for the direct purchaser of the defendant; and (c) they have purchased the goods or
services that were the object of the infringement, or derived from or containing them.\textsuperscript{394}

This presumption spares the claimant from an impossible task that is to prove that the overcharge passes through all the intermediate dealers and finally reaches him. It is consistent with previous CJEU caselaw, which establishes that claimants shall not bear the burden to prove that pass-on has taken place.\textsuperscript{395} Thus, as long as the indirect purchaser proves that they operate in the vertical supply chain, the price increase is presumed to have passed on to them.

Third, art 9 of the Damage Directive provides that a final decision of an NCA or a review court shall be binding on damages actions in the same Member State; further, it shall at least constitute \textit{prima facie} evidence in another Member State.\textsuperscript{396} For claimants of follow-on cases, their burden of proof would be considerably relieved, to the extent that the existence of infringement has been proved and the evidence used by competition authorities or by the review court is valuable in supporting their claims. They could refer directly to the analysis or conclusions in an infringement decision, as well as the method and techniques used therein. This borrowed evidence would also have a higher probative value than the evidence adduced by the claimants themself.\textsuperscript{397}

To sum up, presumptions of law that might be applicable to antitrust damages actions include public enforcement presumptions relevant to prove the infringement and presumptions provided by the Damage Directive relevant to prove other elements, such as the harm and the causation.

No matter what elements presumptions of law intend to prove, i.e. the infringement, the harm or the causation, they are in principle applicable to

\textsuperscript{394} Damage Directive, art 14.

\textsuperscript{395} See \textit{San Giorgio} (C-199/82), [14]. The Court stated that 'any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with [EU] law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced …'. See also \textit{Weber's Wine World} (C-147/01), [111]. The Court emphasized explicitly that 'national rules which place on the taxable person the burden of proving that the charge was not passed on to third parties, which amounts to requiring negative proof, or which establish a presumption that the charge has been passed on to third parties, are not consistent with Community law.' See \textit{Dilexport} (C-343/96) EU:C:1999:59, [54]; \textit{Michailidis} (C-441/98 and C-442/98) EU:C:2000:479, [36]–[38].

\textsuperscript{396} The use of 'presumption' on the binding effect of competition authorities' decisions can be found in the Commission's Staff Working Paper – WP that 'under this option, the decision of the NCA would create a presumption that an infringement existed, unless the defendant can show that he did not infringe [art 101 or 102 TFEU].' See Staff Working Paper – WP, para 145.

\textsuperscript{397} For a more favourable view of \textit{prima facie} assumptions, see Wulf-Heinning Roth (n 256) 77–78.
private damages actions for EU competition law infringements only when EU law provides such presumptions. Even so, national courts may still encounter practical difficulties in their application in individual conditions. Their adjudication shall nevertheless follow the CJEU's interpretation of those presumptions, of EU law, and of the general principles of EU law. Only in the absence of EU law shall national courts hearing the case have complete discretion in applying those presumptions; this is the case when the principles of equivalence and effectiveness are observed and that the rights conferred by EU law to both parties are protected.

As to presumptions of law provided by non-binding legal sources, national courts hearing the case have full discretion to decide whether they apply those presumptions in a given dispute or not.

In national proceedings

So far, the legal burden of proof is provided in art 2 of Regulation 1/2003. The CJEU caselaw rules on the claimants’ evidential burden to prove the harm and the causal link. These shall apply in all national proceedings. The introduction of presumptions improves the efficiency of national judiciary in private actions. Now, the question before national courts is whether all the presumptions established by EU law and CJEU caselaw, in particular those generated in public enforcement proceedings, are applicable in damages actions.

As discussed above, presumptions of law are provided in the legal text. However, not all presumptions of law constitute an integral part of EU law and not all presumptions of law are binding in civil proceedings. Presumptions provided in the Damage Directive are clearly EU law and thus applicable in private actions, including presumption of harm caused by cartel infringements (art 17 of the Damage Directive), passing on of overcharges, only if certain criteria are satisfied (art 14 of the Damage Directive), and the binding effect of national decisions (art 9 of the Damage Directive). In contrast, presumptions provided in soft law instruments, such as Commission Notice, or Commission Guidelines, are not binding and do not constitute an integral part of EU law. Their application falls within the discretionary power of national courts.

As to presumptions of facts, the more contentious question asks whether public enforcement presumptions, i.e. those provided by EU Courts’ judicial reviews of Commission decisions, are the interpretation of arts 101 and 102 TFEU or not. Only the CJEU judgments are capable of giving final interpretations of EU law. This includes both the CJEU’s adjudication on appeals against GC’s judgments and preliminary rulings submitted by national courts. Only when the CJEU has confirmed explicitly in these judgments that certain public enforcement presumptions constitute interpretations of arts 101 and 102 TFEU or constitute an integral part of arts 101 and 102 TFEU, are they automatically applicable in private damages actions where relevant.
There are further implications. If such presumptions are an integral part of arts 101 and 102 TFEU, issues relating to the application of those presumptions are a question of EU law. National courts must apply these presumptions in private actions. There should not be national deviations or divergences. If they are not, issues relating to the application of those presumptions fall within the scope of national procedural autonomy. As a result, national provisions and national caselaw apply. There will be national variations under national courts' discretionary power. Even when the principles of equivalence and effectiveness are observed, the application of such presumptions may result in divergent legal consequences.398

In practice, some public enforcement presumptions have been recognized by the CJEU as interpretations of arts 101 and 102 TFEU. For instance, the CJEU has established the presumption of a causal connection between a concertation (i.e. the existence of collusion among co-infringers) and the market conduct of the undertakings participating in the infringement. The Court rules that when those undertakings remain active on that market, they are presumed to take account of the information exchanged with their competitors in determining their conduct on that market.399 Such presumptions flow from art 101(1) TFEU and consequently form an integral part of the EU law that national courts must respect.

However, for those presumptions, even though they are established as interpretations of the EU competition law, application before national courts may still encounter some difficulties. National courts must, having regarded all the facts and circumstances before them, carefully consider the application of those presumptions in a given case. This consideration relates to the

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398 The application of art 101 TFEU and the application of national competition provisions of Member States may lead to completely different legal consequences. See e.g. cases concerning parties liable for damages competition belongs to the same economic unit or on economic continuity. Previous CJEU caselaw confirms that parties belong to the same unit or in economic continuity are liable for the damage result. However, the application of national provisions may find that company, after acquiring the entire share capital of a company that took part in a cartel contrary to art 101 TFEU, not liable for the damage caused by the dissolved one. This was held by the Helsinki Court of Appeal in the so-called 'asphalt cartel' follow-on damage claims on 20 October 2016. On 29 September 2009, the Finnish Supreme Administrative Court found that several asphalt companies participated in a cartel and fined those 120 million in total. See decision L 09/49467 of the Helsinki District Court on 28 November 2013. See Katri Havu, 'The Helsinki District Court Awards Significant Damages against Asphalt Cartel ("Asphalt Cartel Damages Claims")', e-Competitions Bulletin November 2013, No. 62284. Upon appeal, the Court of Appeal ruled that there were no grounds based on EU law for applying the principle of economic succession (which was established by CJEU in relation to the imposition of fines) to liability for damages. Instead, the Court of Appeal considered that the liability must be based on Finnish tort law. (See Helsinki Court of Appeal, judgment 1466, 20 October 2016, case S 14/1380, p 109) The Supreme Court made a landmark request in the case for a preliminary ruling to the CJEU on the issue of the applicability of the doctrine of economic succession in Skanska (C-724/17).

399 Eturas (C-74/14), [33]. See also T-Mobile (C-8/08), [51]–[53].
assessment of evidence and to the standard of proof, the result of which is governed by national law under the principle of procedural autonomy, and subject to the principles of equivalence and effectiveness. EU legislators have 'consciously accepted the existence of certain variations in Member State practice.' And this, in view of AG Kokott, is inherent in the decentralized EU competition law enforcement.

It still takes time before damages cases concerning public enforcement presumptions are actually brought before the CJEU and even more time before any final decisions are made.

3.5 The presumption of innocence

The presumption of innocence is a principle established under art 6(2) of ECHR and arts 47, 48(1) of Charter of Fundamental Rights, which means that any accused person is presumed innocent until proven guilty. It requires national courts not start with the idea that the undertaking concerned has committed an offence. It prohibits any formal finding of responsibility of the person accused without that person having had the benefit of all guarantees entitled in the right of defence. ECtHR caselaw establishes that the principle is violated, if the person concerned does not have an opportunity to exercise the right to a fair defence before a judicial decision concerning him reflects a

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400 Eturas (C-74/14), [32]–[34]. In Eturas, the Court considered whether the presumption of a causal link between a concertation and the market conduct of the undertakings participating in the practice has taken into account the information exchanged with their competitors in determining their conduct on that market. The Court confirmed the presumption as forming an integral part of art 101 TFEU, but that presumption still needed careful examination in a given case. It followed that the Court examined whether the mere dispatch of a message constituted sufficient evidence to establish that its addressees were aware, or ought to have been aware, of its content, did not follow from the concept of a 'concerted practice' and was not intrinsically linked to that concept.

401 Opinion of AG Kokott in T-Mobile (C-8/08), [86].

402 Opinion of AG Kokott in T-Mobile (C-8/08), [86].

403 The Court states explicitly that the presumption of innocence constitutes a general principle of EU law. See e.g. E.ON Energie (C-89/11 P), [72]; Hülis (C-199/92 P), [149]. It would contravene the spirit of EU law to allow the claimant simply to assert the infringement and require the defendant to prove his innocence. See Koen Lenaerts, 'Some thoughts on evidence and procedure in European Community Competition Law' (n 305) 1471; Luis Ortiz Blanco, European Community competition procedure (2nd edn, OUP 2006) 162. Art 6(2) reads 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' Art 48(1) of the Charter reads 'Everyone who has been charged shall be presumed innocent until proved guilty according to law.' The two articles read together result in the principle of the presumption of innocence. See e.g. Hülis (C-199/92 P), [149] and the caselaw cited therein.

404 Pergan (T-474/04), [75]–[77]. See also Elf Aquitaine (T-174/05), [196].
guilty verdict. Moreover, the law does not require that person prove their innocence or produce any evidence for that purpose.

In the application of EU competition law, this principle has also been recognized as a general principle of EU law. The principle stipulates that when the Court hearing the case still entertains any doubt, the benefit of that doubt must be given to the party accused. However, the relationship between this principle and the various presumptions established in public enforcement cases is not always clear. CJEU caselaw has interpreted this principle in many cases to see if any potential conflicts exist.

The landmark case is *Polypropylene* cartel, where the principle of the presumption of innocence was first explicitly recognized and applied in EU competition law cases. The Court ruled that ‘the presumption of innocence resulting in particular from art 6(2) of the ECHR is one of the fundamental rights’, and it ‘applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.’ It ensures that ‘no one will be described or treated as guilty of an offence before his guilt has been established by a court.’ Starting from *Polypropylene*, this principle has been developed in competition law cases between the EU and an individual, between a Member State and an individual, and between private parties.

In public enforcement cases, the CJEU has addressed the contention between some public enforcement presumptions and the principle of the presumption of innocence. For instance, in *E.ON Energies*, where there was no direct evidence of concertation, concertation was presumed, as it was the only plausible explanation of the observed anti-competitive conduct. The CJEU ruled that the application of this presumption neither unduly reversed the

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405 Barbara, Messegue and Jabardo v Spain, App no 10590/83 (ECtHR, 6 December 1988), [91] 406 *Euras* (C-74/14), [38]. See also *E.ON Energies* (C-89/11 P), [72].

407 See e.g. *E.ON Energies* (C-89/11 P), [72]; Hülis (C-199/92 P), [149]–[150]; *Montecatini* (C-235/92 P), [175]–[176].

408 Hülis (C-199/92 P), [149]–[150]. See also *Montecatini* (C-235/92 P), [175]–[176]; *JFE Engineering* (T-67/00, T-68/00, T-71/00 and T-78/00), [178]; *Dresdner Bank v Commission* (T-44/02) EU:T:2004:299, [61]. In these cases, AG Vestedorf proposed a high standard of proof and contended that competition cases involving fines should be treated as criminal cases. And the criminal nature of competition cases, in his point of view, did not prevent the Commission and the courts from taking an ‘overall view of the evidence’ and from inference when there was no direct evidence. See also Opinion of AG Vesterdorf in *Rhone-Poulenc* (T-1/89) EU:T:1991:38, [1954]; *Sumitomo v Commission* (T-22/02) EU:T:2005:349, [106]; *Euras* (C-74/14), [38]–[39]. This applies in spite of the wording in art 23(5) of Regulation 1/2003 that ‘Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.’


410 Antonio Capobianco (n 355) para 11.
burden of proof nor set aside the presumption of innocence.\textsuperscript{411} This was no more than a normal operation where the Commission was able to establish that an undertaking had taken part in meetings of an anti-competitive nature, and it was for that undertaking to provide another explanation of the tenor of those meetings.\textsuperscript{412} Hence, there was no conflict between the presumption of only plausible explanation and the principle of the presumption of innocence in that case.

However, the CJEU rulings above are addressed in public enforcement cases. The conflict between public enforcement presumptions and the principle of the presumption of innocence may continue to be a problem in competition law cases between private parties. The CJEU's preliminary ruling in \textit{Eturas} case illustrates this situation well.

In \textit{Eturas}, the Court found that E-TURAS, an online travel booking system, imposed a 3% cap on the discount rate, which the Competition Council viewed as constituting a concerted practice and violated art 101(1) TFEU.\textsuperscript{413} The referring court applies the public enforcement presumption that ‘the travel agencies were aware, or ought to have been aware, of the message at issue in the main proceedings.’\textsuperscript{414} The Court then recalled the principle of innocence as a general rule of EU law, 'which the Member States are required to observe when they implement EU competition law'.\textsuperscript{415} The Court ruled that the principle precluded the referring court from relying solely on the presumption.\textsuperscript{416}

The CJEU interpreted the presumption of innocence as not to preclude the national court from establishing public enforcement presumptions. In light of other objective evidence and consistent indicia, it only required that the opponent’s right of defence should be guaranteed. That is, the opponent should have the opportunity to rebut the presumption.\textsuperscript{417} In that regard, this opportunity to rebut must not be excessively difficult or unrealistic. For

\textsuperscript{411} \textit{E.ON Energies} (C-89/11 P), [75]. See also \textit{Montecatini} (C-235/92 P), [181]; \textit{Hüls} (C-199/92 P), [150]–[156].

\textsuperscript{412} \textit{E.ON Energies} (C-89/11 P), [75]–[78].

\textsuperscript{413} \textit{Eturas} (C-74/14), [50].

\textsuperscript{414} \textit{Eturas} (C-74/14), [38]

\textsuperscript{415} \textit{Eturas} (C-74/14), [38]; \textit{VEBIC} (C-439/08) EU:C:2010:739, [63]; \textit{N} (C-604/12) EU:C:2014:302, [41].

\textsuperscript{416} \textit{Eturas} (C-74/14), [39].

\textsuperscript{417} \textit{Eturas} (C-74/14), [40]. See also Opinion of AG Kokott in \textit{T-Mobile} (C-8/08), [89]–[93]. AG Kokott puts in a slightly different way ‘the presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience and the undertakings concerned are at liberty to refute those conclusions.’ To that effect, see also \textit{Hüls} (C-199/92 P), [155]; \textit{Montecatini} (C-235/92 P), [181] indicating that such an approach does not constitute an unduly reversal of the burden of proof.
instance, in *Eturas*, to rebut the presumption that the agencies accused were aware of the message, the Court considered it sufficient when the agencies accused could prove that they did not receive the message.\footnote{418}

Moreover, to comply with the principle, the referring court must associate the presumption with all other evidence presented before it. In other words, it must take a holistic view of the body of evidence in order to establish whether an infringement happens or not.\footnote{419} For example, in *Eturas*, the agencies accused, although they did not respond to the collusive message, acted in concert to limit to 3% the discount that could be applied to bookings made via the system in dispute, through additional technical steps.\footnote{420} It is hard to say that those agencies were not aware of the message, and thus the presumption was not rebutted.

So far, it is clear that the CJEU only applies the presumption of innocence to competition law proceedings that ‘may result in the imposition of fines or periodic penalty payments.’\footnote{421} That is, public enforcement proceedings. The CJEU has only in very limited preliminary rulings interpreted this principle so as to ensure the right of defence and to associate it with other evidence.\footnote{422}

To sum up, first, as a general principle of EU law, the presumption of innocence must apply to damages actions before national courts. Second, the application of public enforcement presumptions that are recognized in CJEU preliminary rulings does not set aside the presumption of innocence. Third, the presumption of innocence requires that national courts, upon their applications of established public enforcement presumptions, ensure that the opponent has the opportunity to rebut the presumption (i.e. to ensure the right to defence) and that the presumptions associate with other objective and consistent evidence in a given case.

\footnote{418} *Eturas* (C-74/14), [41]. To the point that this opportunity must not be ‘so narrow and rigid’ that it becomes virtually impossible, see also Opinion of AG Wahl in *Feralpi* (C-85/15 P, C-86/15 P and C-87/15 P, C-88/15 P and C-89/15 P) EU:C:2016:940, [98].

\footnote{419} *ICI v Commission* (C-48/69) EU:C:1972:70, [68].

\footnote{420} *Eturas* (C-74/14), [43].

\footnote{421} *EON Energies* (C-89/11 P), [72]. See also *Hüls* (C-199/92 P), [149]–[150]; *Montecatini* (C-235/92 P), [175]–[176].

\footnote{422} In fact, the *Eturas* case discussed above is the only preliminary ruling case so far addressing the contention between public enforcement presumptions and the principle of the presumption of innocence. *Eturas* (C-74/14).
4 Standard of proof

4.1 Introduction

The term standard of proof (also known as ‘quantum of proof’) means ‘the degree of cogency or persuasiveness required of the evidence in order to discharge a burden of proof.’\textsuperscript{423} Although it can be regarded as a rule that specifies to what degree national courts must be convinced of the existence of the infringement and damages, there is very little authority on what the level of persuasiveness should be or what the standard of proof is. Neither Regulation 1/2003 nor the Damage Directive contain any specific provisions regarding the standard of proof for proving infringement, the harm or the causation. As confirmed by recital 5 of Regulation 1/2003, ‘[t]his Regulation affects neither national rules on the standard of proof...’

In the absence of applicable EU law and CJEU caselaw, issues related to the standard of proof are in principle governed by national law under the principle of national procedural autonomy.\textsuperscript{424} National courts, in their application of principles and rules of national law governing the standard of proof, must nevertheless observe certain minimum requirements of EU law resulting from, among other concerns, the principles of equivalence and effectiveness.\textsuperscript{425}

The principle of equivalence requires that the standard of proof of an infringement of arts 101 and 102 TFEU shall not be stricter than proof of an infringement of national competition law.\textsuperscript{426} The principle of effectiveness requires that the standard of proof shall not be so strict that claimants are not able to establish the infringement (in stand-alone cases), the harm and the

\textsuperscript{423} James Griffiths, Paul McKeown and Robert McPeake (n 347) 22. AG Kokott stated that ‘[t]he standard of proof determines the requirements which must be satisfied for facts to be regarded as proven.’ Opinion of AG Kokott in \textit{T-Mobile (C-8/08)} footnote 60.

\textsuperscript{424} See e.g. \textit{SIA ’VM Remonts’ and Others v Konkurrencestyres padome} (C-542/14) EU:C:2016:57, [21] & [32]. See also \textit{Eturas} (C-74/14), [29]–[37].

\textsuperscript{425} For more discussion on the principle of national procedural autonomy, the principles of equivalence and effectiveness see Section 2 Current legal framework, above.

\textsuperscript{426} See for example \textit{T-Mobile (C-8/08)}, [83] and footnote 4. AG Kokott elaborated that proof of an infringement of [art 101 TFEU] shall not be stricter than proof of an infringement of art 6 of Netherlands Law on competition (\textit{Mededingingswet}, namely \textit{Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging}, or ‘\textit{Mw}’Stb.1997, No.242).
causation.

Otherwise, the full effect of arts 101 and 102 TFEU would be jeopardized.

The expression of the standard of proof appeared for the first time in EU competition law cases in *Sumitomo* in 2006. In applying arts 101 and 102 TFEU, EU caselaw has discussed this standard in association with the probative value of evidence. The EU Courts focus on the quality of evidence and discuss ‘the standard of proof’ as the persuasiveness of evidence in terms of convincing the judge. They avoid laying down any objective qualities indicating a pre-determined level of persuasion. In practice, the caselaw on this point appears sparse and fragmentary.

This section will separately discuss the standards used or necessary to prove infringement, harm and causation. The appropriate standard of proof may vary between different stages of proceedings. Thus, the standard for proving an infringement is different from that of proving harm or the causal link. In the following paragraphs, this study will try to sort out what

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428 *Pfleiderer* (C-360/09), [24].


431 Notably, this is where the ‘requisite legal standard’ under EU Courts’ judiciary is fundamentally different from ‘preponderance of evidence’ or ‘balance of probabilities’ standard under common law civil cases. For common law layers, a specifically defined thresholds of persuasion roots deeply in historical and cultural backgrounds. As stated by Eric Gippini-Fournier, ‘[t]he purely adversarial approach to litigation traditional in common law systems, the need to formulate jury instructions in criminal cases and the central role of precedent in the formation of the law may all have a role to play in explaining this specificity of common law jurisdiction.’ See Eric Gippini-Fournier (n 36) 189. See also Julian M. Joshua, ‘Proof in Contested EEC Competition Cases: A Comparison with the Rules of Evidence in Common Law’ (1987) 12 E. L. Rev. 315.


433 Likewise, the standard for proving agreements is different from the standard for proving concerted practices. All such differences are discussed in close connection with the Court’s evaluation of evidence.
standards have been provided by EU law, including CJEU caselaw, on the
interpretation of arts 101 and 102 TFEU and what is left for national courts to
decide under national legal systems. For the latter, the study also discuss the
relevant EU legal guidance on themes such as the principle of effectiveness,
and their connections and relevance for cases heard before national courts.

This study does not intend to explore in detail the different rules provided by
different Member States. Instead, it examines from the perspective of the EU
Courts, what minimum requirements for the standard of proof EU law sets out
for national procedural rules.

4.2 The standard to prove an infringement

Early CJEU caselaw generated from the Commission’s public enforcement
decisions demonstrates an effort to develop standards to prove infringement
of the EU competition law.434 In Quinine, the Court partially annulled the
Commission decision for lack of sufficient evidence.435 The Court further
concluded in Suiker Unie that no infringement was found unless the conduct
‘can only reasonably be explained by the existence of a concerted action.’436
Then in United Brands, the Court tried to apply a ‘beyond reasonable doubt’
test where the Commission failed to justify its calculation of excessive
prices.437

434 Some scholars argue that EU courts transpose common law concepts of ‘preponderance of
evidence’, ‘balance of probabilities’ or ‘preponderance of probabilities’ and ‘beyond all
reasonable doubts’ into competition law litigation. See Horacio Vedia Jerez (n 206) 266. While
some of those concepts are transposed into EU competition law cases, they no longer contain
the same meaning as in common law practices. EU Courts have re-evaluated the meaning of
‘balance of probabilities’, or ‘preponderance of evidence’ in EU law context and as an EU law
matter. They develop their own test in judicial practices. The Court has rejected the test of
‘beyond reasonable doubts’ and the test of ‘sufficient probabilities’. However, the Court is too
careful to give a single, pre-determined and horizontally applicable standard of proof at EU
level. Under a decentralized enforcement system of EU competition law, the Court chooses to
leave the issue to national courts. Unlike the burden of proof provided in art 2 of Regulation
1/2003, the standard of proof thus must be discussed within national legal systems. However,
it is still possible to draw benefits from EU Courts’ rulings in public enforcement cases.

435 See ACF Chemiefarma v Commission (C-41/69) EU:C:1970:71, [146] and Boehringer
Mannheim v Commission (C-45/69) EU:C:1970:73, [42]. In both cases, the CJEU used the
expression ‘it is not clear’ to emphasize that evidence produced by the defendant (that is the
communications of the undertakings concerned relating to sales) must sufficiently relate to
supplies within the Common Market.

436 Suiker Unie and Others v Commission (C-40/73 to C-48/73, C-50/73, C-54/73 to C-56/73,
C-111/73, C-113/73 and C-114/73) EU:C:1975:174, [301], [304], [354] & [363]. In several
places in the text, the Court emphasized the importance of the absence of alternative
explanation for the conduct.

437 United Brands v Commission (C-27/76) EU:C:1978:22, [265].
The turning point was the *Polypropylene* cartel cases. The Court examined in detail the primary evidence provided. It dealt with the concept of agreements and concerted practice, as well as the standard to prove these. More significantly, the Court suggested a high standard of proof because cases involving fines have a criminal law nature. This view may cause problems, however, in terms of an overall view of the evidence and to the use of circumstantial evidence.

Another milestone was the *Aalborg* case. The Court ruled that ‘it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum’. Evidence proving the conduct would normally be fragmentary and sparse, ‘so that it is often necessary to reconstitute certain details by deduction’. As a result, ‘the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia’, which taken together may constitute evidence of an infringement of the competition rules in the absence of another plausible explanation. The standard of proof, which must exclude all other plausible explanations, is by no means an easy one.

Previous public enforcement cases show the Court’s unwillingness to use the term ‘standard of proof’. Instead, the Court refers to the requisite legal standard as a substitute. However, it does not clarify what that standard is. Various words are employed to describe the required quality of evidence, such

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439 Opinion of AG Vesterdorf in *Rhône-Poulenc* (T-1/89), II-885. See also *Hüls* (C-199/92 P), [149]–[150]; *Montecatini* (C-235/92 P), [175]–[176]. See also GC ruling in *JFE Engineering* (T-67/00, T-68/00, T-71/00 and T-78/00), [178].

440 Fernandó Castillo de la Torre and Eric Gippini Fournier (n 34) para 2.025.

441 *Aalborg Portland* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [55].

442 *Aalborg Portland* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [56].

443 *Aalborg Portland* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [57].

as ‘sufficiently precise and coherent’, ‘precise and consistent’, ‘solid, specific and corroborative’, ‘firm, precise and consistent body of evidence’, ‘convergent and convincing’, ‘convincing’ or ‘accurate, reliable and consistent’. While the language used varies slightly throughout, it nevertheless conveys a general requirement, i.e. precise, consistent, and convincing evidence.

445 See e.g. Compagnie Royale asturienne des mines and Rheinzink v Commission (‘CRAM’) (C-29/83 and C-30/83) EU:C:1984:130, [20]. See also the GC ruling in Coats Holdings (T-439/07), [38]. In Coats Holdings, the GC also use similar words in [52] that ‘whether ... the Commission relied on sufficiently credible, precise and conclusive evidence to establish, in the context of a global assessment and after examining the explanations or alternative justifications provided by the applicant, that infringement found in art 1(4) of the Contested decision...’ Therefore, even though it is beneficial to consider carefully the words used by EU Courts in their judgments, it is also important to keep in mind the relevant context either global or regional, and the specific sector that might have influenced the criteria of the standard of proof.

446 See e.g. Volkswagen v Commission (T-62/98) EU:T:2000:180, [43] and the caselaw cited therein. The Court ruled that ‘it is necessary to ascertain whether the Commission gathered sufficiently precise and consistent evidence to give grounds for a firm conviction that the alleged infringement took place.’ The very same words were used in Coats v Commission (T-36/05) EU:T:2007:268, [71] and JFE Engineering (T-67/00, 68/00, 71/00 and 78/00), [178], in which the GC ruled that ‘the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place.’ Quoting the words in JFE Engineering, the GC in AC-Treuhand ruled that ‘[i]t is necessary for the Commission to produce precise and consistent evidence to support the firm conviction that the infringement took place.’ AC-Treuhand v Commission (T-27/10) EU:T:2014:59, [56].

447 See e.g. Baustahlgewebe v Commission (T-145/89) EU:T:1995:66, [74]. The GC stated clearly that ‘[i]t is necessary to establish whether the evidence referred to by the Commission, namely the monthly exchange of information and the fact that BStg gave Sotralenz details of all the quantities delivered in Germany, can be regarded as solid, specific and corroborative proof of the existence of a quota arrangement.’

448 See e.g. Ahlstrom Osakeyhti (C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125 to 129/85), [127]. The Court stated that ‘in the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission.’

449 See e.g. Avebe v Commission (T-314/01) EU:T:2006:266, [97]. The GC ruled that ‘it was for Avebe to prove, in the administrative procedure and using a body of convergent and convincing evidence, that, despite that legal situation, only Akzo was aware of and decided on Glucona’s unlawful conduct.’

450 See e.g. Technische Unie (C-113/04 P), [68]; FEG (C-105/04 P), [60].


452 See e.g. Dresdner Bank v Commission (T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP & T-61/02 OP) EU:T:2006:271, [67]. The GC ruled that the Court was ‘under a duty not only to establish whether the evidence relied on is actually accurate, reliable and consistent but also to examine whether that evidence contains all the information ... to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.’
4.2.1 The requirement of precise evidence

As observed by scholars, the Court avoids abstract discussion about the requirement of precise evidence.\(^{453}\) This is probably because of the difficulty in delineating the exact scope and extent of the standard of proof in proving an infringement. However, this is a genuine requirement that the Court has previously considered. Some clues can be drawn from previous CJEU caselaw and GC rulings.

Generally, in public enforcement cases, the Court holds that the Commission must produce sufficiently precise and coherent proof to justify its view on whether the undertaking concerned has behaved anti-competitively, or what abusive conduct it has engaged in.\(^{454}\) The requirement of precise evidence involves two aspects. First, it indicates a higher degree of relevance and reliability. If several pieces of evidence could verify each other’s content, greater precision gives rise to a more relevant and reliable body of evidence. This was the case in *Anic*, in which a quota-fixing regime was attested by various pieces of evidence, including tables setting out the ‘actual figures’ and ‘targets’ for the years 1979 and 1980, as well as ‘aspirations’ for 1981, a table written in Italian setting out quota allocation for 1980, and proposals for year 1981.\(^{455}\) One document ascertains the facts mentioned in other items of evidence, which allows the claimants to rely on it to corroborate the other evidence.\(^{456}\) A document’s ability to align other evidence not only improves the precision of each piece of evidence, but also draws a clearer picture of the whole infringement scheme.

However, this requirement has not always been as clear in the CJEU’s preliminary rulings, which are cases submitted by national courts. For example, in *Huawei Technologies*, AG Wathelet noticed that ‘the course and precise content of the series of contacts between Huawei and ZTE are not clear from the order for reference.’\(^{457}\) The CJEU was given, by Huawei and ZTE, ‘very different’ observations regarding that contact,\(^{458}\) and did not refer to any

\(^{453}\) Andreas Scordamaglia-Tousis (n 270) 263. To that effect, see also Fernando Castillo De La Torre, ‘Evidence, Proof and Judicial Review in Cartel Cases’ (2009) 32 World Competition 521.

\(^{454}\) *CRAM* (C-29/83 and C-30/83), [20].

\(^{455}\) *Enichem Anic v Commission* (T-6/89) EU:T:1991:74, [147]–[153]. Similarly, in *Montecatini*, the GC noted that Monte’s name appeared in various tables found on the premises of polypropylene producers, whose contents clearly showed that they were drawn up for the purpose of determining sales volume target. *Montecatini* (C-235/92 P), [31].

\(^{456}\) *JFE Engineering* (T-67/00, 68/00, 71/00 and 78/00), [263].

\(^{457}\) Opinion of AG Wathelet in *Huawei Technologies* (C-170/13) EU:C:2014:2391, [90].

\(^{458}\) Opinion of AG Wathelet in *Huawei Technologies* (C-170/13), [90]. Huawei claimed that it informed ZTE in November 2010 that ‘it was using various LTE patents owned by Huawei and
requirement regarding the documents’ ability to align evidence. Rather, it emphasized that it was for the referring court to determine whether the guidelines given by the Court had been observed.\textsuperscript{459}

As a matter of fact, the CJEU has neither in public enforcement cases nor preliminary ruling cases confirmed explicitly that the ability to align evidence constitutes an interpretation of arts 101 and 102 TFEU or an integral part of arts 101 and 102 TFEU. The CJEU requires this ability to align evidence indicatively and indirectly in public enforcement cases. Hence, it remains for national courts hearing the damages actions to decide whether this aspect of the requirement of precise evidence applies in stand-alone damages actions. In case of genuine ambiguities, national courts may request that the CJEU issue a preliminary ruling for further interpretation in relation to this requirement.

Moreover, the requirement of precision must also be reflected in construing various elements of arts 101 and 102 TFEU. For instance in Toshiba, the CJEU, in assessing whether the agreement had a restriction by object, pointed out the necessity of considering the precise object of the agreement concerned.\textsuperscript{460} It meant that the evidence must be precise enough to establish elements of arts 101 and 102, such as anti-competitive objective, market threshold,\textsuperscript{461} anti-competitive agreements or concerted practice.

Unlike the requirement to align evidence, the requirement of precise evidence in this aspect has been mentioned several times, both in the CJEU’s public enforcement judgments and in preliminary rulings. The Court has required a certain level of precision in proving both the object of an agreement and the

\textsuperscript{459} Huawei Technologies (C-170/13) EU:C:2015:477, [7].

\textsuperscript{460} Toshiba Corporation v Commission (C-373/14 P) EU:C:2016:26, [24].

\textsuperscript{461} See e.g. Opinion AG Wahl in Intel (C-413/14 P) EU:C:2016:788, [141]. The Court mentioned that ‘a precise threshold of foreclosure of the market must be determined, beyond which the practices at issue can be regarded as abusive’ for the purposes of applying art 102 TFEU. To the same effect, see also Tomra (C-549/10 P), [46]. In addition, the Court also confirmed GC’s determination of a precise threshold of foreclosure. See e.g. Opinion of AG Kokott in Post Danmark (C-23/14) EU:C:2015:343, [91].
concerted practice,\textsuperscript{462} the effect of the infringement,\textsuperscript{463} as well as the effect on trade between Member States.\textsuperscript{464} These rulings indicate that this aspect of precision constitutes an interpretation of arts 101 and 102 TFEU and is thus applicable to all cases, including private enforcement ones. Therefore, national courts shall also be able to establish various elements of the EU competition law to the level of precision of stand-alone damages actions.

\subsection*{4.2.2 The requirement of consistent evidence}

Public enforcement cases also reveal a requirement for consistent evidence in proving the infringement. This requirement is reflected prominently in terms of the overall view of the evidence.\textsuperscript{465} Such consistency is not only required of the relations among evidence, but also over its entirety. A holistic view of the body of evidence means that it is not necessary for every piece of evidence produced by the claimant to have such a strong probative value so as to satisfy the criteria to establish an infringement.\textsuperscript{466} It is sufficient ‘if the body of evidence relied on …, viewed as a whole’, meets that requirement.\textsuperscript{467} Therefore, the items of evidence ‘must not be assessed separately, but as a whole.’\textsuperscript{468}

\textsuperscript{462} For the requirement to prove ‘the precise purpose of the concerted practice’ in preliminary ruling cases, see \textit{ING Pensii} (C-172/14) EU:C:2015:484, [30]; \textit{BIDS} (C-209/07), [15]; \textit{T-Mobile} (C-8/08), [28]. For the requirement to prove ‘the precise object of the agreement’, see \textit{Maxima Latvija} (C-345/14) EU:C:2015:784, [16]; \textit{Pierre Fabre Dermo-Cosmétique} (C-439/09) EU:C:2011:649, [34]; \textit{Allianz Hungária Biztosító and Others} (C-32/11) EU:C:2013:160, [33]; \textit{GlaxoSmithKline Services} (C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P), [55]. See also the requirement to prove ‘the precise object of the agreement’ in public enforcement cases, see e.g. \textit{Toshiba} (C-373/14 P), [24]; \textit{GlaxoSmithKline Services} (C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P), [55].

\textsuperscript{463} \textit{Otis} (C-199/11), [66].

\textsuperscript{464} See e.g. \textit{ASNEF-EQUIFAX} (C-238/05) EU:C:2006:734, [23]–[24].

\textsuperscript{465} Opinion of AG Vesterdorf in \textit{Rhone-Poulenc} (T-1/89), II-945.

\textsuperscript{466} \textit{JFE Engineering} (T-67/00, 68/00, 71/00 and 78/00), [180]. See also \textit{Coats Holdings} (T-439/07), [40].


\textsuperscript{468} \textit{Coats Holdings} (T-439/07), [41]. See also \textit{BPB} (T-53/03), [185]; \textit{ICI v Commission} (C-48/69) EU:C:1972:70, [68].
The reasons to view items of evidence as a whole instead of imposing the requirement on each item are quite obvious. First, competition cases are fact intensive. Evidence with high probative value is often in the possession of the alleged infringers, such as their meeting minutes, sales statistics, communications, and so on.\textsuperscript{469} Claimants could by no means possess a clear evidentiary record or documentary evidence intact enough to prove the existence of an infringement. Even the regulatory body sometimes is not aware of the existence of such evidence.\textsuperscript{470}

Second, evidence of anti-competitive violations is often hard to find, especially in cartel cases where alleged infringers operate clandestinely and secretly.\textsuperscript{471} In \textit{Coats Holdings}, for instance, the infringers held meetings clandestinely in different countries, most frequently in a non-member country. The associated documents were reduced to a minimum.\textsuperscript{472} All available evidence discovered by the Court was fragmentary and sparse.\textsuperscript{473} Only by the use of inferences from the fragmentary pieces of evidence and otherwise unusual coincidences could the court concoct an overall story.\textsuperscript{474}

Against this background, the Court considers it sufficient to infer from ‘a number of coincidences and indicia which, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.’\textsuperscript{475} Moreover, for infringements that extend over years, the

\textsuperscript{469} Such documents include reports of meetings drawn up by an employee and records of telephone conversations – \textit{Dresdner Bank} (T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP), [14]; a fax or a letter between co-infringers – \textit{Dresdner Bank}, [111]; communications between senior executives or between senior executive and staffs – \textit{BPB} (T-53/03), [130]; internal memorandum – \textit{BPB}(T-53/03), [147]; handwritten notes provided by an employee of a competing undertaking – \textit{Enichem Anic} (T-6/89), [175]; and tables taken from the premises – \textit{Anic Partecipazioni} (C-49/92 P), [29].

\textsuperscript{470} Cristina Volpin (n 307) 1162.

\textsuperscript{471} \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P and C-219/00 P), [55]–[57].

\textsuperscript{472} \textit{Coats Holdings} (T-439/07), [134]. See also \textit{BPB} (T-53/03), [63]; \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [55]; \textit{AC-Treuhand} (T-27/10), [59].

\textsuperscript{473} \textit{Coats Holdings} (T-439/07), [134]. See also \textit{BPB} (T-53/03), [63]; \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [55]–[57].

\textsuperscript{474} This is also why the EU Courts reject the approach – ‘beyond reasonable doubt’. It is simply impossible to put that strict standard of proof on cases that are normally fragmentary and sparse.

\textsuperscript{475} See e.g. \textit{Total Marketing Services} (C-634/13 P), [26]; \textit{Verhuizingen Coppens} (C-441/11 P), [70]; \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [57]. See also GC caselaw, \textit{Dresdner Bank} (T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP), [65]; \textit{Coats Holdings} (T-439/07), [42]. The GC employed in almost identical words that ‘[i]t is also necessary to take account of the fact that anti-competitive activities take place clandestinely, and accordingly, in most cases, the existence of
lack of direct evidence of the undertaking's participation during a specified period of time does not preclude the participation from being regarded as established, insofar as such a finding is based on objective and consistent indicia.\footnote{Total Marketing Services (C-634/13 P), [27]. In Total Marketing Services, the evidence relied upon by the party is merely 'the internal email of 3 November 2004 sent by the representative of the appellant to another employee of the company', which could not amount to 'objective and consistent indicia' to prove that the appellant has publicly distanced itself from the infringement. (C-634/13 P) [28]-[30]. See also FEG (C-105/04 P), [97]-[98]; Verhuizingen Coppens (C-441/11 P), [72].}

The idea to view evidence as a whole, i.e. to consider all the indicia and coincidences as a whole, represents the Court's intention to judge the case as a single, complex, and continuous infringement. The coincidences and indicia merely constitute various manifestations, corroborating the actual common will of participants.\footnote{See one good example of such manifestation in AC-Treuhand. The case generated discussions on the continuous nature of long-term and regular anti-competitive meetings. The GC ruled that 'the AC-Treuhand meetings of December 1999 and in March 2000 could not have had a different object from that of the precious meetings where the same undertakings and the same individuals were convened in the same context by Mr. S (the same person'). (T-27/10), [150].} Such manifestations 'must be assessed in the overall context explaining the reason for their existence'.\footnote{BPB (T-53/03), [250]. As elaborated by the GC in BPB that '[i]t would be artificial to split up continuous conduct, characterised by a single purpose, into a number of separate infringements on the ground that the collusive practices varied according to the market concerned.' BPB (T-53/03), [240]. See also Enichem Anic (T-6/89), [204].} Thus, national courts place various manifestations within the overall picture of a single, complex, and continuous infringement. This is a question of evaluation of evidence, 'in which the evidential value of various facts is corroborated or weakened by other factors, which, taken as a whole, may show that there has been a single infringement.'\footnote{BPB (T-53/03), [250]. It is true that certain pieces of evidence viewed together might already suffice the requirement to prove an infringement. However, it is simply unnecessary to prove another infringement based on identical grounds, addressing identical claims or having identical objectives. The accumulation of evidence will add to the severity of the infringement and add to the liability of the infringers. Similarly, for an infringement that has continued for several years, whether there might be a gap of several months without conducting anti-competitively is indeed immaterial. The decisive factor still lies in that various manifestations form an overall plan, observing an anti-competitive object, of EU competition law infringements. To that effect, see GC ruling in Enichem Anic (T-6/89), [205].}

This overall view of evidence has been formulated by the CJEU in its public enforcement judgments with a fixed expression, that 'the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.' BPB (T-53/03), [227].
coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.\textsuperscript{480} Even though the CJEU has not explicitly recognized this overall view of evidence as ‘interpretation of art 101’ or ‘an integral part of art 101’, the Court has indeed confirmed this overall view of evidence as ‘settled case-law’ and applicable ‘in most cases’, and has applied this requirement repeatedly in its public enforcement judgments, often with reference to previous caselaw.

The Court’s expressions and comments in its reasoning about public enforcement judgments give the impression that this overall view of evidence must be applied in consideration of whether the anti-competitive conduct or agreement has infringed art 101 or not. In short, the Court seems to consider this overall view of evidence as a genuine interpretation of art 101.

This impression has been strengthened by the CJEU preliminary ruling case \textit{Euras}. The Court reviewed its caselaw and ruled that the existence of a concerted practice or an agreement ‘must be inferred from a number of coincidences and indicia’, which taken together may constitute evidence of an infringement of the competition rules in the absence of another plausible explanation.\textsuperscript{481} The Court further added that this holistic view complied with the principle of effectiveness, since the principle required that ‘an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent.’\textsuperscript{482}

Nonetheless, there may still be practical difficulties when national courts are to decide the existence of an infringement in a given dispute. They shall take into account all relevant facts and circumstances in order to ascertain whether an overall view of the evidence tendered by claimants in a specific stand-alone case is sufficient to prove that the anti-competitive practice or agreement violates the EU competition law, whether coincidences and indicia are objective and consistent and whether there exists another plausible explanation.

\textit{Plausible alternatives}

Under the requirement of consistent evidence, the inference from coincidences and indicia must be subject to the absence of plausible

\textsuperscript{480} \textit{Total Marketing Services} (C-634/13 P), [26]; \textit{Villeroy & Boch Austria GmbH v Commission} (C-626/13 P) EU:C:2017:54, [47]; \textit{Villeroy & Boch AG v Commission} (C-625/13 P) EU:C:2017:52, [111]; \textit{Verhuizingen Coppens} (C-441/11 P), [70]; \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [57].

\textsuperscript{481} \textit{Euras} (C-74/14), [36]–[40]. See also this holistic approach in Opinion of AG Kokott in \textit{T-Mobile} (C-8/08), [88]; Opinion of AG Trstenjak in \textit{BIDS} (C-209/07), [53].

\textsuperscript{482} \textit{Euras} (C-74/14), [37].
alternatives. The defendant shall be free to furnish evidence casting the facts established by the claimant in a different light.\textsuperscript{483} This does not ‘unduly reverse the burden of proof’ and does not breach the presumption of innocence.\textsuperscript{484} It is only because of the nature of evidence being circumstantial that the relevant court must adopt a contextual approach, examining evidence provided by both contesting parties to approach the ‘truth’ as close as it can.\textsuperscript{485}

Regarding the standard of proving plausible alternatives, public enforcement cases show that the probative force of the evidence tendered by the appellant would potentially lead to two different conditions. In the first condition, evidence presented before the Court could hardly paint the whole picture of the infringement. This is the case when there is no direct evidence of concertation, which is presumed if it is the only plausible explanation for observed parallel behaviour.\textsuperscript{486} The Court reaches the conclusion by deduction, where ‘the established facts cannot be explained other than by the existence of anti-competitive behaviour’.\textsuperscript{487} The conclusion is overturned in the appeal when the defendant casts the facts in a different light and provides plausible alternatives. The existence of any plausible alternative will suffice to question the consistency of evidence in proving an infringement. This is probably due to the weak probative value of the evidence tendered as well as the ‘remote’ inference drawn from the evidence. Under the circumstances, the conclusion relies on the court’s discretion, even though the claimants have not established the infringement in a rigorous manner.

In the second condition, evidence tendered by the appellant is in principle sufficient to prove the infringement to the requisite legal standard.\textsuperscript{488} For defendants, it is not persuasive enough if ‘a circumstance arose which might

\textsuperscript{483} See e.g. \textit{JFE Engineering} (T-67/00, T-68/00, T-71/00 and T-78/00), [186]. The GC concluded that Japanese applicants provided an alternative explanation to prove the existence of circumstances, which casted the facts established by the Commission, even though such a different approach was irrelevant in \textit{JFE Engineering} case. Similarly see also \textit{CMA CGM and Others v Commission} (T-213/00) EU:T:2003:76, [124]. ‘[I]nasmuch as the minutes in issue lend themselves to several interpretations, and since the alternative interpretation of the FETTCSA parties is a plausible one, the Commission’s interpretation cannot be sustained in the absence of a firm, precise and consistent body of evidence.’ To the same effect, see also \textit{CRAM} (C-29/83 and C-30/83), [16].

\textsuperscript{484} See \textit{AC-Treuhand} (T-27/10), [63]; \textit{Montecatini} (C-235/92 P), [181].

\textsuperscript{485} The difficulty to provide direct evidence lies in the nature of agreements and behaviours being secret. For instance, written documents are concealed and unable to be traced; meetings are secretly held at somewhere difficult to be found; records are kept to minimum content. See Walter Frenz, \textit{Handbook of EU Competition Law} (Springer 2016), para 1063.

\textsuperscript{486} Antonio Capobianco (n 355) para 11.

\textsuperscript{487} \textit{Intel} (T-286/09), [66].

\textsuperscript{488} \textit{CMA CGM} (T-213/00), [142]–[155], [168]–[169].
affect the probative value of that evidence.’ This allegation not substantiated lacks the countervailing power to call into question the claimants’ allegations. The plausible alternative in this regard is inherently different from the technique the court uses (as in the first condition) to identify the existence of an infringement. Rather, it functions as a contradictory contention to refute. It follows that the defendant must not only demonstrate the existence of plausible alternatives, but also how such alternatives question the probative value of the evidence or the inference that the appellant relies upon.

Notably, EU caselaw generated from the public enforcement of the Commission observes the possibility to invoke plausible alternatives at almost every step of a case proceeding. For instance, plausible alternatives could refute the anti-competitive object, by disputing the subject matter of the meeting in which the undertaking concerned participated. Moreover, the undertaking concerned may also provide an alternative explanation for the anti-competitive behaviour it has conducted. Furthermore, there could also be plausible alternatives to refute the overall assessment regarding the effect of restricting, preventing or distorting competition on the relevant market. This could be achieved by providing a different economic explanation, in particular one describing the relevant market and reflecting the nature of the undertaking’s conduct on that market. Most importantly, allegations

489 See e.g. AC-Treuhand (T-27/10), [65].

490 See e.g. AC-Treuhand (T-27/10), [64]; E.ON Energies (T-141/08), [56]; Intel (T-286/09), [541]–[543]. In Intel, the alternative explanation offered by the applicant is only capable of questioning the causal link between the exclusivity rebate and Dell’s decision, not the existence of the exclusivity rebate as such.

491 See Montedipe v Commission (T-14/89) EU:T:1992:36, [86].

492 See e.g. Intel (T-286/09), [541]–[544]. The applicant ‘attempts to explain the existence of an exclusive relationship between itself (namely Intel) and Dell during the period in question with reasons other than the grant of exclusivity rebates.’ The GC found that ‘by providing an alternative explanation for the existence of an exclusive relationship between the applicant and Dell, the applicant does not call in question the fact that the level of the MCP rebates was conditional upon exclusivity. Even supposing that the applicant succeeded in proving that Dell used the applicant as its exclusive supplier solely for the reasons put forward by the applicant, that would not call into question the probative value of the evidence on which the Commission relied in order to establish the existence of an exclusivity rebate.’ Thus, an alternative explanation provided by the applicant regarding exclusive rebates would at most have the effect of disapproving the causal link between the exclusive rebates and anti-competitive arrangements, but not the effect of denying the existence of an exclusive rebate as such.

493 Aalborg Portland (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), [69]. See also Solvay v Commission (T-30/91) EU:T:1995:115, [76]–[77].
arguing plausible alternatives must be equally substantiated, so as to have an equivalent probative force as those proposed by the other party.\footnote{Opinion of AG Kokott in \textit{FEG} (C-105/04 P), [73]. For more discussion on the requirement of substantiated arguments, see Section 3.2 Legal burden of proving the infringement, above.}

No matter whether they challenge the probative value of evidence \textit{per se}, or challenge the inference from the coincidences and indicia, the plausible alternatives essentially call into question the consistency of an overall allegation of the existence of an infringement.

However, these observations are drawn up mainly from GC judgments, which do not have the authority to give interpretations of art 101 or 102 TFEU. Hence, for stand-alone damages cases, it is certain that the infringement of art 101 or 102 TFEU must be established in the absence of plausible alternatives. As to what may constitute plausible alternatives, it remains for national courts to deal with in a given dispute, provided that the principles of equivalence and effectiveness are observed and the full effect of arts 101 and 102 TFEU is guaranteed.

\subsection*{4.2.3 The requirement of convincing evidence}

Public enforcement cases also require convincing evidence in proving the infringement. This requirement relies heavily on the credibility and the reliability of evidence produced, in terms of its probative value.\footnote{\textit{IFE Engineering} (T-67/00, T-68/00, T-71/00 and T-78/00), [273]. See also \textit{Mannesmannröhren-Werke} (T-44/00), [84] and the caselaw cited therein; \textit{Dalmine v Commission} (T-50/00) EU:T:2004:220, [72]; Opinion of AG Vesterdorf in \textit{Rhone-Poulenc} (T-1/89), II-954.} Many factors influence the degree of its persuasiveness, including its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliability of its content.\footnote{See \textit{Cement} (T-25/95, T-26/95, T-30/95, T-32/95, T-34/95, T-39/95, T-42/95, T-46/95, T-48/95, T-50/95 to T-65/95, T-68/05 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95), [1053] & [1838]; Opinion of AG Vesterdorf in \textit{Rhone-Poulenc} (T-1/89), II-956; \textit{Coats Holdings} (T-439/07), [45].}

In considering whether the evidence tendered is convincing in terms of proving the allegation, EU courts have attached great importance to the distance between the evidence adduced and the events themselves. In \textit{FEG}, a case involving electro-technical fittings, the Court ruled that the general rules of evidence applied to whether a document ‘was drawn up in close connection with events’, and were not affected by ‘the status of addressee’.\footnote{\textit{FEG} (T-5/00 and T-6/00) EU:T:2003:342, [181].} In another
case, the GC concluded that a direct witness who himself took part in concerted meetings, reinforced the credibility of the statement he produced.\textsuperscript{498}

Moreover, this requirement is closely related to the requirement of precise evidence. The credibility of a document is undeniably reduced, if ‘the context in which it was drawn up is largely unknown’ or it cannot be verified.\textsuperscript{499} The vagueness of the content moves the evidence away from the events and results in lesser credibility. This echoes the previous discussion (in Section 4.1.1) that an improvement in precision results in greater reliability of evidence.

In the CJEU’s preliminary ruling cases and public enforcement judgments, the Court has mentioned the requirement of convincing evidence on very rare occasions, such as in establishing art 101(3) TFEU.\textsuperscript{500} Other issues are not discussed. The AG’s opinions, however, use the requirement of convincing evidence to judge the party’s arguments.\textsuperscript{501} These, however, do not make it clearer whether ‘convincing arguments and evidence’ constitute interpretation of arts 101 and 102 TFEU and whether they constitute a general requirement to prove the whole infringement. In case of genuine ambiguities, national courts may request preliminary rulings from the CJEU to interpret EU law and to clarify the application of the requirement in civil proceedings.

\textit{The test of a firm conviction}

\textsuperscript{498} \textit{IFE Engineering} (T-67/00, T-68/00, T-71/00 and T-78/00), [207]-[210]. The Court confirmed that ‘Mr Verluca was a direct witness of the circumstances which he described.’ Moreover, ‘Mr Verluca, as chairman of Vallourec Oil & Gas, had himself taken part in the Europe-Japan Club meetings.’ Furthermore, ‘Mr Verluca responded in writing to the questions put to him orally during the investigation of 17 September 1996 by Commission staff who had asked him to comment on documents drawn up for the most part by him personally and previously seized by the Commission during the investigation carried out on 1 and 2 December 1994. Mr Verluca subsequently confirmed and supplemented the information already given in his statement of 14 October 1996 and once again in writing, during a further investigation carried out on 18 December 1997. His statement of 14 October 1996 was given in response to a request for information which he states he received on 30 September 1996, and it was sent to the Commission with a copy to a lawyer, Mr Winckler of the firm Cleary, Gotlieb, Steen & Hamilton.’ The Court concluded that considering all those conditions, Mr Verluca made his statements deliberately and after mature reflection. That fact made the statements particularly credible.

\textsuperscript{499} \textit{IFE Engineering} (T-67/00, T-68/00, T-71/00 and T-78/00), [270] & [274].

\textsuperscript{500} \textit{Slovenská sporiteľňa} (C-68/12), [32]. The Court required parties to demonstrate, by means of convincing arguments and evidence, the four conditions for obtaining the exemption under art 101(3) TFEU. See also \textit{GlaxoSmithKline Services} (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P), [42]; \textit{Remí v Commission} (C-42/84) EU:C:1985:327, [45].

\textsuperscript{501} See e.g. Opinion of AG Cruz Villalón in \textit{Otis} (C-199/11), [69]-[70]; Opinion of AG Mengozzi in \textit{AG2R Prévoya\c cne} (C-437/09) EU:C:2010:676, [97]; Opinion of AG Mengozzi in \textit{Pedro IV Servicios} (C-260/07) EU:C:2008:469, [59]; Opinion of AG Kokott in \textit{Austria Asphalt} (C-248/16) EU:C:2017:322, [32].
Early EU caselaw generated from the Commission’s public enforcement has attempted to introduce a test of ‘sufficient probability’. This test relies on the possibility to ‘foresee with a sufficient degree of probability on the basis ... that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.”

As contested by the Commission in Dresdner Bank, ‘[t]he case-law requires only the submission of sufficient evidence’ not ‘irrefutable evidence’, and there is no manifest error as long as ‘the assessment of the facts made by the Commission is more likely than that proposed by the applicants.” This test focuses on the accuracy and objectivity of adduced evidence. However, this more-likely approach is oversimplified and the result of a high degree of uncertainty. As a result, the GC rejected the Commission’s allegation. The EU courts were obviously not prepared to accept a single, pre-determined and systematic standard of proof. As the GC concluded, the Commission failed to meet the requisite legal standard as to whether the facts adduced still entertained any doubt.

While EU Courts expressed their unwillingness to accept a loose and uncertain test of ‘sufficient probability’, they were also reluctant to touch the ceiling of a strict ‘beyond reasonable doubt’ test. In BPB, the GC concluded explicitly that ‘[i]t is apparent from the case-law that the Court must reject the applicant’s assertion that the Commission must adduce proof “beyond reasonable doubt” of the existence of the infringement in cases where it imposes heavy fines.”

502 Société Technique Minière v Maschinenbau Ulm (‘STM’) (C-56/65) EU:C:1966:38, 249. Under this test, the Court focuses mainly on the accuracy of the evidence produced. The word ‘sufficient’ has been frequently used in quite a lot EU caselaw. For example, in CRAM the Court held a ‘sufficiently precise and coherent proof to justify’ anti-competitive behaviours. See CRAM (C-29/83 and C-30/83), [20]. The Court attempts to clear the meaning of ‘sufficient’ as ‘the statement of reasons is to be considered sufficient if it indicated clearly and coherently the considerations of fact and of law’ based on which decisions are made. See ACF Chemiefarma (C-41/69), [76]-[78]. As to the examination of sufficiency, the Court relied on ‘clear and coherent’ evidence. For instance, in ACF Chemiefarma, the Court ruled that to state sufficient reasons for the decisions, relevant authority must rely on relevant facts and law to make the grounds solid. See ACF Chemiefarma (C-41/69), [80].


504 Andreas Scordamaglia-Tousis (n 270) 261

505 Dresdner Bank (T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP), [59]. See, similarly, Baustahlgewebe (C-185/95 P), [58]; Anic Partecipazioni (C-49/92 P), [86].

506 BPB (T-53/03), [64]. Legal scholars have commented on the Court’s rejection of the ‘beyond reasonable doubt’ test. For criticisms, Heike Schweitzer argues that the Court misunderstands that the test of ‘beyond reasonable doubt’ implies that ‘only direct evidence can be used’. In fact, the test could be equally met based on sufficient and consistent indirect evidence. To that effect, see Heike Schweitzer, ‘The European Competition Law Enforcement System and the Evolution of Judicial Review’, in Claus-Dieter Ehlermann, and Mel Marquis (eds.), European Competition Law Review Annual 2009: The Evaluation of Evidence and Its
Notably, even though the GC rejected the ‘beyond reasonable doubt’ test as the standard to prove an infringement, which does not prevent the GC from referring to this test to ascertain key elements of an infringement. For example, in Dresdner Bank case, the GC examined the declarations of certain banks during the administrative procedure. The GC ruled that the level of commissions the banks referred to did not ‘permit the conclusion beyond reasonable doubt that there was a concurrence of wills on the joint fixing of their respective prices.’ At least in this case, the GC applied this test to the standard to prove a concurrence of wills. In addition, the EU courts have also applied this test in examination of exclusionary effect and of anti-competitive effect. Despite these limited applications, however, the EU courts have not ruled explicitly that ‘beyond reasonable doubt’ is a general requirement that must be met in proving the elements of an infringement.

Alternatively, both the GC and the CJEU maintain that the general requirement is whether the Commission has gathered ‘sufficiently precise and consistent evidence to give grounds for a firm conviction that the alleged infringement took place.’ This approach also applies to the exemption under art 101(3)

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507 Dresdner Bank (T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP), [135]–[137].

508 See Opinion of AG Kokott in Post Danmark[(C-23/14), [83]–[84]. In this case, the dominant undertaking must refrain from all commercial practices that are likely to produce an exclusionary effect, not just those in the case of which such an effect seems ‘very likely’ or ‘particularly likely’. The exclusionary effect must be assumed to be ‘beyond reasonable doubt’. AG Kokott emphasizes that the degree of ‘very likely’ or ‘particularly likely’ is insufficient to prove an exclusionary effect.

509 See the application of ‘beyond reasonable doubt’ in anti-competitive effect, in Opinion of AG Wathelet in Orange Polska S.A. v Commission (C-123/16 P). AG Wathelet concurred with the Court in Intel and stated that the infringer's capacity to adversely affect competition ‘cannot merely be hypothetical or theoretically possible’ and ‘the aim of the assessment of capability is to ascertain whether, in all likelihood, the impugned conduct has an anticompetitive foreclosure effect’. Moreover, ‘the assessment of capability as concerns presumptively unlawful behaviour must be understood as seeking to ascertain that, having regard to all circumstances, the behaviour in question does not just have ambivalent effects on the market ..., but that its presumed restrictive effects are in fact confirmed.’ Opinion of AG Wathelet in Orange Polska (C-123/16 P) EU:C:2018:87, [98], with reference to Intel (C-413/14 P), [114]–[121]. Thus, AG Wathelet avoided using the ‘beyond reasonable doubt’ test but suggested a similar criterion on the certainty of key elements in finding an infringement.

510 See e.g. CRAM (C-29/83 and C-30/83), [20]; Ahlström Osakeyhtiö (C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85), [157]; Siemens v Commission (C-239/11 P, C-489/11 P and C-498/11 P) EU:C:2013:866, [217]; Sumitomo (C-403/04 P and
‘that the occurrence of the appreciable objective advantage is sufficiently likely in order to presume that the agreement entails such an advantage.’\textsuperscript{511}

The test of a firm conviction shows that EU Courts adjudicate on the merits of an actual judicial conviction, rather than which party’s evidence presents a higher probability. The conviction must be reached ‘on the basis of the arguments and evidence in its possession.’\textsuperscript{512}

Above all, CJEU caselaw, either generated from public enforcement cases or developed by preliminary rulings, has demonstrated an effort to develop certain standards to prove an infringement of the EU competition law. The Court has tried to impose a general requirement of precise, consistent and convincing evidence as the standard to prove the infringement. The Court has considered some aspects of this general requirement and regarded them as interpretations of arts 101 and 102 TFEU, such as the requirement of precision in constituting the elements of the infringement and the overall view of evidence under the requirement of consistency. These requirements then must be automatically applied in stand-alone damages actions when claimants intend to prove the existence of an infringement.

It shall be noted that these binding aspects are developed from public enforcement cases and target the Commission when it exercises its administrative task, as empowered by the Treaty, to enforce arts 101 and 102 TFEU. However, claimants usually do not have the same investigative power as the Commission. When national courts actually apply these aspects in private damages actions where the claimant needs to prove the existence of an infringement, they may encounter practical difficulties. It remains for national courts to take into account all the relevant facts and circumstances to ascertain how these aspects could actually be applied in a given dispute.

As to other aspects of this general requirement, they are of some reference value to national courts, who may benefit from them in adjudicating private actions.

4.3 The standard to prove the harm

\textsuperscript{511} \textit{GlaxoSmithKline Services} (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P), [94].

\textsuperscript{512} \textit{GlaxoSmithKline Services} (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P), [94].
The Court in *Manfredi* establishes that ‘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 [art 101 TFEU].’ In order to claim compensation, claimants would have to prove, in addition to the infringement, the harm and the causal link.

Technically speaking, the standard to prove the harm includes both the standard to prove the existence of the harm and the standard to prove its extent. Unlike the requisite legal standard for proving an infringement, the tasks of proving both the existence and the extent of the harm remain governed by national law within each Member State. EU law and general legal principles, nevertheless, impose certain restrictions and a minimum level of harmonization of the national rules governing this issue: all the national rules and procedures governing both standards should observe the principles of equivalence and effectiveness, ensure the full effect of arts 101 and 102 TFEU, and guarantee all the rights conferred by EU law, particularly the right to claim full compensation.

### 4.3.1 Actual loss, loss of profits, and payment of interest

The standard to prove the existence of the harm addresses the degree of persuasiveness required of the evidence in order to prove that claimants suffer the harm. In fact, the Damage Directive has imposed some obligations for this standard. Recital 12 provides that claimants must be able to ‘claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law.’ Consequently, the Damage Directive sets the standard to prove the existence of the harm at a substantive level, where actual loss and loss of profits, as well as payment of interest, shall take part.

Actual loss means a reduction in a person’s assets. Loss of profit means the increase in a person’s assets that would have occurred without the infringement. The meaning of actual loss or loss of profit in damages actions

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513 *Manfredi* (C-295/04 to C-298/04), [61].

514 To prove the existence of harm, claimants usually collect ‘personal evidence’ such as how much they have paid for a product or service. To prove the quantification of harm, they need appropriate methodology and techniques to calculate based on economic theories, counterfactual scenarios, controlled variables, and social welfare losses. This requires intensive work on mathematics. In fact, these two elements, albeit different, must be proved together to demonstrate to a degree of legal and factual certainty that the claimant suffered ‘harm’ caused by the infringement. It is almost impossible to prove the harm without indicating to the best approximation the quantification of the harm.

515 Regulation 1/2003, recital 5.

516 Damage Directive, recital 12.
must trace back to the object of full compensation. That is to ‘restore the assets of the victims to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place.’\textsuperscript{517} It follows that a total exclusion of loss of profit would ‘make reparation of damage practically impossible,’\textsuperscript{518} and thus not be compatible with the principle of effectiveness. Hence, in principle, courts shall take into account any benefits that the claimant may obtain in the absence of the harm.\textsuperscript{519}

So far, no CJEU caselaw has discussed the meaning of actual loss in damages actions for EU competition law infringements. Thus, it is unknown how the Court would consider this issue. However, damages actions in EU non-contractual liability cases\textsuperscript{520} also involve the notion of ‘actual and certain damage’.\textsuperscript{521} Thus, the CJEU caselaw on such cases may shed some light on how this actual loss would be defined in view of the Court.\textsuperscript{522}

\textsuperscript{517} Opinion of AG Capotorti in \textit{Ireks-Arkady} (C-238/78) EU:C:1979:203, [9].

\textsuperscript{518} \textit{Manfred} (C-295/04 to C-298/04), [96]. See also \textit{Metallgesellschaft and Others} (C-397/98 and C-410/98) EU:C:2001:134, [91]; \textit{Brasserie du Pécheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others} (C-46/93 and C-48/93) EU:C:1996:79, [87].

\textsuperscript{519} The principle of \textit{compensation lucrum cum damno}. To that effect, see Opinion of AG Mancini in \textit{Pauls Agriculture} (C-256/81) EU:C:1983:91, [5].

\textsuperscript{520} An action for damages against the EU is brought on the basis of art 268 TFEU and the second paragraph of art 340 TFEU, which seeks to have the EU held non-contractually liable to ‘make good any damage caused by its institutions or by its servants in the performance of their duties.’ See more discussion in Koen Lenaerts, Ignace Masels and Kathleen Gutman (n 155) 480–549; Kathleen Gutman, ‘The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection’ (2011) 48 C.M.L. Rev. 695.


\textsuperscript{522} The reference to CJEU caselaw on non-contractual liability of EU is based on some similarities in damages actions between these two types of cases. Similar to the CJEU’s position in damages actions for EU competition law infringements, damages actions for non-contractual liability of EU also require the claimant prove ‘the occurrence of actual damage and the existence of a causal link between that conduct and the harm alleged.’ See \textit{Sviluppo Italia Basilicata v Commission} (C-414/08 P) EU:C:2010:165, [138]; \textit{Trubowest Handel and Makarov v Council and Commission} (C-419/08 P) EU:C:2010:147, [40]. See also early caselaw, \textit{FIAMM and Others v Council and Commission} (C-120/06 P and C-121/06 P) EU:C:2008:476, [106]; \textit{Bouma and Beusmans v Council and Commission} (C-162/01 P and C-163/01 P) EU:C:2004:247, [43]; \textit{Luccaccioni v Commission} (C-257/98 P) EU:C:1999:402, [11]; \textit{KYDEP v Council and Commission} (C-146/91) EU:C:1994:329, [19]; \textit{Oleifici Mediterranei v EEC} (C-26/81) EU:C:1982:318, [16]. Sometimes, EU courts stipulate these requirements in a different
In Cofradía de Pescadores, the applicants claimed the loss of fishing opportunities allocated to Spain, which they could have made use of to catch anchovy. The GC considered that the quota transferred, namely 90% of the TAC for anchovy in ICES area VIII, constituted only a theoretical limit on the maximum catch. It followed that the applicant’s submission that they suffered loss due to not obtaining 90% of the fishing opportunities transferred was solely theoretical and hypothetical damage. Hence, the applicants failed to prove the existence of actual and certain damage.

In Cofradía, the GC denied the damage claim on the ground that the loss suffered was established on a purely theoretical and hypothetical basis. Such an approach is by no means suitable for damages actions for EU competition law infringements. The damage caused by EU competition law infringements is defined by constructing a counterfactual scenario in which there had been no infringement. This counterfactual scenario is hypothetical and thus, it would preclude any damage from being actual and certain.

Cofradía was amended by the CJEU in Agraz A group of companies claimed damages caused by not including Chinese prices in the calculation of the production aid. The GC rejected the claim on the ground that ‘it is impossible to determine with certainty what the impact on the amount of the aid would have been had the price paid to Chinese tomato producers been taken into account.’ On appeal, the CJEU found that the GC had erred in law and held that the Commission’s wide discretion cannot ‘lead automatically to the damage alleged, which is the result of unlawful conduct by that institution, being regarded as uncertain.’ The uncertainty, in this case, concerned the extent of the damage, not the very existence of it. Hence, the Court considered that ‘far from being hypothetical or merely possible, the existence of the damage alleged by the appellants is thus indubitable.’

way. For instance, in Fresh Marine, the Court identified four elements: ‘the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties’. Commission v Fresh Marine (C-472/00 P) EU:C:2003:399, [25].

Cofradía de pescadores (T-415/03), [118].

ibid, [110]–[121].

For more information on counterfactual scenario, see Section 4.3.2 Counterfactual scenario and influential factors, below.


Agraz (T-285/03), [72]–[75].

Agraz (C-243/05 P), [30].

ibid, [33]–[36].

ibid, [42].
then referred the case back to the GC so that it could 'put an economic value on that damage.\textsuperscript{531}

The CJEU clearly recognizes the feasibility of establishing the damage on a purely theoretical basis. The requirement of 'actual and certain' loss points only to the existence of the damage, not its extent. In the view of the Court, a total rejection of the quantification on a theoretical basis would 'deprive actions for compensation of all useful effect',\textsuperscript{532} and thus is incompatible with the principle of effectiveness. Consequently, while actual loss means the existence of the damage being actual and certain, the extent of the damage is subject to the courts' discretionary power.

The above discussions indicate one possible way for the CJEU to define the meaning of 'actual loss' in antitrust damages actions. They are of some relevance to the application of the principle of effectiveness, in terms of what level of 'actual and certain' would be incompatible with the principle.\textsuperscript{533} However, the CJEU caselaw on the EU's non-contractual liability does not constitute an interpretation of the EU competition law and these rulings are merely of reference value. For antitrust damages claims, in the absence of EU law, issues concerning the standard of proof for the existence of the harm remain governed by national law within each Member State. Meanwhile, national courts must observe the principles of equivalence and effectiveness and must ensure the right to claim full compensation, as well as all other rights conferred by EU law.

In addition to being actual and certain, the notion of actual loss as a reduction in a person's assets also requires that the harm must be personal.\textsuperscript{534} This personal character also reflects the meaning of the right to full compensation as being 'to place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed.\textsuperscript{535} Hence, the right to full compensation is indeed a personal right of the individual (either a natural or a legal person) to seek compensation.\textsuperscript{536}

\textsuperscript{531} ibid, [49]–[50].

\textsuperscript{532} Agraz (C-243/05 P), [31].

\textsuperscript{533} As confirmed by the CJEU, a total exclusion of constructing the damage on purely theoretical basis would be incompatible with the principle of effectiveness, in that such rulings would render the appellant extremely difficult or practically impossible to prove 'an actual and certain damage'. Agraz (C-243/05 P), [42].

\textsuperscript{534} Practical Guide, para 7.

\textsuperscript{535} Damage Directive, art 3.

\textsuperscript{536} Manfred (C-295/04 to C-298/04), [89]–[100]. In Manfred, the CJEU used the phrase 'the right of individuals to seek compensation' at [100] or 'the right of any individual to seek compensation' at [95] repeatedly to illustrate the right to compensation as a personal right. Similarly, in damages actions for EU's non-contractual liability, the infringement of a rule law is capable of incurring that liability only where the rule of law is intended to confer rights on
It follows that legal persons must separate their assets from the personal assets of their members. 537 Besides, they may not claim collective compensation for their members.538

Moreover, claimants should also receive the payment of interest as part of the harm suffered.539 This is because claimants claim damages after a significant delay in EU competition law cases. It could be months after the NCA or the Commission make a final decision, or even years after the infringement happened. The compensatory nature of antitrust damages claims requires the reparation of adverse effects resulting from the infringement.540 In case of significant delays, adding interest ensures that the victim is awarded the real value of the loss suffered.541 It is also economically sensible that the award of interest could compensate for ‘the effects of money losing its value over time, as well as the lost opportunity to the injured party from having the capital at

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537 See for example GAARM v Commission (C-289/83) EU:C:1984:398, [4]–[5]. The CJEU considered that ‘It is not, however, apparent from the applicant’s claims that they purport to act in the capacity of producers nor is it possible to infer that capacity from the instruments constituting and regulating them, which were produced to the Court.’

538 Such claims may be remedied under collective redress. ‘Collective redress’ refers to ‘a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress).’ Thus, collective redress functions as an alternative measure to join claims and pursue them collectively as a better means of access to justice, ‘in particular when the cost of individual actions would deter the harmed individuals from going to court.’ Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60 (Recommendation on Collective Redress), para 3. See also joint information note by Vice-President Viviane Reding, Vice-President Joaquin Almunia and Commissioner John Dalli, ‘Towards a Coherent European Approach to Collective Redress: Next Steps’, SEC(2010) 1192, paras 4–6.

539 Damage Directive, recital 12.

540 Marshall II (C-271/91), [31]; Manfredi (C-295/04 to C-298/04), [97]. See also White Paper section 2.5 and Staff Working Paper – WP, para 187.

its disposal.’\textsuperscript{542} Hence, the payment of interest constitutes ‘an essential component of compensation.’\textsuperscript{543}

More explicitly in Recital 12 of the Damage Directive, the payment of interest is ‘an essential component of compensation to make good the damage sustained by taking into account the effluxion of time.’ In order to place the injured party in the position as if the infringement has never occurred, the payment shall be due ‘from the time when the harm occurred until the time when compensation is paid.’\textsuperscript{544} This applies without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit.\textsuperscript{545}

In the absence of applicable EU law, it is incumbent on the Member States to set the rate for the payment of interest in national law. The rate can be either statutorily fixed or variable on a case-by-case analysis, as long as it is in accordance with the principles of effectiveness and equivalence. It follows that a national rule that excluded the payment of interest would not be compatible with the principle of effectiveness.\textsuperscript{546} In this setting, national courts in antitrust damages actions should have the capacity to adjust the interest rate.

The actual loss, loss of profit and payment of interest formula underlines in essence the policy goal of ensuring full compensation.\textsuperscript{547} The Damage Directive, based on the compensatory nature of damages claims, limits an award of compensation not to ‘lead to overcompensation, whether by means


\textsuperscript{543} Manfredi (C-295/04 to C-298/04), [97]. See also Marshall II (C-271/91), [31].

\textsuperscript{544} Damage Directive, recital 12.

\textsuperscript{545} Damage Directive, recital 12.

\textsuperscript{546} Irwinie (C-565/11) EU:C:2013:250, [26]–[29]. In Irwinie, the Court was asked to give preliminary rulings on the question whether EU law must be interpreted as precluding a national system, which limits the interest granted on repayment of a tax levied in breach of EU law to that accruing from the day following the date of the claim for repayment of that tax. The Court ruled that ‘the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of adequate compensation for the loss sustained through the undue payment of the tax.’ Hence, a total exclusion of the payment of interest or insufficient calculation of interest would deprive the applicants of adequate compensation. This is incompatible with the principle of effectiveness. See also Littlewoods (C-591/10), [29].

\textsuperscript{547} Damage Directive, arts 3 and 4.
of punitive, multiple or other damages.’ Moreover, the term ‘full compensation’ gains meaning from similar terms such as adequate or commensurate compensation and remains open to interpretation.

Previous CJEU preliminary ruling cases indicate a rather prudent touch, in terms of defining the meaning of adequate, commensurate or full compensation. First, the Court underlines that the total exclusion of certain losses is incompatible with EU law and the principle of effectiveness. Limiting the compensation a priori to an upper limit or prohibiting the granting of payment of interest are obviously contrary to EU law insofar as they make it impossible to compensate in full the damage sustained. Second, the national measures ‘to make good in full’ must guarantee real and effective judicial protection. It seems that the Court leaves much room for national law to set the criteria for determining all other compensation-related issues,


549 See e.g. Von Colson (C-14/83), [23], where the Court ruled that ‘where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.’ See also Marshall II (C-271/91), [26]; Draehmpaehl v Urania Immobilienservice (C-180/95) EU:C:1997:208, [25]; Palmisani (C-261/95), [35].

550 Factorlane (C-46/93 and C-48/93), [82]. See also Palmisani (C-261/95), [26]; AGM-COSMET (C-470/03) EU:C:2007:213, [94].

551 Katri Havu, ‘Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts?’ (n 201) 24–26. Havu noted that commensurate and full compensation are often interchangeable, even though ‘both “full compensation” and “compensation commensurate with damage” remain vague as long as detailed specifications are lacking as to what losses should be compensated for and in what circumstances.’ With reference to Michael Dougan (n 11) 259–260. Moreover, Havu also noticed the difference discerned between the notions and in how they are used by the CJEU. For instance, adequate compensation may allow remedies without financial compensation. However, she concluded that ‘at the moment, however, it appears that no obvious, clear-cut differences in meaning exist between different contexts or fields of law when the ECJ discusses full, adequate and commensurate compensation.’ ‘If the currently highly pointillist caselaw develops further and more clearly distinguishes between different situations or fields of law, the problem deserves further attention.’

552 See Marshall (C-271/91), [30]–[32] & [38]; Metallgesellschaft (C-397/98 and C-410/98), [4]; AGM-COSMET (C-470/03), [90]–[95]; Irinie (C-565/11), [26]–[29]; Factorlane (C-46/93 and C-48/93), [87]. ‘Total exclusion of loss of profits as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.’ See AGM-COSMET (C-470/03), [95]; Manfred (C-295/04 and C-298/04), [90]–[100]; Donau Chemie (C-536/11), [22]–[25].

553 See Von Colson (C-14/83), [23]. See also Marshall (C-271/91), [24]–[26]; Paraguay (C-460/06) EU:C:2007:601, [46]; Fontie (C-63/08) EU:C:2009:666, [42].
and to apply the law to the facts in the light of the requirements of EU law and the general principles.\textsuperscript{554}

The above discussion on the meaning of full compensation nevertheless indicate potential restrictions on national courts when hearing a given dispute, in terms of applying a certain standard of proof for the existence of the harm. This standard of proof shall not unduly impede claimants’ right to claim full compensation. Such restrictions impose substantial requirements on national courts when they interpret and apply the Directive-based rules in concrete cases. For instance, it might be problematic when national courts apply very stringent interpretations on an ‘actual and certain’ loss or on the condition of causation. This is also in accordance with the principle of effectiveness, where national rules shall not render the claim of right to full compensation excessively difficult or practically impossible.

4.3.2 Counterfactual scenarios and influential factors

In addition to the standard for proving the existence of the harm, national rules will also determine ‘the appropriate standard of proof and the required degree of precision in showing the amount of harm suffered,’\textsuperscript{555} that is, the standard for proving the extent of the harm or the quantification of the harm.

In principle, the standard for proving the extent of the harm is governed by national law within each Member State, provided that the principles of equivalence and effectiveness are observed and the full effect of arts 101 and 102 TFEU is guaranteed. The principle of effectiveness further requires that ‘applicable national rules and their interpretation should reflect the difficulties and limits inherent to quantifying harm in competition cases.’\textsuperscript{556} Such difficulties and limits must be dealt with in the national context, which potentially results in divergent approaches that national courts adopt in proving the harm.

Against this background, the Commission has published the Practical Guide on the quantification of harm to ‘offer assistance to national courts and parties involved in actions for damages.’\textsuperscript{557} Initially, the Commission promoted

\textsuperscript{554} Von Colson (C-14/83), [28]; AGM-COSMET (C-470/03), [94].

\textsuperscript{555} Quantification Communication, point 8. Point 8 provides further that ‘[n]ational law further determines to what extent and how courts are empowered to quantify the harm suffered on the basis of approximate best estimates or to make use of equitable considerations.’

\textsuperscript{556} Quantification Communication, point 9.

\textsuperscript{557} This study will discuss the Practical Guide in terms of the standard for proving the harm. The purpose of the Practical Guide is to place at the disposal of courts and parties to damages actions economic and practical insights that may be of use when national rules and practices are applied. It provides detailed information on the main methods and techniques available to quantify the harm. The Practical Guide is purely informative, which does not have a binding
damages actions towards the approximation of Member States' tort law and civil procedure regulations.\textsuperscript{558} However, the conditions to quantify the harm in antitrust damages actions are notably different from those in normal civil cases. Despite the purely economic nature of antitrust tort,\textsuperscript{559} the harm in these torts also has a social aspect. The effect of the infringement demonstrates a harm to the consumer, as well as a loss of social welfare.\textsuperscript{560} The infringement is detrimental not only to the legitimate rights of the party, but also to certain public interests, particularly normal competition within the internal market.\textsuperscript{561}

To address these concerns, the Commission has proposed a counterfactual scenario, which asks what is likely to have happened without the infringement.\textsuperscript{562} The Commission also provides insights into the most frequent forms of harm and sets out methods and techniques to handle the various forms. The goal is to enhance the effectiveness of antitrust damages


\textsuperscript{559} See for example Richard A. Posner, 'Common - Law Economic Torts: An Economic and Legal Analysis' (2006) 48 Ariz. L. Rev. 735, 736. In the article, Posner considers private antitrust litigation as in essence ‘economic tort’. See also Spencer Weber Waller, 'The Incoherence of Punishment in Antitrust' (2001) 78 Chi. -Kent L. Rev. 207, 207. Waller argues that antitrust began with the common law tort of restraint of trade but has long been separated from the rest of tort law. This particularity reflects in the criminal nature of fines at the public side of antitrust enforcement, as well as treble damages as 'civil penalty' in common law system.

\textsuperscript{560} Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos (n 322) 14. The infringement causes an effect of higher prices on lost consumers/loss of volume to actual consumers, which is a loss of social welfare that cannot be compensated anywhere else back to the society, not even the infringer. That is called ‘deadweight lost’.

\textsuperscript{561} Francisco Marcos and Albert Sanchez-Graells (n 558) 473-478.

\textsuperscript{562} Practical Guide, para 12.
actions and to increase the foreseeability and legal certainty for all parties involved.\textsuperscript{563}

However, the Practical Guide and the various methods and techniques provided therein only explain the calculation of damages. The Practical Guide neither clarifies the interpretation of EU law and the application of the principle of effectiveness, nor indicates what national decisions and national rules are compatible with EU law. The answers to all these issues must be found in relevant CJEU caselaw. Besides, the Practical Guide is not binding, and thus national courts are still at liberty to apply or not apply the counterfactual scenario and the methods and techniques provided by the Practical Guide. The Practical Guide and the methods and techniques provided therein, nevertheless, have referential significance that national courts can benefit from.

The central question in antitrust damages quantification is thus to define this hypothetical scenario. The construction of the counterfactual scenario is largely decided by the method chosen by the court hearing the case. In practice, various methods are available, including comparator-based methods, simulation models, cost-based and finance-based analysis and so on. Among these, courts often employ comparator-based methods, which rely on ‘real-life data that are observed on the same or a similar market.’\textsuperscript{564} Such reliable data are collected ‘on the same market at a time before or after the infringement’,\textsuperscript{565} ‘on a different but similar geographic market’,\textsuperscript{566} or ‘on a different but similar

\textsuperscript{563} Quantification Communication, point 11.

\textsuperscript{564} Practical Guide, para 37.

\textsuperscript{565} This method concerns particularly comparison over time on the same market. See Practical Guide, paras 38–48. Comparison over time is employed when the undertaking concerned provides a service or a product, which it is alone in the position to provide. See e.g. \textit{General Motors v Commission} (C-26/75), EU:C:1975:150, [11]–[24]. In this case, through comparison over time, the Court confirmed the Commission’s finding that ‘between 15 March and 31 July 1973, the applicant imposed a charge which was excessive in relation to the economic value of the services provided by way of the approval procedure.’ (C-26/75), [16]. Similarly, see \textit{British Leyland v Commission} (C-226/84) EU:C:1986:421, [25]–[34]. However, as regards comparisons over time, national courts shall be careful enough to take into account other factors that may affect the ultimate price of a product or service. Such factors include: legitimate business strategies (for example, an undertaking might decide to try to penetrate a new market and, for some time, charge a very low price, thus accepting minimal margins); an increase in costs (due to external factors such as changes in local taxation or borrowing costs, or to business decisions of the undertaking itself such as choices regarding advertising campaigns or research and development); or even consumer preferences (for example, shifts in the perception of a product by the customers in response to new marketing strategies).’ They all may cause a sudden change in prices. See Opinion of AG Wahl in \textit{AKKA/LAA} (C-177/16), EU:C:2017:689, [41].

\textsuperscript{566} This method is also called geographic comparison. See e.g. \textit{Deutsche Grammophon v Metro SB} (C-78/70), EU:C:1971:59, [14]–[19]. In this case, the Court compared the difference between the controlled price and the price of the product reimported from another Member State. Even though the final judgment found that, the result of the comparison did not
product market’.\textsuperscript{567} When the comparables are sufficiently homogeneous, a comparison of real-life data can be meaningful.\textsuperscript{568} The emphasis on the reliability of data makes it more convincing to establish the difference between the price actually charged by the undertaking concerned and the benchmark price.\textsuperscript{569} This approach establishes a persuasive analysis of whether the actual price is unfair\textsuperscript{570} and whether the unfair price causes harm to the victim.

A more crucial concern, however, is the choice of the method. Each method has particular features, strengths and weaknesses that make it more or less suitable to the specific circumstance of a given case than other methods.\textsuperscript{571} On occasion, national courts may choose to combine several methods to conduct

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\textsuperscript{567} This method concerns comparison across competitors. This method has already been widely used in various competition cases. The appellants sometimes rely on comparison with co-infringers to argue for the principle of equal treatment. See e.g. \textit{Pilkington Group and Others v Commission} (C-101/15 P) EU:C:2016:631, [55]–[58]. Even though the appellant employs this comparison to argue the amount of fine imposed disproportionate compared with the other participants in the infringement, thus violating the principle of equal treatment. It nonetheless shows the reliability to comparison across competitors in examining various facts. See also \textit{ANGED} (C-236/16 and C-237/16) EU:C:2018:291, [91]. In this case, the Court uses comparison to test whether ‘the generalised presumption of stronger economic capacity in the case of a larger sales area’ is accurate.


\textsuperscript{569} AG Wahl has in several opinions identified the reliability data as the precondition of a meaningful comparison concerning the Commission’s requests for the information under art 18(2) of Regulation 1/2003 to make a meaningful comparison. The Commission could make a meaningful comparison only if the information requested was provided at roughly the same time and was accurate and complete. Errors or delays, even by a single respondent, would have meant that the comparison envisaged by the Commission would not have been feasible or, in any event, sufficiently reliable.’ See Opinion of AG Wahl in \textit{Italmobiliare} (C-268/14 P) EU:C:2015:697, [93]; Opinion of AG Wahl in \textit{Schwenk Zement} (C-248/14 P) EU:C:2015:695, [36]; Opinion of AG Wahl in \textit{HeidelbergCement} (C-247/14 P) EU:C:2015:694, [63].

\textsuperscript{570} As the Court observed in \textit{United Brands}, ‘[t]he questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.’ \textit{United Brands} (C-27/76), [252]. See also \textit{Scippaccola and Terezakis v Commission} (C-159/08 P) EU:C:2009:188, [47].

\textsuperscript{571} Practical Guide, paras 123–124. AG Wahl in \textit{AKKA/LAA} examined the method: geographic comparison, relying not only on ‘the consumption habits, economy and citizens’ welfare (gross domestic product)’, but also on the fact that Latvia and its neighbouring countries of Lithuania and Estonia ‘also share the same historical and cultural heritage.’ Thus, Wahl ‘find those criteria to be objective and verifiable.’ Opinion of AG Wahl in \textit{AKKA/LAA} (C-177/16), [62]–[63].
a thorough examination of the existence of harm and its quantification.572 In any event, the appropriate approach to quantifying the harm is determined by applicable national law and by the court hearing the case in a given situation.573

Notably, it is only possible to estimate, not measure with certainty and precision, what the hypothetical counterfactual scenario is likely to look like. Prices, sales volumes, and profit margins depend on a wide range of factors and complex, often strategic interactions between market participants that are not easily estimated.574 As the Court recognized, ‘the loss of earnings is the result not of a simple mathematical calculation but of an evaluation and assessment of complex economic data.’575 Such an assessment is of a largely hypothetical nature. Hence, while it is possible for national courts to consider a ‘fixed’ standard to prove the existence of harm, the extent of harm is subject to national courts’ approximate best estimates.

In fact, no matter whether they are proving the existence of the harm or the extent of it, national courts must not establish either one arbitrarily. Both standards must be associated with considerations including the burden of proof, rebuttable or irrefutable presumptions, the availability of relevant data and the costs and time involved.576 In other words, a national court should use all procedures available to it under national law to ascertain whether both standards employed by the national court are appropriate in a given dispute.

In any event, there exist certain standards. A claimant cannot simply enter a bundle of receipts and claim that the prices were higher than that they should be in a certain period, geographic area or product market. The level of persuasiveness to prove both the existence and the extent of the harm requires the claimant to show reliable data, to make convincing comparisons (or some other method) and to prove in material fact an ‘actual, certain and personal’ harm: that either the actual price charged was excessively unfair or the exclusionary practices caused monetary loss.


573 Manfred (C-295/04 to C-298/04), [88] and the caselaw cited therein.

574 Practical Guide, para 16.

575 See Mulder and others v Council and Commission (C-104/89 and C-37/90) EU:C:2000:38, [79]. The CJEU recognizes that competition cases are characterized by considerable limits to the degree of certainty and precision that can be expected.

576 Quantification Communication, para 8; Practical Guide, para 124.
4.3.3 Manifestations of harmful effects

The Practical Guide identifies two principle categories of harmful effects, either resulting in a rise in price \(^{577}\) or having an exclusionary effect \(^{578}\). Different harmful effects require different standards to prove the harm, as well as different standards for quantifying the harm.

*A rise in price*

Most infringements result in a rise in price, especially cartels engaging in such acts as price fixing, market sharing, output limiting, excessive pricing, and so forth.\(^{579}\) Increased prices can indicate that products or services are no longer under normal market function. Customers thus pay an overcharge.

Normally, to prove the harm of a rise in price, claimants need to demonstrate an overcharge, which is the ‘difference between the price actually paid and the price that would have prevailed in the absence of an infringement of competition law.’\(^{580}\) An empirical study shows that (a) the vast majority of cartels do in fact lead to an overcharge, and (b) there is considerable variance in the overcharges observed.\(^{581}\) These two conclusions deliver two pieces of information. First, overcharges must be proven. Second, there is greater tolerance as to the accuracy of the extent of overcharge shown. Consequently, the strict standard extends to proving the existence of an overcharge, not to its exact amount.

The simplest condition for overcharge schemes concerns the immediate overcharge paid directly by the customer to the infringing undertaking. Methods showing an increase in price paid over time, an increase in profits

\(^{577}\) The effect of a rise in price as a typical kind of harm caused by the cartel, see e.g. Recital 42 of the Damage Directive that ‘[d]epending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel.’ This result from the Commission’s reliance on studies indicating that only 7% of cartels do not lead to overcharges. See also Practical Guide, para 44. For example, in *Polypropylene* cartel, the ‘big four’ attended bosses’ meetings and their purpose was to determine the steps to bring about a rise in prices. An ICI employee about what has transpired at a pre-meeting on 19 May 1983, which the ‘big four’ has attended, evidenced this purpose. *Montecatini* (C-235/92 P), [20].

\(^{578}\) Practical Guide, para 21.

\(^{579}\) See art 101 TFEU.

\(^{580}\) Damage Directive, art 2(20).

\(^{581}\) Practical Guide, paras 139–145.
that is not due to a better market condition, or the existence of illicit profits, may all qualify to meet the standard of proof of an overcharge.\textsuperscript{582}

More complicated schemes concern the standing of an indirect purchaser.\textsuperscript{583} Figure 1 shows a simplified example of a supply chain involving indirect purchaser and end users. According to art 14(1) of the Damage Directive, an indirect purchaser must demonstrate whether and to what degree an overcharge was passed on to him. The burden of proving both the existence and the scope of a pass-on rests with the claimant, who may require disclosure from the defendant or from a third party.

In either scheme, the defendant may invoke a passing-on defence that the claimant passed on down the chain the whole or part of the overcharge resulting from the infringement of competition law.\textsuperscript{584}

This burden is indeed quite overwhelming.\textsuperscript{585} Even a defendant who also participated in the infringement may find it difficult to prove that the claimant has passed on the overcharge. The defendant may need to study the

\textsuperscript{582} Practical Guide, paras 146–160.

\textsuperscript{583} The CJEU has confirmed the standing of indirect purchasers in cases relating to the reimbursement of taxes or charges levied by the Member States in breach of relevant EU law. See for instance \textit{Ireks-Arkady v Council and Commission} (C-238/78), EU:C:1979:226, [13]–[18]. The Court ruled that ‘The statistical data and the arguments put forward by the parties do not permit the conclusion to be drawn that the applicant actually passed on, or could have passed on, the loss resulting from the abolition of the refunds in its selling prices.’ \textit{Ireks-Arkady} (C-238/78), [16]. Obviously, the Court confirmed the possibility to claim pass on, but in this case, the evidence adduced by the appellant could not support this claim. See also \textit{San Giorgio} (C-199/82), [13]–[15]; \textit{Comateb and Others v Directeur général des douanes and droits indirets} (C-192/95) EU:C:1997:12, whole case; \textit{Michalidis} (C-441/98 and C-442/98), [30]–[42]. As a result, the Court ruled that even though pass on may be normal commercial practices, no presumption as such shall be established. \textit{Ireks-Arkady} (C-238/78), [20]. Later, the standing of indirect purchasers has also been confirmed by CJEU in the area of the EU competition law. See e.g. \textit{GT-Link} (C-242/95), [26]. These jurisprudences predate the Damage Directive.

\textsuperscript{584} Damage Directive, art 13 and recital 39. See also Staff Working Paper – WP, para 228. For further discussion, see Ioannis Lianos, Peter Davis and Paolisa Nebbia (n 172) 37.

\textsuperscript{585} Sebastian Peyer, ‘The Antitrust Damages Directive – Too little, too late’ (n 199) 5.
market conditions where the claimant operates in order to prove that the
claimant has passed on the overcharge to downstream market players. Thus,
claimants are not entitled to compensation.

Comparing the conditions between claimants claiming damage as an indirect
purchaser (art 14) and defendants invoking a passing on defence (art 13), the
presumption that price increases are passed down the supply chain applies
under art 14 but not under art 13.\textsuperscript{586} In other words, the defendant invoking
the passing-on defence needs to prove the existence of this presumption, that
is, the claimant passed on the whole or part of the overcharge. The different
treatment seems to indicate that the infringer who has an informational
advantage does not need the same level of protection as the victims.\textsuperscript{587}

However, how the indirect purchaser’s claims and the defendant’s passing-on
defences work depends on national courts’ application of their relevant
national rules. In any event, national courts should make full use of all
mechanisms at their disposal to ensure the right to full compensation and to
avoid over- or under-compensation.\textsuperscript{588} Moreover, national courts should also
ensure all the rights conferred by EU law, including the position and the rights
of the defendants, so that all the parties have all the protections that are
required by EU law.

Furthermore, the passing-on defence may attract special attention in parallel
proceedings.\textsuperscript{589} Art 15 of the Damage Directive intends to ensure consistent
rulings where multiple claims at different levels of the supply chain happen
simultaneously in relation to the same infringement. The Directive further

\textsuperscript{586} For more discussion on this presumption, see Section 3.4.2 Presumptions of law, above.

\textsuperscript{587} See Magnus Strand, ‘Indirect Purchasers, Passing-on and the New Directive on

\textsuperscript{588} White Paper, 8.

\textsuperscript{589} The issue of ‘parallel proceedings’ has been discussed widely already in public
enforcement cases. One influential decision is the Toshiba Corporation (C-17/10)
EU:C:2012:72. In this case, the Court delimited the competences and powers of the
Commission and NCAs that ‘a national competition authority does not, ... permanently and
definitively lose its power to apply national competition law where the Commission opens a
proceeding for the adoption of a decision under Chapter III of Regulation No 1/2003.’ Toshiba
Corporation (C-17/10), [91]. The Court continued to rule on the principle of \textit{ne bis in idem}.
According to the Court, the application of the principle of \textit{ne bis in idem} is subject to three
cumulative conditions that ‘in the two cases the facts must be the same, the offender the same
and the legal interest protected the same.’ Toshiba Corporation (C-17/10), [97]. In spite of the
CJEU caselaw, scholars have identified the major challenges that Member State courts face in
this context. One of them is how to avoid a parallel proceeding and another is to ensure a well-
placed court will hear and determine the case. See, for example, Mihail Danov, Florian Becker
185. See also the problem of accountability in Katalin J. Cseres, ‘Parallel Enforcement and
Accountability: The Case of EU Competition Law’ (2017) University of Groningen Faculty of
<http://dx.doi.org/10.2139/ssrn.2995729>.
imposes an obligation on national courts to join or coordinate parallel actions, or at least to take due account of ‘actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain.’ This account includes both the proceeding and the judgment.\textsuperscript{590} One consideration for these arrangements is to avoid contradictory economic assessments in parallel proceedings where they concern equivalent facts.\textsuperscript{592} National courts are to take account of parallel proceedings and judgments in order to decide whether the evidence given therein of the existence and the scope of the pass-on is clear and certain enough to discharge the burden of proof.

However, even if the economic assessments that concern equivalent facts are identical, the decision about a passing-on defence may still be different. Judgments of a successful passing-on defence may be of only reference value in a parallel proceeding in a different geographical area, against a co-infringer, or at a different level of a supply chain. It remains up to the national court to decide all aspects of a pass-on defence on a case-by-case basis, taking into account all the relevant factors and available evidence before it.\textsuperscript{593}

\textit{Exclusionary effect}

Illegal practices also aim to reduce competitors’ market share and to exclude them from the relevant market, commonly referred to as foreclosure.\textsuperscript{594} Such practices include margin squeeze, predatory pricing, tying and bundling, resale price maintenance, and so on.\textsuperscript{595} In case of exclusionary effect, both

\textsuperscript{590} Damage Directive, art 15(1)(a) and recital 44. This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidentiary value of judgments rendered in that context.’

\textsuperscript{591} As to the proceeding, recital 44 of the Damage Directive requires the application of Regulation No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1. Under art 30 of this regulation, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction. As to the judgments, art 15(1)(b) of the Damage Directive provides that ‘judgments resulting from actions for damages as referred to in point (a).’

\textsuperscript{592} Oxera and a multi-jurisdictional team of lawyers led by Assimakis Komninos (n 322) para 528.

\textsuperscript{593} \textit{Weber’s Wine World} (C-147/01), [96] & [100]; \textit{Alakor Gabriantermelő és Forgalmazó (C-191/12)} EU:C:2013:315, [30].

\textsuperscript{594} See \textit{Post Danmark} (C-209/10), [22]–[24].

\textsuperscript{595} See art 102 TFEU.

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competitors and consumers suffer harm. They all enjoy a right to full
compensation, as an injured party within the meaning of the Damage
Directive. However, the standard for a competitor to prove harm is
different from the standard for a consumer.

Competitors may suffer a decrease in market share or even exclusion from the
market as an exclusionary effect of an infringement of arts 101 and 102 TFEU.
Their loss of profits may be caused by reduced avenues (reduction in quantity)
or by increased costs (when the infringement affects the price of an input).
Hence, the construction of a counterfactual scenario must be sufficiently
persuasive to show all the benefits they would have obtained if there had been
no infringement. This is usually achieved by deducting the estimated costs in
a non-infringement scenario from the expected revenues had the infringement
not occurred. The key is to prove an actual loss in profits, not a speculative
one.

The more complex situation is the prevented entry of competitors. The
foreclosure of new entrants presents inherent difficulties in quantifying the
harm, since the undertaking has not been active on the market and there is a
lack of observable data concerning its performance. In this case, the
problem for a counterfactual scenario is that even in the absence of the
infringement, the undertaking may still fail in starting a new business in a
market in which it has not operated before. This failure may result from
external factors such as the competitive environment or customer preferences,
or from internal factors such as business strategy or cost-profit imbalance. In
fear of unsuccessful claims, such foreclosed competitors may seek damages
only for the cost incurred in order to enter the market, rather than the whole
of the profit foregone.

Consumers suffer harm due to a distorted and restricted market caused by
exclusionary effects. They might be aware of an increase in price or reduction
in choice. In practice, the price curve may not always slope upwards.
Customers may experience a reduced price at the beginning, as infringers often
intentionally lower their prices to drive competitors out of the market.

When infringers finish occupying the majority or whole of the relevant market,

596 Art 1 of the Damage Directive states that ‘anyone who has suffered harm caused by an
infringement of competition law by an undertaking or by an association of undertakings can
effectively exercise the right to claim full compensation for that harm from that undertaking
or association.’ As long as the undertaking or individual qualifies as an injured party, it could
claim compensation in an action for damages within the meaning of the Damage Directive.


598 Practical Guide, para 189.

599 Practical Guide, para 201.

600 Practical Guide, para 203.

601 This is the case of predatory pricing.
the price curve may climb immediately and precipitously. Therefore, the standard of proof is stricter to the extent that customers must explain clearly that the drop in price is an intentional predation, and a subsequent rise causes real harm.

Compared with an obvious rise in price, exclusionary effects usually work in a slow and secret manner. Thus, the standard to prove the harm caused by exclusionary practices cannot be the same as the one used to prove the harm caused by a rise in price. In the absence of applicable EU law, it is for national courts to decide what the concrete standard of proof in either condition is within each Member State, as long as they guarantee the parties’ right to full compensation. However, national legal systems should take into account the inherent difficulties of quantifying different forms of harm and should observe the principles of equivalence and effectiveness.

4.4 The standard to prove causation between the infringement and the harm

In addition to the infringement and the harm, claimants also need to adduce a set of cogent and persuasive pieces of evidence to prove the causal link between the infringement and the harm. It was not until *Manfredi* that the Court authorized an explicit expression of a causal relationship, where ‘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 [art 101 TFEU].’ 602 Causation in this regard decides which harms are legally relevant and recoverable. It functions not only to explain the occurrence of particular events, but also to attribute legal responsibility to the agents whose actions provoke the events.

The standard to discharge this burden of proof is unknown. The Court attributes this task to ‘the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of “causal relationship”, as long as the principles of equivalence and effectiveness are observed.’ 603 These very same words are also found in Recital 11 of the Damage Directive.

However, at this point, there are some preliminary observations that reveal certain difficulties in constructing a causal link, although AG Kokott in *Kone* case provides an example as to how it would look like if the Court ruled on the issue of causation.

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602 *Manfredi* (C-295/04 to C-298/04), [61]. See also *City Motors Groep NV v. Citroën Belux NV* (C-421/05), EU:C:2007:38, [33].

603 *Manfredi* (C-295/04 to C-298/04), [63]–[64].
4.4.1 Difficulty in constructing a causal link

Overall, causation is difficult to prove in damages actions for EU competition law infringement.\(^{604}\) Figure 2 and the elaboration provided below address this issue.

When an agreement or concerted practice has been found to be violating art 101 or art 102, it is deemed void.\(^{605}\) However, the contracts agreed to between the downstream purchasers, including the direct purchaser, indirect purchaser and end-user, are usually still valid under contract law.\(^{606}\) Therefore, downstream purchasers cannot claim damages based on a breach of contract. For this type of claimant, the causal link cannot be traced back to the infringers through contract, which is the only legal relationship in the context. Hence, for private enforcement of EU competition law, the causal link must be found somewhere else – i.e. due to the breach of the competition law.\(^{607}\)


\(^{605}\) Art 101(2) provides that ‘any agreements or decisions prohibited pursuant to this Article shall be automatically void.’

\(^{606}\) Here, for the purpose of a simple model, other conditions are controlled. For example, the contract between the Infringer B and the direct purchaser is regarded as valid under national contract law, even though it is possible that the contract could be invalid due to reasons such as fraud, threat or obviously unfairness according to different contract law regulations.

\(^{607}\) For example, in English law, ‘damages in the vast majority of cases are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling.’ Peter R. Wills (n 1) para 10.6.4, citing Harvey McGregor, *McGregor on damages* (17th edn, Sweet & Maxwell, 2003) para 1-001. In view of Willis, arts 101 and 102 TFEU create civil causes of action to ensure that anyone suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.
For actions seeking damages for violations of the EU competition law, the legal basis are national laws that have the same or similar meaning as art 3(1) of the Damage Directive. These national rules regulate damages similarly to art 3(1)’s formulation: ‘any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.’ In practice, national courts should be able to establish the causal link between the harm suffered by downstream purchasers (such as loss of profits) and the anti-competitive effect of the agreement or concerted practice.

The practical difficulty appears in proving the anti-competitive effect on the market where the claimants operate. This is particularly the case for indirect purchasers and end-users. As the commercial relation between parties becomes attenuated, other influential factors intervene and contribute to the increase in price. It then becomes problematic to attribute the rise in price solely or substantially to the anti-competitive agreement or concerted practice. Hence, as the distance between the claimant and the infringer is greater, it is more difficult to prove that the anti-competitive effect reaches the level of market on which the indirect purchasers or end-users operate.

This tendency is in direct proportion to the need for full compensation. Direct purchasers suffer the most harm from anti-competitive conduct in a distorted market. Such claimants have the closest causal link with the infringers and their conduct. The fact that they can most easily claim damages is proportionate to the urgency and the necessity to compensate them fully. For indirect purchasers, however, the remoteness in causation presents difficulties in identifying the scope of full compensation and sometimes calls into question the necessity of compensating them at all.

The degree of remoteness is no doubt the key element in constructing or denying the causal link. However, the intention of the Damage Directive to
compensate ‘any natural or legal person’ who has suffered harm caused by an infringement’ causes specific difficulties in measuring this remoteness.\textsuperscript{608} In a recent preliminary ruling from the CJEU, the referring court asked whether compensation could be claimed by those ‘who are not active as suppliers or customers’ on the relevant market, but who only ‘grant loans to buyers of the products offered on the market.’\textsuperscript{609} The claimant claimed its loss based on the fact that loan rates were higher than they would have been in the absence of the cartel.

The Court emphasized the right of any individual to claim compensation, regardless of whether that persons are suppliers or customers on the market affected by a cartel, or who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market.\textsuperscript{610} This ruling includes literally anyone who might have suffered losses due to the cartel. However, the real difficulty, which was to establish the causal link, was for the referring court to decide. The referring court should determine whether the applicants suffered losses, whether the amount of subsidies was higher than it would have been without that cartel agreement, and whether the applicants were unable to profit more due to the cartel.\textsuperscript{611}

In this case, the causal link seemed too remote to attribute the losses suffered by a third party solely or considerably to the cartel. It seems that the Court’s eagerness to ensure a wide application of the right to full compensation has generated problems in the measurement of remoteness and in ascertaining authentic victims. A loan lender, who does not even stand in the direct commercial line, may now potentially claim compensation. This simply goes too far.

4.4.2 Opinion of AG Kokott in \textit{Kone} case

National diversity in terms of applicable rules on causation and the concept of causation\textsuperscript{612} potentially invites ‘forum shopping’ in antitrust damages actions.\textsuperscript{613} Lowering the standard of proof cannot reduce such risks. Similarly, to require less evidence or a lesser degree of likelihood would not help

\textsuperscript{608} Damage Directive, art 3.

\textsuperscript{609} \textit{Otis Gesellschaft m.b.H. v Land Oberösterreich} (C-435/18), EU:C:2019:1069, [19].

\textsuperscript{610} ibid, [34].

\textsuperscript{611} ibid, [34].

\textsuperscript{612} Staff Working paper – GP, para 275. This national diversity issue was highlighted in Ashurst Report. There have long been disagreements on a clear definition of causation in the different national legislations in EU Member States. See in Notes to VI.-4.101 of the Commission Frame of Reference, 3422, <http://ec.europa.eu/justice/policies/civil/docs/dcrf_outline_edition_en.pdf>.

\textsuperscript{613} Opinion of AG Kokott in \textit{Kone} (C-557/12), [29].
mitigate the situation.\textsuperscript{614} It would only lead to a flood of damages claims, most of which would not be backed up by sufficient evidence proving either the infringement per se or the damage caused by the infringement. There is a real risk of abusive litigation. In practice, cultural differences in national tort law, different emphases in terms of enforcement policies regarding competition law, the criterion for evaluation of causation and so on, all hinder EU courts in reaching a universally applicable test of causation.

A sign that EU courts will engage in the discussion of causal links emerges in \textit{Manfredi} case. The CJEU mentioned that it is up to ‘the legal system of each Member States to prescribe the detailed rules governing the exercise of right [to damage], including those on the application of the concept of “causal relationship”’...\textsuperscript{615} However, the Court did not elaborate further on the requirements in establishing such a link. This view, as later laid down in art 3 of the Damage Directive, stipulates that ‘Member States shall ensure that any natural or legal person who has suffered harm \textit{caused} by an infringement of competition law is able to claim and to obtain full compensation for that harm,’\textsuperscript{616} observing the principles of equivalence and effectiveness.\textsuperscript{617}

In \textit{Kone}, AG Kokott’s opinion provides an insight into what an EU rule would look like, if the CJEU were to rule on the concept of a causal link, as well as the standard for proving the causal link. This case concerns the phenomenon of


\textsuperscript{615} \textit{Manfredi} (C-295/04 to C-298/04), [61]–[63].

\textsuperscript{616} The issue of causation was once put forward by the Commission in Green Paper as an important factor that will influence damages actions. (See Green Paper Question N) The Staff Working Paper – GP, highlighted three challenges arising out of the concept of causation in damage actions in the context of the EU competition law. First, to prove a causal link will often require complex economic analysis based on a large number of facts and economic data, indicating both the practical and theoretically difficulty in addressing the causation issue. Second, the national diversity also causes obstacles to further harmonization. Third, the application of national requirements on causation must not compromise the objective of effective competition enforcement, guaranteeing a right to full compensation, while observing the principles of equivalence and effectiveness. Unfortunately, the Commission held back and did not mention once causation issue in the following White paper but acknowledged in annexed Staff Working Paper that it is particularly difficult to demonstrate in detail the causation in competition cases, especially for anti-competitive behaviour to which several infringers have contributed. Likewise, in Practical Guide, causation is merely referred to \textit{en passant} as essentially a matter for national legislation to deal with observing the principles of equivalence and effectiveness.

\textsuperscript{617} Special attention shall be paid to the principle of effectiveness. This principle may ‘influence’ notions of causation as existing in national civil law and eventually lead to their clarification so as to facilitate damages actions further. See Ioannis Lianos (n 614) 174–175.
umbrella pricing. Umbrella pricing happens ‘when undertakings that are not themselves party to a cartel, benefiting from the protection of the cartel’s practices’, either knowingly or unknowingly, ‘set their own prices higher than they would otherwise have been to under competition conditions.’ The opinion addresses the question of whether civil liability for damages of the members of a cartel also extends to beneficiaries under the condition of umbrella pricing.

In *Kone*, the umbrella pricing happened as a result of an elevator cartel. The injured party purchased elevators from a manufacturer not involved in the cartel, the price of which was set under the umbrella of the elevator cartel, and was thus higher than it should be under normal competition conditions. The issues of causation appearing before the Court were ‘whether there is sufficiently close connection between the cartel and the losses resulting from umbrella pricing caused by a cartel’ and ‘whether these are excessively remote losses for which damages cannot reasonably be awarded against the members of the cartel.’ Thus, the CJEU and AG Kokott were invited to rule on the standard to prove the causation.

AG Kokott began by confirming the issue of causation as a matter of EU law. AG Kokott introduced a distinction between ‘the existence of the constitutive rules of the right to claim damages’ (i.e. the question of whether compensation is to be granted) and ‘the details of application of such claims and the rules for their actual enforcement’ (i.e. the question of how compensation is to be granted). While the latter was to be dictated by national law, the former was formulated closer to the standing issue and both were found to already be constitutive principles under the ambit of EU law.

After confirming the legitimacy of EU courts’ ruling on the causation issue, AG Kokott continued to examine in detail the requirements to establish a causal link. On the one hand, the criterion for establishing a causal link must ensure


619 Opinion of AG Kokott in *Kone*(C-557/12), [2].

620 See relevant cases for the same elevator cartel, *Otis*(C-199/11) and Schindler Holding and Others v Commission (C-501/11 P) EU:C:2013:522.

621 Opinion of AG Kokott in *Kone*(C-557/12), [3].

622 Opinion of AG Kokott in *Kone*(C-557/12), [19].

623 Opinion of AG Kokott in *Kone*(C-557/12), [23]. Such details of the application of damages claims and the rules for actual enforcement would include issues, such as jurisdiction, procedure, time-limits and the furnishing of proof.

624 However, AG Kokott neither made any reference to the principle of the supremacy of EU law, nor considered the potential tension with the principle of national procedural autonomy. See more discussion in Ioannis Lianos (n 614) 219.
the full effectiveness of the prohibition laid down in arts 101 and 102 TFEU. On the other hand, it must ensure that cartel members are not subject to unlimited liability.\textsuperscript{625} Thus, AG Kokott proposed that there must be a ‘sufficiently direct causal link’ between the harmful conduct and the damage alleged.\textsuperscript{626} This very same criterion also applied to other cases involving claims to compensation for infringement of other fields of EU law.\textsuperscript{627}

Furthermore, AG Kokott clarified that the ‘sufficiently direct causal link’ criterion depended on two critical elements. First, the loss resulting from the effect of the anti-competitive conduct, which in this case was the loss resulting from umbrella pricing, must be foreseeable.\textsuperscript{628} As ruled by AG Kokott, ‘it is common business practice for undertakings to keep a close eye on market trends and to take those trends duly into considerations when making their own commercial decisions.’\textsuperscript{629} In \textit{Kone}, that level of attention justified the foreseeability of umbrella pricing by cartel members as economically rational and far from unusual.\textsuperscript{630}

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\textsuperscript{625} Opinion of AG Kokott in \textit{Kone} (C-557/12), [32]–[33].
\textsuperscript{626} Opinion of AG Kokott in \textit{Kone} (C-557/12), [34]–[35]. This ‘sufficiently direct causal link’ is extensively discussed, for instance, by AG Ruiz-Jarabo Colomer in \textit{Schneider Electric}. AG Ruiz-Jarabo Colomer contended that ‘the link which would trigger non-contractual liability is inadequate in this case because it lacks the particular characteristics which are necessary, that is, the damage does not \textit{directly, immediately and exclusively} arise from the unlawful act, in a relationship of cause and effect.’ Opinion of AG Ruiz-Jarabo Colomer in \textit{Schneider Electric} (C-440/07 P) EU:C:2009:48, [140]. To that effect, see also A. G. Toth, ‘The Concepts of Damage and Causality as Elements of Non-contractual Liability,’ in Ton Heukels and Alison McDonnell (eds.), \textit{The Action for Damages in Community Law} (Kluwer Law International, The Hague, London and Boston, 1997) 192. Moreover, AG Ruiz-Jarabo Colomer referred to ‘a direct influence’ between the unlawful act and the damage suffered. See Opinion of AG Ruiz-Jarabo Colomer in \textit{Schneider Electric} (C-440/07 P), [144].
\textsuperscript{627} This wide application of the criterion of ‘sufficiently direct causal link’ extends to situations, where a Member State incurs liability for damages caused to individuals by a breach of EU law. See e.g. \textit{Factorianne} (C-46/93 and C-48/93), [51]; \textit{Leth} (C-420/11) EU:C:2013:166, [41]; \textit{Test claimants} (C-446/04) EU:C:2006:774, [71]. It also applies in disputes between private parties to assert the civil liability of cartel members for loss caused by them on the market. See e.g. \textit{Otis} (C-199/11), [65].
\textsuperscript{628} Opinion of AG Kokott in \textit{kone} (C-557/12), [42]. See also Opinion of AG Wahl in \textit{Intel} (C-413/14 P), [301]. AG Wahl considered that ‘the application of EU competition rules to some specific conduct could be justified only when that conduct has \textit{foreseeable}, immediate and substantial effects in the internal market.’ AG Wahl found that the GC failed to address ‘the \textit{foreseeability} of the anticompetitive effect those agreements (allegedly) produced in the internal market.’ See Opinion of AG Wahl in \textit{Intel} (C-413/14 P), [323]. However, this ‘foreseeability’ in \textit{Intel} case is examined between the unlawful act and its anti-competitive effect, not between the unlawful act and the individual loss. In short, no generally applicable ‘foreseeability requirement’ exists to indicate the level of persuasiveness to prove the causation.
\textsuperscript{629} Opinion of AG Kokott in \textit{Kone} (C-557/12), [46].
\textsuperscript{630} ibid, [46]–[52].
Second, compensation for the damage (from umbrella pricing) must be compatible with the objectives of the competition rules that have been infringed.\footnote{\textit{i}bid. [53].} The AG Kokott examined this element from two different aspects, namely whether it formed an integral part of the enforcement system to afford such compensation (right to full compensation) and whether it fulfilled the function of correcting the negative consequences (corrective justice).\footnote{Opinion of AG Kokott in \textit{Kone (C-557/12)}, [57].} After considering both aspects, AG Kokott refuted all the objections proposed by the appellant.

However, the CJEU did not follow the approach adopted by AG Kokott. In fact, the Court avoided discussing this issue at all. Instead, it reaffirmed that the application of the concept of the causal link was for national law to deal with, observing the principles of equivalence and effectiveness.\footnote{\textit{Kone (C-557/12), [24]. See also Damage Directive, art 3 and recital 11. As the Directive further explains that 'Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.'} Umbrella pricing, in view of the Court, was one of the possible effects of the cartel that was anything but unforeseeable and that cartel members thus could not disregard.\footnote{\textit{Kone (C-557/12), [30].}} A categorical exclusion of compensation in the case of umbrella pricing would put at risk the full effect of art 101 TFEU, if the ‘direct causal link’ were not to compensate those individuals who had no contractual links with a member of the cartel, but with an undertaking hiding under the pricing shelter and enjoying the benefits of a cartel.\footnote{\textit{Kone (C-557/12), [33]–[34]. However, even if it is confirmed that individuals who suffer harm from undertakings hiding under umbrella pricing, there are difficult questions. Who would pay, the indirect beneficiary or the cartel members? Could the indirect beneficiary keep their profits? Does the several and join liability article also cover the indirect beneficiary? If the answer is yes, then what about undue punishment of the cartel members who presumably would have to disgorge their own profits and compensate for those profits outside the cartel? Since the discussion on umbrella pricing case is the only example that the AG attempted to address the issue of causation and the umbrella pricing \textit{per se} is not the focus of this study, none of these questions will be discussed further.}

Thus far, there has been no established CJEU caselaw on the issue of causation as an interpretation of EU law. The CJEU has not ruled on what kinds of national decisions or national rules would jeopardize the full effect of arts 101 and 102 TFEU. Moreover, except for the case of categorical exclusion, the CJEU has not considered other conditions, when the granting of compensation under certain causal links would be incompatible with the principle of
effectiveness. These issues, in the absence of applicable EU law and CJEU caselaw, are governed by national law within each Member State.\textsuperscript{636}  

\subsection*{4.4.3 Causation in fact and causation in law}

It is clear from the CJEU judgment that the full effect of art 101 TFEU would be put at risk if a national rule categorically excluded, for legal reasons, any civil liability for undertakings that had no contractual links with a member of the cartel, but whose pricing policy was a result of the cartel.\textsuperscript{637} It is important to notice here the legal aspect of the concept of causal link.

In order to attribute the result of harm to the cause of an infringement, claimants must establish a legally causal relationship to the requisite legal standard.\textsuperscript{638} A legally causal relationship shall include both causation in fact for explanatory purposes and causation in law with the function of attributing liability.\textsuperscript{639} Thus, if private claimants intend to establish legal causation between the harm and the infringement, they must not only look backwards to explain the occurrence of the harm, but also attribute the harm to the infringement in a sufficiently direct manner.

In the absence of a universally applicable legal test of causation, national laws may adopt different approaches to establish a legally causal relationship. No matter how such approaches manifest themselves, causation must be associated with legal consequences, attributing the liability under competition law. Issues such as justice, efficiency and policy should be taken into account.

\textsuperscript{636} Otis (199/11), [65]. The Court ruled clearly that 'the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.'

\textsuperscript{637} Kone (C-557/12), [33]–[37]. The ruling of the CJEU considered that the full effect of art 101 TFEU would be put at risk, 'if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case.' However, circumspectly, the Court pointed out that risk existed 'to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto.' In other words, the Court simply emphasized again the importance to guarantee the right to full compensation, either with or without contractual link, but did not go further to clear the concept of causal link.

\textsuperscript{638} Ioannis Lianos (n 614) 177. To that effect, see also Alex Broadbent, 'Fact and Law in the Causal Inquiry' (2009) 15(3) Legal Theory, 173–191.

\textsuperscript{639} Definition for ‘causation in law’ see Antony Maurice Honoré, ‘Causation in the Law’, in Edward N. Zalta (ed.), \textit{The Stanford Encyclopedia of Philosophy} (Winter 2010 Edition), available at: <https://plato.stanford.edu/entries/causation-law/>. In addition, legal causation may also cover other issues, such as the question of proximity or remoteness, recoverability of the harm, the extension of an infringer’s liability, or what constitutes an adequately and sufficiently direct cause to generate (or reduce) liability. See Oxera and a multi-jurisdictional team of lawyers led by Assimakis Komninos (n 322) para 475.
only at the liability attribution stage – examining the causation in law. It is very likely that the finding of factual causation may not lead to any legal consequences, if *force majeure* intervenes or other moral or economic arguments weigh against legal liability.640

The attribution task indicates a higher standard for proving causation, far beyond a natural causal link in the common sense.641 Legal causation must present a normative consequence. Hence, a wrongful application of this standard of proof – as a legal rule – would cause 'an error of law and not an error in the assessment of the evidence and would therefore be reviewable on appeal.'642 In this regard, the legal aspect of causation functions to limit the attributable liability.643 As in *Kone*, the legal aspect of causation limits the liability to those whose anti-competitive conduct has 'a sufficiently direct causal link' to the harm alleged.644

In addition, once the standard to prove causation is made stricter, it reduces the probability that a claim is brought in the first place and reduces the likelihood of successful claims. Victims who did not buy the goods, due to a higher price, are deprived of the chance to claim this part of the deadweight loss. The fact that many such victims are deprived of their legitimate standing in claiming the damage could lead the overall social harm to be higher than the private harm compensated through antitrust damages actions.645 Amongst such victims, umbrella pricing victims as well as indirect purchasers also amount to an indispensable source of private antitrust litigation.646


641 For more discussion on the differences between causality employed in science and causation employed in tort law, see Ioannis Lianos (n 614) 178, 10–14.

642 Eric Gippini-Fournier (n 36) 192. See e.g. in *Tetra Laval*, '[a]lthough the [GC] stated, in [155], that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination ... it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence.' (C-12/03 P), [41]. Notably, in *Tetra Laval*, the Court did not suggest a specific standard of proof in merger cases, but again referred to 'requisite legal standard' and the Court's conviction as the only standard.

643 Ioannis Lianos (n 614) 184. See also Michael A. Carrier (n 36) 997.

644 *Kone* (C-557/12), [33].

645 Centre for European Policy Studies (CEPS), Erasmus University Rotterdam (EUR) and Luiss Guido Carli (LUISS) (n 312), 418. 'The fact that many of these plaintiffs would not be granted standing could lead the overall social harm (Hs) to be higher than the private harm compensated through antitrust damages actions (Hp). Thus, if D are the damages awarded in court, D = Hp < Hs.'

646 Ioannis Lianos (n 614) 177. Ioannis Lianos refers to an examination of caselaw on damages claims for the infringement of EU and national competition in the five most significant
4.4.4 The 'but-for' test and a 'sufficiently direct causal link'

In *Kone*, AG Kokott confirmed the legitimacy 'to lay down criteria which ensure that cartel members are not subject to unlimited liability to provide compensation for any losses, however remote ... in the sense of a "conditio sine qua non" (also known as an equivalent causal link or a but-for causal link).'\(^{647}\) Hence, the infringement is the cause of the damage, if and only if, but for the occurrence of the infringement, the damage would not have been incurred, considering the present occasion.\(^{648}\) In other words, there may be parallel causes responsible for the damage. The infringement is at least a contributory cause. However, without the infringement, the damage would not have incurred.

It follows that there must be 'a sufficiently direct causal nexus' between the harmful conduct and the damage alleged.\(^{649}\) Previous CJEU caselaw applied this 'sufficiently direct causal link' in damages cases concerning the non-contractual liability of EU institutions.\(^{650}\) In the view of AG Kokott, 'the very

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647 Opinion of AG Kokott in *Kone* (C-557/12), [33]. The but-for test has already been used in antitrust damages actions in some Member States. For example, the Competition Appeal Tribunal (CAT) in *2 Tranvel Group Plc v. Cardiff City transport Services* [2012] CAT 19, [77] explains extensively the use of but-for test. The claimant must show a larger probability (more than 50%) that the damage would not have occurred 'but for' the defendant's fault -- breach of duty. However, for later damage actions, the English and Wales courts have shifted from the but-for test to the balance of probabilities, see e.g. *Barker v Corus Ltd* [2006] 2 AC 572.

648 Richard W. Wright (n 640) 1021.

649 Opinion of AG Kokott in *Kone* (C-557/12), [33].

650 See e.g. *Dumortier v Council* (C-64/76, C-113/76, C-167/78, C-239/78, C-27/79, C-28/79, and C-45/79) EU:C:1979:223, [21]. In *Dumortier*, the Court referred to 'a sufficiently direct consequence of the unlawful conduct.' Similarly, in *Factortame*, the Court considered that the EU law conferred a right to reparation where 'there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.' (C-46/93 and C-48/93), [51]. To that effect, see also *Test Claimants* (C-446/04), [218]. Similarly, the Court ruled that 'it is for the national court to assess whether the loss and damage claimed flows sufficiently directly from the breach of Community law to render the State liable to make it good.' *Trubowest* (C-419/08 P), [53] & [58]. In *Leth*, the Court put it in a slightly different way as 'a sufficiently direct causal nexus between the conduct of the institutions and the damage' and 'a direct link of cause and effect between the unlawful conduct of the institutions concerned and the damage alleged.' *Leth* (C-420/11), [41]. See more recently, *Equipolymers and Others v Council* (C-363/17 P) EU:C:2018:402, [36]–[37]; *Safa Nicu Sepahan v Council* (C-45/15 P) EU:C:2017:402, [61]. Even though expressed in different ways, the idea of a 'sufficiently direct causal link' remains the same. Notably, the word 'sufficient' may be omitted sometimes; the word 'direct' is always emphasized. The GC also used this test to deal with causal link. See e.g. *Meyer v Commission* (T-333/01) EU:T:2003:32, [45]. The GC considered that '[t]he damage suffered results directly and exclusively from the applicant's voluntary acceptance of the rates proposed by the Banque Socredo for the loans
same criterion should also be applied to all other cases involving claims to compensation for infringement of [EU] law, irrespective of whether such claims are brought by individuals against Member States or between private parties to assert civil liability of infringers.\footnote{Opinion of AG Kokott in \textit{Kone} (C-557/12), [34], with reference to Opinion of AG Van Gerven in \textit{Banks v British Coal} (C-128/92) EU:C:1993:860, [45]–[54]; \textit{Otis} (C-199/11), [65]. However, the question of the transferability of the entire reasoning between different types of damages cases (either EU liability, Member State liability or cases between private parties) is not entirely clear, in the absent of explicit references to all the different contexts. See Katri Havu, ‘Full, Adequate and Commensurate Compensation for Damages under EU Law’ (n 201) 41, with reference to Isabel C. Durant (n 604) 55–56. Havu noticed that ‘the transferability of reasoning in vertical liability cases to horizontal liability cases could be viewed with some reservation.’ Moreover, ‘there is not much discussion by the ECJ on applying EU law to causation and damages in the EU liability caselaw line,’ with exceptions such as \textit{Trubowest} (C-419/08 P), [51]–[64]; \textit{Schneider Electric} (C-440/07 P), [197]–[208]; \textit{Safa Nica} (C-45/15 P), [52]–[53], [62]–[67] & [73]–[80].} Accordingly, in spite of various national laws and their respective non-contractual liability regimes, as well as the difference in the terminology used to describe ‘legal causation’, the considerations are substantively the same.\footnote{Opinion of AG Kokott in \textit{Kone} (C-557/12), [34].}

However, the strict approach adopted by the CJEU to test the existence of a ‘sufficiently direct causal link’ in non-contractual liability of the EU may cause additional difficulties in antitrust damages actions.

For example, on 10 October 2001, the Commission adopted a decision declaring that a transaction, in which Schneider acquired 98.7\% of the shares in Legrand, was incompatible with the common market.\footnote{Schneider-Legrand (Case COMP/M.2283) Commission Decision [2004] OJ L101/1 – the incompatibility decision.} On appeal, the GC annulled this decision on the grounds of errors of analysis and assessment of the impact of the transaction on the national sectoral markets outside France, and breach of rights of defence, vitiating the decision (\textit{Schneider I judgment}).\footnote{\textit{Schneider Electric} v \textit{Commission} (T-310/01) (the \textit{Schneider I judgment}) EU:T:2007:212, [256]–[296], [404]–[419] (for the first ground) & [444]–[465] (for the breach of Schneider’s rights of defence).} On 10 October 2003, Schneider brought an action to claim damages for the non-contractual liability of the EU under the second
paragraph of art 340 TFEU. In its judgment, the GC identified a direct causal link with respect to a reduction in the transfer price, which Schneider granted to Wendel-KKR in purchase of Legrand’s assets, to enable the date of the transfer to be deferred.⁶⁵⁵ Because of the Commission’s decision, Schneider was obliged to commence and to conclude a purchase agreement with Wendel-KKR to transfer its holdings in Legrand in a very short time. That obligation justified selling at a lower price to defer the completion of the sale until the Schneider judgment, when "Wendel-KKR had to be paid for accepting the risk of depreciation of the assets in Legrand."⁶⁵⁶ Under those circumstances, the breach of Schneider’s rights of defence was ‘sufficiently directly linked’ to the deferral in completion of the sale and to the reduction in the transfer price. That deferral was essential ‘to enable Schneider properly to exercise the right available to all companies in its position to obtain a lawful decision as to the compatibility with the common market of a duly noticed concentration and, possibly, to be heard in a procedure offering it the requisite safeguards."⁶⁵⁷

On appeal, the CJEU overturned the GC’s ruling in part. The CJEU found that Schneider’s decision to complete the transfer with Wendel-KKR was based ‘essentially on its fear that, on resumption of the in-depth investigation, it would not obtain … a decision upholding the compatibility of the concentration.’⁶⁵⁸ The resumed investigation could have led to either a decision finding the concentration compatible or the adoption of a further incompatibility decision and divestiture decision.⁶⁵⁹ In case of a compatible transaction, Schneider would not have to transfer Legrand. In case of a further decision, the transfer ‘is among the risks normally assumed by an undertaking which exercises the option provided for in [art 7(3)] of the Regulation to implement a concentration through a public bid before the Commission has given a decision on the transaction concerned.’⁶⁶⁰ The Court considered Schneider’s decision as the direct cause of the damage, ‘which it was not obliged to take under the sale procedure … to allow the transfer of Legrand to take effect on 10 December 2002.’⁶⁶¹ In making that choice, Schneider took the risk of having to pay a penalty of EUR 180 million.⁶⁶² Thus, there was no

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⁶⁵⁵ *Schneider Electric* (T-351/03), [288], [303]-[317].

⁶⁵⁶ Ibid, [312].

⁶⁵⁷ Ibid, [315].

⁶⁵⁸ *Schneider Electric* (C-440/07 P) EU:C:2009:459, [197]–[203].

⁶⁵⁹ Ibid, [204].

⁶⁶⁰ Ibid, [204].

⁶⁶¹ Ibid, [205].

⁶⁶² Ibid, [206].
causal link between a reduction in the transfer price and the illegality vitiating the Commission’s decision.\textsuperscript{663}

Similarly in \textit{Internationaler Hilfsfonds}, the CJEU found that parties were free ‘to choose to bring the matter before the Ombudsman before instituting proceedings before the [GC] and, second, the services of a lawyer were unnecessary in proceedings before the Ombudsman.’\textsuperscript{664} When they chose to have recourse to the Ombudsman, the costs incurred ‘cannot therefore be regarded as damage caused by the institution in question.’\textsuperscript{665} Hence, there was no causal link between the damage alleged and the actions of the Commission.\textsuperscript{666}

These two cases indicate a rather strict approach to testing the existence of a ‘sufficiently direct causal link’. The approach requires that the damage must derive directly from an unlawful act, ‘as opposed to the applicant’s own choice or decision.’\textsuperscript{667} It imposes further requirements on the applicant’s reasonable diligence. As settled by CJEU caselaw in cases concerning the non-contractual liability of the EU, ‘the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself.’\textsuperscript{668} Hence, the applicant’s negligence might interrupt the causal link, where ‘the negligence proves to be the immediate or determinant cause of the damage.’\textsuperscript{669}

The strict approach adopted in the EU’s non-contractual liability cases does not support a broad definition of the causal link as a but-for condition (a \textit{sine qua non}).\textsuperscript{670} In damages actions for EU competition law infringements, a requirement for the applicant’s reasonable diligence might categorically exclude any claimant who also participated in the infringement, no matter how

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\textsuperscript{663} Ibid, [207]-[208] & [221]-[222].

\textsuperscript{664} \textit{Internationaler Hilfsfonds v Commission} (C-331/05 P) EU:C:2007:390, [9].

\textsuperscript{665} \textit{Internationaler Hilfsfonds} (C-331/05 P), [27].

\textsuperscript{666} Ibid, [29].

\textsuperscript{667} Kathleen Gutman (n 519) 729.

\textsuperscript{668} \textit{Mulder} (C-104/89 and C-37/90), [33].

\textsuperscript{669} \textit{Trubowest} (C-419/08 P), [61]; \textit{Atlantic Container Line and Others v Commission} (T-113/04) EU:T:2007:377, [32]-[34]. In these cases the GC reasoned that ‘even if the conduct alleged against the [EU] institution contributed to bringing about the harm alleged, that causal link may be broken by negligence on the part of the person adversely affected, where that negligence proves to be \textit{the immediate cause of the damage}.’ Moreover, the burden of proving the causal link falls on the applicant. See e.g. \textit{Fresh Marine} (C-472/00 P), [47]-[49], where the Court considered that having provided a bank guarantee, the applicant would have ‘run an unusual commercial risk going beyond the level of risk inherent in the pursuit of any economic activity if it had continued to export to the [EU].’ The fact that the applicant would have no option ‘but to increase its export prices by the amount of those provisional duties’ shows a fulfilment of reasonable diligence.

\textsuperscript{670} \textit{Atlantic Container Line} (T-113/04), [40].
minor their role. By means of participation, the claimant contributes to the infringement and the damage caused by the infringement, whether willingly or unwillingly. As a result, they could never show reasonable diligence in avoiding or limiting the damage. Such a categorical exclusion does not comply with the principle of effectiveness, because not everyone who has suffered harm caused by the infringement is able to obtain full compensation for that harm.671

In *Kone*, AG Kokott considered that the criterion for ‘a sufficiently direct causal link’ in EU non-contractual liability cases should also be applicable in damages claims for infringements of EU law, including those of EU competition law.672 However, the AG’s opinion does not constitute an interpretation of EU law. The criterion for ‘a sufficiently direct causal link’ established in EU non-contractual liability cases are of only some relevance for the application of the principle of effectiveness and are only of reference value to the applicability of ‘a sufficiently direct causal link’ in antitrust damages cases. Thus, the existence, the concept and the criterion of ‘a direct causal link’ and all other related issues remain a matter to be assessed by national courts under national law.

At present, the issue of the causal link has not achieved a uniform formula, no matter if it occurs in cases of EU non-contractual liability or in cases of EU competition law infringement. Neither has the ‘but-for’ test. In fact, the ‘but-for’ test *per se* may already indicate the specific difficulties generated by the relationship between causes – whether several causes compete for one result or several causes contribute cumulatively to one result.673

When causes compete for the same result – i.e. the damage – each of the infringers is equally responsible for that result. Under this situation, the ‘but-for’ test may lead to the problem of under-inclusiveness. To illustrate, in the presence of multiple simultaneous sufficient causes,674 each cause alone is capable of causing the same damage. In the context of competition law, it could be argued that the withdrawal of one individual infringer may not influence the excessive price operated by the cartel.675 Under that circumstance, a strict ‘but-for’ test might lead to the conclusion that the infringer’s action caused no

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672 Opinion of AG Kokott in *Kone* (C-557/12), [34].
673 *Otis* (199/11), [65].
674 Here, the author identifies three most typical forms of cause combination. First, ‘multiple simultaneous insufficient causes’ are available for the damages. They are cumulative causes. Neither of them alone can lead to the same damage. Each of them adds a bit to the effect of the present damage. Thus, they must be held cumulatively to be responsible for the damage. Second, ‘multiple simultaneous sufficient causes’ are causes, each of which is capable of causing the same damage. Third, practically speaking, it is always possible to be a combination of these two.
675 Ioannis Lianos (n 614) 180.
damage, since neither its participation nor withdrawal would influence the price on the market. This all-or-nothing approach, coupled with an uncertain standard of proof, may lead to under-compensation.\textsuperscript{676}

In addition to competing causes, the conduct of multiple infringers may also contribute cumulatively to the damage.\textsuperscript{677} Individual contributions aggregate to cause the effects of restriction, prevention or distortion of competition. Under these circumstances, it remains for the claimants to establish to the requisite legal standard that the harm they suffered results from the infringement.

Notably for defendants, the condition of cumulative causes offers them a chance to escape liability under art 101(1) TFEU, when their contribution to the overall anti-competitive effect is insignificant.\textsuperscript{678} However, the benefit of successfully claiming an insignificant role only results in an exemption from fines. It is questionable whether exemption from fines could lead to dispensing with damage liability.

Theoretically speaking, the fact that the undertaking concerned has participated in the infringement verifies a breach of EU competition law. Thus, such an undertaking qualifies itself as being responsible for the infringement. Immunity or a reduction in the fine therefore cannot protect it from the civil law consequences of its participation.\textsuperscript{679} Hence, it shall be held jointly and

\begin{itemize}
  \item \textsuperscript{676} See Israel Gilead, Michael D. Green and Bernhard A. Koch, 'General Report – Causal Uncertainty and Proportional Liability: Analytical and Comparative Report', in Israel Gilead, Michael D. Green, and Bernhard A. Koch (eds.) Proportional Liability: Analytical and Comparative Perspectives (de Gruyter 2013) 1–73, 5. As argued by the authors, the application of traditional but-for test coupled with the prevailing evidentiary rules on the standard of proof may cause under-compensation. See also Ken Oliphant, 'Causal Uncertainty and Proportional Liability in England and Wales', in Israel Gilead, Michael D. Green, and Bernhard A. Koch (eds.) Proportional Liability: Analytical and Comparative Perspectives (de Gruyter 2013) 121, 139. This book points out that the same difficulty does not arise in legal systems where the standard of proof is a certainty or substantial certainty.
  
  \item \textsuperscript{677} For instance, in Delimiti, the Court ruled that the effects of a bundle of agreements must be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition. It followed that the cumulative effect of several similar agreements constituted on factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States was capable of being affected. Delimiti v Henninger Bräu (C-234/89) EU:C:1991:91, [14].
  
  \item \textsuperscript{678} Delimiti (C-234/89), [24]. See also Maxima Latvija (C-345/14), [25]–[31]. The Court ruled that '[t]o assess the extent of the contribution of each of the agreements at issue in the main proceedings to the cumulative closing-off effect, the position of the contracting parties on the market in question and the duration of the agreements must be taken into consideration.' Maxima Latvija (C-345/14), [29].
  
  \item \textsuperscript{679} AGC Glass (C-517/15 P), [76]; Evonik Degussa v Commission (C-162/15 P) EU:C:2017:205, [92].
\end{itemize}
severally liable for the damage claimed by claimants within the meaning of art 11 of the Damage Directive.

In practice, however, the exemption from fines and the insignificant role of the undertaking concerned may signify only a weak causal relationship between the undertaking’s conduct and the damage result. That is, the anti-competitive effect of the undertaking concerned is so minor that it is unlikely to have caused the damage result or it is too remote to extend to the market where the claimant participates.

Such practical difficulties must be dealt with in the case’s own specific context, taking into account all relevant factors. National courts have full discretion to decide the standard for establishing causation, whether the claimant needs to pinpoint the actual harm-causing actions of the defendant or whether it is enough to draw some general causation just because the undertaking has participated in a larger arrangement.

For some defendants, it is only possible to establish a general connection to the competition law infringement as being part of a bigger arrangement, such as being present at the anti-competitive meeting. In that case, general liability law, according to which claimants must prove concrete harm-causing actions, might lead to the problem of under-compensation. Hence, in order to ensure the right to full compensation as envisioned by the Damage Directive, national courts should at least ensure that being part of a competition restriction is sufficient to find the undertaking concerned liable for damages, even if the claimants cannot show specifically that some damages can be traced back to this undertaking.

The provisions on joint and several liability of the Damage Directive already try to address these issues to some extent. However, procedurally claimants should already be able to establish the causation before the liability attribution stage. Hence, there remain significant gaps regarding the extent to which the national judiciaries, in establishing causation, could achieve the right to full compensation and ensure the full effect of arts 101 and 102 TFEU.

Last but not least, the lack of sufficient evidence is always a difficulty for private claimants, no matter what they would like to prove: the infringement, the damage, or the causal link. For the causal link, parties may lack adequate economic data to indicate the existence of a causal link680 or lack ‘scientific consensus on the inferences that can be drawn from the evidence.’681 Such difficulties, including all the other difficulties discussed previously, result in doubt as to how a sufficiently direct causal link would in practice be proved,

680 For more discussion on the viewpoint that causal uncertainty follows an increasing reliance such scientific data in damages actions, see Ariel Porat and Alex Stein, Tort liability under uncertainty (OUP 2001).

681 Ioannis Lianos (n 614) 186.
what standard of proof is required, what role ‘fault’ – either negligence or intention – plays, as well as the operation of the ‘but-for’ test.

The ‘but-for’ test only attempts to identify factual causation. According to AG Kokott, the identification of what constitutes foreseeability relies heavily on the common sense of the court in charge. The court shall take into account whether the occurrence of loss is foreseeable in ‘practical experience’ or otherwise ‘an entirely extraordinary train of events’. Hence, the whole ‘but-for’ test relies heavily on the central function of national courts based on their understanding of ‘common sense’ (perhaps in economic terms) and of EU competition law. Emphatically, the CJEU has been silent on the approach adopted by AG Kokott. It only reaffirms that the application of the concept of causal link is for national law to deal with, observing both the principles of equivalence and effectiveness. Hence, national courts have discretion to apply other, different tests in different cases.

If causation-in-fact is in practice over-complicated, the court may resort to finding causation-in-law by developing auxiliary methods, avoiding an in-

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682 Notably, in Damage Proposal, the Commission merely stated that ‘certain measures suggested in the White Paper, such as collective redress and rules on the fault requirement, have since been discarded for the purposes of this proposal’. Moreover, the principle of national procedural autonomy requires that in the absence of applicable EU law it be for national law to lay down detailed rules governing the action for damages for EU competition law infringements. Thus, it is for national courts to adjudicate damages cases under their discretion.

683 Ioannis lianos (n 614) 183. See also Jane Stapleton, ‘Law, Causation and Common Sense’ (1988) 8(1) Oxford Journal of Legal Studies 111–131, 116. Stapleton identified three steps to a causal inquiry, the first step of which attempts to identify factual causation, for instance the but-for test. The second step based on ‘common sense principles’ identifies whether the intervention of a deliberate voluntary human act or abnormal coincidence breaks the link. The third step engages further in policy concerns and thus limits the scope of liability.

684 Opinion of AG Kokott in Kone (C-557/12), [41]–[43].

685 Kone (C-557/12), [24]. See also Damage Directive, art 3 and recital 11.

686 Some courts may require direct causation in order to award damages, i.e. the damage would not have occurred to the same extent in the absence of (but for) the defendant’s anti-competitive behaviour or that the infringement of the competition rules is a condicio sine qua non, of the damage. Lower level of causation may concern adequacy, reasonable causation, proximate causation, remoteness or directness. See e.g. Horacio Vedia Jerez (n 206) 281. Since the ‘but-for’ test demonstrates various problems as indicated below, ‘material cause’ has been established in US in Zenith Radio Corp. V Hazeltine Research, Inc., 395 U.S. 100 (1969), as an alternative choice.

687 It is important to notice that not every legal system requires causation in law to be proved by the claimant. For instance, in Germany, the scope of liability in relation to the extent of damage can be assessed by the court based on available evidence. See Walter Van Gerven, Pierre Larouche and Jeremy Lever, Cases, Materials and Text on National, Supranational and International Tort Law (Hart Publishing 2000) 397.
depth factual inquiry, or providing a specific procedural rule. Whatever approaches national courts adopt, the national judiciaries should always examine the existence of the causal link between the infringement and the damage alleged on a case-by-case basis and take due account of various circumstances and facts.

4.5 Conclusions regarding the standard of proof

The CJEU has extensively discussed the standard for proving infringement in the Commission’s public enforcement cases. The core problem here is the transferability of CJEU caselaw in public enforcement to private actions. That is to say, it remains questionable whether CJEU rulings generated from public enforcement constitute an interpretation of arts 101 and 102 TFEU, and thus are applicable in all types of civil damages cases.

So far, CJEU caselaw has confirmed some aspects of the general requirement for precise, consistent and convincing evidence in proving the infringement as interpretations of arts 101 and 102 TFEU. Such aspects include the requirement of precision in constituting the elements of the infringement, the overall view of evidence under the requirement of consistency, a test of firm conviction, and so on. These aspects must be automatically applied in stand-alone damages actions when claimants intend to prove the existence of an infringement. It remains for national courts to take due account of all relevant facts and circumstances and to ascertain how these requirements could be applied in a given dispute.

As for the standard for proving the harm and the causal link, interesting references can be drawn from damages actions for violations of other EU laws, such as the non-contractual liability of EU cases. Such references do not constitute an interpretation of arts 101 and 102 TFEU, and they only have reference value in terms of the application of the principle of effectiveness, and the meaning of ‘an actual and certain harm’ or ‘a sufficiently direct causal link’. It remains a matter for national courts to assess these articles under their

688 This would be the reason to introduce joint and several liability of multiple infringers in competition law infringements. See Damage Directive, art 11 and recital 33. Thus, the Directive adopts the obligatio in Solidum, instead of engaging in the problematic but-for test. By applying this test, all the infringers are equally responsible for the ‘entire harm caused by the infringement’, and the issue of causation will be more relevant in the subsequent right to recover the overpaid contribution from other infringers. The amount of harm thus depends on individual contribution. The attribution of the share as the relative responsibility of a given infringer may refer to turnover, market share or the role in the cartel. Damage Directive, Recital 37. Consequently, those factors on deciding the individual contribution constitute an alternative to the causation in fact.

689 For example, presumptions such as ‘Anic presumption’ may be provided to ease the burden of proof for claimants to prove the infringement, for fairness reasons. Accordingly, the risk of causal uncertainty must be borne by the infringers, i.e. the wrongdoers.
national law regarding the existence and the extent of the harm, the existence of a sufficiently direct causal link between the harm and the infringement, and the standards to prove both.690

690 Otis (199/11), [65].
5 Access to evidence

5.1 Introduction

Evidence of anti-competitive violations is often hard to find. Those violations often take place in a clandestine and secret manner. Infringers often try their best to avoid leaving any traces of documentary evidence.\(^{691}\) As a result, ‘evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant.’\(^{692}\) Sometimes, even competition authorities may not have knowledge of such evidence. Hence, there are specific information asymmetries due to the factual and economic complexity of EU competition law cases.\(^{693}\)

The need for access to evidence is generated not only from ‘the interests of competitors or of consumers’ to prepare their claims,\(^{694}\) but also has roots in

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\(^{691}\) The notion of ‘documentary evidence’ in this context includes not only evidence in written forms, but also all other kinds of forms, such as radio, electronic forms, oral forms, and so on. However, compared with other forms of evidence, written evidence remains the most important form in competition law cases. For example, the CJEU caselaw in several occasions has expressed the view that witness evidence is secondary, and similarly documentary evidence is primary. See e.g. in Salzgitter Mannesmann (C-411/04 P), [42]. ‘In EU competition law cases, oral evidence plays only a minor role, whereas written documents play a central role.’ See similarly GC caselaw in Akzo Nobel and Others v Commission (T-47/10) EU:T:2015:506, [316]. ‘Specifically as regards oral evidence, it has been held already that this type of evidence plays only a minor role in the administrative phase of the Commission’s investigation.’

\(^{692}\) Damage Directive, recital 14. In fact, this difficulty has already appeared in previous EU caselaw; see e.g. Pfeiderer (C-360/09); Donau Chemie (C-536/11); EnBW (C-365/12 P). See more discussion on this issue in Bruce Wardaugh, ‘Cartel Leniency and Effective Compensation in Europe: The Aftermath of Pfeiderer’ (2013) 19(3) European Journal of Current Legal Issues. <webjcli.org/article/view/251>. This expression stays in line with the definition provided in Staff Working Paper – GP, para B1 that ‘[i]nformation asymmetry exists when one party (usually the defendant) has in its control or has access to more evidence relating to a given claim than the (potential) claimant.’


\(^{694}\) It also includes consumers’ interests to participate in EU competition law procedures. See discussion in Katalin J. Cseres and Joana Mendes, ‘Consumers’ Access to EU Competition Law Procedures: Outer and Inner limits’ (2014) 51(2) CMLR 483, 490. In this article, Cseres and Mendes see this function also in the EU competition law itself that ‘consumers get a fair share of the economic benefits from the effective working of markets. The enforcement of competition law affects consumers’ economic interests, and therefore, consumer ought to be involved in competition law procedures.’ See also Katalin J. Cseres, ‘Towards a European Model of Economic Justice: The Role of Competition Law’ in Hans-Wolfgang Mickлиз (ed.), The Many Concepts of Social Justice in European Private Law (Edward Elgar 2011) 405–450. Even though the discussion presents from the perspective of purely consumers, (which in this study
the public interest in ‘protect[ing] the structure of the market and thus competition as such.’\textsuperscript{695} Access to evidence incentivizes victims to bring damages actions. Thus, it ensures a more effective compensation mechanism when the costs of antitrust infringements are borne by the infringers.\textsuperscript{696} Effective remedies increase the probability of both civil actions being initiated and infringements being detected.\textsuperscript{697} Improving corrective justice is beneficial in deterring future infringements and in achieving greater compliance with EU competition rules.\textsuperscript{698}

To compensate for information asymmetry and to facilitate damages actions, the Damage Directive requires that national courts should ‘be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures, to order the disclosure of specified items of evidence or categories of evidence upon request of a party.’\textsuperscript{699} However, the disclosure must not jeopardize the protection of confidential information,\textsuperscript{700} and the effectiveness of leniency programmes and settlement procedures.\textsuperscript{701} Member States are at liberty to carve disclosure rules to fulfil all of the requirements described above.

As for other disclosure-related issues not provided by the Damage Directive or by other EU laws, it is up to Member States to lay down concrete rules governing disclosure under the principle of national procedural autonomy. Most indispensable of all, Member States shall ‘establish and apply national rules on the right of access, by persons believing themselves to be adversely

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\textsuperscript{695} To that effect, see e.g. \textit{T-Mobile (C-8/08), [38]–[39]; GlaxoSmithKline Services (C-501, 513, 515 and 519/06 P), [62]–[63]. See also Pinar Akman, ‘Searching for the Long-lost Soul of Article 82 EC’ (2009) 29 Oxford Journal of Legal Studies, 300.

\textsuperscript{696} White Paper, 3.

\textsuperscript{697} Impact Assessment Report – WP, 23.

\textsuperscript{698} However, some scholars argue that competition is not always good for consumers. See e.g. Maurice E. Strucke, ‘Is Competition Always Good?’ (2003) 1(1) Journal of Antitrust Enforcement 162, 174–178. Strucke argued that instead of competing to build consumers’ trust in their business, firms ‘compete in devising better or new ways to exploit consumers.’ To illustrate this point, Strucke gives examples: ‘using framing effects and changing the reference point ...; anchoring consumers to an artificially high suggested retail price ...; adding decoy options ... to steer consumers to higher margin goods and services; ...’ Rational companies can even exploit consumers’ biases. See, similarly, Philip Marsden and Peter Whelan, ‘Consumer Detriment and its Application in EC and UK Competition Law’ (2006) 569 ECLR 169. The CJEU has acknowledged this point in previous caselaw, see \textit{RTE and ITP v Commission} (C-241/91 P and C-242/91 P) EU:C:1995:98, [24]–[36].

\textsuperscript{699} Damage Directive, art 5 and recital 16.

\textsuperscript{700} Damage Directive, art 5(4).

\textsuperscript{701} Damage Directive, art 6 and art 7.
affected by a cartel, to documents relating to national proceedings."\textsuperscript{702} These rules and their application must observe the principle of equivalence\textsuperscript{703} and the principle of effectiveness.\textsuperscript{704}

Under the principle of equivalence,\textsuperscript{705} national legislatures may not simply duplicate the same set of disclosure rules from similar domestic claims and national courts may not interpret this principle merely 'pro forma'. The Court establishes that 'it is for the national court to determine the question of equivalence',\textsuperscript{706} namely the exact requirements required to ensure disclosure and the meaning of comparable or similar treatments. National courts, in considering the latter meanings, must take into account 'the purpose and the essential characteristics of allegedly similar domestic actions.'\textsuperscript{707} Thus, national courts must consider disclosure rules in the procedure as a whole, 'as well as the operation and any special features of that procedure before the different national courts.'\textsuperscript{708}

In short, the meaning of equivalence must extend to the actual level of protection in damages actions, at least to the level of protection offered in normal civil torts.\textsuperscript{709} It seems that the Court considers a similar context-specific balancing test as it applies to the principle of effectiveness.\textsuperscript{710}

A literal reading of the principle of effectiveness seems to set the bottom line to offer an opportunity for parties to exercise their right to full compensation. On the one hand, an absolute ban on access is not desirable. Such a ban renders it almost impossible or, at the very least, excessively difficult to exert the right to full compensation conferred on parties adversely affected by an infringement of arts 101 or 102 TFEU.\textsuperscript{711} On the other hand, a generalized access, under which any document relating to competition proceedings must be disclosed to a party requesting it, is also not tenable. The sole intention to bring an action for damages cannot justify a request to access to all evidence

\textsuperscript{702} Donau Chemie (C-536/11), [26]; Pfleiderer (C-360/09), [23].

\textsuperscript{703} Courage v Crehan (C-453/99), [29]; Manfredi (C-295/04 to C-298/04), [62]; Jörös (C-397/11), [29].

\textsuperscript{704} Pfleiderer (C-360/09), [24]; VEBIC (C-439/08), [57].

\textsuperscript{705} Pfleiderer (C-360/09), [30]; Donau Chemie (C-536/11), [12] & [27].

\textsuperscript{706} See Palmisani (C-261/95), [33]; Levez (C-326/96), [39]; Rosado Santana (C-177/10), [90].

\textsuperscript{707} Palmisani (C-261/95), [34]–[38]; Levez (C-326/96), [43]–[44].

\textsuperscript{708} Levez (C-326/96), [44] and Van Schijndel (C-430/93 and C-431/93), [19].

\textsuperscript{709} See e.g. van der Weerd (C-222/05 to C-225/05), [29]–[32]. In this case, the Court ruled that if a national court could raise certain points of national law of its own motion, it must also provide that under EU law.

\textsuperscript{710} Paul Craig and Gráinne de Búrca (n 83) 249.

\textsuperscript{711} Donau Chemie (C-536/11), [32].
either in the hands of the other party or a third party, or in the files relating to competition authorities’ investigations.\textsuperscript{712} Moreover, such generalized access potentially contravenes the protection of business secrets and other confidential information, the protection of personal data and privacy and so on.\textsuperscript{713} In addition to an absolute ban and generalized access, the discretionary power that national courts have on disclosure remains enormous.

Previous CJEU caselaw reveals a contextual approach, one that imposes some restrictions on national courts’ discretion to comply with these principles. In \textit{Doniias}, the Court, in consideration of the principle of effectiveness, required national courts to ‘use all procedures available to [them] under national law, including that of ordering the necessary measures of inquiry.’\textsuperscript{714} Similarly, in \textit{Laboratoires Boiron}, when the Court found that national schemes ‘make it impossible or excessively difficult for such evidence to be produced’, the relevant national court ‘is required to use all procedures available to it under national law’ to guarantee the production of that evidence.\textsuperscript{715} Hence, the contextual approach requires that when national courts consider the effectiveness of national disclosure rules, they must examine the rules in the context of national legal systems, taking all related procedures and measures into account. This is a concrete requirement to guarantee that available national disclosure rules shall be both effective and efficient.\textsuperscript{716}

In addition, this contextual approach also reflects the fact that the Court requires national courts to weigh up the respective interests both in favour of

\textsuperscript{712} See CJEU caselaw on access to the Commission’s file: \textit{Donau Chemie} (C-536/11), [33] and \textit{EnBW} (C-365/12 P), [106].

\textsuperscript{713} \textit{Donau Chemie} (C-536/11), [33].

\textsuperscript{714} \textit{Direct Parcel} (C-264/08), [35].

\textsuperscript{715} \textit{Laboratoires Boiron} (C-526/04), [55].

\textsuperscript{716} This approach was clearly explained in AG Kokott’s opinion in a recent damage case \textit{Cogeco Communications}. According to AG Kokott, a shorter limitation period in national law does not automatically make it extremely impossible or excessively difficult to bring actions for damages for infringements of the EU competition law. In Portuguese national law, the limitation period begins to run irrespective of whether the injured party is aware of the identity of the responsible person and the extent of injury. Moreover, this law does not provide for suspension or interruption of the limitation period during the proceedings pending before the NCA. These contexts of national legislation make it excessively difficult to bring actions for damages. See Opinion of AG Kokott in \textit{Cogeco Communications} (C-637/17) EU:C:2019:32, [73]–[83]. AG Kokott concluded that ‘Comme le souligne néanmoins à juste titre la Commission, il ne suffit pas lors du contrôle de l’effectivité d’examiner de manière isolée certains éléments du régime national de prescription. Il convient au contraire d’apprécier ce régime dans son ensemble.’ With reference to \textit{Manfredi} (C-295/04 to C-298/04), [78]–[82]; Opinion of AG Kokott in \textit{Berlusconi} (C-387/02, C-391/02 and C-403/02) EU:C:2004:624, [109].
disclosing the information and in favour of protecting it.\textsuperscript{717} The weighing-up can effectively circumvent both the problem of an absolute ban on any access and the problem of a generalized access that allows an improperly wide access,\textsuperscript{718} because the weighing-up takes into account all the relevant facts and circumstances on a case-by-case analysis.\textsuperscript{719} As far as the Court is concerned, the weighing-up excludes a categorical rejection of the right to full compensation and a disregard of particular circumstances.\textsuperscript{720} However, neither EU documents nor CJEU caselaw have provided practical guidelines on how to execute the weighing-up so far. Weighing-up thus remains within the discretion of national courts.

Among various measures to facilitate damages actions in EU law, disclosure of evidence stands out in the fields of both EU intellectual property law and EU competition law, ‘whereas the other private enforcement-related directives under consideration remain entirely silent on this point.’\textsuperscript{721} In EU intellectual property law, evidence is considered ‘paramount’ in establishing an infringement of an intellectual property right (IPR).\textsuperscript{722} Similarly, the Commission called evidence ‘an important element’ in bringing actions for

\textsuperscript{717} Donau Chemie (C-536/11), [30]. See also Pfleiderer (C-360/09), [30]; EnBW (C-365/12 P), [107]; Commission v Bavarian Lager (C-28/08 P) EU:C:2010:378, [77]–[78].

\textsuperscript{718} Donau Chemie (C-536/11), [31]–[33].

\textsuperscript{719} Donau Chemie (C-536/11), [34].

\textsuperscript{720} See an example of a disregard of a particular circumstance (e.g. conditions under umbrella pricing) in Kone (C-557/12), [33].

\textsuperscript{721} Folkert Wilman (n 9) 329. See IPR Enforcement Directive, art 6 and Damage Directive, arts 5-7. Access to evidence is particularly important in private enforcement proceedings relating to these two fields. None of the Procurement Remedies Directive, the Consumer Injunctions Directive, the Unfair Terms Directive or the Product Liability Directive refers to the disclosure of evidence. Folkert Wilman considers why the fields of intellectual property law and competition law have been \textit{smeled out} for the disclosure of evidence. The reason provided by the official is to emphasize evidence as an important element, which is typically only in the possession of the infringer or a third party. Objections to this reason argue that private party may confront the same problem – evidence-related difficulties – also in cases concerning other subject matters. See reference to Alexander Bruns, ‘Evidence’ in Jürgen Basedow, Jörg Philipp Terhechte and Lubos Tichý (eds.), \textit{Private Enforcement of Competition Law} (Nomos 2011) 130. According to Folkert Wilman, while it may be true that evidence-related difficulties exist in all kinds of claims, but private parties under the Procurement Remedies Directive, the Unfair Terms Directive and so on, are less dependent on the evidence possessed by infringers compared with competition or intellectual property cases. However, in these two cases, claimants depend on evidence or information that is solely in the possession of the alleged infringer or a third party and they cannot institute the claims without involving that evidence or information. Folkert Wilman admits that such reasoning is considerably general. Nevertheless, it indicates that there are grounds for the fields of intellectual property law and competition law to be \textit{smeled out}.

\textsuperscript{722} IPR Enforcement Directive, recital 20.
damages for EU competition law infringements. Both the IPR Enforcement Directive and the Damage Directive become natural points of reference as far as disclosure of evidence is concerned.

In the IPR Enforcement Directive, art 6 provides that competent judicial authorities may order the defendant to present (that is, to disclose) certain evidence lying under their control. The competent judicial authorities shall be able to ‘order prompt and effective provisional measures’ to preserve that evidence. Moreover, the competent judicial authorities may order the defendant or third parties to provide information ‘on the origin and distribution networks of the goods or services.’ Such information includes (a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers, and (b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

The disclosure regime in the Damage Directive builds on the approach adopted by the IPR Enforcement Directive. They are comparable in certain aspects. First, they have some similar provisions. For example, under either directive, national courts may order one party to disclose certain evidence under their control upon the request of the other party. However, this measure is accompanied by different details in each directive. Unlike the IPR Enforcement Directive, the Damage Directive extends the measures by which both contesting parties could request the national courts to disclose evidence from a third party. Moreover, under the Damage Directive, parties can also order disclosure of evidence included in the file of a competition authority with specific limitations to restrict the use of the evidence.

Along with these similarities in provisions, CJEU caselaw also reveals comparable understandings on the disclosure of evidence concerning the principle of proportionality, the protection of confidential information,
a fair balance struck between different fundamental rights involved, and avoiding conflict with general principles of EU law.\textsuperscript{733} Hence, when disclosure rules under the Damage Directive are discussed in this section, it is beneficial to refer to the comparable disclosure rules in the IPR Enforcement Directive.

This section explores in-depth the various conditions and incidental difficulties in requests for disclosure from the perspective of claimants in actions for damages. The following paragraphs will discuss access to evidence separately in follow-on damages actions and in stand-alone damages actions.\textsuperscript{734}

5.2 Access to evidence in follow-on damages actions

In follow-on damages cases, a competition authority has made its decision that the undertakings concerned were conducted anti-competitively, in violation of EU competition law. When an action for damages is brought before a national court, three different dossiers may be subject to disclosure. First, claimants may require access to the documents of the competent competition authority, which concerns access to administrative documents.\textsuperscript{735} Second, claimants may require access to files of the national court or tribunal with competence in competition proceedings.\textsuperscript{736} Third, claimants may also require disclosures from the defendant or a third party.


\textsuperscript{734} A differentiation between access to evidence in follow-on cases and in stand-alone cases does not necessarily mean that such access forms a clear boundary as to which documents are accessible under which case. Instead, claimants may also request access to Commission files under Transparency Regulation in stand-alone cases. Moreover, they may also request courts’ order to disclose evidence in the hand of the defendant or a third party in follow-on cases. The division merely functions as an indicator that in follow-on cases, access to evidence in the hand of competition authority or a review court plays the leading role. Likewise, in stand-alone cases, access to evidence in the hand of the defendant or third party plays the central role.

In addition, the author intentionally draws the division between follow-on cases and stand-alone cases, partly because the CJEU caselaw has more to say in follow-on cases. Previous CJEU caselaw sheds some light on access to evidence in follow-on cases regards various private and public interests concerned therein. Whereas, access to evidence in stand-alone cases remains governed by national law within each Member States, and there has not been CJEU caselaw discussing this matter in detail. Hence, disclosure-related issues in stand-alone cases are mostly within national courts’ discretionary power.

\textsuperscript{735} Opinion of AG Jääskinen in Donau Chemie (C-536/11), [25]–[26].

\textsuperscript{736} Opinion of AG Jääskinen in Donau Chemie (C-536/11), [26].
There are various restrictions on these access requests, such as the protection of business secrets and confidential information, black-list ban on access to leniency statements and settlement submissions, and the exceptions provided in art 4 of the Transparency Regulation. These restrictions delineate boundaries with regard to the accessibility of a particular piece of evidence. Even though not every document used in a public proceeding is accessible,\textsuperscript{737} such evidence is generally of great importance to claimants who intend to prove damages suffered due to the infringement.

The following parts of this section discuss this further. Section 5.2 will focus on the first and second types of documents, including their availability for disclosure and potential difficulties in disclosure. Finally, Section 5.3 will analyze the third type of document, which is critical for claimants in stand-alone damages actions.

5.2.1 Access to administrative documents

Administrative documents are ‘the documents of the competent competition authority relating to an antitrust investigation.’\textsuperscript{738} This category consists of all documents generated in a competition proceeding that have been obtained, produced or assembled by the competition authority. They are in the possession of the authority that has conducted the antitrust investigation.\textsuperscript{739} The notion of documents concerns not only evidence in written form, but also all other forms such as electronic, audio-visual, expert evidence, and so forth. For follow-on damages claimants, the availability of such evidence will have a

\textsuperscript{737} See e.g. art 4(2) of the Transparency Regulation. The institutions shall refuse access to a document where disclosure would undermine the protection of, e.g. court proceedings and legal advice; or the purpose of inspections, investigations and audits.

\textsuperscript{738} Opinion of AG Jääskinen in Donau Chemie (C-536/11), [25]. The concept of ‘documents’ that is subject to access consists of all documents in a competition investigation that are obtained, produced and/or assembled by the competition authority. In the course of an investigation, the competition authority may obtain a number of documents, some of which may, following a more detailed examination, proved to be unrelated to the subject matter of the case in question. Such documents may be returned to the undertaking from which they have been obtained. Upon return, these documents will no longer constitute part of the ‘documents’. See Notice on access to the Commission file, paras 8-9. It is settled EU caselaw that ‘[t]he fact that the investigation in question was conducted by a public authority of a Member State and not an institution does not affect the inclusion of the documents in the scope of the third indent of Article 4(2) of Regulation No 1049/2001.’ Thus, those concepts provided in the Transparency Regulation or in Commission Notice on the rules for access are applicable to cases investigated by an NCA. See also Franchet and Byk v Commission (T-391/03 and T-70/04) EU:T:2006:190, [121]–[124]; Unión de Almacenistas de Hierros de España v Commission (‘CNC’) (T-623/13) EU:T:2015:268, [40]–[44].

\textsuperscript{739} Björn Lundqvist and Helene Andersson, ‘Access to Documents for Cartel Victims and Cartel Members -- Is the System Coherent?’ In Maria Bergström, Marios Lacovides and Magnus Strand (eds.) Harmonising EU Competition Litigation -- The New Directive and Beyond (Hart Publishing 2016) 165.
huge influence, not only on their confidence in bringing the claim but also on the outcome of damages claims. This study discusses separately the administrative documents held by the Commission and by NCAs.

5.2.1.1 Access to documents held by the Commission

For infringements of arts 101 and 102 TFEU found by the Commission, access to documents held by the Commission is vital for claimants preparing for follow-on damages actions.

The right to access the Commission’s file is provided in art 42 of the Charter, art 27 of Regulation 1/2003, and art 15(1) of Regulation 773/2004. Based on these provisions, parties shall have the right to access the Commission’s file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. This right is provided as one of the procedural guarantees to fully respect the parties’ right of defence in the proceedings conducted by the Commission, which is the administrative proceeding.740

Generally, there are two approaches available. First, claimants may seek access directly from the Commission, based on art 2 of the Transparency Regulation. Second, they could gain access by requesting the national court hearing the case order the disclosure under art 6 of the Damage Directive. These two approaches rely on different legal bases for access, exhibit different features and have their own specific problems.

Direct access under the Transparency Regulation

For the first approach, the Transparency Regulation provides that ‘any citizen of the [EU], and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions’, which in the present context refer to documents of the Commission.741 The regulation intends to confer on the public as wide a right of access as possible

740 Notice on access to the Commission file, para 1.

741 Transparency Regulation, art 2(1). See also Verein für Konsumenteninformation v Commission (T-2/03) EU:T:2005:125. In this case, the victim of a cartel seeks access based on art 6 of the Transparency Regulation in order to gather evidence for further damages actions against the infringer. See also EnBW (T-344/08) EU:T:2012:242; CDC Hydrogene Peroxide v Commission (T-437/08) EU:T:2011:752. Other case shows there are other conditions where applicants request access to merger control files to annul a clearance decision. Éditions Jacob v Commission (T-237/05) EU:T:2010:224. Sometimes, applicants request access to find out whether the fine decision would indicate (tacitly or expressly) his name. R Z v Commission (T-173/09) EU:T:2009:180. In addition to the parties to the proceeding, third party (competitors or shareholders) may also show interest in accessing such documents. Agrofert Holding v Commission (T-111/07) EU:T:2010:285.
to documents of the EU Institutions\textsuperscript{742} and ensures that citizens can exercise the right of access in the easiest possible way. The access applies not only to documents held by the Commission but also to documents drawn up or received by it and in its possession, in the investigation of the infringement.\textsuperscript{743} It is up to the Commission to grant access.\textsuperscript{744}

In principle, all documents of the Commission should be accessible to the public. While the regulation intends to give the fullest possible effect to the right of public access to documents, there are certain public and private interests that must be respected.\textsuperscript{745} Art 4 thus provides exceptions to documents whose disclosure would undermine, for instance, the privacy and integrity of an individual, a person's commercial interest, court proceedings, the purpose of inspections, investigations and audits, the institution's decision-making process, and so on.\textsuperscript{746} Many of these public and private interests are already provided for EU law, such as art 27 and art 28 of Regulation 1/2003 concerning the protection of professional secrecy, art 15 of Regulation 773/2004 and art 339 of TFEU. CJEU case law has also confirmed on various occasions that the \textit{effet utile} of these interests should not be put at risk by the right to public access.\textsuperscript{747}

\textsuperscript{742} EnBW (C-365/12 P), [61] \& [85].

\textsuperscript{743} Transparency Regulation, art 2(3).

\textsuperscript{744} Transparency Regulation, art 2(2). In practice, the Commission often rejects such access requests by damages applicants, invoking the exceptions for the protection of the purpose of inspections, investigations and audits and the commercial interests of third parties. See Commission, 'Report from the Commission on the Application in 2010 of Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents' COM(2011) 492, para 5.4. The Commission emphasized that the right of access under the Transparency Regulation shall not put in risk the full effect (\textit{'effet utile'}) of procedural rules governing the issue. Such procedural rules refer to art 28 and art 27 of Regulation 1/2003 concerning the obligation of professional secrecy, art 15 of Regulation 773/2004 and art 339 of TFEU. These provisions, in view of the Commission, justifies why access to certain documents potentially undermines the exceptions laid down in art 4 of the Transparency Regulation. See \textit{Technische Glaswerke Ilmenau} (C-139/07 P) EU:C:2010:376, [61]; \textit{Sweden v API} (C-514/07 P, C-528/07 P and C-532/07 P), [56].

\textsuperscript{745} See Transparency Regulation, recital 4 and art 4.

\textsuperscript{746} Art 4(1) of the Transparency Regulation provides exception on (a) public interests, such as public security, defence and military matters, international relations and the financial, monetary or economic policy of the Community or a Member state; and (b) privacy and integrity of the individual, in particular regarding the protection of personal data. Art 4(2) provides exception on the protection of commercial interests, court proceedings and legal advice and the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. See also Transparency Regulation, recital 11.

\textsuperscript{747} See Commission, 'Report from the Commission on the Application in 2010 of Regulation (EC) No. 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents' COM(2011) 492 final, para 5.4. See e.g. \textit{Technische Glaswerke Ilmenau} (C-139/07 P), [51]–[52], concerning art 4(2) of the Transparency Regulation. See also
These limitations, however, do not exempt the Commission entirely from the obligation to disclose documents. Since such limitations derogate from the principle of the widest possible right of access and thus, they must be interpreted and applied strictly. As ruled by the CJEU, this strict approach is limited to ‘verifying whether the procedural rules and the duty to state reasons have been complied with’ and ‘whether there has been a manifest error of assessment or a misuse of powers.’ Hence, it does not preclude the Commission from enjoying wide discretion in determining whether to grant access or not.

Thus, to justify a refusal of access, the Commission must explain how access to the particular document would ‘specifically and actually undermine the interest protected by an exception’ under art 4 of the Transparency Regulation. In other words, the disclosure requests must have ‘a specific and actual adverse effect on the interest protected.’ The refusal cannot be justified in a merely general and abstract manner.

It follows that the establishment of these limitations depends on ‘a balancing of the opposing interests in a given situation.’ The balancing should ask specifically which interests favour disclosure and which favour non-disclosure. The decision taken on request for access must depend on which interests must prevail in a particular case.

This balancing, however, takes time. In order to accelerate the decision-making process, the Commission usually bases its decisions on general presumptions, which apply to certain categories of documents. As confirmed

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Sweden v API (C-514/07 P, C-528/07 P and C-532/07 P), [69]–[70]; Sison v Council (C-266/05 P) EU:C:2007:75, [62]; Éditions Odile Jacob (C-514/14 P) EU:C:2016:55, [111]; Commission v Agrofert Holding (C-477/10 P) EU:C:2012:394, [52]; LPN and Finland v Commission (C-514/11 P and C-605/11 P) EU:C:2013:738, [40].

Sison (C-266/05 P), [63]. See also Netherlands and Van der Wal v Commission (C-174/98 P and C-189/98 P) EU:C:2000:1, [27].

Sison (C-266/05 P), [64].

EnBW (C-365/12 P), [64]. To that effect, see also Sweden and Turco v Council (C-39/05 P and C-52/05 P) EU:C:2008:374, [48]; Technische Glaswerke Ilmenau (C-139/07 P), [53]; Éditions Odile Jacob (C-404/10 P), [116]; Agrofert Holding (C-477/10 P), [57]; LPN and Finland (C-514/11), [44]; Schenker (T-534/11), [47].

ClientEarth and PAN Europe v EFSA (C-615/13 P) EU:C:2015:489, [69]. See also Sweden and Turco (C-39/05 P and C-52/05 P), [49]; Sweden v MyTravel and Commission (C-506/08 P) EU:C:2011:496, [76]; Technische Glaswerke Ilmenau (C-139/07 P), [53].

Schenker (T-534/11), [44]; EnBW (C-365/12 P), [63].

Schenker (T-534/11), [44]. For example, in Schenker, the applicant has not shown why access to the documents included in the case file or the un-redacted Airfreight decision are necessary to the extent required to establish a superior public interest justifying the access based on art 4(2) of the Transparency Regulation. See also EnBW (C-365/12 P), [63].

EnBW (C-365/12 P), [63]. See also LPN and Finland (C-514/11), [42].

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by the Court in *EnBW*, the Commission is likely to gather commercially sensitive information of the undertakings concerned, such as commercial strategies, sales figures, market share, and business relations.\(^{755}\) The Commission is entitled to presume that disclosure of documents gathered in public enforcement proceedings in principle would undermine the protection of the commercial interests of the undertakings involved in such a proceeding.\(^{756}\) Thus, there is no need to carry out a specific, individual examination of each of the documents in a file relating to a proceeding under arts 101 and 102 TFEU.

The consideration to apply similar treatment to documents of the same nature in disclosure requests indicates an efficiency purpose to accelerate the Commission’s decision-making process. However, this acceleration does not exclude the right of interested parties to show that access is justified, on the grounds that the disclosure of a specific document is not covered by the established general presumption, or that there is an overriding public interest outweighing the interest in disclosure.\(^{757}\)

When an exception under art 4(2) or art 4(3) of the Transparency Regulation is applicable, the question then becomes what may constitute an overriding public interest under EU law. An overriding public interest here is different from those provided in art 4(1). The meaning of an overriding public interest, within the meaning of these articles, must draw from a comparative perspective as ‘overriding’.

The word overriding does not direct to a natural superiority or some conventional hierarchy of various rights. Instead, this overriding is a result of comparison carried out in specific contexts. Interests proposed by parties to support disclosure are to be weighed against a prior protection of commercial interests, a prior protection of court proceedings and legal advice, and a prior protection of the purpose of inspections, investigations and audits in a specific case. The question of which interest must prevail shall be answered with regard to the claims alleged and the evidence submitted by both parties. Therefore, no right here is naturally overriding, not even the right to claim full compensation.\(^{758}\)

Meanwhile, upon interpreting the exceptions to the right of access provided in art 4 of the Transparency Regulation, the Commission must also take account of the specific rules governing access laid down by Regulations 1/2003 and

\(^{755}\) *EnBW*(C-365/12 P), [79].

\(^{756}\) *EnBW*(C-365/12 P), [93].

\(^{757}\) See e.g. *Technische Glaswerke Ilmenau* (C-239/07 P), [62]. See further discussion in Anca D. Chirita (n 39) 163.

\(^{758}\) *EnBW*(C-365/12 P), [100]–[108]. See also *Sweden v API* (C-514/07 P, C-528/07 P and C-532/07 P), [158]; *Agrofert Holding* (C-477/10 P), [86].

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773/2004. They pursue different objectives from the Transparency Regulation. They restrict access by listing competing interests, such as the rights of defence, protection of the duty of professional secrecy, and so on. This again requires a balancing among conflicting interests. As noted by the Court, each regulation must be applied consistently and in compatibility with the others.

Up until now, the CJEU has not yet clarified further which interest could constitute an overriding public interest (as in arts 4(2) and 4(3) of the Transparency Regulation) that claimants in damages actions could rely upon to request the examination of a specific document. What is more, the CJEU has mentioned that the claimants who seek disclosure must establish the necessity for the Commission to weigh up respective interests in favour of both disclosure and non-disclosure a case-by-case basis. What that ‘necessity’ looks like remains for the CJEU to elucidate.

**Indirect access through national courts**

In addition to direct access under the Transparency Regulation, private parties can also request disclosure indirectly through national courts.

In accordance with art 6 of the Damage Directive, Member States shall ensure that national courts are able to order the disclosure of evidence included in the file of the Commission. The disclosure must be subject to the proportionality test. Evidence can only be ordered after the Commission has closed its proceeding. The disclosure can never apply to leniency

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759 See *EnBW*(C-365/12 P), [83]; *CNC* (T-623/13), [57]–[65].

760 It is settled EU caselaw that ‘Regulation Nos 1/2003 and 773/2004 are designed to ensure that the rights of defence of the parties concerned are respected and complaints dealt with diligently.’ See e.g. *Schenker* (T-534/11), [49] and *EnBW*(C-365/12 P), [8]. Regulation 1/2003 and Regulation 773/2004 have as their objectives to ensure the handling of complaints and the parties’ right to defence, stated in Recital 1 of Regulation 773/2004. They safeguard the confidentiality of information and the observance of the obligation of professional secrecy in proceedings under art 101 TFEU. To that effect, see *CNC* (T-623/13), [60]. As to the Transparency Regulation, it consolidates the initiatives to improve the transparency of the decision-making process in Recital 3 of that Regulation.

761 *EnBW*(C-365/12 P), [83].

762 See *EnBW*(C-365/12 P), [84]; *Bavarian Lager*(C-28/08 P), [56]; *Éditions Odile Jacob*(C-404/10 P), [110]; *Agrofert Holding*(C-477/10 P), [52].

763 See *EnBW*(C-365/12 P), [107]; *Bavarian Lager*(C-28/08 P), [77]–[78]; *Donau Chemie*(C-536/11), [30] & [34].

764 Damage Directive, art 6(1).

765 Damage Directive, art 6(4).

766 Damage Directive, art 6(5).
statements and settlement submissions.\textsuperscript{767} National courts shall request the disclosure from the Commission only where no one else can reasonably produce that evidence.\textsuperscript{768} This approach relies on the central function of the court to order the disclosure.

Attention shall be paid to art 6(10) of the Damage Directive. This article requires Member States ensure that national courts request disclosure from the Commission only where no party or third party could reasonably provide that evidence.\textsuperscript{769} A literal reading of this article seems to view indirect access as a last resort, where the availability of indirect access comes at the exhaustion of all other means, including that of direct access under the Transparency Regulation. In that case, national courts are required to perform due diligence before their orders are communicated to the Commission. They are not only to ensure the necessity and the proportionality of disclosure,\textsuperscript{770} but also to ensure that only the Commission and no other party could reasonably provide that evidence.

However, the real question lies, technically speaking, in how national courts could verify this last-resort status, which is to verify whether both parties and the third party could reasonably provide that evidence. Is it sufficient if the national court asks the other party or the third party whether they have that evidence at hand and that party simply answers no? What level of due diligence shall the court exert here?

These considerations are practical. They form ‘a duty to verify’ that the national court hearing the damages claims must conduct. This provision prevents national courts from requesting disclosure from the Commission arbitrarily. Arguably, this article only controls the quality of the courts’ orders but leaves the quality of the requests submitted by the requesting party for relevant national courts to decide.

A more central question related to national courts’ duty to verify concerns the correlation between direct access and indirect access. It asks whether direct access under the Transparency Regulation shall be regarded as a reasonable way to provide evidence: in other words, whether indirect access is available only at the exhaustion of direct access.

There are two possible answers. First, since the Damage Directive applies without prejudice to the rules and practices of the Transparency Regulation,\textsuperscript{771} national courts may consider the disclosure request regardless of whether the

\begin{itemize}
  \item \textsuperscript{767} Damage Directive, art 6(6).
  \item \textsuperscript{768} Damage Directive, art 6(10).
  \item \textsuperscript{769} See also the Damage Directive, recital 29.
  \item \textsuperscript{770} Damage Directive, art 6 and recital 16.
  \item \textsuperscript{771} Damage Directive, recital 20.
\end{itemize}
requesting party has previously requested access directly from the Commission or not. In that case, the two approaches (i.e. direct access under the Transparency Regulation and indirect access under the Damage Directive) form a parallel application and do not interact much. Direct access is merely an optional way to gather more evidence and that the chance to do so is equal for both contesting parties.

However, whether there is a need for claimants to request direct access depend heavily on sincere cooperation between national courts and the Commission. This is because if claimants could already obtain sufficient evidence through a request to the national court by means of indirect access – the same evidence the court itself also needs in order to adjudicate the case at hand – they do not need to request the same evidence again from the Commission.

Sincere cooperation between the Commission and national courts guarantees that the Commission will assist national courts when they apply EU law.\textsuperscript{772} To achieve that end, the Cooperation Notice provides the most frequent types of such assistance, including the transmission of information \textsuperscript{773} and the Commission’s opinions\textsuperscript{774} at the request of national courts, and the ability of the Commission to submit observations.\textsuperscript{775} However, the Cooperation Notice \textit{per se} is not binding. In the absence of EU procedural rules to guarantee these forms of assistance, it is up to Member States to provide appropriate procedural guarantees and to make full use of the possibilities offered by the Cooperation Notice. Such procedural guarantees should observe the principles of equivalence and effectiveness, ensure the full effect of arts 101 and 102 TFEU, and guarantee all the rights derived from EU law, in particular the right to claim full compensation.

According to the Cooperation Notice, the Commission’s assistance in ensuring national courts’ application of the EU competition law in damages actions,\textsuperscript{776} does not concern the Transparency Regulation at all.\textsuperscript{777} Hence, if the national court is able to apply arts 101 and 102 TFEU and the Damage Directive to the full effect with the help of the Commission via sincere cooperation, there seems

\textsuperscript{772} See CJEU caselaw on the interpretation on the principle of loyal cooperation, e.g. Order of Zwartveld and Others (C-2/88-IMM) EU:C:1990:440, [8]–[12]; Delimitis (C-234/89), [53].


\textsuperscript{774} See Cooperation Notice, points 27–30.

\textsuperscript{775} See Cooperation Notice, points 31–35.

\textsuperscript{776} See the Commission’s assistance to ensure national courts’ application of the EU competition law in lawsuits between private parties, such as actions relating to contracts or actions for damages, in Cooperation Notice, point 1.

\textsuperscript{777} To that effect, the Cooperation Notice does not mention at all ‘Regulation 1049/2001’ or ‘Transparency Regulation’.
no need for private parties to go through all the trouble to apply for direct access under the Transparency Regulation.\textsuperscript{778}

So far, the EU law and previous CJEU rulings mainly concern disclosure in public enforcement proceedings.\textsuperscript{779} Disclosure in follow-on damages actions happens after the Commission has closed the administrative proceedings. Hence, it is questionable whether previous experience in disclosure generated from public enforcement cases is applicable in follow-on damages actions in civil proceedings. These are genuine ambiguities such that the CJEU, if given the chance, may further clarify in preliminary ruling requests.

Second, national courts may consider direct access as a pre-condition before ordering the request from the Commission. National courts substantially consider whether any party or third party could reasonably provide that evidence. Under these circumstances, authentic difficulties emerge from the correlation between these two approaches.

One difficulty lies in a situation where the Commission has previously rejected the parties’ direct access request. They then turn to national courts. The question now is whether a national court’s order is capable of overturning the Commission’s previous rejection. That is to say, regarding the same set of evidence, whether the Commission, which has previously rejected the disclosure request, would find it necessary or obligatory under sincere cooperation to transmit that information to the national court.

These concrete conditions must be differentiated. If the Commission has rejected the previous disclosure request on the grounds that it would undermine the protection of the purpose of inspections or investigations, this reason cannot stand in follow-on damages actions.\textsuperscript{780} As soon as the administrative proceeding has closed, disclosure of evidence in the hand of the Commission cannot seriously undermine the Commission’s decision-making process, except for documents containing opinions for internal use as part of

\textsuperscript{778} Here, ‘all the troubles’ refers to all the preparatory work and the length of the application for access under the Transparency Regulation. See Transparency Regulation, art 6, where the applications shall be made in any written form \textit{in a sufficiently precise manner} to enable the Commission to identify the document. See more in Transparency Regulation, arts 7–11.

\textsuperscript{779} See Regulation 1/2003, arts 27(1) & (2); Regulation 773/2004, art 15.

\textsuperscript{780} For cases concerning protection of the purpose of inspections, investigations and audits, see e.g. \textit{AGC Glass} (C-517/15 P), [79]; \textit{EnBW} (C-365/12 P), [60]–[61]; \textit{Technische Glaswerke Ilmenau} (C-139/07 P), [26]. See also GC rulings: \textit{Ryanair v Commission} (T-494/08 to T-500/08 and T-509/08) EU:T:2010:511, [70]–[71]; \textit{MyTravel v Commission} (T-403/05) EU:T:2008:316, [40]–[46]. In this case, the GC ruled that the report in dispute concerned opinions for internal use as part of deliberations and preliminary consultations within the Commission, and thus was capable of falling within the scope of application of the second subparagraph of art 4(3) of the Transparency Regulation.
deliberations and preliminary consultations within the Commission,\(^781\) as well as leniency statements and settlement submissions.\(^782\)

However, the protection of the purpose of inspections or investigations may continue to be an issue, when some parties no longer appeal and thus face damages actions and some others remain in proceedings.\(^783\) Once disclosure of evidence in such damages actions is regarded as potentially undermining the Commission’s decision-making process in the remaining ongoing proceedings, disclosure will only be available after a final decision of the Commission or by EU Courts that cannot be, or that can no longer be, appealed by ordinary means.\(^784\) This may constitute a *de facto* delay of the following civil proceeding, when the national court considers the evidence must be ordered. Alternatively, the national court may choose to discard the disclosure request, if the appealing proceedings before EU Courts are too lengthy.\(^785\)

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\(^781\) Transparency Regulation, art 4(3).

\(^782\) Under art 6(6) of the Damage Directive, the national court can at no time order a party or a third party to disclose these two categories of documents.

\(^783\) See e.g. the *Truck* cartel. The Commission first reached a settlement decision with MAN, Daimler, DAF, Iveco and Volvo/Renault in July 2016. It followed a Commission decision imposing a fine over €2.93 billion for participating in a cartel concerning medium and heavy trucks. Another infringer Scania decided not to settle this cartel case with the Commission. As a result, the Commission’s investigation against Scania was carried out under the standard cartel procedure and has imposed a fine of €880 523 000 on Scania. See Commission decision of 19.7.2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement (AT.39824 - Trucks), COM(2016) 4673 final. See also Commission Press Release, ‘Statement by Commissioner Vestager on decision to fine truck producers €2.93 billion for participating in a cartel’ Brussels, 19 July 2016, and ‘Antitrust: Commission fines Scania €880 million for participating in trucks cartel’ Brussels, 27 September 2017. While Scania has challenged the Commission’s decision before the General Court, the other five truck manufacturers are targeted by a number of private damages actions for alleged harm caused by the cartel in some EU jurisdictions. See e.g. in UK, High Court of justice Business & Property Courts of England and Wales, Competition List (ChD), Case HC-2016-003442, *Royal Mail Group Limited v DAF Trucks Limited and others*. The Royal Mail Group filed a damage claim to the High Court of Justice against DAF Trucks and asked for full access to the Commission’s file relating to the Commission’s 2016 settlement decision. See also in Germany, Oberlandesgericht Düsseldorf, VI-W (Kart) 2/18, 3 April 2018. In this case, the claimant seeks to obtain the full (confidential) version of the Commission’s 2016 settlement decision as well as all supporting evidence. For more discussion on follow-on damages actions for the *Truck* cartel, see Ingrid Vandenborre, Thorsten Goetz and Andreas Kafetzopoulos, ‘Access to the EU Commission’s File or Decision for Purposes of Damages Claims, and Confidentiality of Information under European Competition Law’ (2018) 9(10) Journal of European Competition Law & Practice 655. See Scania’s application to annul the Commission decision, *Scania and Others v Commission* (T-799/17) Application: OJ C 42 from 05.02.2018, 40.

\(^784\) This definition of ‘final decision’ is borrowed from the Damage Directive, art 2(12) ‘final infringement decision’.

\(^785\) Since damages actions are civil proceedings, which serve the purpose of doing justice to the victims of anti-competitive agreements and concerted practices. Justice delayed may amount to justice denied. See further discussions in Renato Nazzini, *Concurrent Proceedings in Competition Law. Procedure, Evidence and Remedies* (OUP 2008) 133. There have already
On the contrary, the ending of public enforcement proceedings would not
make such a difference in case of the protection of commercial interests, legal
advice, and professional secrecy. The protection of such interests would
not change after the Commission has made a decision.

Indeed, what will change is the Commission’s attitude towards disclosure.
Under the Transparency Regulation, the Commission shall ensure wide access
after balancing the various interest provided in art 4, and many other
considerations such as the Commission’s decision-making process, the third
party’s consent, Member States’ consent, and so on. The Commission holds
wide discretion to decide this issue, observing the relevant CJEU caselaw.

However, when it comes to the national courts’ request to disclose in follow-
on damages actions under the Damage Directive, the Commission is under the
obligation of sincere cooperation with national courts under art 15(1) of
Regulation 1/2003. This article, read in conjunction with art 4(3) TUE,
provides a general duty of loyal cooperation, which imposes an obligation on
the Commission to transmit to national courts information in its possession for
effective application of arts 101 and 102 TFEU. EU caselaw requires the
Commission ‘to provide the national court with whatever information the
latter asks for’, regardless of whether that information is covered by
professional secrecy. Professional secrecy covers both business secrets and
other confidential information.

However, this duty is not absolute. In order to guarantee art 339 TFEU, the
Commission may refuse to transmit a document, if the national court does not
have at the disposal effective measures to protect confidential information,

been national cases where the court hearing damages actions rejected disclosure request and
considered that proceeding too lengthy. See e.g. Equilib v. KLM, Martinair, Air France et al,
ECLI:NL:RBAMS:2015:1778 - Court of Amsterdam, 25-03-2015 /C/13/486440/ HA ZA 11-
944, [4.12]; similarly, SCC v. KLM et al, ECLI:NL:RBAMS:2015:1780 – Court of Amsterdam,25-
03-2015 /C/13/562256 / HA ZA 14-348, [4.13]. For substantial delay, the Court elaborates
that it will take a period of one year for SIA (Swiss International Airlines) to examine the
documents.

See e.g. Éditions Odile Jacob (C-404/10 P) concerning the protection of commercial
interests and legal advice; Agrofert Holding (C-477/10 P) concerning the protection of the
purpose of investigations, commercial interests, legal advice and the decision-making process
of the institutions; order of Commission v Pilkington Group (C-278/13 P(R)) EU:C:2013:558,
concerning the protection of professional secrecy; MyTravel (C-506/08 P) concerning the
protection of court proceedings and legal advice and the decision-making process in case of
concentrations.

See Transparency Regulation, art 4(1)-(6).

See Postbank v Commission (T-353/94) EU:T:1996:119, [64]-[67]; Delimitis (C-234/89,
[53]; Dijkstra (C-319/93, C-40/94 and C-224/94) EU:C:1995:433, [34].

Cooperation Notice, point 24.

Cooperation Notice, point 23.

Cooperation Notice, point 24.
or if there are overriding reasons relating to the need to safeguard the interests of EU or to avoid any interference with its functioning and independence, in particular by jeopardizing the accomplishment of the tasks entrusted to it.\footnote{Cooperation Notice, point 26. To that effect, see also order of Zwartveld (C-2/88-MM), [10]–[11]; Postbank (T-353/94), [93]; First Franex (C-275/00) EU:C:2002:711, [49]; Postbank (T-353/94), [93].}

Therefore, although the protection of commercial interests, legal advice, and professional secrecy would not change after the Commission has made a decision, the Commission’s attitude towards information transmission will likely be different between private parties’ requests under the Transparency Regulation and national courts’ requests under sincere cooperation. The Commission enjoys wider discretion in the former. As to the latter, the Commission is under obligation to transmit the information and to assist the national court to apply arts 101 and 102 TFEU to the full effect.\footnote{See Cooperation Notice, point 9. Since arts 101 and 102 TFEU are directly applicable EU law, they are a direct source of rights and duties for all those affected and must be fully and uniformly applied in all the member States from the date of their entry into force. See e.g. Simmenthal (C-106/77), [14]–[15].}

Bearing the above considerations in mind, does it mean that claimants could access evidence more easily through a request by the national court? There seems no guarantee that this will happen easily or to what extent ease of the request could be expected by the requesting party. This remains to be seen in practice. CJEU caselaw, if given the chance, may also shed some light on the sincere cooperation between the Commission and national courts in regarding what extent national courts could actually receive information from the Commission. Nevertheless, the Commission’s previous rejection might be seen as proof that the claimant has exhausted the possible ways to obtain that evidence.

The above discussions on the correlation between the direct access approach under the Transparency Regulation and the indirect access approach under the Damage Directive boil down to the relationship between the Commission and national courts – the boundary of their respective powers. That boundary, however, is indeed blurred.

The procedure of disclosing documents in the hand of the Commission demonstrates an overlap of powers between the Commission and national courts. To illustrate, upon the parties’ request to disclose documents held by the Commission, national courts first evaluate the request under the proportionality test, the relevance to the present case, the confidentiality of the information requested, and all related factors. After a careful evaluation, national courts may decide to ask the Commission for information transmission. The Commission then exercises its evaluation again: whether such information involves professional secrecy, whether there are overriding
public interests, or whether disclosure will jeopardize the task entrusted to the Commission.\textsuperscript{794}

There might be some discord, when the Commission and national courts evaluate the disclosure request from different standpoints and emphasize different interests. From the perspective of the Commission, the duty of sincere cooperation is subject to considerations relating to the need to safeguard the interests of the EU and to avoid any inference with its own function and independence, in particular not to jeopardize the accomplishment of the tasks entrusted to the Commission.\textsuperscript{795} Hence, in fulfilling the duty of sincere cooperation, the Commission shall be committed to remaining neutral and objective in its assistance. ‘Indeed, the Commission’s assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court.’\textsuperscript{796} The Commission considers this a priority over all other interests.

From the perspective of national courts, their consideration on disclosure builds on the need to fulfil their judicial function. Access to evidence, as provided for under the Damage Directive, compensates for information asymmetry between the contesting parties, and tries to ensure a more level playing field.\textsuperscript{797} National courts thus confirm the disclosure request when there is a need to do so for an adversarial debate between the parties and for themselves when they also need more information in order to exercise adjudication.

Hence, the overlapping of powers between the Commission and national courts renders the issue of access to the Commission’s file unpredictable and uncertain. It is unknown what level of due diligence the national court will exercise to ensure a proportionate disclosure, to what extent the Commission will cooperate sincerely, and how the indirect access to the Commission’s file will actually work, while the right to full compensation remains guaranteed.

With regard to information transmission, the Commission amended the Notice in 2015 to align their disclosure rules with the Damage Directive in order to assist national courts and to ensure coherent application of arts 101 and 102 TFEU. The modification emphasizes that disclosure of information by the Commission to national courts shall not ‘unduly affect the effectiveness of enforcement of the competition rules by the Commission, in particular so as not to interfere with pending investigations nor with the functioning of

\begin{itemize}
\item \textsuperscript{794} Cooperation Notice, points 24–26.
\item \textsuperscript{795} Cooperation Notice, point 26.
\item \textsuperscript{796} Cooperation Notice, point 19.
\item \textsuperscript{797} See Damage Directive, recitals 7, 9, 10 & 15.
\end{itemize}
leniency programmes and settlement procedures.’ 798 These amendments only reinforce the Commission’s perspective to prioritize the tasks entrusted to it and to ensure public enforcement of EU competition law.

In addition to information transmission, in follow-on damages actions the Commission can also give its opinions on questions regarding the application of EU competition law or submit observations to national courts as amicus curiae. 799 As part of its cooperation, the Commission can always voice its opinion on national cases, and its power to transmit information might play a decisive role in follow-on cases. What the Commission ‘can do’ enables it to closely ‘monitor’ the performance of national courts.

5.2.1.2 Access to documents held by an NCA

When an NCA finds an infringement of arts 101 and 102 TFEU or of equivalent national competition law, anyone who has suffered harm caused by that infringement can request the national court hearing the case to disclose evidence included in the file of that NCA. 800 Under the Damage Directive, rules governing access to documents held by an NCA are identical to rules governing access to documents held by the Commission. National courts must ensure that the disclosure is proportionate and that they have taken into account the legitimate interests of all parties and third parties concerned. 801 National courts must balance the interests favouring disclosure or non-disclosure. These considerations should extend to the scope and the cost of disclosure, the

798 Communication from the Commission — Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC [2015] OJ C256/5, para 2.

799 See Regulation 1/2003, art 15. For a summary, see Commission, ‘Application of antitrust law by national courts – Overview’ <http://ec.europa.eu/competition/court/antitrust.html>. Art 15(2) also provides that national courts are obliged to submit to the Commission a copy of any written judgment where arts 101 and 102 TFEU have been applied. See those written judgments in <http://ec.europa.eu/competition/elolade/antitrust/nationalcourts/>. Pursuant to art 15(3) of the Regulation 1/2003, the Commission, acting on its own initiative, may submit written observations ("amicus curiae" observations) to courts of the Member States where the coherent application of arts 101 and 102 TFEU so requires. For more information, see <http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html>. See also Damage Directive, art 6(11).

800 It is also possible that parties, no matter the claimants or the defendants, will request disclosure directly from an NCA. This happens only when national law provides that possibility. For example, in Finland, the Act on the Openness of Government Activities (Laki viranomaisten toiminnan julkisuudesta) empowers anyone to request copies of public documents from public authorities. All information is available in the FINLEX database: <http://www.finlex.fi/en>. See more discussion in Ilkka Leppihalme and Toni Kalliokoski, ‘Finland: Competition Litigation 2019’ 05/09/2018 ICLG, available at: <https://icl.com/practice-areas/competition-litigation-laws-and-regulations/finland>.

801 Damage Directive, arts 5(3) and 6(4).
relevance of the document, the confidentiality of the information requested, and so forth.\textsuperscript{802} Moreover, leniency statements and settlement submissions constitute a black-list immune from disclosure.\textsuperscript{803} In addition, national courts will only order such disclosure where no party or third party is reasonably able to provide that evidence.\textsuperscript{804}

To disclose documents held by NCAs, there are practical differences between damages actions brought in the same Member State where the infringement decision is taken, and damages actions brought in a different Member State. For the former, both the court hearing the case and the NCA finding the infringement sit in the same Member State. In spite of detailed rules implementing the Damage Directive, there are existing disclosure rules and existing institutional cooperation that national courts must respect before they respond to any disclosure request.

As to the latter, the relevant court needs to order disclosure from an NCA in a different Member State, a cross-border action. It depends largely upon cooperation and mutual assistance at EU or international level.

At the EU level, the European Competition Network (‘ECN’) guarantees that the European Commission and NCAs work closely to enforce the EU antitrust rules.\textsuperscript{805} To empower NCAs to be more effective enforcers (ECN+), the Commission adopted the ECN+ Directive to ensure that NCAs have the necessary guarantees of independence, resources, enforcement, and fining powers to be able to effectively apply arts 101 and 102 TFEU.\textsuperscript{806}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{802} Damage Directive, arts 5(3) and 6(4).
\item \textsuperscript{803} Damage Directive, art 6.
\item \textsuperscript{804} Damage Directive, art 6(10).
\item \textsuperscript{806} Council Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3 (ECN+ Directive), recital 3. For more information, see European Commission, ‘Empowering National Competition Authorities’, 3. <http://ec.europa.eu/competition/antitrust/nca.html>. The Directive identified several gaps and limitations in NCAs’ tools and guarantees and found that ‘companies engaging in anti-competitive practices can face very different outcomes of proceedings depending on the Member States in which they are active.’ The Directive aims to compensate uneven enforcement by creating a ‘truly common competition enforcement area.’ The Directive also
\end{itemize}
\end{footnotesize}
The changes introduced by the ECN+ Directive potentially contribute to the evidential quality of documents drawn up by a NCA. When the documents are more detailed than those previously available are, they can be very valuable for claimants of follow-on cases.

For example, the ECN+ Directive provides effective powers of investigation to detect any agreement, decision or concerted practice prohibited by art 101 TFEU or any abuse of dominant position prohibited by art 102 TFEU at any stage of the proceedings before them. Such powers include the power to inspect businesses or other premises, to examine any documents related to the business of the company, to ask any representative or member of staff for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers, and so on. These powers ensure that NCAs are able to conduct all necessary unannounced inspections of undertakings and associations of undertakings for the application of arts 101 and 102 TFEU.

Moreover, the ECN+ Directive requires arrangements to be made available for NCAs to request mutual assistance for the notification of documents related to the application of arts 101 and 102 TFEU. NCAs apply EU competition rules with a cross-border dimension. The cooperation between NCAs or between NCAs and national judicial competition authorities can help ensure that evidence in the hands of the NCA enforcing the EU competition law is sufficient to find the existence of an infringement. Such arrangements ensure that NCAs have parallel powers, equivalent to the Commission, to apply arts 101 and 102

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808 See ECN+ Directive, arts 6–12.

809 ECN+ Directive, recitals 69, 75 and arts 24–27. As mentioned in the proposal, the cooperation extends to the interlinkage between authorities’ leniency programmes with a need to guarantee cross-border legal certainty. In practice, previous experiences show the insufficiency in that aspect. Divergence in application of leniency programmes already lead to an uneven outcome as some applicants benefit from immunity and other under equivalence conditions were not at all. Companies who considered turning themselves in were deterred from cooperation under this legal uncertainty. Besides, they sought for forum shopping in a Member State, which would be most beneficial. This impeded the function of leniency system as a whole. ECN+ Proposal, 8.
TFEU. Thus, evidence held by NCAs is gaining in importance and is becoming crucial to claimants of follow-on cases.

In addition, when the infringement happens in more than one Member State, the national court hearing the damage claim may find it sufficient merely to request disclosure of evidence directly from the NCA in the same Member State. Because of the stronger ECN+ and closer cooperation, NCAs are more likely to exchange information and ask for mutual assistances between themselves. Once the documents related to the infringement are shared among NCAs that are involved in the same infringement, it becomes easier for the national court to order disclosure of the same documents from the NCA in its own Member State.

At the international level, national courts can rely on bilateral or multilateral cooperation notices or international conventions to rule on these issues, if available. It is up to each Member State to lay down detailed rules governing disclosure-related issues, as long as parties’ right to claim full compensation is ensured and all other rights derived from EU law are guaranteed, including the right to an effective remedy, the right of defence, the right to information, and so on.

As previously discussed, the Damage Directive has provided rules governing access to evidence in the file of an NCA for damages actions for EU competition law infringements. However, these rules are far from flawless. There are observable unclear areas, even before any national court refers to the CJEU for a preliminary ruling.

The first observation concerns the practical difficulties in the cross-border dimension of information transmission. Art 6 provides the possibility that a national court in one Member State can order the disclosure of evidence from an NCA in another Member State. It implies that the legal systems of both the Member States involved shall ensure that this transmission of information happens. That would require Member State–level cooperation to facilitate such transmissions. In that case, there must be mutual recognition of the importance of cooperation. Such cooperation is only attainable when substantial treatments for disclosure in these two Member States are equivalent. That further requires a set of sufficiently similar disclosure rules as well as restrictions on the disclosure.

The need to offer equivalent treatments for disclosure in two Member States as the pre-condition for the cooperation can be seen in the following example. Consider the condition where Member State A has disclosure rules that are looser than those in Member State B. It means that the NCA in Member State A

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810 ECN+ Directive, recital 68.

811 However, since this study does not enquire into detailed national evidentiary rules governing disclosure-related issues, what bilateral or multilateral cooperation notices or what international conventions have been agreed or somehow related will not be further discussed.
is more flexible in terms of information transmission than the NCA in Member State B. Thus, damages claimants could request disclosure in Member State A more easily than in Member State B. This then potentially creates an incentive for forum shopping in terms of disclosure of evidence in the file of an NCA, that is, Member State A becomes a preferred forum to obtain evidence in order to support the claims.

However, as to how national courts could actually order the disclosure of evidence from an NCA in a different Member State, the Directive only requires Member States to ensure this cooperation but remains 'remarkably silent' on practical issues.\textsuperscript{812} The ECN+ Directive also leaves this issue completely untouched. Recital 17 of the Damage Directive merely refers to a general scheme in Regulation 1206/2001, which only concerns cooperation between courts.\textsuperscript{813} Therefore, how the information transmission between national courts and NCAs in different Member States would be exercised in antitrust damages actions remains a grey zone.

The second observation relates to limits on the use of evidence obtained solely through access to the file of a competition authority, including both NCAs and the Commission. Such evidence is disclosed for the purpose of damages actions.\textsuperscript{814} One question is whether such evidence obtained in damages claims could also be used in other claims, including a claim for an injunction or a breach of contract.

According to the Damage Directive, the use of such evidence in other claims for the enforcement of arts 101 and 102 TFEU is not prohibited. Art 7 of the Damage Directive limits the use of evidence obtained solely through access to the file of a competition authority in three situations. First, art 7(1) emphasizes the inadmissibility of leniency documents and settlement submissions. Second, art 7(2) ensures that evidence obtained for the public enforcement proceeding cannot be disclosed until the competition authority has closed the proceeding. Third, art 7(3) concerns the use of such evidence subject to the person himself or the successor.

Recital 32 of the Damage Directive clearly states that limitations on the use of such evidence aims to prevent any detraction from the effective enforcement


\textsuperscript{813} Recital 17 of the Damage Directive provides that ‘[w]here a court in one Member State requests a competent court in another Member State to take evidence or requests that evidence be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 apply.’ It is indeed interesting to notice that Regulation 1206/2001 provides differentiated treatments between final decision provided by an NCA or by a competent review court. For the former, this Regulation does not apply. As to the latter, the situation fits perfectly to the co-operation between national courts. This is also the reason to discuss the access to judicial documents separately.

\textsuperscript{814} See clearly the Damage Directive, art 6(1).
of competition law by a competition authority, such as the commercialization of evidence.\textsuperscript{815} This recital confirms the use of such evidence in other claims, since they are also meant for the effective enforcement of competition law. As to claims without the purpose of competition law enforcement, this issue remains unclear.

5.2.1.3 Restrictions on disclosure of administrative documents

\textit{Restriction 1: confidential information}

When claimants request disclosure of evidence through national courts, the defendant may oppose this and argue that such information should be protected as confidential information; such information consists of both business secrets and other confidential information. The protection of these two categories of information has been provided in art 339 TFEU, as the protection of professional secrecy.\textsuperscript{816} In line with arts 15(2) and 16(1) of Regulation 773/2004, the Damage Directive in Recital 18 confirms that while evidence containing business secrets or other confidential information, in principle, shall be available in damages actions, such information shall also be appropriately protected from being disclosed. The measures used to protect such information should not impede the exercise of the right to claim full compensation at any time.

However, neither EU law nor CJEU caselaw has clearly defined the concepts of business secrets and other confidential information.\textsuperscript{817} It remains for the national court hearing the case to consider the protection of these two categories in deciding whether disclosure of certain evidence can be ordered in a concrete case. However, the EU Courts' rulings and AG opinions generated from the Commission’s public enforcement cases and some non-binding legal sources, such as the Commission Notice on access to the Commission files, shed some light on how business secrets and other confidential information may be defined, as well as their respective scope for protection.

In \textit{Evonik Degussa}, AG Szpunar elaborates that the confidentiality of a piece of information results either solely from its intrinsically sensitive content or from a combination of the content and the circumstances under which the information was communicated to the authorities.\textsuperscript{818} The AG’s elaboration indicates that business secrets are intrinsically sensitive, and other confidential information could cover whatever is communicated to the

\textsuperscript{815} See the Damage Directive, Recital 32.

\textsuperscript{816} Art 339 TFEU proposes an obligation to protect professional secrecy.

\textsuperscript{817} To that effect, see A. Beumer and A. Karpetas, 'The Disclosure of Files and Documents in EU Cartel Cases: Fairytale or Reality?' (2012) 8(1) European Competition Journal 123, 134.

\textsuperscript{818} Opinion of AG in \textit{Evonik Degussa} (C-162/15 P) EU:C:2016:587, [42].
authorities. These two categories together constitute the confidential information to which access may be partially or entirely restricted.\footnote{To that effect, see Notice on access to the Commission file, point 17.}

For business secrets, CJEU caselaw establishes that the right to the protection of business secrets is a general principle of EU law.\footnote{See e.g. \textit{AKZO Chemie v Commission} (C-53/85) EU:C:1986:256, [28]; \textit{SEP v Commission} (C-36/92) EU:C:1994:205, [36]; \textit{Varec (C-450/06)}, [49]; \textit{Interseroh Scrap and Metals Trading} (C-1/11) EU:C:2012:194, [43]. See also Opinion of AG Szpunar in \textit{Evonik Degussa} (C-162/15 P), [41]. See also GC caselaw, \textit{Postbank} (T-353/94), [82].} Business secrets usually include an enterprise’s competitive advantage, which is usually unknown to competitors due to the owner’s effort to keep it secret.\footnote{See, for reference, Notice on access to the Commission file, point 18.} It may include ‘technical and/or financial information relating to an undertaking’s know-how; margins calculations and price structure; production secrets and processes; supply sources; quantities produced and sold; market shares; customers and distributors lists; marketing plans; cost and methods of assessing costs; and sales strategy.’\footnote{As confirmed by the Commission in Notice on access to the Commission file, point 18 that business secrets are, ‘confidential information about an undertaking’s business activity could result in a serious harm to the same undertaking.’} Such information is highly confidential, the disclosure of which not only to the public but also to a person other than the one provided the information might seriously harm the provider’s interests.\footnote{\textit{Postbank} (T-353/94), [87].}

The GC has inspiringly interpreted, in several judgments, the concept of ‘information covered by business secrecy’ by identifying three criteria. First, only a limited number of persons know that information. Second, disclosure of that information is liable to cause serious harm to the provider or to a third party.\footnote{\textit{Bank Austria Creditanstalt v Commission} (T-198/03) EU:T:2006:136, [71]; \textit{Pergan} (T-474/04), [65]; \textit{Idromachine and Others v Commission} (T-88/09) EU:T:2011:641, [45]; \textit{Evonik Degussa} (T-341/12), [70]; \textit{Akzo Nobel} (T-345/12), [48]; \textit{Pilkington Group} (T-462/12), [25]; \textit{AGC Glass} (T-465/12), [27]; \textit{Nexans France and Nexans v Commission} (T-423/17 R) EU:T:2017:835, [45].} Third, the interests liable to be harmed by disclosure must, objectively, be worthy of protection.\footnote{In some cases, the party did not appeal, see e.g. \textit{Bank Austria Creditanstalt} (T-198/03); \textit{Pergan} (T-474/04); \textit{Akzo Nobel and Others v Commission} (T-345/12) EU:T:2015:50. In some cases, the party did not dispute the concept of ‘confidential information’ in appeals, see for example \textit{Idromachine and Others v Commission} (C-34/12 P) EU:C:2013:552; \textit{Pilkington Group} (C-278/13 P(R)); \textit{AGC Glass} (C-517/15 P). For example, in \textit{Evonik Degussa}, the contention focuses on a fixed time limit. ‘Information which was secret or confidential, but
Notably, in a liquidation case concerning the information communicated to the financial markets supervisory authority the CJEU employed this exact formula – all three conditions included – to identify the concept of confidential information. Instead of establishing a universally applicable test, the Court emphasized the need for a uniform application of EU law, such that ‘where a provision of EU law makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an independent and uniform interpretation throughout the European Union.’ Hence, the interpretation of the provisions about confidential information must consider ‘the wording of the provision at issue’ – arts 5(3) and (4) of the Damage Directive in the present context, the context of the provision, and ‘the objective pursued by the legislation in question.’

However, this case does not directly concern NCAs or competition law cases. Rather, it concerns access to evidence in the file of national financial market supervisory authorities under Directive 2014/65. The CJEU’s preliminary ruling in this case on the concept of confidential information provides a point of comparison, as detailed guidance about confidential information is lacking in the Damage Directive and in previous CJEU caselaw. In the following paragraphs, a careful examination of this three-step test with reference to CJEU rulings on access to the Commission’s case file in public enforcement proceedings will provide useful insights on the concept of confidential information, including the concept of business secrets in the specific context of follow-on damages actions.

The first criterion limits the audience of that information to a limited number. Defining access as such points only to the possibility, not to the reality of how many people actually access it. For instance, if some experts can draw that information from the undertaking’s annual audit report or accounting statement, that information is potentially accessible to an unlimited audience. In practice, the undertakings concerned hold such information clandestinely

which is at least five years old, must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, ... despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties.’ *Evonik Degussa*(C-162/15 P), [64]–[70].

827 *Baumeister* (C-15/16) EU:C:2018:464, [35].

828 *Baumeister* (C-15/16), [24].

829 This ‘provision’ shall also include Damage Directive, recital 18 and Regulation 1/2003, recitals 16, 32 and art 27.

830 *Baumeister* (C-15/16), [24]. To that effect, see also *Fish Legal and Shirley* (C-279/12) EU:C:2013:853, [42]; *A* (C-184/14) EU:C:2015:479, [31]–[32].

and secretly,\textsuperscript{832} to ensure that it is safely protected from outsiders. For the normal EU competition law infringement, such information only circulates among specific persons who know the overall scheme of the infringement or who are the virtual operators of the scheme.

The second criterion examines whether the disclosure of the information would cause serious harm to the undertaking’s business activities. The undertaking accused may object to the opposing party’s disclosure requests, third-party access requests or the publication of Commission decisions, as these disclosures would seriously harm the commercial interests of the company \textsuperscript{833} and thus frustrate its legitimate expectations. \textsuperscript{834} These objections must be substantiated.\textsuperscript{835}

Meanwhile, the serious harm potentially incurred by the undertaking caused by the disclosure also imposes higher requirements on the authority that is called upon to decide the disclosure request. Not only the harm but also the severity of the harm requires the authority to ‘carry out a concrete, individual examination of the document at issue and to provide specific reasons for which it considers that its disclosure would concretely and actually undermine the interest protected,’\textsuperscript{836} based on a case-by-case evaluation.

\textsuperscript{832} See \textit{Aalborg Portland} (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P), [55]–[57]; \textit{Coats Holdings} (T-439/07), [134]; \textit{BPR} (T-53/03), [63]; \textit{AG-Treuhand} (T-27/10), [59]. See e.g. Opinion of AG Mengozzi in \textit{Deutsche Lufthansa} that ‘the purported benefits arising from the application of the fees in question are enjoyed only by airlines which enter into commercial relations with FPH and thus \textit{a limited number of persons within the economic sector concerned}.’ Opinion of AG Mengozzi in \textit{Deutsche Lufthansa} (C-284/12) EU:C:2013:755, [51].

\textsuperscript{833} See e.g. \textit{Technische Glaswerke Ilmenau} (C-139/07 P), [21]; \textit{Evonik Degussa} (C-162/15 P), [59].

\textsuperscript{834} See \textit{AGC Glass} (C-517/15 P), [62].

\textsuperscript{835} See \textit{Dalmine} (C-407/04 P), [66]. This is an appeal case, where Dalmine (‘the appellant’) seeks to set aside the GC judgment, insofar as it dismissed its action for annulment of Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty. See \textit{seamless steel tubes} (Case IV/E-1/35.860-B) Commission Decision [2003] O L140/1. See \textit{Dalmine} (T-50/00). In its third plea, the appellant alleges that the contested decision contained ‘certain facts which had no connection with the infringements, and which were potentially harmful to it owing to the fact that the information thus made public might be used by third parties.’ The CJEU in its finding confirmed that the appellant has not shown ‘how the contested grounds are capable of producing effects such as to change its legal position’. The Court concluded that ‘[a]s the findings in the contested decision relating to the cartels affecting the markets outside the Community and also price-fixing were characterised by the appellant as superfluous grounds, it cannot in any event maintain that in the absence of those findings the contested decision would have had an essentially different content.’ \textit{Dalmine} (C-407/04 P), [66]–[71].

\textsuperscript{836} \textit{Agrofert Holding} (C-477/10 P), [724] and \textit{MyTravel} (C-506/08 P), [27].
The second criterion connects closely with the third criterion, that is, the impaired interests must objectively be worthy of protection.\textsuperscript{837} Such interests may include commercial interests, protection of personal data, privacy, or public interests.\textsuperscript{838} That interest, however, does not cover the interest of undertakings to avoid actions for damages following the finding of an infringement.\textsuperscript{839}

The three criteria above, used in defining what information belongs to business secrets, have not been widely discussed by the CJEU in competition law cases. They are merely of reference value, which national courts might benefit from when they face parties’ disclosure requests. National courts remain at full liberty to consider other criteria to define business secrets and their scope of protection, as long as the full effect of arts 101 and 102 TFEU is observed and all the rights derived from EU law to both contesting parties are guaranteed, in particular the right to claim full compensation as pursued by the Damage Directive.

In addition to business secrets, other confidential information might also be protected from disclosure. According to recital 13 of Regulation 773/2004, the category of other confidential information includes information other than business secrets that may be considered as confidential, insofar as its disclosure would significantly harm the undertaking or the person. Hence, the

\textsuperscript{837} Bank Austria Creditanstalt (T-198/03), [71].

\textsuperscript{838} See Transparency Regulation, art 4. Notably, disclosure of information in non-liberalised area is more likely to harm ‘public interests’ compared with already liberalised areas. Non-liberalised areas, such as energy, telecommunications, transport, water and post, are controlled by public authorities rather than by private companies in some countries. When certain public services are open for liberalisation, consumers can choose from among different service providers and products and are subject to market competition. Information possessed by relevant service providers mainly concerns commercial interests, personal data and privacy. In contrast, remaining non-liberalised areas are called as services of general economic interest (‘SGEI’) in EU. SGEI are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Such areas include transport networks, postal services and social services. Usually, national governments consider it important to guarantee a general access of these services that should be available to all citizens. Such services are often essential to the Member States’ social and political objectives, such as equity, participation, cohesion, solidarity, or reflect economic efficiency considerations. These concerns may constitute ‘public interests’ that are objectively worthy of protection in antitrust damages actions. See Commission, ‘Competition >Liberalisation.’<http://ec.europa.eu/competition/competition/public_services_en.html>. Commission, ‘State aid>Services of General Economic Interest (Public Services).’<http://ec.europa.eu/competition/state_aid/services_of_general_economic_interest.html>. See more information on SGEI in ‘Services of General Economic Interest – Opinion Prepared by the State Aid Group of EAGPC), 29.06.2006, available at:<http://ec.europa.eu/competition/state_aid/services_of_general_economic_interest.html.pdf>.

\textsuperscript{839} Damage Directive, art 5(5).
common feature of both two categories of information is that they are confidential.

The negative consequences of revealing confidential information may expose providers to the risk of retaliatory measures.\textsuperscript{840} Therefore, the notion of confidential information may include information that would allow parties to identify the provider who has a justified wish to remain anonymous.\textsuperscript{841} As underlined by the CJEU, the Commission’s ability to guarantee the anonymity of some of its sources of information is of crucial importance to ensure the effective prevention of prohibited anti-competitive practices.\textsuperscript{842}

However, the guarantee of anonymity may generate additional difficulties in attributing the harm caused by the infringement in a vertical supply chain in follow-on damages actions. Imagine claimant A buys certain products or services from Intermediate Dealer B, who contracts with Infringer C. In follow-on damages actions, the protection of confidential information would mean that, the identity of Intermediate Dealer B is redacted from documents disclosed by the Commission or NCAs. Claimant A may be able to prove that Infringer C violates the EU competition law and that he buys C’s products or services from Intermediate Dealer B. However, since B is anonymous, he may not be able to identify B in the middle of the causal link, since there is no (direct) evidence proving B is the customer of C, at least not from the documents disclosed by the competition authorities. This is particularly the case when Infringer C provides inputs to Intermediate Dealer B and B produces final products to Claimant A. As the supply chain extends, and more intermediate dealers are anonymous, it becomes less likely for Claimant A to be able to construct a clear causal link.

To ascertain the confidentiality of certain pieces of information, national courts must view not only the content of the information, but also the specific circumstances under which it was produced. For example, the GC in the

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\textsuperscript{840} Both the GC and the CJEU in dominant position cases confirm this concern. See e.g. \textit{BPB Industries and British Gypsum v Commission} (T-65/89) EU:T:1993:31; \textit{BPB} (C-310/93 P) EU:C:1995:101. See the same concern in merger cases, e.g. \textit{Endemol v Commission} (T-221/95) EU:T:1999:85, [69]; \textit{Laval v Commission} (T-5/02) EU:T:2002:264, [98]. See also from the perspective of the Commission in Notice on access to the Commission file, point 19.

\textsuperscript{841} See e.g. \textit{Adams v Commission} (C-145/83) EU:C:1985:323, [34]; \textit{Salzgitter Mannesmann} (C-411/04 P), [45]. See also GC rulings \textit{BPB} (T-53/03), [34]–[38]; \textit{Volkswagen} (T-62/98), [279]; \textit{Degussa} (T-279/02) EU:T:2006:103, [409]. Most obviously, in \textit{BPB}, the information is communicated to the Commission on condition that it remains confidential. \textit{BPB} (T-65/89), [33]; \textit{BPB} (C-310/93 P), [26]. See also Notice on access to the Commission file, point 19.

\textsuperscript{842} \textit{Roquette Prereres} (C-94/00) EU:C:2002:603, [64]. To that effect, see also Damage Directive, art 5(5).
Pilkington Group case was called upon to consider whether the identity of the applicant’s customers was known to a limited number of persons. The GC invoked the Hearing Officer’s observation and referred specifically to standard practices in the automobile glass market. It concluded that the glass installed in a car bore a visible indication of its trade origin that rendered it possible to associate a particular model with the supplier of the glass.\textsuperscript{843} As a result, the identity of the applicant's customers was not known to only a limited number of persons.

However, to view the specific circumstances in which the information is produced is by no means an easy job. Hence, the CJEU has considered it necessary to establish certain presumptions to improve judicial efficiency in identifying the confidentiality of certain information.\textsuperscript{844}

Previous CJEU caselaw has established a five-year presumption that 'information which was secret or confidential, but which is at least five years old, must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature.'\textsuperscript{845} Hence, in principle, the passage of five years renders information non-confidential. However, parties could still rebut this five-year presumption by claiming that the contested information remains confidential since it constitutes essential elements of the undertaking’s commercial position or that of interested third parties.\textsuperscript{846}

Moreover, previous CJEU caselaw generated from the Commission's public enforcement has confirmed a general presumption of confidentiality that competition authorities could rely upon to find a category of documents not accessible.\textsuperscript{847} Those documents are of a generally similar kind and are likely to apply to requests for disclosure relating to documents of the same nature.\textsuperscript{848}

\textsuperscript{843} Pilkington Group v Commission (T-462/12) EU:T:2015:508, [56].

\textsuperscript{844} For more discussion, see Section 3.4 Presumptions applicable to damages actions, above.

\textsuperscript{845} Evonik Degussa (C-162/15 P), [64].

\textsuperscript{846} Evonik Degussa (C-162/15 P), [64]. See also Pilkington Group (T-462/12), [58]; Order of Spira v Commission (T-108/07) EU:T:2012:226, [65]; Order of Hynix Semiconductor v Council (T-383/03) EU:T:2008:505, [60].

\textsuperscript{847} See Baumeister (C-15/16), [42]; Sweden and Turco (C-39/05 P and C-52/05 P), [48]–[50]; ClientEarth v Commission (C-612/13 P) EU:C:2015:486, [68]–[70].

\textsuperscript{848} See e.g. Baumeister (C-15/16), [42]. For a concrete example, see Pilkington Group (T-462/12), [6]. The Commission in its public enforcement proceeding has divided the information at hand into three categories. The first contains customer names, descriptions of the products concerned and any information that could allow an individual customer to be identified (‘Category I information’). The second contains the number of parts supplied; the allocation of quotas to each car manufacturer; price agreements, pricing calculations and price changes, and, last, the numbers or percentages involved in the allocation of customers between the cartel members (‘Category II information’). The third contains information
Meanwhile, CJEU caselaw has also observed certain categories of information as non-confidential. These include descriptions of the products or categories of products, definitions of the geographic market, information on price developments in the affected market, the precise description and duration of the infringement, and dates and places where the infringement was committed. The disclosure of such information is beneficial. Potential claimants would have more information to judge clearly whether they were adversely affected by the infringement or not. Thus, damages actions brought before national courts are more likely to be genuine. Claimants with such information preparing for antitrust damages actions should be able to identify applicable laws that they could rely upon and to substantiate their damages claims.

It should be noted that the entire discussion above analyzes the concept of confidential information based on CJEU caselaw generated from the Commission’s public enforcement and hence is concerned mainly with access to Commission documents. They provide a point of comparison, as this discussion may be relevant to access to NCA documents. In both cases, national courts encounter some identical difficulties, such as the concepts of business secrets and confidential information, the conditions for overriding public interests, situations where parties’ interests are seriously harmed, the necessity for anonymity, circumstances under which the information is produced, the existence of a general presumption of a category of evidence, and so forth.

There are also specific difficulties when antitrust damages actions are brought before national courts and have a cross-border dimension. One such difficulty

concerning natural persons who were members of the applicant’s staff (‘Category III information’). The GC has confirmed the general presumption that Category II information on prices agreed with each customer, on the quantities of car parts supplied and on details linked to commercial policy as realised in sales agreements can be classified, as a general rule, as business secrets. However, it is the applicant’s own behaviour that it chose to communicate that information precisely to the persons and entities from which that information is supposed to be secret (i.e. its competitors) that harms the confidentiality of that information. See Pilkington Group (T-462/12), [60].

AGC Glass (C-517/15 P), [21].

CDC Hydrogen Peroxide (C-352/13) EU:C:2015:335, [21], [33]-[34], [43]-[56].


Art 6(3) Regulation 864/2007 (Roman II Regulation), where ‘[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be affected’.
is generated from the exercise of competent authorities. It is possible that information legally obtained in one Member State would fall under stricter confidentiality rules in another Member State and thus not be accessible. In this case, how national courts and NCAs cooperate will have a decisive influence on the feasibility of a national court's disclosure order in a different Member State. In principle, national law and bilateral or multilateral agreements would govern this cooperation. At the EU level, art 15(3) of Regulation 1/2003 nevertheless provides for NCAs to submit observations before national courts. However, how this potential conflict would be negotiated between authorities is yet to be seen.

Where the Damage Directive and other EU law are silent on such issues, national courts hearing an antitrust damage action could always request preliminary rulings from the CJEU in case of genuine ambiguities. It is exclusively for the CJEU to interpret EU law, such as to clarify the concept of confidential information in a liquidation case, and in the context of cases concerning access to Commission documents, it has the same connotation when utilized in follow-on damages actions. It could also be that the CJEU considers these discussions unhelpful, and instead interprets EU law based on general principles of EU law, such as the principles of equivalence and effectiveness.

In addition, the confidentiality of the information is one thing and its accessibility is another. Accessibility is determined, first, by asserting whether the information concerned is genuinely confidential or not. Even where that information is confidential, art 5(4) of the Damage Directive empowers national courts to disclose evidence containing confidential information if they consider it relevant to actions for damages. The confidentiality of such information remains preserved by national courts, with effective measures at their disposal. Second, national courts should consider whether the disclosure is proportionate. That is, national courts must exert a delicate balancing of all the legitimate interests of all parties and third parties concerned. Third, in follow-on damages claims, national courts must ensure that the confidential information 'cannot be obtained elsewhere' but from access to the competition

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853 To that effect, see Commission Guidance on IPR Enforcement, 13.

854 See Regulation 1/2003 art 15(3). 'Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of [arts 101 and 102 TFEU]. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State.'

855 Here refers solely to Baumeister (C-15/16).

856 See e.g. Kone (C-557/12).

857 See Damage Directive, art 5(3). In analogy to Recital 13 of Regulation 773/2004, national courts or competition authorities must strike a balance between the need to disclose and the harm the disclosure might cause.
authorities’ files. However, these considerations must not jeopardize the full effect of arts 101 and 102 TFEU, and must not vitiate the rights conferred by the EU law to both parties, in particular the right to claim full compensation.

**Restriction 2: Leniency statements and settlement submissions**

Another important restriction on disclosure of documents in the hand of competition authorities is to respect the interests of effective public

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enforcement of EU competition law.\footnote{Damage Directive, recital 26. While both leniency programme and private antitrust lawsuits have deterrence effect individually, scholars and practitioners have concerned whether the disclosure of evidence would undermine the efficacy of leniency programme. Some authors believe that the threat is not convincing, given the remarkable reduction of fines granted to leniency applicants. See e.g. Alan Rilcy, 'The Modernization of EU Anti-cartel Enforcement: Will the Commission Grasp the Opportunity?' (2010) 31(5) European Commission Law Review 195. Likewise, this possible deterrence effect has been criticized by the Association of European Competition Law Judges in 'Comments on the White Paper on Damages Actions for breach of the EC Antitrust Rules', para 18, which notes that the supposed negative effect of private enforcement on leniency applications has not been demonstrated and may have been over-estimated. Meanwhile, some authors rather lay emphasis on the achievement of private enforcement. See e.g. Thomas Knight and Casy Ste. Claire, 'Reconciling the Conflict: Antitrust Leniency Programs and Private Enforcement', research paper, 3. Available at: \url{https://people.clas.ufl.edu/thomasknight/files/KnightSteClaire_ILE.pdf}. Knight and Claire argue that such a statement leaves out an important point that 'private damages lawsuits reduce the probability of sustained collusion'. The ground for such a statement relies on a mere perception that as private damages action going on, cartels are closely monitored, and due to a fear of being identified, they will cease their infringement. Moreover, Knight and Claire make use of economic model to explain whether private suits would reduce the efficacy of leniency programme or not. The problem lies in the use of economic model, which from the very beginning has established unrealistic preconditions and has simplified people's behaviour by introducing certain variables. It shall be highlighted that phenomenon and people's behaviour in terms of legal environment cannot be anticipated by 'model', since there is no economic element playing dominantly guiding people's behaviour. See further Wouter P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (n 3); Cornelis Canenbely and Till Steinworth, 'Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programmes and Private Damages Actions?' (2011) 2(4) Journal of European Competition Law and Practice 315; Caroline Cauuffman and Niels J. Philippen, 'Who Does What in Competition Law: Harmonizing the Rules on Damages for Infringements of the EU Competition Rules?' (2014) Maastricht European Private Law Institute Working Paper No. 2014/19, available at SSRN: \url{https://ssrn.com/abstract=2520381} or \url{http://dx.doi.org/10.2139/ssrn.2520381}; Philipp Kirst and Roger Van den Bergh, 'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives' (2016) 12(1) Journal of Competition Law & Economics 1.}

A leniency statement is an oral or written presentation voluntarily provided by the undertaking concerned to competition authorities solely for the purpose of obtaining immunity or a reduction of fines under a leniency programme.\footnote{Damage Directive, art 2(16).} It may also be a record describing the knowledge of that undertaking of a cartel and its role therein.\footnote{Damage Directive, art 2(16).}
A leniency programme is considered the most effective source of evidence. It triggers ‘a race to compete’, which causes a classical prisoner’s dilemma. This race accelerates the process of cooperation. Parties thus offer highly self-incriminating corporate statements or submissions in exchange for reductions in fines. However, this process functions only when there is a real risk of detection and punishment by the authorities. In that case, the pay-off from detecting and collaborating with the competition authority is greater than the expected pay-off from continuing the cartel.

If the other party or a third party could access leniency statements in damages actions, the disclosure of highly self-incriminating statements and submissions might deter undertakings from cooperating with authorities. It exposes cooperating undertakings to civil or criminal liabilities more than those that do not cooperate. As a result, leniency applicants become the

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864 Caterina Migani (n 41) 96. See also Wouter P.J. Wils, ‘Leniency in Antitrust: Theory and Practice’ (n 863) 48.

865 Caterina Migani (n 41) 96. See also Caroline Gauftman ‘The Interaction of Leniency Programmes and Actions for Damages’ (2011) 7 The Competition Law Review 205.


867 See Commission Observations in National Grid v. ABB [2011] EWHC 1717 (Ch), [2012] EWHC 869 (Ch), para 17. The Commission discusses ‘whether disclosure would increase the leniency applicants’ exposure to liability, compared to the liability of parties that did not cooperate. In order to answer the question, the Commission first confirms the common ground laid out in point 39 of the Leniency Notice that such an immunity or reduction in fines cannot protect the cooperation company from civil law consequences as a result of its participation in an anti-competitive infringement. In Pfeiderer case, the attitude of the Court shows a concern that leniency programmes would be compromised if such documents are later on to be disclosed to claimants. Pfeiderer (C-360/09), [26]. To address this concern, the Commission first offers its experience in leniency programme where a leniency applicant who received immunity successfully, tends not to challenge a cartel decision, which finds the applicant participating in the infringement. Under the default circumstances, the decision thus ‘becomes definitive against that party long before it becomes definitive against those who contest their liability for the infringement’. Commission Observations in National Grid, para 17.1. Therefore, companies who participated in leniency programme actually face the possibility to take full responsibility for damages claims, and according to the rules set forth in Damage Directive, they could only seek remedies after another company has been decided
‘preferential target of litigation’.\textsuperscript{868} That adds to the additional cost for cooperation. In addition, a potential flood of damages claims endangers the significance of discounts on fines and the pay-off. As a result, the undertaking concerned faces extra time costs, labour costs and lawyer fees to handle those claims.

The same applies to settlement submissions. Settlement submissions are a voluntary presentation by the undertaking concerned to either acknowledge or dispute its participation in and responsibility for an infringement.\textsuperscript{869} As with leniency statements, disclosure in follow-on damages actions shall not frustrate the undertaking’s willingness to engage in settlement procedures, which may negatively influence the public enforcement of the EU competition law executed by the Commission. Such a procedure is employed by the Commission to simplify or expedite administrative processes.\textsuperscript{870}

The Damage Directive offers double security to both documents. First, national courts cannot order a party or a third party to disclose such documents at any time. Second, when a (third) party obtains such documents solely through access to the file of a competition authority, national courts must deem such evidence inadmissible or otherwise protected under applicable national rules in actions for damages.\textsuperscript{871}

One potential problem emerges regarding the definition of leniency statements when parties request disclosure of documents in the hands of the Commission. Under art 6(6) of the Damage Directive, national courts cannot at any time order the disclosure of leniency statements. National courts thus exclude such documents within the meaning of art 2(16) of the Damage

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\textsuperscript{868} See Damage Directive, recital 34. See also CDC Report, 10. However, this role of leniency applicants as the ‘preferential target of litigation’ shall be considered more carefully. In any event, referring to the final decision of a competition authority or a competent review court, claimants usually sue several cartel members jointly, no matter whether they are leniency applicants or not. Moreover, infringers of EU competition law infringements are jointly and severally liable for the harmful result of the infringement. Hence, even though leniency applicants are more easily targeted, the fair share among infringers remains the same. Leniency applicants could always recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. See Damage Directive, art 11.

\textsuperscript{869} Damage Directive, art 2(18).


\textsuperscript{871} Damage Directive, art 7(1).
Directive. When disclosure orders are communicated to the Commission, it is then for the Commission to decide whether to transmit certain documents or not. Before the Commission makes the decision, it may perform due diligence by examining again whether the documents ordered are leniency corporate statements within the meaning of art 4(a) of Regulation 2015/1348.\(^{872}\)

The Damage Directive entered into force on 26 November 2014 and the Regulation 2015/1348 entered into force on 3 August 2015. It was entirely possible for the EU legislature to achieve uniform terminology for leniency documents, which are drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme. Hence, it is unclear if the difference in the terminology provided under these two EU laws is an intentional act or merely a degree of tolerance where the legislature considers it more appropriate for the authority facing the access request to decide.

However, confusion will inevitably emerge in relation to the definition and the exact scope of leniency documents. The possible consequences would be that some documents considered by national courts as not belonging to leniency statements may not be transmittable by the Commission, since the Commission considers such documents as leniency corporate statements, and vice versa. These consequences will become clearer if we examine carefully the definitions of leniency statements under the Damage Directive and of leniency corporate statements under Regulation 2015/1348 separately.

Art 2(16) of the Damage Directive narrows the scope of documents provided for a leniency programme to a description of ‘the knowledge of that undertaking or natural person of a cartel’ and of ‘its role therein.’ This definition has a subjective and personal focus. It only requires the participant’s knowledge of the cartel and its role in the cartel from its own perspective, irrespective of whether the participant’s knowledge is correct or not, or whether the participant plays a marginal role in the infringement.

As to the Regulation 2015/1348, art 4a(2) stipulates similarly that ‘leniency corporate statements’ as ‘voluntary presentations of their knowledge of a secret cartel and their role therein, which may be also in the form of voluntary presentations of the knowledge of former or current employees or representatives of the undertaking.’ This definition does not stop here. The 2006 Leniency Notice further elaborates the meaning of ‘a corporate statement’. It includes a detailed description of the alleged cartel arrangement,\(^{873}\) the name and address of all the participants, information on


\(^{873}\) This includes for instance ‘its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel
which other competition authorities, inside or outside the EU, have been approached, or intended to be approached, and any other relevant evidence.\textsuperscript{874} These contents suggest a more comprehensive and detailed definition as to what voluntary presentations of the undertakings’ knowledge of a cartel shall look like. The undertaking concerned shall provide crucial elements of a cartel that are capable of revealing the nature, organization and the operation of the whole cartel. Hence, a combination of Regulation 2015/1348 and the 2006 Leniency Notice seems to indicate a more objective and impersonal definition of leniency corporate statements, compared with leniency statements provided under the Damage Directive.

One example that illustrates the difference described above would be the knowledge of former employees. If national courts consider that such information falls outside the scope of leniency statements under the Damage Directive, courts then order disclosure from the Commission. However, as this category of documents falls within the scope of leniency corporate statements under Regulation 2015/1348, the Commission might not transmit them according to art 15(1)(b) of Regulation 2015/1348 or according to the Commission’s own Cooperation Notice.\textsuperscript{875}

The duty of loyal cooperation requires the Commission provide information that only the Commission can provide, as soon as possible. The Commission could still refuse the transmission by citing overriding reasons relating to the need to avoid any interference with the functioning and independence of EU or the need to safeguard its interests in, for example, fulfilling the task entrusted to it.\textsuperscript{876}  In actions for damages, the Commission has every reason to consider the key role of the leniency programme in exposing secret cartel infringements and in ending them, as an important tool for the public enforcement of EU competition law.\textsuperscript{877} Transmission shall be subject to these considerations.

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\textsuperscript{874} 2006 Leniency Notice, point 9.

\textsuperscript{875} See Cooperation Notice, para 26(a). It reads, ‘the Commission will not at any time transmit the following information to national courts for use in actions for damages for breaches of Article 101 or 102 of the Treaty: — leniency corporate statements, within the meaning of Article 4a(2) of Regulation (EC) No 773/2004.’

\textsuperscript{876} Order in Zwartveld (C-2/88), [24]–[25]; First and Franex (C-275/00), [49]; Delimitis (C-234/89), [53]. To that effect, see Cooperation Notice, para 26. ‘The Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the European Union or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it.’

\textsuperscript{877} See Damage Directive, recitals 26–27.
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Obviously, there is a gap between how national courts understand leniency statements and how the Commission understands leniency corporate statements. For national courts, they try to resolve the questions raised in the dispute before them. The arguments put forward by the parties dictate what kind of information is even relevant. Hence, their decisions on disclosure have a bearing on the parties’ claims and arguments. The Commission, as discussed above, always has general and policy-oriented tasks, such as to ensure the goal of EU competition law to promote a competitive EU market, the public enforcement of arts 101 and 102 TFEU, its own independence and function as an EU institution, as well as the existence of overriding public interests. As to how this gap would adversely influence the parties’ interest in seeking disclosure or the cooperation between the Commission and national courts, the answers to all issues remain to be seen in practice.

In the end, it might be more than appropriate to request preliminary rulings from the CJEU to clarify the scope of leniency statements under the Damage Directive. The authoritative interpretation of EU law by the CJEU is binding on both national courts and the Commission. Such rulings could also provide more legal certainty to damages claimants.

However, it might take a long time before any CJEU caselaw addresses this issue. Currently, the Damage Directive at least guarantees that the claimant could dispute the nature of certain documents as leniency statements, and national courts hearing this issue may request assistance from the competent competition authority. As to the authors of such documents, they shall at least have the opportunity to be heard.

In addition, both the Damage Directive and the Regulation 2015/1348 exclude pre-existing information. Pre-existing information exists irrespective of the proceedings of a competition authority, whether or not it is in the file of a competition authority. Even though pre-existing information may have significant evidentiary value in proving an infringement, the nature of that information being already public renders it not part of leniency documents and thus accessible by parties or third parties. Claimants could thus get that information from somewhere else.

The discussions above concern the restriction of leniency statements in the hand of the Commission. For leniency statements in the hand of NCAs, it

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878 Transparency Regulation, art 4.
879 Damage Directive, art 6(7).
881 Damage Directive, art 2(17).
882 To that effect, see Ae Beumer and A. Karpetas (n 817) 149. See also Opinion of AG Mazák in Pfleiderer (C-360/09), [42]–[47].
remains unknown how the cooperation between national courts and NCAs from different Member States would proceed. However, this issue is gaining importance, since NCAs are taking the dominant role in applying EU antitrust rules. Observing this, the ECN+ Directive empowers NCAs to ensure the full effect of arts 101 and 102 TFEU more effectively. It will be interesting to see what potential influences the stronger role of NCAs gives rise to. Will it influence the decentralized enforcement of EU competition law? How will it interact with damages actions in national courts, either in the same Member State or in different Member States? Will it have any impact on the distribution of judicial power between NCAs as administrative bodies that actually act as judicial authorities and national courts as traditional judicial bodies in competition law cases?

Meanwhile, the importance of ensuring the existence of the leniency programme is equally relevant in the context of settlement procedures. The Damage Directive guarantees the interests of the effective public enforcement of competition law, by not affecting either leniency programmes or settlement procedures. The need to protect settlement submissions is the same as with leniency statements. Such documents are produced for the sole

883 In fact, the gap between national courts’ understanding of leniency statements and the Commission’s understanding of leniency corporate statements is only a tip of the iceberg. In the end, the difficult part is all about how national courts understand leniency statements under the Damage Directive. This is because national courts are the final authority to rule on antitrust damages actions. What is more problematic is when national leniency programmes come into play. It will only be more gaps regarding the concept of ‘leniency documents’ among various Member States, and among NCAs/national courts that are called upon to consider whether a particular document belongs to ‘leniency documents’ or not.


885 Due to the relevance to the present topic, the author does not intend to discuss these questions further. Hence, questions are proposed to indicate potential confusions that will generate from a stronger role of the NCAs. These questions worth further researching.

886 See Impact Assessment Report – Proposal, 15. See also in non-binding Commission document: Notice on settlement procedures, point 1. The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission’s delivery of effective and timely punishment, while increasing overall deterrence. The cooperation covered by this Notice is different from the voluntary production of evidence to trigger or advance the Commission’s investigation, which is covered by the Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006 Leniency Notice). Provided that the cooperation offered by an undertaking qualifies under both Commission Notices, it can be cumulatively rewarded accordingly. To that effect, see also Notice on settlement procedures, point 33.


888 To that effect, see Damage Directive, art 31. In the whole directive, ‘leniency statements’ and ‘settlement submissions’ are discussed together, except for the definition part in art 2 of
purpose of cooperating with the competition authorities and both types are highly self-incriminating. The interest in ensuring undertakings’ continued willingness to cooperate prevails over the interest to guarantee the right to full compensation. 889 This priority does not distinguish between leniency statements and settlement submissions.

5.2.2 Access to judicial documents

Judicial documents in general refer to ‘the documents relating to the proceedings before a competent court or tribunal deciding on the matter which may comprise, inter alia, (some or all) documents of the antitrust investigation.’ 890 However, for antitrust damages actions, not all judicial documents are relevant. Parties may request access to judicial documents held by EU Courts if the infringement is found by the Commission or appealed before EU Courts. If the infringement is found by NCAs or appealed before national courts, the parties must turn to competent national review courts to request access to judicial documents held by them.

For infringements found by the Commission and appealed before EU Courts, judicial documents that are accessible concern mainly GC judgments and CJEU judgments. As for other documents presented in cases before the GC and the CJEU, they are neither public nor accessible. This is because the right of access under art 15(3) TFEU or under the Transparency Regulation is applicable only when the Court exercises its administrative tasks. It is settled CJEU caselaw that ‘pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission.’ Thus, they do not require the same breadth of access to documents as the legislative activities of an EU institution. 891 For competition infringements appealed before EU Courts, only GC judgments and CJEU judgments are accessible, and these are publicly available in the caselaw database. 892

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890 Opinion of AG Jääskinen in Donau Chemie (C-536/11), [25].
891 Technische Glaswerke Ilmenau (C-139/07 P), [60]. ‘It is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents.’ See Sweden v API (C-514/07 P, C-528/07 P and C-532/07 P), [79]–[82].
As to infringement decisions appealed before national courts, judicial documents in that context concern evidence in the hand of a competent national review court. Conditions shall be differentiated between damages actions brought in the same Member State where the infringement is found, and damages actions brought in a different Member State from that in which the infringement decision is made. It is necessary to explore the different conditions separately.

In case of an infringement of competition law found by a final decision of a review court, this finding is irrefutably established for damages actions brought before national courts in the same Member State. Under such circumstances, the relevant disclosure issues rely on applicable national law and judicial cooperation between national courts to acquire sufficient evidence.

When follow-on damages actions are brought before national courts in another Member State, this final decision shall function as least as prima facie evidence that an infringement has occurred. In this case, it is vital for claimants to access judicial documents of the competent court concerning the infringement.

Under such circumstances, a final judgment has already been delivered. The release of documents will clearly not undermine the integrity of the judicial process. On the contrary, disclosure of such evidence enables claimants and national courts hearing the damages actions to understand the reasons for the final decision and the process through which the final decision was reached. This explanatory function characterizes the ‘accountability of which courts are subject, one that is related to the quality of their deliberative process and the arguments arising from it.’ In addition, to gain knowledge of all the different and opposing views contextualizes the final decision. This is particularly important when the final decision is merely prima facie. Without understanding the whole picture of the infringement, it would be considerably more difficult for national courts to assert the defendant’s role in an infringement and the plausibility of damages claims.

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893 Damage Directive, art 9(1).
894 Damage Directive, art 9(2).
895 Opinion of AG Poiares Maduro in Sweden v API (C-514/07 P, C-528/07 P and C-532/07 P) EU:C:2009:592, [31]. Obviously, considerations related to the integrity of the judicial process or to equality of arms, which militate in favour of secrecy while the case is pending fall away once judgment has been given.
896 Opinion of AG Poiares Maduro in Sweden v API(C-514/07 P, C-528/07 P and C-532/07 P), [32].
Again, access is subject to a balance of interests favouring disclosure and interests favouring non-disclosure. There will certainly be cases where access is declined due to more weighty countervailing considerations. That might be the protection of personal data, confidential information, public interests, and so on. However, in principle, ‘once judgment has been handed down access should be the norm.’

While disclosure is reasonable and legally valid, uncertainties remain in terms of technical issues on practical requests.

Regulation 1206/2001 governs the cooperation between the courts of Member States in the taking of evidence in civil or commercial matters and is thus applicable to antitrust damages actions. This regulation intends to improve, simplify and accelerate cooperation, for the proper functioning of the internal market. Under this Regulation, national courts shall be able to request the court of a Member State to take evidence, or national courts may take evidence directly in another Member State. It is for each Member State to designate a central body responsible for supplying relevant information, seeking solutions to any difficulties in respect of a request and forwarding the request to a competent court. The transmission and execution of the requests shall be direct and as fast as possible. Meanwhile, the legibility and reliability of the document requested shall also be observed.

Aside from this regulation, there are other bilateral, multilateral or international conventions applicable to disclosure-related issues. Regulation 1206/2001 makes it clear that this regulation should prevail over the provisions applying to its field of application in international conventions.

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897 Opinion of AG Poiares Maduro in *Sweden v API* (C-514/07 P, C-528/07 P and C-532/07 P), [36]. See also Transparency Regulation, art 4. Such rights constitute legitimate public and private interests that are worthy of protection as exceptions for disclosure.


899 Regulation 1206/2001, art 1(1). The Member States here exclude Denmark, which is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.


901 Regulation 1206/2001, recital 8.

concluded by the Member States. 903 Meanwhile, the prevailing role of Regulation 1206/2001 does not prevent Member States from concluding evidentiary provisions that are more favourable to claimants in guaranteeing their right to full compensation, 904 with other Member States or in international conventions.

After all, access to national judicial documents may not be such a problematic issue when national publicity legislation has already required a full publication of review courts’ judgments after their antitrust proceedings have ended. 905 A full publication of review courts’ judgments may include details of the case, economic analysis of market conditions, the market share of the undertaking concerned, the court’s reasoning, arguments of both contesting parties, and so on. 906 All such information helps the claimants to draw a clear picture of the infringement and provides them with supportive evidence that they can rely upon to furnish damages claims.

However, what is then problematic is when the review court in its final judgments does not discuss evidence concerning the existence of the harm (either a rise in price or exclusionary effect) at all. This happens when the case only concerns an anti-competitive object, which alone is sufficient to conclude that the undertaking concerned has violated competition rules. Thus, there is no need to examine further anti-competitive effects. 907 Under such circumstances, even though full publication guarantees a wide knowledge of the infringement, the content of judicial documents may not be very helpful. In the end, the claimant would still have to prove how this specific infringement causes specific harm to him.

Moreover, while some Member States require a full publication of the case file of competent review courts, others do not. For instance, the Belgian judiciary does not systematically publish judgments involving antitrust law and, as a result, a meaningful number of judgments is unpublished. By contrast, in the Netherlands the number of published judgments reflects the number of actual

903 Regulation 1206/2001, recital 17.

904 By analogy, see art 8(2) of Directive 2000/43, art 10(2) of Directive 2000/78 and art 19(2) of Directive 2006/54. See also Nigel Foster, Blackstone’s EU Treaties and Legislation (OUP 2017), 417.

905 See e.g. Act on the Openness of Government Activities in Finland.

906 See e.g. German competition cases, information available at: <https://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/EN/Expertensuche_Formular.html?nn=3589876&docId=3589896>.

907 Traditionally, the CJEU in its caselaw has established an object/effect dichotomy. The Court considers at first the purpose of anti-competitive conducts; and then in the absence of sufficient evidence to prove the object, it proves the anti-competitive effect. In other words, if an object of preventing, restricting or distorting competition is obvious; no actual effect needs further consideration. See e.g. T-Mobile (C-8/08), [28]; Order of Commission v Slovakia (C-207/09) EU:C:2009:757, [15]–[16]; GlaxoSmithKline Services (C-501/06 P), [89].

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cases more accuracy, since the judiciary’s policy is to systematically publish all cases involving arts 101 and 102 TFEU.\footnote{Simon Vande Walle, ’6.Private Enforcement of Antitrust Law in Belgium and the Netherlands – is There a Race to Attract Antitrust Damages Actions?’ in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds.), Private enforcement of EU competition law: the impact of the damages directive (Edward Elgar 2018), 120. This point is addressed with reference to Xavier Taton, Thomas Franchoo, Isabel Rooms and Niels Baeten, ’Les actions civiles pour infraction au droit de la concurrence – Chronique de jurisprudence (2011–2015). Private handhaving van het mededingingsrecht in België – Overzicht van rechtspraak (2011–2015), 8 (2017) Tijdschrift voor Belgisch Handelsrecht, 779–829 and Dutch Council for the Judiciary et al., ’Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl’, <https://www.rechtspraak.nl/Uitsprakenen-nieuws/Uitspraken/Paginas/Selectiecriteria.aspx>.} National diversity thus leads to divergence in the availability of information concerning infringement. Member States that require full publication thus potentially attract more damages claimants and become a more popular forum for antitrust damages actions.

The issue of publication of review courts’ judgments has not been identified as a main obstacle to a more effective system of damages actions.\footnote{See e.g. Green Paper, 4–11.} Hence, even though such differences exist among Member States, theoretically speaking, they will not have a significant adverse effect that prevents damages claimants from initiating damages actions. However, it at least influences that claimants choose to bring damages actions in one Member State instead of another.

In the absence of applicable EU law, it is for Member States to lay down detailed rules governing relevant publicity issues, observing the principles of equivalence and effectiveness.\footnote{Courage v Crehan (C-453/99), [29] and the caselaw cited therein. See also Opinion of AG Mazák in Pfeiderer (C-360/09), [23] and Unibet (C-432/05), [42].} Those rules, when applied in damages actions for EU competition law infringements, must ensure the full effect of arts 101 and 102 TFEU and ensure all the rights derived from EU law, in particular the right to claim full compensation.

5.2.3 Other documents before a national court

This category concerns ‘(iii) documentary evidence before a civil court competent to hear an eventual private law claims based on the restriction of competition.’\footnote{Opinion of AG Jääskinen in Donau Chemie (C-536/11), [25].} This includes various evidence presented before a national court deciding on the civil law consequences of an illegal restriction of competition. In antitrust damages actions, this may entail evidence obtained both from pre-trial discovery and from disclosure requests through national
courts during civil proceedings. The Damage Directive provides relevant rules governing disclosure requests through national courts.

Since Section 5.2 has discussed access to evidence in follow-on damages actions, the following paragraphs will discuss access to evidence in stand-alone damages actions. Theoretically speaking, claimants in stand-alone actions can request evidence from the opponent party, a third party, and from a competition authority or a competent review court. However, in stand-alone cases, there is no final decision of a competition authority or a competent review court finding an infringement. Hence, disclosure requests for evidence from the opposing party or from a third party play the main role in encouraging effective damages actions. As to access to evidence from a competition authority or from a competent review court, the considerations are almost identical to discussions presented in Section 5.2 concerning access to evidence in follow-on damages actions.

5.3 Access to evidence in stand-alone damages actions

Stand-alone damages cases are cases where damages actions ‘do not follow on from a prior finding by a competition authority of an infringement of competition law.’ There are fewer stand-alone cases than follow-on actions. However, stand-alone actions have special value not only in correcting the harm to the claimants, but also in emphasizing the role of damages actions as being complementary to public enforcement.

Scholars viewing these actions from the perspective of law and economics have produced various models to demonstrate that stand-alone actions can improve welfare only if the competition authority is sufficiently effective, that is, they play a complementary role to (good) public enforcement, but are not a substitute for it. Based on this finding, they consider it highly important for

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912 Opinion of AG Jääskinen in Donau Chemie (C-536/11), [26].

913 Green Paper, para 1.3. The concept of ‘stand-alone’ actions is discussed in comparison with the concept of ‘follow-on’ actions. The latter concern cases brought after a competition authority has found an infringement. On the different ‘public value’ of the two claim categories, see Ariel Ezrachi, ‘From Courage v Crehan to the White Paper—The Changing Landscape of European Private Enforcement and the Possible Implications for Article 82 EC Litigation’ in Mark Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds.), Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms? (Berlin, Springer-Verlag, 2008), 117, 119–20.

914 Centre for European Policy Studies (CEPS), Erasmus University Rotterdam (EUR) and Luiss Guido Carli (LUISS) (n 312).

national courts to acquire sufficient information and to provide a well-matched competition between litigants.\textsuperscript{916}

Art 5 of the Damage Directive requires Member States ensure national courts’ ability to order the defendant or a third party to disclose relevant evidence that lies in their control, when the claimant could present a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of his claim for damages. Moreover, under the principle of equal arms, upon the request of the defendant, national courts shall also be able to order the claimant or a third party to disclose relevant evidence.

However, this ability to request disclosure of evidence from the opposing party or from a third party is not without limits. Having considered the potential negative effects that may generate from overly broad disclosure,\textsuperscript{917} art 5(3) requires national courts to limit the disclosure of evidence to that which is proportionate. In applying the proportionality test, national courts shall consider the following three conditions.

First, national courts shall examine the plausibility of disclosure requests, that is, whether the claim or defence is supported by available facts and evidence justifying the request to disclose.\textsuperscript{918} This condition is not just a factor to consider. Rather, disclosure is allowed ‘only where a claimant has made a plausible assertion.’\textsuperscript{919} The plausibility reflects the requirement of a minimum level of fact pleading, which requires that claimants shall have sufficient facts to show that there are plausible grounds to suspect some damages caused by the infringement of competition rules.\textsuperscript{920} Meanwhile, national courts shall

\begin{flushleft}
\footnotesize
\textsuperscript{916} Paul Milgrom and John Roberts ‘Relying on the Information of Interested Parties’ (1986) 17(1) RAND Journal of Economics 18. They found that only when the decision-maker, namely the court, acquire sufficient information and when parties’ interests are sufficiently opposed, competition between litigants could lead to efficient decision-making. In fact, in a dispute resolution case, information provision by the parties creates better monitoring (through appeals) than information provision by an external investigator appointed by the decision-maker. See Elisabetta Iossa and Giuliana Palumbo, ‘Information Provision and Monitoring of the Decision-maker In the Presence of An Appeal Process’ (2007) 163 Journal of Institutional and Theoretical Economics, 657–682.


\textsuperscript{918} Damage Directive, art 5(3)(a).

\textsuperscript{919} Damage Directive, recital 16.

\end{flushleft}
always bear in mind the difficulties faced by claimants in asserting detailed facts to support the claim in the initial fact pleading. This difficulty in demonstrating the plausibility of the damages claims is inherent to the information asymmetry in competition law cases.

Second, national courts shall examine practical issues, in terms of the scope and the cost of disclosure.921 The scope of disclosure shall be limited to what is genuinely relevant to the case and shall be proportionate with regard to, on the one hand, the burden of disclosure and, on the other hand, the nature and value of the claims alleged and the seriousness of the infringement in dispute.922 This limitation reflects in essence that the disclosure undertaken must be proportionate to its objectives 923 that is the right to claim full compensation. Beyond that, disclosure may not be necessary.

One central issue underlined in the Damage Directive is to prevent fishing expeditions, where parties to the proceedings request non-specific or overly broad information.924 A generic disclosure is not proportionate to the sole intention to bring a damage action, as it is highly unlikely that damages actions must ‘be based on all of the evidence in the file relating to those proceedings.’925 Hence, the Damage Directive requires Member States to strike a balance between the real need of the claimants to access relevant evidence and the fear that such access might lead to misuse for a fishing expedition.926

The need to prevent a non-specific or overly broad disclosure is also central for national courts when they order disclosure of evidence in the hand of competition authorities. National courts shall assess the proportionality test especially carefully when ‘disclosure risks unravelling the investigation strategy of a competition authority’, by revealing the documents that belong to the case file or by influencing negatively undertakings’ cooperation with the competition authorities.927 This might further be detrimental to the second objective of the Damage Directive – coordination between private and public enforcement.

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923 Takis Tridimas, The General Principles of EC Law (n 63) 89.
924 Damage Directive, recital 23.
925 See e.g. Donau Chemie(C-536/11), [33]; EnBW(C-365/12 P), [106].
927 Damage Directive, recital 23.
Based on the concerns above, to ensure genuinely relevant and necessary disclosures, the Damage Directive provides that national courts shall tailor their orders as ‘specified items of evidence or categories of evidence’, ‘circumscribed as precisely and as narrowly as possible’.\(^{928}\) Where the order aims to obtain a category of evidence, national courts shall identify the category by referring to constitutive elements such as the nature, the object or the content of the requested evidence, the time during which it was drawn up, or other relevant criteria.\(^{929}\)

However, many uncertainties remain as to how precise a category of evidence should be. Is it sufficient to understand specified categories of evidence as evidence related to a specified product, period or territory? Is it sufficient if the category refers to how the evidence is drawn up, such as meeting minutes, telephone records, or annual report? Alternatively, should the specified category demonstrate a particular feature, such as market share, annual profit, price negotiations, or business plan?

One related problem concerns how such evidence shall be disclosed in practice. Competition law cases are often fact-intensive. Information indicating market share may be scattered across several pieces of evidence. Whereas, meeting minutes drawn up on a particular date may contain information varying from price negotiations to business plans. In the end, national courts may still need to examine all the pieces of evidence one by one to ensure the exact scope of information for their disclosure orders.

In any event, in case of genuine ambiguities, national courts could always request preliminary rulings from the CJEU to interpret the Damage Directive and to interpret other relevant EU law, to clarify the exact scope of disclosure.

Furthermore, the issue of scope relates closely to the issue of cost. The question of which party bears the financial burden of disclosure might impose significant impact on claimants’ legal actions—whether they will fish or not.\(^{930}\) To illustrate, this study provides the following table to illustrate how Member States’ choice on the allocation of financial burden influences the cost.

**Table 1: allocation of the financial burden influences costs**

<table>
<thead>
<tr>
<th>Options</th>
<th>result of the case</th>
<th>whether to bear the financial burden</th>
<th>litigation cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>win</td>
<td>YES</td>
<td>only disclosure cost</td>
<td></td>
</tr>
</tbody>
</table>

\(^{928}\) Damage Directive, art 5(2).

\(^{929}\) Damage Directive, recital 16.

<table>
<thead>
<tr>
<th>(1) costs on whoever requests</th>
<th>lose</th>
<th>YES</th>
<th>disclosure cost + litigation cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) costs on whoever loses</td>
<td>win</td>
<td>NO</td>
<td>no cost at all</td>
</tr>
<tr>
<td></td>
<td>lose</td>
<td>YES</td>
<td>disclosure cost + litigation cost</td>
</tr>
</tbody>
</table>

Option 1 places the financial burden on whoever requests the disclosure. Option 2 treats the financial burden as potentially recoverable and places it on whoever loses the case. Compared with Option 2, Option 1 has a stronger deterrence effect in preventing fishing expeditions. For this Option, no matter whether the requester wins or loses the case, they must always pay the price for the request. The more they request, the more they pay. Requests continue, until the compensation rewarded no longer offsets the disclosure cost.

However, the deterrence effect might be so strong that it extends to potential damages claimants. In stand-alone cases, claimants rely on disclosure to prove their claims. The claimants who win the case still bear the disclosure cost. This additional cost might render the claimants under-compensated when the final pecuniary gain is less than the actual disclosure cost. This explains why ‘the damage awards should include pre-judgment interest in order to compensate the victims for the real value of the harm suffered.’

Under Option 2, the disclosure cost is potentially recoverable. The risks are still there, but the recoverability is at least comforting. The deterrence effect – not as strong as that under Option 1 – still deters a non-specific search to some extent.

The above example shows how the allocation of the financial burden of disclosure will influence parties’ willingness to fish. Hence, the national court deciding the disclosure request shall consider the cost of disclosure as an important aspect of the proportionality test.

As to the third condition of the proportionality test, national courts shall examine whether the disclosure has guaranteed the protection of confidential information. Damages claims for competition law cases usually involve commercially sensitive information. National courts are empowered to

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disclose evidence containing confidential information only when they have effective measures to protect such information at their disposal.\textsuperscript{934}

The definition of confidential information, including business secrets and other confidential information, can refer to the discussion in Section 5.2.1.3 on restrictions on disclosure of administrative documents. The considerations are almost identical.

Similarly, a balancing test is required to ascertain whether the confidential treatment granted to certain information is proportionate or otherwise \textit{de facto} precludes the exercise of the right to full compensation. One relevant concern is that if addressees of a disclosure order are able to invoke a general confidentiality defence that blocks the disclosure of any commercially sensitive information, the disclosure of evidence under art 5 that is essential for claimants to establish a damage claim would become practically impossible.\textsuperscript{935}

In exercising this balancing test, the ability to reduce the scope of disclosure and to limit its impact is an important parameter.\textsuperscript{936} National courts may consider, on the one hand, the value of the damages claims and the degree of relevance of the evidence requested. On the other hand, they may also consider the harmful consequences the disclosure may have on the interests of the information owner. National courts may additionally consider the difference between disclosure to the claimants only and disclosure to the public at large.\textsuperscript{937}

So far, the CJEU has not considered this issue in relation to the proceedings of antitrust damages actions. However, in a different context – the context of IPR enforcement – the CJEU has considered the balancing test between the protection of victims of infringements of EU law and the protection of the privacy of the infringer, in assessing the proportionality in disclosing the personal data of natural persons. A reading of an IPR enforcement case may provide some guidance on how the CJEU might interpret the proportionality test in disclosure of confidential information in damages actions by analogy.

In \textit{Promusicae}, the applicant sought information from Telefónica, a Spanish provider of Internet access. Such information concerned the names and addresses of certain Internet users who used ‘file sharing’ in respect of music files for which the applicant and its members held the exploitation rights. The applicant intended to bring civil proceedings using the data. Telefónica refused the request and claimed that under the national law (‘LSSI’) such data are only available in a criminal investigation or for safeguarding public security and

\textsuperscript{934} Damage Directive, art 5(4).

\textsuperscript{935} Staff Working Paper – WP, 35.

\textsuperscript{936} ibid, 36.

\textsuperscript{937} ibid, 36.
national defence, and not for civil proceedings.938 Thus, the Court was asked whether EU law, in particular the E-Commerce Directive,939 the Information Society Directive,940 and the IPR Enforcement Directive, required Member States to lay down an obligation to communicate personal data in the context of civil proceedings.941

Having considered the intention of the provisions of these three directives, in the light of the TRIPS Agreement and the Charter, the Court ruled that Member States were not compelled to lay down an obligation to not communicate personal data in the context of civil proceedings.942 The core issue of the proportionality test in this case was to balance IPR holders’ interests in protecting their right to intellectual property and gaining an effective remedy with a further fundamental right to guarantee protection of personal data and hence of private life.943 The Court examined whether the disclosure at issue was proportionate to the legitimate aim pursued. In terms of the legitimate aim in that case, reference must be made to the rules provided in the three directives, as to ‘what circumstances and to what extent the processing of personal data is lawful and what safeguards must be provided for.’944 In other words, what EU legislators intended to achieve by adopting directive measures.

The Court took the view that the provisions of the three directives were relatively general, because they must apply to many different situations. Thus, they entailed a certain degree of flexibility that left ‘the Member States with the necessary discretion to define transposition measures which may be

938 Promuscae (C-275/06), [29]–[34].


941 Promuscae (C-275/06), [41].

942 Promuscae (C-275/06), [57]–[63]. The Court identified that arts 41, 42 and 47 of the TRIPS Agreement required an effective protection of intellectual property rights and the institution of judicial remedies for their enforcement. What’s more, the national court referred to arts 17 and 47 of the Charter first to protect the right to property, including intellectual property, and second to guarantee the right to an effective remedy. However, the Court also noticed that the Directives mentioned in this case sought to ensure full respect for the rights set out in arts 7 and 8 of the Charter, which guaranteed the right to respect for private life (art 7) and the right to protect personal data (art 8).

943 Promuscae (C-275/06), [61]–[63].

944 Promuscae (C-275/06), [66]. As the Court ruled in Schecke, the derogations and limitations in relation to the protection of personal data must apply only insofar as is strictly necessary. Volkner und Markus Schecke and Eifert (C-92/09 and 93/09) EU:C:2010:662, [77], referring to Satakunnan Markkinapörsssi and Satamedia (C-73/07) EU:C:2008:727, [26].
adapted to the various situations possible.\textsuperscript{945} However, the Court did require that when transposing the directives, Member States must 'take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the [EU] legal order.'\textsuperscript{946} Furthermore, the authorities and national courts must implement the transposed measures not only in consistency with the directive \textit{per se}, but also in conformity with fundamental rights and with the general principles of EU law, as well as the principle of proportionality.\textsuperscript{947}

The Court’s ruling sheds some light on the balancing test to ensure the proportionality of disclosure. The balance excludes any autonomous right either to grant access or to refuse it.\textsuperscript{948} To ensure proportionality, national courts shall always consider whether the disclosure is necessary to achieve the objective – the right to full compensation.\textsuperscript{949} As to many other issues not yet discussed, the national court could always request preliminary rulings to clarify the test of proportionality and to clarify whether that test has the same connotation as that given in IPR enforcement cases under IPR Enforcement Directive.

In short, the three conditions above must always be considered in exercising the test of proportionality. While it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the disclosure observing the principles of equivalence and effectiveness,\textsuperscript{950} national courts are the authority to rule on this issue in practice. They shall apply their proportionality test in the spirit of the Damage Directive that is to ensure the right to claim full compensation. They are under obligation to ensure the full effect of arts 101 and 102 TFEU, and the full effect of the Damage Directive. Meanwhile, they must also guarantee all the rights conferred on by EU law to the claimants as well as to the defendants, so that all the parties have all the protections required by EU law.

\textsuperscript{945} Promusicae (C-275/06), [67]; Lindqvist (C-101/01) EU:C:2003:596, [84].
\textsuperscript{946} Promusicae (C-275/06), [68].
\textsuperscript{947} Promusicae (C-275/06), [68]. See also Lindqvist (C-101/01), [87]; Ordre des barreaux francophones and germanophone and Others (C-305/05) EU:C:2007:383, [28]. In addition, this also applies to cases concerning injunctions. See Scarlet Extended (C-70/10) EU:C:2011:771, [48]–[49]; SABAM (C-360/10) EU:C:2012:85, [46]–[47].
\textsuperscript{948} To that effect, see Coty Germany (C-580/13), [36]. In this case, the Court ruled out an autonomous right to information which individuals may exercise directly against the infringer or the persons covered by art 8(1)(a) to (d) of the IPR Enforcement Directive.
\textsuperscript{949} To that effect, see Takis Tridimas, \textit{The General Principles of EC Law} (n 63) 96.
\textsuperscript{950} Courage v Crehan (C-453/99), [29]; Palmisani (C-261/95), [27]; Rewe-Zentralfinanz (C-33/76), [5].
5.4 Final remarks

The discussions above demonstrate claimants’ options to obtain sufficient evidence to support their damages claims and the difficulties they may encounter during the requests. Obviously, access to evidence in damages actions is no longer a game played solely between contesting parties. Instead, it involves various players, including national courts, third parties, NCAs, the Commission, and even EU Courts in case of appeals or preliminary rulings. Their intervention and, sometimes, their crucial role in determining the level of access, render the issue of access to evidence somewhat unpredictable and uncertain. Even though both national law and EU law are applicable to claimants access requests, it is unknown whether national courts will actually order the disclosure, whether the Commission will transmit the information, how a national court could order disclosure from the NCA in another Member State, whether access could be achieved in full or in part, and so on.

Of course, all these practical questions will reveal themselves as more cases are presented before national courts. For the moment, there are already various sources of rules and significant room for discretion, so the entirety of the law is not easy to grasp and the outcomes of claims concerning access are not easy to predict. This in itself can deter damages claims. The multi-player game exacerbates the matter, when it seems confusing to claimants as to what documents they could ask to access (after calculating the request cost); what constitutes ‘a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility’ of their claims;\(^{951}\) and how much time, energy and labour costs they must input to claim damages.

The concerns above derive from the predominant importance of access to evidence. The issue of access to evidence in the context of damages actions for EU competition law infringements is dominated by considerations to ‘overcome ... structural information asymmetry’, ‘to improve victims’ access to relevant evidence’, and to guarantee ‘a minimum level of disclosure inter partes’.\(^{952}\) The EU legislature regards this issue as the key element to ensure ‘a more level playing field’ and to ensure effective damages actions. This, in the author’s view, serves the basic requirement of adversarial trial and that the claimant is an equivalent position to raise the case against the defendant.\(^{953}\)

However, it is questionable whether the uncertainty and unpredictability accompanied by this multi-player game in the post-Directive state of law is sufficient to compensate for information asymmetry or to guarantee a minimum level of disclosure inter partes, let alone to ensure effective damages actions. Legal certainty is the premise for any assured remedies provided for

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\(^{951}\) See Damage Directive, art 5.

\(^{952}\) White Paper, 5.

\(^{953}\) To that effect, see Andrew Choo, Evidence (5\(^{th}\) edn, OUP 2018) 55.
the claimants. Where there is a lack of legal certainty, it is hard for claimants to ascertain what rights they enjoy and what obligations they must obey under the Damage Directive, or what procedural guarantees they could expect in this multi-player game.

In practice, the complexity of this multi-player game may not be attractive for claimants who only are claiming a small amount of money, are short of resources to anticipate the likeliness of success or are tired of going through all relevant laws to find out how and under what condition the access will be granted. In that case, the issue of access to disclosure may not bring ‘greater legal certainty’ as it is expected to.\textsuperscript{954}

\textsuperscript{954} See Damage Directive, recitals 7, 9, 10, 34 & 48.
6 Conclusions

6.1 Overview of issues discussed

In damages actions for EU competition law infringements, arts 101 and 102 TFEU produce a direct effect in relations between contesting parties. In the absence of applicable EU law, evidentiary issues fall under national procedural autonomy, with the limits of the principles of equivalence and effectiveness. However, the imposition of the Damage Directive – together with other EU law and CJEU caselaw – affects the application of evidentiary rules such as burden of proof, standard of proof, and access to evidence before national courts.

This study explores the theme from three main aspects: the burden of proof, the standard of proof, and access to evidence. The burden to prove infringement is codified clearly in art 2 of Regulation 1/2003, which falls on whoever alleges the claim. The burden to prove other elements of damages claims, including the harm and the causal link, falls on whoever makes an allegation. The CJEU has developed public enforcement presumptions to promote a cost-efficient judicial procedure. However, only when the CJEU in its public enforcement judgments or preliminary rulings recognizes explicitly that such presumptions constitute interpretations of arts 101 and 102 TFEU or an integral part of the EU competition law, will these presumptions become automatically applicable in private damages actions. As to other public enforcement presumptions, whether they apply in a given damages dispute remains for national courts to consider within their discretionary power. Where there is a genuine ambiguity of EU law, national courts may request a preliminary ruling from the CJEU for interpretation of EU law.

As for the issue of the standard of proof, early CJEU rulings in public enforcement cases have indicated a general requirement of precise, consistent and convincing evidence in proving the infringement. Like public enforcement presumptions, some aspects of this general requirement have been confirmed by the CJEU as interpretations of arts 101 and 102 TFEU and thus are applicable in private damages actions. Even so, there remain practical difficulties when national courts apply them in a given dispute. As to other aspects of this general requirement, the CJEU’s discussions are of some reference value that national courts may benefit from in private actions. As to the standards of proving the harm and the causal link, they are in principle governed by national law within each Member State. In applying national rules on this issue, national courts must observe the principles of equivalence and effectiveness, ensure the full effect of arts 101 and 102 TFEU, and guarantee all the rights conferred by EU law to both contesting parties, in particular the right to full compensation.

In terms of the issue of access to evidence, this study distinguishes between follow-on cases and stand-alone cases. In follow-on damages actions, a competition authority has made its decision that the undertaking concerned violates EU competition law. Thus, it is vital for damages claimants to have
access to evidence held by competition authorities (the Commission, NCAs or a competent review court). For the Commission’s file, the claimants could either request direct access under the Transparency Regulation or request national courts to order the disclosure under the Damage Directive. In terms of the NCAs’ files, it is largely unknown how Member States could ensure such disclosure. However, possible national diversities must not vitiate the full effect of arts 101 and 102 TFEU and must always guarantee the individual claimant’s right to full compensation. In both conditions, access must also observe the protection of business secrets and other confidential information, and the absolute ban on disclosing leniency statements and settlement submissions.

In stand-alone damages actions, in the absence of a competition authority finding an infringement, claimants can rely significantly on the national courts’ orders to disclose evidence from the defendant or a third party. National courts should exercise the proportionality test to ensure that access requests of a private party are proportionate to ensure the objectives of the Damage Directive and the full effect of arts 101 and 102 TFEU. However, there are practical difficulties regarding disclosure in damages actions before national courts. Where the Damage Directive is genuinely ambiguous on issues concerning disclosure, it is appropriate to request preliminary rulings from the CJEU to seek interpretations of relevant EU law or of general legal principles.

This study observes that the EU law and the CJEU caselaw remain significantly silent on many issues related to evidentiary rules in private enforcement of the EU competition law. National courts may draw inspiration and hints as regards the correct application of EU law and national solutions that are compatible with EU principles from previous CJEU caselaw concerning areas such as non-contractual liability of EU or IPR enforcement cases. Nonetheless, genuine ambiguities in the interpretation of the Damage Directive and other EU law could always be submitted to the CJEU to resolve in the form of preliminary rulings.

In the absence of applicable EU law and CJEU caselaw, it is in principle up to the Member States to lay down detailed rules governing the rules of evidence in damages actions, observing the principles of equivalence and effectiveness. However, this study observes that in parallel application of both EU and national law in private competition enforcement cases, the CJEU in its caselaw ‘incorporates’ certain features and concepts of the EU competition law that national courts must respect. Such ‘incorporation’ gives rise to a set of fragmentary and non-systemized rules of evidence in private antitrust damages actions, as influenced by the substance and the goal of EU law.

This condition raises concerns when damages claimants are not certain of the applicable rules they could rely on, or of national courts’ application of those rules, or of the rights and obligations conferred to them by those rules. It also imposes higher requirements on the quality and capacity of national
judiciaries and pushes national courts to be fully prepared for damages actions for EU competition law infringements. These features all reinforce EU competition law and damages actions for EU competition law infringements as being highly specialized areas that are not easily accessible by ordinary judges or by ordinary victims.

6.2 Key findings and further concerns

6.2.1 The role of the CJEU: a regulatory dimension

Even though the Damage Directive, Regulation 1/2003 and other EU law have provided some evidentiary rules in damages actions, many issues, even central ones, are not discussed exhaustively and thoroughly in the legislation. As a result, the role of the CJEU in developing law in private enforcement of EU competition provisions remains highly central.955 To illustrate, in antitrust damages actions, national courts are under obligation to ensure the full effect of arts 101 and 102 TFEU, and to ensure that the Damage Directive gains its full effect. Whenever there are genuine ambiguities in EU law, national courts may request preliminary rulings from the CJEU to give authoritative interpretations on ambiguities. National courts adjudicating as the last instance are indeed obliged to do so. By means of preliminary rulings, the CJEU clarifies the meaning of the Treaty provisions, general legal principles and relevant EU law and emphasizes various issues, such as the full effect of EU law, the meaning of full compensation, the coordination between private and public enforcement of the EU competition law, and so forth.

In dealing with damage-related issues, the CJEU has gone from a passive role to a proactive one.956 Take the principle of national procedural autonomy as an example. For instance, in Dounias, the Court was asked whether 'in judicial


956 See e.g. the passive role of the CJEU in early caselaw where the Court barely discussed the private enforcement matters and it relied mainly on national law: Société de vente de ciments v Kerpen & Kerpen (C-319/82) EU:C:1983:374. This old case concerned nullity of contract term under art 101(2) TFEU. The Court ruled that the automatic nullity decreed by art 101(2) TFEU applied only to those contractual provisions that were incompatible with art 101(1). 'The consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations' were not a matter of EU law and must be determined by national courts under relevant national law. Kerpen (C-319/82), [11]–[12].
proceedings seeking to establish State liability with a view to obtaining compensation for damage caused by a breach of [EU law], witness evidence is admissible only in exceptional cases.\textsuperscript{957} The CJEU ruled: ‘[EU law] does not preclude a provision of national law under which ... provided that such a provision applies also to similar domestic actions and that it does not prevent individuals from asserting rights which they derive from the direct effect of [EU law].’\textsuperscript{958} Similarly, when dealing with presumptions, the Court again put it passively that ‘[EU law] does not preclude the national court from proceeding on the assumption ... provided that the principles of effectiveness and equivalence are observed.’\textsuperscript{959}

Later, the Court converted this principle from pure negative obligations to positive requirements. In \textit{Courage}, the CJEU ruled explicitly that ‘in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State ... to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU law],’ provided that the principles of equivalence and effectiveness were observed.\textsuperscript{960} The transformation from ‘not precluding a provision of national law’ to ‘liability to lay down the detailed rules’ indicates an active requirement to act and to provide guarantees to the right to damages, as also embodied in the Damage Directive.\textsuperscript{961}

This transformation indicates the increasing involvement of the CJEU in monitoring the rules of evidence as well as national procedural law.\textsuperscript{962} The CJEU caselaw sets up the positive obligation that Member States shall lay down detailed procedural rules governing this issue. Then it decides which national evidential rules comply with EU law principles and which do not. By doing so, the CJEU makes possible a consistent approach regarding domestic procedural

\textsuperscript{957} \textit{Dounias} (C-228/98), [68].

\textsuperscript{958} \textit{Dounias} (C-228/98), [72].

\textsuperscript{959} \textit{Direct Parcel} (C-264/08), [36].

\textsuperscript{960} \textit{Courage v Crehan} (C-453/99), [29]. See also \textit{Manfredi} (C-295/04 to C-298/04), [62]–[64]. In this case, the Court pointed out that those rules that must be provided under national law included 'the application of the concept of 'causal relationship'. For cases concerning state liability, see e.g. \textit{Palmisani} (C-261/95), [27]. The Court ruled that 'it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused.'

\textsuperscript{961} Look carefully at the manner of the writing, the whole Damage Directive speaks in a requiring tone that 'Member States shall ensure that...' Member States shall ensure 'the right to full compensation' (art 3), shall ensure the principles of effectiveness and equivalence (art 4), shall ensure disclosure of evidence (arts 5–7), shall ensure the effect of national decisions (art 9), shall ensure joint and several liability (art 11), and so forth.

\textsuperscript{962} The CJEU no longer merely precludes a national provision, but requires substantially that national law shall ensure, for instance, the right to claim full compensation.
law (here, the rules of evidence).\textsuperscript{963} After this, the CJEU, in response to preliminary rulings submitted by national courts and in appeals generated from public enforcement cases, can develop an EU-wide understanding with regard to the issue of disclosure, the criteria of weighing-up, the standard of proof in finding an EU competition law infringement, the conditions where those rules invalidate a contractual term, and so forth.\textsuperscript{964} Apparently, by way of interpreting the EU law and general EU principles, the CJEU acquires the ability to conduct a \textit{de facto} review of national law.\textsuperscript{965}

During that process, the CJEU is capable of incorporating EU law concepts into the application of national law.\textsuperscript{966} The ‘weighing-up interests’ test is one typical example. In \textit{Huawei v ZTE}, the Court introduced the balancing test to assess the appropriateness of bringing an action for a prohibitive injunction or for the recall of products. The Court held that it must ‘strike a balance between maintaining free competition – in respect of which primary law and, in particular, art 102 TFEU prohibit abuses of a dominant position – and the requirement to safeguard that proprietor’s intellectual-property rights and its right to effective judicial protection, guaranteed by art 17(2) and art 47 of the Charter, respectively.’\textsuperscript{967} The interpretation by the CJEU regarding the balancing of interests aims to provide ‘a high level of protection for intellectual-property rights’.\textsuperscript{968} This ruling moves towards an effective enforcement of exclusive intellectual property rights.

In this case, the balancing test includes not only an ‘EU policy element’ to maintain free competition, but also an ‘EU principle element’ to ensure

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\textsuperscript{963} The need to safeguard a certain level of uniformity of law is embedded deeply in the EU competition law. The aim of the EU competition law is to make ‘common market’ or ‘internal market’ work better. As noted by the Commission, the competition in this context is a Europe-wide issue. With the growth of the internal market and globalisation, the effects of illegal behaviour, like running a cartel, are often felt in many countries across the EU and beyond. Such a market will only function better if the rules applicable here are uniformly interpreted and consistently applied. Here lies the fundamental difference between the tasks entrusted by the CJEU (and other EU Courts) and by national courts.

\textsuperscript{964} See e.g. \textit{Aziz} (C-415/11) EU:C:2013:164, [65]–[75]. The Court requires the Member States to address pitfalls in national law, where ‘the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out.’ \textit{Aziz} (C-415/11), [76].

\textsuperscript{965} Jürgen Basedow (n 957) 447.

\textsuperscript{966} Rainer Kulms (n 859) 227.

\textsuperscript{967} \textit{Huawei Technologies} (C-170/13), [40]–[43], [55].

\textsuperscript{968} \textit{Huawei Technologie} (C-170/13), [58].

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effective judicial protection. These EU law elements\(^{969}\) are involved through a contextual approach. The contextual approach requires that the balancing test shall take due account of ‘the specific legal and factual circumstances’,\(^{970}\) of the policy guarantees of arts 101 and 102 TFEU, and of all other rights conferred by EU law for both parties.

Furthermore, the imposition of either ‘EU policy elements’ or ‘EU principle elements’ may have presupposed a default priority in the various interests. This priority is quite visible in art 4 of the Transparency Regulation. ‘Public interests’ usually outweigh ‘private interests’ such as the commercial interests of natural or legal persons. The ‘public interests’ are defined as ‘EU public interests’, which concern international relations, the financial, monetary or economic policy of the EU, and so on.\(^{971}\) In addition, the CJEU caselaw brings additional contents to this priority. For instance, in several cases concerning access to the Commission’s files, the Court established a presumption that ‘disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities.’\(^{972}\)

The ‘EU policy elements’ or ‘EU principle elements’ can also be found in phrases such as ‘injured party’, ‘specified items of evidence or relevant categories of evidence’, ‘as precisely and as narrowly as possible’, and ‘proportionate’. The meaning and the content of these EU legal elements are largely influenced by the substance and the goal of the EU law. The imposition of these EU legal elements nevertheless influence how national courts apply these phrases, on the premises that relevant issues are presented before the CJEU and that national courts actually follow the Court’s precedents.

Some concerns are that the Court is gnawing away the edges of national civil procedure by means of directive measures that improve the functioning of the internal market. Meanwhile, the CJEU itself is ready to act vigorously through ‘interpretation’ that affects individual protection in competition law cases. Its impetus in favour of the full compensation and in favour of the full effect of EU law nevertheless requires certain adjustments in national evidentiary rules \textit{per se} and in practical applications.

\(^{969}\) Notably, both ‘EU policy elements’ and ‘EU principle elements’ are provided in CJEU caselaw that constitutes an indispensable part of EU law. Hence, they are all together regarded as ‘EU law elements’ in the current and following discussions.

\(^{970}\) \textit{Huawei Technologie} (C-170/13), [55]–[56]; \textit{Post Danmark} (C-209/10), [26]; \textit{Deutsche Telekom v Commission} (C-280/08 P) EU:C:2010:603, [175]; \textit{Michelin v Commission} (C-322/81) EU:C:1983:313, [73]; \textit{British Airways} (C-95/04 P), [67].

\(^{971}\) See Transparency Regulation, art 4.

\(^{972}\) \textit{Technische Glaswerke Ilimenau} (C-139/07 P), [61]; \textit{Éditions Odile Jacob} (C-514/14 P), [123]; \textit{Agrofert Holding} (C-477/10 P), [64]; \textit{LPN and Finland} (C-514/11), [64]; \textit{EnBW} (C-365/12 P), [93].
However, the imposition of EU law elements may fail to achieve an EU-wide understanding of many issues, due to the CJEU’s inconsistencies in interpreting directives. In practice, the CJEU’s caselaw records an inconsistent approach from ‘cautious interpretation of detailed provisions that resists transplant to a more general level’ to ‘remarkably ambitious willingness to find solutions that are by no means evidently mandated by the explicit terms of relevant EU measures.’ Sometimes, the CJEU’s attitude diverges on the same issue. In fact, such inconsistencies have already extended to various fields of EU law.

Those inconsistencies in the Court’s interpretation of directives do not necessarily mean that the Court’s interpretation is without limits. Instead, the CJEU’s *judicial acquis* in interpretation of EU law is subject to various constraints. Such constraints include the public policy pursued by arts 101 and 102 TFEU, the complementary role of damages actions, the objective of the right to full compensation under the Damage Directive, the need for effective procedural remedies, as well as compliance with the principles of equivalence and effectiveness.

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974 See e.g. the issue of ‘non-material damage’. In Leitner, the CJEU considers that the existence of non-material damage in some Member States but not in others would cause significant distortions of competition. The Court employs a wide interpretation that the right to compensation include damage other than personal injury–non-material damage. See *Leitner* (C-168/00) EU:C:2002:163,[21]–[23]; *Brazzelli Lualdi*(C-136/92 P), [42]; *Safa Nicu*(C-45/15 P), [49]. See also GC rulings: *Brazzelli Lualdi v Commission* (T-17/89) EU:T:1992:25, [35]; *Moritz v Commission* (T-20/89) EU:T:1990:80, [19]; *Holcin (Deutschland) v Commission* (T-28/03) EU:T:2005:139, [63]; *Moot v Commission* (T-41/95) EU:T:1996:87, [37]. However, the CJEU in a product liability case concludes that it is solely for national law to govern the compensation for non-material damage. See e.g. *Veedfeld* (C-203/99) EU:C:2001:258, [27]; *Hagen v Zeeghege* (C-365/88) EU:C:1990:203, [20].

975 For an elaborative analysis of the Court’s inconsistencies in interpreting directives, see Stephen Weatherill (n 975) 185–203. Weatherill took the examples from the issue of ‘cooling-off’ period in consumer protection. He found that the Court’s caselaw varied between reluctance to import a solution found in directive to another in *Schulte* (C-350/03) EU:C:2005:637; regulating issues not covered by the directive in *Leitner* (C-168/00); stepping further to seek general principles of civil law in *Hamilton* (C-412/06) EU:C:2008:215. It appears that the more the Court intervenes the EU regime, the less space it allows for national autonomy, and the more it trespasses on the legislative function. The examples given by Weatherill are representative, but lack universality. It may be argued that such inconsistencies may apply only in consumer protections. Just as Weatherill concluded in his work: ‘The Court accordingly gives special force to EU consumer law and, via its application by national courts, it accentuates the contours of consumer law as a distinct discipline within national legal order.’ For now, no one can say for sure whether such inconsistencies will also appear in damage actions for EU competition law infringements. However, it seems sufficient to raise the concerns.

976 See Damage Directive, recitals 1–14. This is not an exhaustive list.
In fact, the form of ‘directive’ intends to leave a huge margin of appreciation to Member States. This is particularly the case for evidentiary rules, as essentially it is a matter governed by national law. It follows that the role of the CJEU in this regard is restricted, and it must be careful not to ‘specify’ or ‘contextualize’ the general rules. In the end, it may be worth questioning how much ‘harmonization’ can be expected from the Court’s rulings and how much is really needed for antitrust damages actions that proceed before national courts.

6.2.2 Further implications for ‘incorporation’ of EU law elements

The ‘incorporation’ of EU law elements is one corollary of the parallel application of both EU law and national law on evidence-related issues. This ‘incorporation’ has further practical and theoretical implications.

In private damages actions, the rules of evidence applicable to normal damages torts already exist in various Member States. Such rules exist coherently in the procedural rules within each national legal system. As the Damage Directive is in force, Member States can integrate evidentiary rules provided in the Directive into their national legal systems.

Later, as genuine ambiguities arise, the CJEU is called upon to clarify evidence-related issues through interpretation. When the Court interprets certain EU law or general EU principles, they come gradually and piecemeal. Specific issues are addressed, when parties appeal before the EU courts or when national courts request for preliminary rulings. The standard of proof best exemplifies this situation. The CJEU has spent years developing a general requirement of precise, consistent and coherent evidence on the standard to prove the competition infringement. As previously discussed, some aspects of this requirement have been confirmed by the Court as interpretations of arts 101 and 102 TFEU and thus are automatically applicable in private damages actions. As to other aspects not yet confirmed by the Court, they fall within national courts’ discretionary power to consider their practical application in a given dispute.

As a result, the evidentiary rules governing damages actions appear to be fragmentary and non-systematized. This feature raises further concerns that a set of fragmentary and non-systematized evidentiary rules may lead to the lack of legal certainty.

977 The problematic nature of the CJEU’s power to rule on the ‘optimal level of specificity’, see Hugh Collins, The European Civil Code. The Way Forward (CUP 2008), 200. In practice, this problem has been testified in the rejected proposal for a Consumer Rights Directive (PCRD).

978 For detailed discussion on which aspects of the general requirement of precise, consistent and coherent evidence has been recognized explicitly by the CJEU and which has not. See Section 4 Standard of proof, above.
The principle of legal certainty refers to the situation where parties to the law must know what the law is in order to be able to plan their actions accordingly. As the Court requires, ‘rules of law [must] be clear, precise and foreseeable in their effects’, in particular where they may have adverse effects on individuals and undertakings. Previous CJEU caselaw has considered this principle creatively, finding various propositions in the procedural aspects. For instance, the CJEU has invoked legal certainty to determine the jurisdiction of national courts to apply art 101 TFEU. The Court argued that ‘conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices.’ As the principle applies in various conditions, it is clear that this principle cannot be viewed in isolation but in the context of judicial reasoning as a whole.

For damages actions generated from EU competition law infringements, the lack of legal certainty generated from a set of fragmentary and non-systemized evidentiary rules and its problems are reflected in the following aspects.

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980 *Deza a.s v European Chemicals Agency* (C-419/17 P) EU:C:2019:52, [69]; *Global Starnet* (C-322/16) EU:C:2017:985, [46]; *Berlington Hungary and Others* (C-98/14) EU:C:2015:386, [77]; *Test Claimants in the Franked Investment Income Group Litigation* (C-362/12) EU:C:2013:834, [44]; *ASM Brescia* (C-347/06) EU:C:2008:416, [69]; *VEMW and Others* (C-17/03) EU:C:2005:362, [80].

981 *Delimitis* (C-234/89), [47]. See similar case in relation to the provisions on State aids, *SPEI and Others* (C-39/94) EU:C:1996:285, [40].

982 See the application of the principle of legal certainty to ensure that limitation period must be fixed in advance and any application by analogy of a limitation period must be sufficiently foreseeable for a person. *Fallimento Traghetti del Mediterraneo* (*FTDM*) (C-387/17) EU:C:2019:51, [71]–[76]; *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10) EU:C:2011:282, [32]; *Danske Slagerier* (C-445/06) EU:C:2009:178, [34]; *Marks & Spencer* (C-62/00) EU:C:2002:435, [39]. See the application of the principle of legal certainty on Commission’s decisions. *Gasorba and Others* (C-547/16) EU:C:2017:891, [27]. See the application of the principle of legal certainty on the compatibility of an aid measure with the Commission’s prior control in matters of State aid. *ANGED* (C-233/16) EU:C:2018:280, [76]; *Diputación Foral de Vizcaya and Others v Commission* (C-465/09 P to C-470/09 P) EU:C:2011:372, [96]–[97]. See also the application of this principle on hearing officer’s competence to adjudicate on certain issues. *Evonik Degussa* (C-162/15 P), [122]–[124].

983 Takis Tridimas, *The General Principles of EC Law* (n 63) 164. This point is best illustrated by the interpretation of legal certainty on the direct effect of directives. In *Van Duyn*, the Court relies on the principle of legal certainty to confirm the direct effect of a directive. As the Court ruled, in implementing a clause of a directive, ‘legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.’ *Van Duyn v Home Office* (C-41/74) EU:C:1974:133, [13]. Tridimas argued that this principle can also be invoked to support opposite conclusion, to prevents directives from producing direct effect. The main point here is that ‘legal certainty’ as a conceptual tool must be applied in specific conditions in the context of judicial reasoning taken as a whole.
First, the lack of legal certainty is embedded in the EU level in terms of the lack of clarity of the applicable law. The problem of legal uncertainty in applicable EU law is that the rights derived from the EU law, including the Directive, may not be fully protected because of legal ambiguities and the objectives of the Directive may not be achieved.

Notably, the rights derived from the EU law, including the Directive, point to the general legal content of the applicable law, not the exact text of it. According to the Court’s ruling in Germany, the transposition of the Damage Directive into national law may not require verbatim expression in specific legislation.984 Whereas, the general legal content must depend on ‘the content of the directive, [and] be adequate for the purpose’, provided that national rules shall ‘create a situation which is sufficiently precise, clear and transparent’ to guarantee the full application of the Damage Directive. On that occasion, ‘where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.’985 Hence, a legally certain, precise, and clear set of rules is the premise for the right to full compensation being effectively relied upon by claimants.

It follows that when existing legislation already contains the general legal content provided in the Damage Directive, implementation may not require legislative action.986 Even so, rights and obligations derived from the Damage Directive must always be ‘unequivocally stated so that individuals could have a clear and precise understanding of them’.987 In other words, both rights enjoyed by and obligations imposed on individuals shall be clear enough to

984 Commission v Germany (C-29/84) EU:C:1985:229, [23]. See also Commission v Italy (C-363/85) EU:C:1987:196, [7]; Commission v Germany (C-131/88) EU:C:1991:87, [6].

985 Germany (C-29/84), [23]–[24], [28]. In this case, the Court accepted the Commission’s argument that reference to principles of law which are as general as those relied on by the German Government is not sufficient to establish that national law fully guarantees compliance with provisions of directives which are of such a precise and detailed nature. Germany (C-29/84), [31]. See also Commission v Italy (C-363/85) EU:C:1987:196, [7]; Commission v Italy (C-120/88) EU:C:1991:74, [10]–[11]; Commission v Italy (C-119/92) EU:C:1994:46, [44]–[45].

986 To that effect, see Germany (C-29/84), [23]. See also Commission v Greece (C-236/95) EU:C:1996:341, [13]–[16]. In this case, the Hellenic Public considered that the transposition of Directive 89/665 might not require formal transposition, since existing national law already provided sufficient judicial protection as regards award procedures for public supply and public works contracts. However, the Court confirmed that the national provisions are in conformity with the Directive but held that the judicial protection provided in the national law was confined to certain categories of claimants, and the national caselaw did not satisfy the requirements of legal certainty. See also Commission v Luxembourg (C-220/94) EU:C:1995:190, [10]–[12].

987 Takis Trídimas, The General Principles of EC Law (n 63) 166. To that effect, see also Commission v Denmark (C-143/83) EU:C:1985:34, [9]–[14].
comprehend. This is inherent in the requirement of legal certainty, where situations and legal relationships governed by the law shall remain foreseeable, and the effect of the EU law must be clear and predictable for those who are subject to it.

Moreover, lack of clarity of the applicable law at the EU level seems to build barriers for the application of the principle of the protection of legitimate expectations. Under this principle, individuals or business entities may operate legitimately based on reasonable expectations or predictions as to the way they will be treated by a competition authority or a national court in the future application of relevant EU law in antitrust damages actions. ‘Such a person’s reliance on the certainty of the law should be rewarded by the protection of his confidence in the system.’

Previous CJEU caselaw shows certain requirements in order for this principle to apply. To begin with, the claimant must be ‘a prudent person of reasonable knowledge and experience’ and the outcome would be what such a person ‘would have so expect[ed].’ It follows that this principle ‘cannot be relied on by a person who has infringed the legislation in force.’ The violation, including anti-competitive conducts or abuses of dominant position, would

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988 Gondrand and Garancini (C-169/80) EU:C:1981:171, [17]–[18]. In this case, the Court ruled that the charges imposed on the taxpayers must be clear and precise that they could ascertain unequivocally the rights and obligations. Inzo v Belgische Staat (C-110/94) EU:C:1996:67, [21]. See also a Common Customs Tariff case. Ministre des Finances v Pardo & Fils and Camicas (C-59/94 and C-64/94) EU:C:1995:326, [10]. The Court held that ‘in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties, as defined in the relevant headings of the Common Customs Tariff and the notes to the sections or chapters.’ These documents are ‘important means for ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation.’ The Court referred to Neckermann Versand v Hauptzollamt Frankfurt am Main-Ost (C-395/93) EU:C:1994:318, [5]. See also Gebroeders van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen (C-143/93) EU:C:1996:45, [27]–[33]. Directeur général des douanes et droits indirects v Eridania Beghin-Say (C-103/96) EU:C:1997:151, [38]–[41]; Lopey Export v Hauptzollamt Hamburg-Jonas (C-315/96) EU:C:1998:31, [27]–[32].

989 Duff and Others (C-63/93) EU:C:1996:51, [10]; Order of Fratelli Martini and Cargill (C-421/06) EU:C:2007:662, [56]; Alcoa trasformazioni v Commission (C-194/09 P) EU:C:2011:497, [71]; ANAFE (C-606/10) EU:C:2012:348, [76]. In ANAFE, the Court ruled that ‘the principle of legal certainty, which constitutes a general principle of [EU] law, requires that [EU] legislation be clear and precise, and that its application be foreseeable for all interested parties.’ ANAFE (C-606/10), [76]


991 John Tillotson and Nigel Foster (n 90) 242.

992 coopératives agricoles de céréales v Commission and Council (C-95 to 98-74, 15 and 100-75) EU:C:1975:172, 1692; Union Malt v Commission (C-44 to 51/77) EU:C:1978:14, [37]; Lührs v Hauptzollamt Hamburg-Jonas (C-78/77) EU:C:1978:20, [6].

993 FTDM (C-387/17), [68] and ThyssenKrupp v Commission (C-65/02 P and C-73/02 P), [41].
exclude any legitimate expectations derived from and only from arts 101 and 102 TFEU.

Notably, a person can only plead a breach of this principle when the ‘authority’ (i.e. the applicable law) creates precise assurances.994 Previous CJEU caselaw reveals the difficulties in ascertaining this creation. For example, previous rules do not create legitimate expectations to prevent new rules from applying to the future effects of situations that arose under the earlier rule.995 The adoption of a commitment does not create legitimate expectations in respect of the undertakings concerned as to whether their conduct complies with art 101 TFEU.996

As for antitrust damages actions, it is necessary to ask what assurances EU law or CJEU caselaw has created, in particular with regard to evidentiary issues. For damages actions, the Damage Directive may create legitimate expectations regarding the right to full compensation, the right to access to evidence where arts 5 to 7 of the Damage Directive shall be applied, or as a defendant to invoke a passing-on defence. CJEU caselaw on general principles may also have created legitimate expectations that national rules of evidence for damages actions shall not be less favourable than rules in domestic actions, or that national rules on evidentiary issues shall not make it virtually impossible or excessively difficult to claim full compensation.

However, the problem with the fragmentary and non-systematized evidentiary rules in the present context is that they are insufficient to create precise assurances. Since the Damage Directive entered into force in 2014 and its transposition was completed in 2018, it would take a long time for the CJEU to gather sufficient caselaw in order to ascertain in what condition exist legitimate expectations. More explicitly, it needs specific CJEU caselaw not only to confirm that such legitimate expectations exist but also to clarify the concrete conditions under which these legitimate expectations may apply.

However, CJEU caselaw cannot exhaust all the conditions under which legitimate expectations apply. Hence, even though the CJEU has confirmed that legitimate expectations exist in certain conditions in following caselaw, their applications would only be more difficult to ascertain under the various national judiciaries.

In addition, since damages actions would involve several laws simultaneously, a combination of all the available laws might cause additional difficulties for

994 See e.g. Deza a.s. (C-419/17 P), [69]; Agrargenossenschaft Neuzelle (C-545/11) EU:C:2013:169, [26]; Global Starinet (C-322/16), [46]; Nuova Agricast and Cofra (C-67/09 P), [71]; Europäisch-Iranische Handelsbank v Council (C-585/13 P) EU:C:2015:145, [95].


996 Gasorba (C-547/16), [28].
the party concerned to ascertain whether it enjoys a legitimate expectation or not. For instance, an undertaking that infringes art 101 TFEU in principle cannot rely on the legitimate expectations created by art 101 TFEU. However, that undertaking as a leniency applicant may enjoy certain legitimate expectations under the Damage Directive and 2006 Leniency Notice\textsuperscript{997} when the undertaking joins the leniency programme and discloses the existence of a cartel.

The latter legitimate expectations that the undertaking enjoys under the Damage Directive and 2006 Leniency Notice do not influence the fact that it cannot enjoy any legitimate expectations derived from the EU competition law. CJEU caselaw confirmed that such expectations ‘have neither the object nor the effect of prohibiting the Commission from publishing the information relating to the elements constituting the infringement of [art 101 TFEU] which was submitted to it in the context of the leniency programme and which does not enjoy protection against publication on another ground.’\textsuperscript{998}

Second, parallel to the EU level unclarity of the applicable law, the lack of legal certainty also indicates the difficulties that national courts may encounter in adjudicating antitrust damages actions. In the present context, discussion on evidentiary rules in private damages actions, the lack of clarity at the EU level of the applicable law leaves many issues for national courts to deal with under national law. National courts may perceive that they have much room for discretion in all kinds of issues. However, the parallel application of both EU law and national law makes the question of who shall decide far more complicated than in normal damages torts (i.e. where national courts shall decide).

Take access to evidence as an example. Section 5 of this study notes that the issue of access to evidence involves various players, including national courts, third parties, NCAs, national courts in the same or in a different Member State, the Commission, and even EU Courts in case of appeals or preliminary rulings. Their intervention and, sometimes, crucial role in determining the access render the issue of access to evidence unpredictable and uncertain.

However, accessibility is indeed crucial for private parties to bring damages actions, the result of which is decided not by a simple ‘who’ question—it is neither national courts nor the Commission, but the interplay among various parties. The interplay may involve institutional cooperation between national courts and NCAs, between national courts and the Commission, and between NCAs and the Commission. It may also involve twofold balancing exercises of both national courts and competition authorities. As a result, the lack of legal certainty questions whether the disclosure rules provided in the Damage Directive are sufficient to compensate information asymmetry, to guarantee a

\textsuperscript{997} Damage Directive, art 6(6).

\textsuperscript{998} \textit{AGC Glass} (C-517/15 P), [77]–[81] and \textit{Evonik Degussa} (C-162/15 P), [89]–[94].
minimum level of disclosure *inter partes*, and to ensure effective damages actions.

In addition, national courts’ discretion on various issues is further restricted when they have to guarantee the full effect of arts 101 and 102 TFEU, the full effect of the Damage Directive, and all the rights derived from relevant EU law. These guarantees are achieved through consistent interpretation and application of all relevant rules by the national court hearing the case.

National courts should fulfil this function, as they are bound to ‘interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.’\(^99\) Moreover, as stated previously, such an interpretation requires the national court to ‘consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.’\(^100\) National courts thus should not only interpret relevant national law in light of the objectives pursued by the Damage Directive but also prevent retroactive application of the harmonized provisions relating to damages actions.

However, the CJEU’s function in developing EU law creates specific difficulties for consistent interpretation and application of all relevant rules in antitrust damages actions where both EU law and national law apply in parallel. As previously discussed, the CJEU is entitled by the Treaty to interpret EU law and general legal principles. However, CJEU caselaw only touches upon specific issues and such rulings come sporadically. It is possible for the Court’s rulings to contradict previous national judgments on the same or similar issues.\(^101\) When this happens, since the damages actions are caused by EU competition law infringements, the CJEU ruling must be applied by national courts. This potentially undermines the authority and the effectiveness of national courts’ rulings, which become uncertain and unpredictable for potential damages claimants.

\(^99\) *Pfeiffer* (C-397/01 to C-403/01), [113]. See also *Impact* (C-268/06), [98]–[101]; *Adidas* (C-408/01), [21]; *Oceano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98), [30]; *Coote v Granada Hospitality* (C-185/97) EU:C:1998:424, [18]; *BMW* (C-63/97), [22]; *Harz v Deutsche Tradax* (C-79/83) EU:C:1984:155, [26].

\(^100\) *Pfeiffer* (C-397/01 to C-403/01), [115]. The Court ruled further that ‘if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.’ *Carbonari and Others* (C-131/97) EU:C:1999:98, [49]–[50].

\(^101\) See e.g. *Skanska* (C-724/17), concerning parties liable for damages competition belongs to the same economic unit or on economic continuity. The CJEU rulings is apparently different from the judgement given by the Helsinki Court of Appeal.
Why contradictions exist is not difficult to comprehend. When the CJEU interprets EU law or general EU principles, the EU law elements imposed are not inherent in a particular national legal system. Rather they are imposed by external force, one that embodies EU principles, EU policies, EU values, EU rights and obligations. These EU legal elements may coincide with national principles, national values, national rights and obligations. Sometimes, they may also conflict with each other. When the latter happens, different rulings on the same or similar issues might turn up.

Hence, the existence of such contradictions originates from the mechanism of the EU legal system, from how the CJEU functions and the tasks entrusted to it and from the parallel application of both EU law and national law in damages actions for EU competition law infringements. So far, there have been no effective measures to prevent potential collisions from happening. National courts in a given dispute should always be cautious and consider how CJEU caselaw shall be applied.

The difficulties that national courts encounter due to the lack of legal certainty caused by a set of fragmentary and non-systemised evidentiary rules and the parallel application of both EU law and national law, further impose higher requirements on the quality and capacity of national judiciary in damages actions for EU competition law infringements.1002

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Take the ‘weighing interests’ test in disclosure as an example. Under the Damage Directive, national courts that face a disclosure request, shall weigh the interests in favour of disclosing the information and interests in favour of protecting the information,\(^{1003}\) in order to examine the proportionality of the access requests. This weighing-up could prevent both the problem of a generalized access and a categorical rejection of access.\(^{1004}\) In assessment of a request for access to evidence held by a competition authority, the competition authority may exercise the weighing-up test again before transmitting the information.\(^{1005}\)

The weighing-up test reflects the existence of various conflicting interests. National courts, in applying the proportionality test to examine the access requests, shall balance on the one hand the right to full compensation and, on the other hand, the protection of confidential information, the protection of commercial interests, and so on.\(^{1006}\)

The involvement of conflicting interests shows a complex scheme of access in damages actions. This scheme is fundamentally different from either discovery in US federal law – which serves to improve the ‘sufficiency of evidence’\(^ {1007}\) – or disclosure in the UK’s civil procedure rule.\(^ {1008}\) These disclosure or discovery rules are automatically applied in civil proceedings. They are applied with great legal certainty, since both the US discovery and the UK disclosure are written down as pre-trial procedures.

In order to rule on the issue of disclosure in damages actions, the legal and economic knowledge contained in the weighing-up test pushes national courts

\(^{1003}\) Donau Chemie (C-536/11), [30]; EnBW (C-365/12 P), [107]; Bavarian Lager (C-28/08 P), [77]–[78].

\(^{1004}\) See Donau Chemie (C-536/11), [31]–[34].

\(^{1005}\) See e.g. Section 5.2.1 Access to administrative documents, above.

\(^{1006}\) For more discussion, see Section 5.3 Access to documents in stand-alone cases, above.

\(^{1007}\) The concept of ‘sufficiency of evidence’ in the US federal law context concerns ‘the probative weight of evidence necessary to submit to the jury.’ See Geoffrey C. Hazard and Michele Tarullo, *American Civil Procedure: An Introduction* (Yale University Press 1993) 144, available at: <http://web.b.ebscohost.com/ehost/ebookviewer/ebook/bmxlYntfXzUyOTU4X19BTg27si d=bc9ccdd6-570b-4160-a7ae-6f23fbe44c2@pdc-v sessmgr01&vid=0&format=EB&lpid=lp.144&rid=0>.

\(^{1008}\) In US, Rules 26 of Federal Rules of Civil Procedure provides for automatic disclosure. ‘(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: (i) the name and ...; (ii) a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession ...; (iii) a computation of each category of damages claimed.’ In UK, similar rules are provided in Rule 31.5 Disclosure of Civil Procedure Rules. See also Eva Storskubb (n 44) 118.
to acquire sufficient familiarity with EU law and CJEU caselaw and to have equivalent judicial skills in order to assume their role as 'Community courts'.\textsuperscript{1009} They shall have a thorough understanding of all relevant national law, national caselaw, EU law, CJEU caselaw, general principles and all relevant rights and obligations provided therein.

Moreover, in a given dispute, national courts should be able to examine various conflicting interests based on due diligence. Special attention should be paid, when dealing with the same type of infringements, since the interests that conflict may be different. Even when the interests that conflict are the same, their gravity may vary under various circumstances. Hence, there is no standard answer or fixed formula illustrating which interests must prevail. Rather, the system relies heavily on the central function of national courts to carry out this ‘weighing-up interests’ test, taking into account all relevant facts and circumstances, whenever it involves a case-specific contention.

Like the ‘weighing-up interests’ test, many EU legal elements are ‘incorporated’ into evidentiary rules governing antitrust damages actions and must be carefully considered by national courts. However, antitrust damages are cases presented before national courts actions in the end. It is for national courts to apply these EU legal elements in a given dispute. It is for national courts to dispense the final judgments on whether the claimant suffered harm caused by EU competition law infringements and how much compensation they are entitled to. Most importantly, it is for national courts to observe the principles of equivalence and effectiveness, to ensure the full effect of arts 101 and 102 TFEU, and to guarantee all the rights conferred by EU law to both contesting parties, in particular the right to claim full compensation.

6.2.3 ‘Specialized’ procedural rules in actions for damages

\textsuperscript{1009} For discussion on judges unfamiliar with EU law, see Sacha Prechal (n 1002) 433. See specific problems that national courts encounter in the application and enforcement of EU law, see e.g. Deirdre Curtin and Ronald Van Ooik, ‘Revamping the European Union’s Enforcement Systems with a View to Eastern Enlargement’ (The Hague 2000) WRR Working Document no. W110. For discussion on the role of national courts as ‘community courts’ and they shall be able to apply EU law, see John Temple Lang, ‘The Duties of National Courts Under Community Constitutional Law’ (1977) 22(1) ELR 3–18. John Temple Lang argued that national courts act as EU courts, when national courts have the power to apply all rules of EU law. National judges have a duty, in common with EU courts, to see that EU law is respected in the application and interpretation of the EU Treaties. ‘The national court is the natural forum for Community law’. See also Monica Claes (n 62) 58. In Chapter 3, Monica Claes discusses the creation of a Community mandate for national courts. This chapter bases on John Temple Lang’s duty list. Accordingly, duties are imposed on the national courts in their capacity as Community courts, including the duty to apply Community law in its entirety and protect rights which it confers on individuals, the duty to interpret and apply national law as far as possible to make them compatible with and to fulfil the requirements of Community law, and so on.
The imposition of EU legal elements, the parallel application of both EU law and national law, a higher requirement for the quality and capacity of national judiciary, the involvement of more parties in disclosure requests under the Damage Directive, and so on, delineate the boundary between damages actions of EU competition law infringements and any other damages actions. Those ‘specialized’ procedural rules are introduced solely for damages actions when the case concerns arts 101 and 102 TFEU or equivalent national competition law, while national general procedural law remains relevant for other kinds of cases.

This runs the risk of reinforcing the picture of EU competition law and relevant antitrust damages actions as highly specialized areas that are ‘inaccessible to the outside world’. This specialization hampers its full integration into the basic “tool kit” of the ordinary judge. It may further require a specialized court with adequate personnel, technical and organisational resources to ensure that national rules do not render the right to full compensation excessively difficult or practically impossible.

A series of training sessions launched by the DG COMP verifies this concern that national judges shall be better equipped with adequate knowledge on various issues, including the disclosure of evidence, the passing on of overcharges, economic principles of competition law, and so on.

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1010 Notably, the damages actions here include both actions for infringements of the EU competition law and those for infringements of national competition law, where national competition law pursues the same objectives as arts 101 and 102 TFEU. This is obvious in the text of the Damage Directive, as the Commission intends to cover all follow-on damage actions, no matter such actions follow an EU competition law infringement or a national one. See for example in the Damage Directive, art 2. The definition of ‘infringement of competition law’ means an infringement of art 101 or 102 TFEU, or of national competition law. Moreover, ‘action for damages’ means an action under national law by which a claim for damages is brought before a national court ... where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim. Of course, the definition of ‘national competition law’ refers to provisions of national law that predominantly pursue the same objective as arts 101 and 102 TFEU, and that are applied to the same case and in parallel to EU competition law pursuant to art 3(1) of Regulation 1/2003.

1011 Sacha Prechal (n 1002) 436.

1012 European Commission, ‘Training of national judges and judicial cooperation in the field of EU competition law’. In fact, the training of national judges on EU competition law is part of the Justice Programme 2014-2020, the general objective of which is ‘to contribute to the further development of a European area of justice based on mutual recognition and mutual trust, in particular by promoting judicial cooperation in civil and criminal matters.’ Council Regulation (EU) No 1382/2013 of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 [2013] OJ L354/73. The Commission has launched a special project Antitrust Damages Actions (‘ADA’) for interdisciplinary training of European judges on implementation of EU rules. Obviously, the focus of this project is the Damage Directive, including economic principles and economic reasoning, and specific terminology used in the application of the EU competition law. The website for the project: <http://adaproject.eu/>.
Meanwhile, it remains debatable whether this is the 'harmonization' that the Commission wants to achieve in safeguarding the full effect of EU competition law.\textsuperscript{1013} This raises particular concern when national law takes over, some kinds of transformation happens, and the outcomes are uncertain and unpredictable. National courts may prefer to avoid all the above specificities by circumventing the issues with EU competition law. Not surprisingly, looking at the potential workload, they may choose to set aside such damages actions or not treat the case at hand as an EU law issue at all.\textsuperscript{1014}

When national courts are not making any additional efforts to ensure effective damages actions, the Directive may – in view of the GC judge I.S. Forrester – 'neither usher in the apocalypse nor create a sort of competitive utopia.'\textsuperscript{1015} In other words, the promulgation of the Damage Directive may not lead to any substantial changes in legal practices.

6.3 Future research

Admittedly, this study is far from perfect. There are many other interesting issues not discussed, due to the author's choice of specific issues, and the depth, breadth and length of the research.

Issues relevant for private enforcement of the EU competition law are just open for debate. As previously discussed, even though EU law and CJEU caselaw have more or less ruled on evidentiary issues in antitrust damages actions, such a set of fragmentary and non-systematized rules relies on the central function of the national courts to apply them in a given dispute. It is for national courts to observe the principles of equivalence and effectiveness, to ensure the full effect of arts 101 and 102 TFEU, and to guarantee all the rights conferred by EU law, in particular the right to claim full compensation.

Hence, it is natural to keep an eye on how national courts apply EU law and CJEU caselaw, how they interpret relevant national evidentiary rule to fulfil their role as 'Community courts',\textsuperscript{1016} and to monitor closely national judicial practices. In fact, it is already apparent that there are divergences in the

\textsuperscript{1013} Sometimes, it is referred to as 'certain level of uniformity'. See for example Armin Von Bogdandy, 'Founding Principles of EU Law' (2010) 12 Revus, para 41 and Gerda Falkner, Oliver Treib, Miriam Hartlapp, Miriam Hartlapp and Simone Leiber (eds.), Complying with Europe: EU Harmonisation and Soft Law in the Member States (CUP 2005).

\textsuperscript{1014} This is because, when national courts treat certain issues as an EU law issue, they must interpret national law in conformity with EU law. That also indicates higher requirements on the national court and heavy workload. See e.g. \textit{Dominguez} (C-282/10), [25]-[31]; \textit{Mau} (C-160/01) EU:C:2003:280, [34].


\textsuperscript{1016} See e.g. more recently, Pier Luigi Parcu, Giorgio Monti and Marco Botta (n 28).
approach of certain jurisdictions to the implementation of the Damage Directive.\textsuperscript{1017} For national courts’ practical application and interpretation of these national rules, there will only be more divergent approaches, even within the same Member State.

Meanwhile, further studies on national judicial practices will not only find divergent approaches but also be able to ascertain the overall improvement of antitrust damages actions. Related concerns are how well the minimum level of protection to overcome the information asymmetry influences the effective damages claims, whether forum shopping is still a big problem, whether individual claimants get full compensation, and so forth. These concerns cannot easily be addressed. It will take a long time for the result of the facilitation of antitrust damages actions to manifest itself and require years of close monitoring to ascertain whether the Damage Directive achieves its objectives.

One related issue is to focus on the cooperation between NCAs, between NCAs and national courts, and between the Commission and national courts. This issue relates closely to the practices of the national judiciaries. Member States may employ different approaches to ensure cooperation among NCAs, and between NCAs and national courts, both in the same Member State and in different Member States. There cannot be a single answer to what kind of cooperation works best. The approach adopted must be suitable for national conditions. What may be meritorious is to what extent such cooperation may benefit the effectiveness of antitrust damages actions.

Facilitation of antitrust damages actions is just the first step in enhancing private enforcement of EU law at large. If damages actions turn out to be a successful remedy not only to ensure the right to full compensation for individual victims, but also to complement public enforcement, this form of private enforcement may worth popularizing in other areas of EU law.

As observed from the research in previous sections, the role of cooperation is central in the facilitation of antitrust damages actions. Such cooperation constitutes a procedural guarantee and could be applied to damages actions for other kinds of infringements. It will be an important indicator for EU legislators to consider whether they will facilitate damages actions in other areas of EU law.
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