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Perchance to Dream:
Well Integrated Public and Private Antitrust
Enforcement in the European Union

This volume presents contributions prepared for the 16th edition of the Annual EU Competition Law and Policy Workshop, held on 17–18 June 2011 at the European University Institute in Florence. The 2011 Workshop was devoted to issues pertaining to the development of private antitrust litigation in the EU, with an accent on the interplay between private antitrust litigation and public enforcement of the competition rules by European authorities. This was the second of the workshops I have organized with Philip Lowe, and it marks an organizational change in the sense that we conducted the event under the auspices of the EUI's Law Department, where our activities now continue in collaboration (since 2012) with a third co-director, Professor Giorgio Monti. Aside from the usual lag between the time our sessions convene and the time the proceedings are published, I am also responsible for holding up the production of this volume until the European Commission came forward in June of 2013 with a package whose measures include plans for a Directive in the field of 'certain rules governing actions for damages under national laws for infringements of the competition law provisions of the Member States and of the European Union' (see Annex I). This draft Directive, an unprecedented legal instrument in this field of law, is currently being scrutinized, and its more sensitive provisions are quietly being amended, by the European Parliament and by the governments of the EU Member States. Nevertheless, the basic contours of the way forward can be seen, and we now proceed with the present publication, a collection of analyses which shed abundant light on our subject. The Commission's draft legislative text and flanking measures – which include

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I have benefited from the kind support of numerous individuals who can't all be named but Philip Lowe, Giorgio Monti, Claus Ehlermann and our illustrious program sponsors are certainly among them, as are the many gifted scholars and practitioners that joined in our discussions and contributed the chapters herein. On specific points I have benefited from comments kindly provided by Nicholas Khan. (As if it had to be added, neither he nor his institution is engaged by any of the views expressed in this chapter.) I have also benefited from the views exchanged in a workshop I co-organized on 5 October 2013 with Hans Micklitz, Giorgio Monti and Andreas Schwab, entitled 'Shaping Private Antitrust Enforcement in the EU'. I would like to thank all the speakers who joined us on that occasion as well. A collection of essays based on the latter event is under construction and will be published.

a Recommendation on collective redress and other non-binding instruments addressing the quantification of harm in private damages actions – have been taken into account to the extent possible given the subsequent scurrying to get the product to market. My own brief conclusions regarding the Directive-to-be and the Recommendation on collective redress appear at the end of this chapter. The Commission's package represent an early milestone in the course of a longer discussion that will develop over many decades to come and which was launched by Claus Ehlermann and his Workshop guests in 2001 while anticipating the judgment of the Court of Justice in the seminal *Courage* case.¹ Further reflections will undoubtedly follow in our forum once the empirics lend themselves to more analysis and lesson-learning.

Background

The EU Competition Law and Policy Workshop is an ongoing program that explores topical policy and enforcement issues in the area of competition law and economics.² Each year the Workshop brings together a group of top-level EU and international policy makers, judges, legal practitioners, economic experts and scholars to take part in intensive debates that explore specific competition-related issues in an informal and non-commercial environment. A chief aim is to stimulate critical reflection on the part of both the Workshop participants and the broader public.

Structure of the Workshop

The present volume consists of five main parts. The first four correspond to the organization of the discussions at our meeting, while the fifth is something of a bonus feature that looks both backward and forward. The five parts are as follows:

¹ See Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing, 2003).

² In this series, which is published by Hart of Oxford (see <http://www.hartpub.co.uk/SeriesDetails.aspx?SeriesName=European+Competition+Law+Annual>), we have covered (to name only a few topics) the abuse of dominance, the application of competition rules in intellectual property scenarios, the prohibition against cartels, cartel settlements and commitment decisions, judicial review by the EU Courts and the evaluation of evidence, and merger control from the perspective of various jurisdictions worldwide. Two forthcoming works will address: the relationship between competition policy and many other public policies; and the dilemma, figuratively speaking, of enforcing competition law in a way that is both effective and legitimate.

- (1) *Designing a balanced system: damages, deterrence, leniency and litigants' rights;*
- (2) *Integrating public and private enforcement in Europe. Legal and jurisdictional issues;*
- (3) *Options for collective redress in the European Union;*
- (4) *Drawing lessons and conclusions;* and
- (5) *Private damages claims and the elusive future.*

The remainder of this introduction previews the written contributions in this book and provides related commentary to add context, draw connections between the various papers, or interject personal views or musings. As I'm always at pains to stress, the introduction is no substitute for the contents of the other contributions, not least because I occasionally pass over some of those contents due to the already exaggerated loquacity of the remarks that follow.

Part 1 Designing a Balanced System: Damages, Deterrence, Leniency and Litigants' Rights

ANDY GAVIL: 'Designing Private Rights of Action for Competition Policy Systems: The Role of Interdependence and the Advantages of a Sequential Approach'. In this chapter, Gavil considers the relative merits of establishing a private enforcement system by way of comprehensive legislation versus a 'sequential', or incremental approach that introduces a few elements of the system but leaves space for organic growth. Gavil's suggestion is that it is risky to usher in a seemingly complete apparatus all at once. The argument underlines the interdependence of the many threads woven into a mature system of private antitrust enforcement. The interplay of those threads – for example, in terms of litigation incentive structures, cost rules, *locus standi* criteria, evidentiary disclosure mechanisms, the role of expert economic evidence, manageable standards of proof, effective judicial systems, adequate remedies, etc. – is bound to produce results that are practically impossible to predict *ex ante*. This unpredictability arguably points to the superiority of a more humble approach in which foundations are laid for gradually building experience and making periodic adjustments after cycles of trial, error and observation. One concern is the perception in the United States (not always grounded in fact) that private enforcement has run amok. As others such as Stephen Calkins and Bill Kovacic have often noted, if some elements of the antitrust enforcement ecosystem are perceived to be imbalanced, other elements will be 're-equilibrated' in various ways, including by way of procedural devices, or by re-interpretation of substantive law, or by the sweeping conclusion that antitrust is, in light of its social costs, simply an inferior institution best left on the shelf in certain economic regulatory contexts. Such instances of 'backlash' can

then potentially spill over to other areas, not just making it more difficult to file private claims but also indirectly harming public enforcement efforts, despite the quite different objectives driving private enforcement on the one hand and public enforcement on the other.³

But ironically, the United States does not only provide a cautionary tale of what can happen if the excesses of private antitrust litigation provoke too much re-equilibration; Gavil also emphasizes that the development of private enforcement in the United States epitomizes the sequential approach he advocates. In this regard a historical overview is presented to remind the reader that although the much-reviled treble damages provision in U.S. federal antitrust law (15 U.S.C. § 15, which also allows recovery of costs and reasonable attorney fees) dates back to 1890,⁴ it was not until the 1960s and 1970s that crucial pieces of the private litigation and class action framework were put in place.⁵ Gavil does not describe a developmental process of error and adjustment, and there may be doubt about whether the sequential experience in the U.S. produced an outcome superior to some counterfactual and hence unobservable big-bang approach. Nevertheless, if the U.S. experience has thus far been unsatisfactory, it does not follow that sub-optimal incrementalism in the U.S. must be echoed by sub-optimal incrementalism in Europe.

Gavil's advice on taking sequential steps appears to have been taken to heart by the European Commission, whose proposed Directive published in June 2013⁶ is by no means an exhaustive, comprehensive prescription for national antitrust litigation. Several elements of the future private enforcement system seem to have ample space to develop over time, and the construction of the edifice will surely proceed in an iterative manner, not only because the proposed

³ Gavil points out, though, that the range of options considered in Europe to promote private litigation steer wide of system features commonly regarded as being (singly or in combination) pernicious in the U.S. system, such as contingency fees, automatic and burdensome discovery rules, the right of plaintiffs to recover legal fees, lay juries and so on. Consequently, Gavil considers that the risk of a backlash in Europe similar to that seen in the U.S. federal courts is attenuated.

⁴ See, eg, Donald Baker, 'Rewriting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?', 16 *Loyola Consumer Law Review* 379–408 (2004), at 379–382; David Gerber, 'Private enforcement of competition law: a comparative perspective', in Thomas Möllers and Andreas Heinemann, eds., *The Enforcement of Competition Law in Europe*, Cambridge University Press, 2007, pp 431–451, at 434; Wouter Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 32 *World Competition* 3–26 (2009), at 14.

⁵ Neither the Sherman Act nor the Clayton Act provides for class action litigation. The non antitrust-specific possibility of aggregating claims in a class action was introduced, as a continuation of an earlier rule applied by equity courts, in a federal rule of civil procedure (FRCP 23) in 1938. See Harry Kalven, Jr. and Maurice Rosenfield, 'The Contemporary Function of the Class Suit', 8 *University of Chicago Law Review* 684–721 (1941). (As result of later amendments in 1966, which introduced the 'opt out' principle, Rule 23 came of age, as it were, assuming its principal modern features.) Aggregated claims in the U.S. are traced back to *West v Randall*, 29 F. Cas. 718 (R.I. 1820). However, far earlier antecedents from medieval England are well documented. See Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action*, Yale University Press, 1987.

⁶ The proposed Directive is included as Annex I to this volume. By the time the Council of Ministers and the European Parliament are done amending the proposal, the original proposal will of course be outdated. The Annex is nevertheless deliberately included for purposes of comparison and in order to provide historical context to inform future research.

directive is an instrument of minimal harmonization but also obviously because, notwithstanding the Commission's current soft law efforts (taking the form of a Recommendation addressed to the Member States), binding harmonization has not yet been attempted in the politically delicate and legally complex field of collective redress.⁷

TOM OTTERVANGER: 'Designing a balanced system: Damages, Deterrence, Leniency and Litigants' Rights'. This essay presents the view, held by many in Europe, that it is not appropriate to conceive of private antitrust litigation as furthering traditional objectives of public enforcement, such as, in particular, deterrence and deterrence-induced compliance.⁸ Ottervanger acknowledges that marginal gains in deterrence might flow as a by-product of more robust damages claims, but he stresses, among other things, that the interests of private claimants do not coincide with the public interest, which is more properly the lodestar of the public enforcer. Private claimants care little, for example, about the future consequences of the jurisprudence to which they contribute today, so long as they succeed in vindicating their (generally economic) rights. This line of reasoning seems to lead to the conclusion, espoused by Ottervanger, that it is not entirely appropriate for the EU legislator to 'design' a system which encourages antitrust damages claims, or which 'integrates' such litigation with public enforcement, since integration may imply cumulative application. Thus, recalling the premises guiding the adoption of Regulation 1/2003, it is suggested that the empowerment of national courts, in particular by making Article 101(3) directly applicable, should result in private litigation substituting for the use of public resources to investigate and punish unlawful conduct; but that subjecting defendants first to public exposure (ending in fines) and then to private exposure (ending in payment of damages or in a costly settlement) is both inconsistent with the original aims of the reform and apt to constitute 'disproportionate double deterrence'.⁹ From

⁷ For discussion of collective redress in the European context, see the contributions to this volume by Mario Siragusa, by Silvia Pietrini and by Bruno Lasserre; and Roger Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem', 20 *Maastricht Journal of European and Comparative Law* 12–34 (2013). For extended discussions, see Silvia Pietrini, *L'action collective en droit des pratiques anticoncurrentielles. Perspectives nationale, européenne et internationale*, Bruylant, 2012; Sonja Keske, *Group Litigation in European Competition Law: A Law and Economics Perspective*, Intersentia, 2010. See also Jurgen Backhaus, Alberto Cassone and Giovanni Ramello, eds., *The Law and Economics of Class Actions in Europe. Lessons from America*, Edward Elgar, 2012.

⁸ On this theme, see also, eg, Wouter Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', 26 *World Competition* 473–488 (2003).

⁹ For further discussion of the poor coordination (eg, given the lack of 'equalization' mechanisms) between public and private enforcement, see Michael Frese, 'Fines and Damages under EU Competition Law – Implication of the Accumulation of Liability', Amsterdam Center for Law & Economics Working Paper No. 2011-05, with references; Damien Geradin and Laurie-Anne Grelier, 'Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?', <http://ssrn.com/abstract=2362386> (2013). The idea that adding civil liability to fines imposed by the European Commission leads to disproportionate combined exposure seems to presuppose that the fines imposed by the Commission are sufficiently deterrent. However, even at their infamously high level, it seems that EU fines frequently fall short of their optimal levels. See Mario Mariniello, 'Do

this perspective, Ottervanger argues that follow-on claims for damages are ‘not some form of policy instrument for attaining general interest objectives through further deterrence. They are simply tort actions.’¹⁰ A logical implication of this remark would seem to be that, since tort litigation traditionally (though not exclusively) belongs to the domain of national private law and national civil procedure, legislative action in this field at the EU level should remain minimal. Indeed, even as a matter of policy the Commission is criticized for including, in its press releases, the standard coda that informs potential victims of antitrust infringements of the EU-law right to seek damages before national courts.

One could not take issue with the proposition that private litigants engage in self-serving behaviour (which in the worst cases may consist of seeking and possibly obtaining anticompetitive judicial interventions), and that they pursue the public interest only when their individualized decision tree tells them they should, ie, when the public interest and their own interests converge. There is also some appeal in the prevalent argument that the instruments of public enforcement and private litigation should not be confused or conflated, and that the objectives of deterrence and compensation should be kept separate. However, private litigation is not solely private; it occurs in a highly developed judicial system in which the public interest is represented and guarded in various ways. As a matter of EU jurisprudence, moreover, the Court of Justice has not hesitated to state that private claims to enforce the directly effective antitrust rules of the Treaty before national courts contributes to the effectiveness of those rules; from the Court’s point of view, private litigation thus transcends purely private interest.¹¹ It also

European Union fines deter price-fixing?’, Bruegel Policy Brief 2013/04, May 2013. Having said that, the ‘optimal fine’ theory that animates EU fines seems unlikely to secure optimal compliance. To state the argument briefly, a key employee deciding whether to collude can rationally expect to face no adverse consequences in her lifetime (since few cartels are ever unearthed) or to face them only after years of delay, by which time she will probably be long gone or dead. (The period of delay, if the cartel is exposed, will be the lifetime of the cartel plus years of investigation time – see Mariniello, *ibid*, referring to 10–20 years of lag from the moment of decision to the moment of sanction, if any. One may add that even in a scenario where an undertaking is punished, shareholders may not sanction responsible individuals in a manner that promotes adequate compliance, making the link between public fines and compliance more tenuous still.) The weaknesses in the links between public fines and conformity with antitrust rules may also suggest that, at least with respect to certain kinds of cases (eg, follow-on cartel damages actions), there may be only a weak link between the prospect of exposure to civil damages and compliant behavior, and by the same token there may be only a weak link between the *combined effect* of public and private liability and compliance.

¹⁰ See page 21. (*Note*: cross-references made in this chapter to specific page numbers are generally accurate but a slight shift in pagination may have occurred due to typesetting.)

¹¹ The latter two points are espoused, for example, in Assimakis Komninos, ‘The Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Ceasari’, this volume, pages 143–144. *Cf.* also Andreas Reindl, ‘The European Commission’s Package on Private Enforcement in Competition Cases’, *CPI Antitrust Chronicle*, August 2013 (1), for example at page 4 (‘According to *Pfleiderer*, deterrence consideration[s] should [...] be of overriding importance when shaping the rules governing the private litigation regime.’); and Andreas Reindl, Secretariat Note in OECD Roundtable on Private Remedies 2007 (2006), DAF/COMP(2006)34, 8–20, at 10. On the other hand, while it seems clear enough that the ‘right to damages’ as it emerged in *Courage v Crehan* was mainly driven by the imperative of ‘effectiveness’, and while *Pfleiderer* pointedly seems to underline this, it has also been argued that *Courage*, when read ‘in the light of the wider case law of the Court of Justice’, is in

seems a bit idealized to say (as some do, although Ottervanger stops short of saying it) that deterrence simply has no role in the context of private litigation. The matter is rather more nuanced than the mere observation that deterrence may be an unintended side-effect of private actions that lead to compensation, and that the relationship goes no further. The more realistic way to look at the issue is to ask why compensation mechanisms exist. Do they exist purely for the sake of compensation? Maybe, but if they somehow signal that a system of law will not rest until corrective justice is done (or until the statute of limitations runs), and if that signal alters the incentives of some marginal subset of a larger group of actors that could potentially have to pay compensation, such that some instances of tortious behaviour are not undertaken in the first place, it is legitimate to recognize that the system of private litigation has wider public benefits. By making collusion more expensive, a margin of such behaviour is avoided, which likewise avoids on some marginal basis the need to be compensated. A private litigation system does not only protect those wronged in the past; its very existence is in part supposed to be a prophylactic against its own use.¹² It is better to recognize this property of damages recovery than to erect an artificially binary system of compensation versus deterrence as a way of keeping public enforcement and private litigation in separate spheres that do not touch, or that touch only accidentally.¹³

Ottervanger discusses other subjects as well including, for example, access to documents in possession of a competition authority in light of judgments such as *Pfleiderer* and, with regard to the application of Regulation 1049/2001, *EnBW Energie Baden-Wurtemberg* and *Editions Odile Jacob*. I will just call attention here to his reference to the 2005 Dutch Act on the collective settlement of mass damages claims (ie, the ‘WCAM’).¹⁴ As the name suggests, the Act applies only where private litigation is settled out of court, the settlement being conditional on approval by the Amsterdam Court of Appeal. This legislation represents a hybrid model of dispute resolution in the sense that no mass claim can be forced upon a

reality concerned more with the compensation of victims than it is with deterrence. For this portrayal, see Paolisa Nebbia, ‘Damages actions for the infringement of EC competition law: compensation or deterrence?’, 33 *European Law Review* 23–43 (2008); Wouter Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’, cited above note 4, quote at 14.

¹² As already suggested, however, the effectiveness of the prophylactic should not be overstated. See above note 8 *in fine*.

¹³ Cf. Van den Bergh, ‘Persisting Collective Action Problem’, cited above note 7, at 32–33 (stating pithily that ‘public and private enforcement are not mutually exclusive but [rather] should reinforce each other’ and accepting as desirable the additional deterrence effects that could be produced by a functioning private enforcement system). Cf. also Commission, Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and of the Council, SWD(2013) 203 final of 11 June 2013, included in this volume as Annex II, para 29 (‘All stakeholder groups apart from business are generally of the view that both instruments are in principle equally important and must hence be independent and complementary mechanisms.’).

¹⁴ See also, eg. Willem van Boom, ‘Collective Settlement of Mass Claims in the Netherlands’, in Matthias Casper, André Janssen, Petra Pohlmann, Reiner Schulze, eds., *Auf dem Weg zu einer europäischen Sammelklage?*, Sellier, 2009, pp 171–192 (assessing the Dutch Act positively in the main, subject to some criticisms); Erik Werlauff, ‘Class Action and Class Settlement in a European Perspective’, [2013] *European Business Law Review* 173–186, at 182–184.

defendant without his consent, which is by definition a part of the settlement; but at the same time, the claimants are bundled together on an opt-out basis. Failure to opt out means the claimant concerned will have to be content with the terms of the settlement. This inspired solution (which has led to some concrete results in the Netherlands¹⁵ and which the UK Government has decided to emulate as a complement to class litigation in its current initiative on private enforcement¹⁶) defuses or at least attenuates the perceived dangers of opt-out approaches while overcoming the collective action problem that makes opt-in approaches likely (in my view, and in the view of consumer organizations) to fail or to deliver poor results. Although some Member States have collective redress mechanisms based on the opt-out principle or on opt-in/opt-out combinations (accompanied by safeguards to minimize abuse),¹⁷ the Commission frankly seems to have bent to the will of industry (a sign of direct lobbying pressure and indirect pressure via the European Parliament), advising Member States in Recommendation 2013/396/EU on collective redress to avoid opt-out bundling of claims, and to specifically defend any exceptions, by way of law or court order, on grounds of ‘sound administration of justice’.¹⁸ (To put this in perspective, no justification

¹⁵ See, eg, Werluff, cited previous footnote, at 182 and 183 (observing that ‘[i]n practice the model has proved to be of very great value’ to both claimants and tortfeasors; and citing a product liability dispute and several cases concerning misconduct in the financial sector).

¹⁶ See UK Department for Business, Information and Skills, ‘Private Actions in Competition Law: A consultation on options for reform – government response’, BIS/13/501 (29 January 2013), pages 50–51. The report is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf. Where the UK collective settlement procedure is employed, the opt-out element will apply only to class members domiciled in the UK; those domiciled abroad will have the opportunity to opt in. See Renato Nazzini, ‘Competition Litigation in the United Kingdom: What Lies Ahead?’, *CPI Antitrust Chronicle*, April 2013(1), at pp 5–6. Limiting the opt-out principle to the UK border in this way is intended to lessen the incidence of forum-shopping. See Silvia Pietrini, ‘The Future of Collective Damages Actions in Europe’, this volume, page 264.

¹⁷ Apart from the Netherlands and now the UK, some (generally mixed or incomplete) version of an *opt-out* collective action regime has been established in Bulgaria, Denmark and Portugal; in general, the experience so far in these latter jurisdictions has been relatively limited. About twice as many Member States (Austria, Finland, France, Hungary, Italy, Poland, Spain, Sweden and others) have, as of this writing, *opt-in* rules of one form or another. The pending French bill is also constructed around an opt-in ‘*action de groupe*’. See projet de loi relatif à la consommation (EFIX1307316L), <http://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000027383756&type=general>.

¹⁸ Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013 OJ L201/60, para 28. The Commission contends that opt-in systems ‘respect the right of a person to decide whether to participate or not’, and adds that they make it easier to determine the combined value of the individual claims. Furthermore, tracking down beneficiaries of a successful recovery is difficult, so disbursements might not reach those entitled to them. See Commission, ‘Towards a European Horizontal Framework for Collective Redress’, COM(2013) 401/2, pages 11–12. The counter-arguments to mandatory opt-in procedures are relegated to footnotes (37 and 38) in the Communication. The presumption in favour of opt-in actions and against opt-out is curious given that the effectiveness of opt-in procedures has never to my knowledge been demonstrated (whereas notorious instances of its failure have been recorded – see below note 170). A reversal of that presumption seems more sensible to me. (For more details as to why Recommendation 2013/396 is apt to be of limited impact, see Sonja Keske, ‘Collective Redress – (Too) Great Expectations?’, presented at a conference I organized at LUMSA University in Rome on 8 November 2013, not yet published.)

requirement seems to apply if a Member State simply chooses not to adopt or not to maintain any form of collective redress, contrary to what is recommended by the Commission.) In the Recommendation, it is stated that the Member States ‘should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial [...]’.¹⁹ However, this reference to collective consensual dispute resolution (‘CDR’) does not seem to accommodate Dutch-style settlement solutions, because the envisaged pre-trial and midst-of-trial settlements relate to cases brought on an opt-in basis. In the future, more attention should be given to other models, including the Dutch settlement model and the two-track opt-out/opt-in model soon to take effect in the UK.²⁰ As for the possibility to justify opt-out systems as being necessary for the sound administration of justice, although this may be some sort of green light in yellow camouflage, the nature of the signal may be questioned. The message seems to be that judicial economy and the avoidance of potentially conflicting solutions arising from fragmented litigation are legitimate goals, whereas effective access to justice for consumers is not. This is an unsustainable position.

But the real problem with ‘opt-out’ is that it is tainted by its American heritage, and it is commonplace to point to the U.S. Supreme Court itself and its frosty attitude toward class actions in judgments such as (i) *Wal-Mart v Dukes* (564 U.S. ___, 131 S.Ct. 2541 (2011) (a judgment whose relevance to antitrust cases was however rather limited, in part but not only because it was a Rule 23(b)(2) case, not a Rule 23(b)(3) case); see also *Comcast Corp. v Behrend*, 569 U.S. ___ (2013)) and (ii) *American Express v Italian Colors* (570 U.S. ___ (2013), discussed below, notes 116–120 and accompanying text) as confirmation that opt-out class actions must be inherently pernicious. Sober accounts of the U.S. system show that it is not ‘opt-out’ as such that leads to abuse, but rather its undesirable dis-synergies with other features such as the asymmetric shifting of legal costs in favor of plaintiffs, the mandatory trebling of damages as applied to most defendants (ie, those not benefiting from a de-trebling under ACPERA), and other features discussed later in the main text.

In light of the political sensitivity to ‘opt-out’ collective actions, the Commission would have been better advised to abstain from making a recommendation one way or another. It could have left the choice to the Member States, which would then have been in a position to accumulate experience and later to compare results. But in my view this is probably what the Commission seeks to achieve anyway, notwithstanding the tenor of the Recommendation. The Commission knows some Member States such as the UK will likely experiment in any case with the ‘opt-out’ approach (which may incorporate court-approved *cy præs* distribution of unclaimed damages), and that if positive experiences are forthcoming, they can be used as ammunition at the time of the Recommendation’s review in 2017 or thereafter to support a change of heart.

¹⁹ Recommendation 2013/396, cited previous footnote, para 25.

²⁰ The commendable idea of eschewing the binary choice of opt-in and opt-out (and instead granting discretion to judges to adopt the procedures most appropriate for the cases before them) arises from the recognition that some claims accrue to medium and large businesses that do not require the special features of an opt-out to ensure they will enforce their rights, whereas other claims accrue to dispersed victims which individually tend to lack the resources and incentives to do so. Besides the Netherlands and the UK, other opt-out class action systems that could be explored as potential sources of inspiration include those in Australia (where the main ‘safeguard’ is the loser-pays rule, although, oddly, there is no certification stage) and some of the provincial systems in Canada. For discussion of the Australian system, see, eg, Stuart Clark and Christina Harris, ‘The Push to Reform Class Action Procedure in Australia: Evolution or Revolution’, 32 *Melbourne University Law Review* 775 (2008). Class litigation in Canada is discussed by Brian Facey and David Rosner, ‘Collective Redress for Cartel Damages in Canada’, this volume.

SCOTT CAMPBELL AND TRISTAN FEUNTEUN: ‘Designing a Balanced System: Damages, Deterrence, Leniency and Litigants’ Rights – A Claimant’s Perspective’. Campbell and Feunteun provide comments that recognize Europe’s instinctive aversion to US-style antitrust litigation (although they correctly observe that notions circulating in Europe about the US system are often caricatured and incomplete) and at the same time call for an EU Directive that will reinforce the incipient trend, in some Member States, toward better means of obtaining compensation for anticompetitive harm. The chapter is generally focused on the efforts of the EU and the UK to encourage private enforcement, and in that regard the authors discuss, for example, the Joint Information Note issued by Commissioners Reding, Almunia and Dalli on 5 October 2010,²¹ and the consultation on options for reforming private antitrust litigation launched by the UK Department for Business, Information and Skills in April of 2012.²² Like other authors in this volume they also discuss the crucial subject of access to evidence for claimants in national litigation, especially with regard to materials in the case files of competition authorities. The judgments in *Pfleiderer* and *CDC Hydrogene Peroxide* are mentioned, and the authors make suggestions about how to develop a differentiated approach to the disclosure of evidence. Here it is emphasized that, while certain measures of protection are justified and proper, in particular corporate statements and settlement submissions, there is no need to protect pre-

²¹ See <http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf>.

²² See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf. The BIS followed up the consultation with its ‘Government Response’ in January of 2013 (cited above note 16). Under the UK’s envisaged system the CAT, which will have exclusive jurisdiction to hear and adjudicate collective actions, will decide whether to certify a case and whether it is amenable to opt-out or whether an opt-in procedure should be used instead. See page 31 of the Government Response. With regard to the new possibility of proceeding on an opt-out basis, at page 6 (see also page 40), the BIS summarizes the pre-cautions taken in its proposal:

Recognising the concerns raised that this could lead to frivolous or unmeritorious litigation, the Government is introducing a set of strong safeguards, including:

- Strict judicial certification of cases so that only meritorious cases are taken forward.
- No treble damages.
- No contingency fees for lawyers.
- Maintaining the ‘loser-pays’ rule so that those who bring unsuccessful cases pay the full price.

Claims will only be allowed to be brought by claimants or by genuine representatives of the claimants, such as trade associations or consumer associations, not by law firms, third party funders or special purpose vehicles. Any unclaimed sums would be allocated to the Access to Justice Foundation (AtJF). [Furthermore, as mentioned above, the opt-out rule will apply only to class members domiciled in the UK, while non-UK claimants may opt in – see above note 16.]

The UK proposals have been discussed in various commentaries. See, eg, Nazzini, ‘What Lies Ahead?’, cited above note 16; Gerald Barling, ‘The UK Competition Regime: Recent Developments and Further Proposals for Change’, in Philip Lowe, Giorgio Monti and Mel Marquis, eds., *Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, forthcoming (praising the Government’s plans to strengthen collective actions, given the inadequacy of the over-restrictive Article 47B of the Competition Act 1998 (opt-in only), and Article 19(6) of the Rules of Civil Procedure; but also praising the stipulation of various safeguards to avoid the encouragement of a litigation culture in the UK). See also Silvia Pietrini, ‘The Future of Collective Damages Actions’, this volume (advocating the use of the proposed UK model, with its combination of territorial opt-out and safeguards against abuse, as a desirable model of common European rules).

existing documents.²³ They do not refer to other types of documents prepared in connection with an investigation, such as replies to requests for information; but since documents such as these are not ‘pre-existing’, the authors may countenance some degree of protection. It is asserted that nothing should prevent a leniency applicant or party to a cartel settlement from disclosing corporate statements or settlement submissions, on a voluntary basis and after the Statement of Objections or similar proposed decision has been issued, if it so chooses in the context of settlement discussions with private claimants. According to Campbell and Feunteun, ‘voluntary evidence disclosure by leniency applicants and other defendants is often the key to ensuring that settlement negotiations can progress properly and be appropriately supervised by the courts’.²⁴ Without specifying mandatory rules for Member States with regard to voluntary disclosure of such evidence, the Commission did come forward in June of 2013 with a relatively, but not perfectly clear category-based approach to evidence disclosure via court order.²⁵ The Commission’s proposal is presented in schematic form below.

²³ For a critical view of the distinction between those materials worth protecting and ‘pre-existing’ documents, see Sven Völcker’s case note on Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, 49 *Common Market Law Review* 695-720 (2012).

²⁴ Page 35.

²⁵ In section 4.3.3 of his chapter, Luís Morais calls for further precision with regard to these rules. For example, he says ‘the Directive should specify that protection against disclosure should apply not only to the first oral statement made by a party within a leniency procedure but also to subsequent and complementary submissions’. See Morais, ‘Integrating Public and Private Enforcement of Competition Law in Europe: Legal Issues’, this volume, page 130; similarly, see Geradin and Grelier, ‘Tip of the Iceberg’, cited above note 9, at 11 and 19. Morais, Geradin and Grelier are also wary – and others will be too, surely – of the only temporary protection that would apply as regards the ‘grey list’ documents seen in the chart below.

Access to leniency and other materials under Commission's proposal of 11 June 2013

Degree of protection	Types of documents	Under Commission's proposal, degree of protection and earliest moment of possible disclosure²⁶
Black list	Documents whose disclosure could jeopardize public enforcement efforts, specifically: <ul style="list-style-type: none"> - Corporate leniency statements; - Settlement submissions 	<u>'Absolute' protection:</u> Never disclosable by court order
Grey list	Documents prepared for the purpose of the investigation, such as: <ul style="list-style-type: none"> - Replies to requests for information; - Statements of Objections; - Preliminary assessments (under Article 9 of Regulation 1/2003) 	<u>Temporary protection:</u> Disclosable by court order ²⁷ only after the authority in question takes a decision in the case or closes its file
White list	Pre-existing materials not prepared in connection with the investigation, such as: <ul style="list-style-type: none"> - Written agreements; - Texts of e-mails; - Minutes of meetings 	<u>No protection:</u> ²⁸ Disclosable by court order at any time

²⁶ Presumably the tenets that apply here would also be observed in other contexts, including for example the case where, pursuant to Article 15 of Regulation 1/2003, a national court requests that the Commission provide it with materials in its case file.

²⁷ A court order would not be automatic; the national court would only issue such an order after satisfying itself that the request for evidence is proportionate. Proportionality in this context often boils down to whether a party has other reasonable means of its own to obtain the requested materials, and whether the information sought is of genuine relevance to the matter before the court. Illustrative in this regard is *National Grid Electricity Transmissions Plc v ABB Limited and Others* [2012] EWCH 869 (Ch), 4 April 2012. See especially para 39.

²⁸ It appears that the proposal, if adopted, would necessarily relax point 40 of the Commission's 2006 Leniency Notice, which states: 'The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001, even after the decision has been taken.' (footnote omitted) Documents received by the Commission 'in the context of' a leniency application include pre-existing documents as a matter of course. Another note of dissonance resulting from the liberal rule on pre-existing documents relates to point 26 of the 2004 Notice on cooperation between the Commission and the courts of the EU Member States, where the Commission commits to withhold from national courts information submitted by a leniency applicant unless the applicant consents. Since this confidentiality commitment is broad and covers pre-existing documents, the Commission intends at a later stage to align the latter Notice with the Directive. See page 15 and footnote 45 of the Explanatory Memorandum attached to the draft Directive (Annex I to this volume).

Campbell and Feunteun also recount the experiences, particularly in Germany, in cases involving the consolidation of multiple claims. They discuss, among other cases, the experience of CDC in seeking substantial bundled claims (amounting to hundreds of millions of euros) from companies that participated in the cement and hydrogen peroxide cartels. CDC's special purpose vehicle model sidesteps collective action in the sense that the company evaluates the value of multiple claims for damages, purchases them (with nominal up-front consideration coupled with deferred potential compensation whereby a percentage of any damages recovered is paid to the original assignors) and then seeks recovery in its own name while bearing the full risk of failure. With the support of the German Federal Court of Justice and lower German courts, the door is now open in Germany to the pursuit of consolidated claims in a way that partially overcomes the problem of 'scattered harm' and its consequence of under-supply in compensation claims.²⁹ Finally, the authors discuss the spontaneous efforts of private litigants in Europe to settle claims for damages by means of settlement funds. Significant cases in this context, and notably the air passenger and marine hose cartels, provide examples of imaginative solutions aimed at achieving 'global peace', which include, among other things, the possibility of 'turncoat' cartelists furnishing ammunition in private proceedings against erstwhile co-conspirators.

DONALD BAKER: 'Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe'. Baker's paper appears in this collection as a reminder that a full appreciation of how private enforcement in the EU fits within the broader picture requires a consideration of the criminal law environment as well as the administrative law environment. Are cartels a supreme evil in the rest of the world just as they are in the U.S.?³⁰ As a starting point, Don Baker fully embraces the wisdom of criminal law penalties and incarceration for cartelists under the Sherman Act, and he gives good reasons to support his views.³¹ These include,

²⁹ In the cement cartel case, for example, following appeals on threshold issues of procedure and admissibility (decided ultimately by the Bundesgerichtshof in CDC's favour), Judge Ollerdißben of the Landgericht Düsseldorf heard evidence on 10 October 2013 and a verdict on aggregated damage claims approaching 200 million euros is awaited. Four other lawsuits are pending in Germany, the Netherlands and Finland. However, while the CDC model can be promising where medium and large businesses wish to outsource the enforcement of claims reaching a certain value (due to high-volume purchasing of the cartelised product), relative transaction costs rise in the case of final consumers and small businesses, whose claims tend to be of modest or micro scale. CDC is not the solution for them. A similar point is made in Tim Reher, 'Specific Issues in Cross-Border EU Competition Law Actions Brought by Multiple Claimants in a German Context', in Paul Beaumont, Florian Becker and Mihail Danov, eds, *Cross-Border EU Competition Law Actions*, Hart Publishing, 2013, chapter 12, at page 161 ('the assignment model is not feasible in cases of dispersed and small individual damages').

³⁰ U.S. law does however condone the supreme evil of antitrust in the case of purely outbound export cartels.

³¹ See, eg. OECD policy roundtable on Cartel Sanctions against Individuals 2003, DAF/COMP(2004)39 (10 January 2005), including in particular the Background Note by Andreas Reindl at pages 15–28. The document is available at <http://www.oecd.org/competition/cartels/34306028.pdf>. See also Christopher Harding and Julian Joshua, *Regulating Cartels in Europe*, Oxford University

above all, the frequent disconnect between the pathology – an individual rational or not-so-rational actor choosing whether to collude – and the remedy, ie, the mere imposition of high corporate fines.³² Undoubtedly, some company officers and directors are deterred from unlawful collusion by the prospect of negative consequences flowing from the tarnished corporate reputation and possibly diminished share prices or other losses that may cause shareholders to hold them to account.³³ But, as suggested earlier, given the low rate of detection of cartels, and given the extraordinary time lag that can elapse before the company must pay any penalty, many company officers and directors must feel secure when they roll the dice. The U.S. experience suggests that serious enforcement of criminal law under the Sherman Act goes a long way toward closing the deterrence gap.³⁴

But irrespective of the wisdom of punishing natural persons for cartelizing markets, Baker's assessment of the situation in Europe suggests clearly that the same attitudes do not prevail here. At the level of the EU, as Baker points out, individual criminal penalties for cartels are alien to the Treaty-based legal framework.³⁵ That will not change soon, even if some of us would like to see the EU move in that direction when there is sufficient and hard-won intellectual and popular momentum. But even at the level of the Member States – and here Baker focuses on the experiences of the United Kingdom and Ireland – the record on individual punishment so far is unimpressive. The well-publicized story in the

Press, 2010, chapter 11; Douglas Ginsburg and Joshua Wright, 'Antitrust Sanctions', 6(2) *Competition Policy International* 3–39 (Autumn 2010).

³² See also James Venit and Andrew Foster, 'Competition Compliance: Fines and Complementary Incentives', this volume, page 71 ('The lack of individual penalties may lead to diverging incentives between firms and their employees as regards competition compliance. Where a decision maker faces individual rewards for generating profits (even those gained anticompetitively) but no penalties for violating the antitrust laws, his or her normative commitment to 'following the rules' may not be aligned with the goal of maximum competition compliance.').

³³ See *ibid* (discussing securities fraud litigation and derivative shareholder suits brought in U.S. courts under securities laws).

³⁴ Arguably, this also raises the conceivable possibility that some employees managing globally active firms may intensify their quest for cartel profits in other countries (including relatively poor countries) in order to compensate for lost 'opportunities' in the United States. Paradoxically, insofar as this theoretical diversion phenomenon occurs, the strong consumer-regarding impact of the Sherman Act indirectly harm consumers elsewhere. Of course, the fault lies with the cartelists, not with cartel crusaders in the U.S.

³⁵ There may however be other non-criminal possibilities under the current framework. Although the antitrust prohibitions in the Treaty are addressed to undertakings, there is an argument to the effect that the Treaty would not preclude the imposition of administrative fines or other non-criminal sanctions such as director disqualification on (non-undertaking) natural persons. The argument would be that non-criminal sanctions are necessary and proportionate to the goal of ensuring the effectiveness of the Treaty rules. This possibility of the Commission imposing administrative fines or other non-criminal sanctions without any revision of the Treaty is highlighted by Jim Venit and Andrew Foster in their contribution, 'Competition Compliance'. Could the Commission impose such sanctions even without amendments to Regulation 1/2003? If it did so, there would likely be a legal fight raising interesting questions before the EU Courts as to the assumptions underlying the Regulation and as to the boundaries of the Commission's powers. Notwithstanding the desirability of individually targeted sanctions, my own view is that, given the secondary law framework as it stands, such acts by the Commission would be *ultra vires* and possibly contrary to general principles of EU law.

UK has been so unsatisfactory, in fact, that there is new legislation (Section 47 of the Enterprise and Regulatory Reform Act 2013³⁶) purporting to correct the flawed Section 188 of the Enterprise Act 2002.³⁷ More generally, it is a stunning fact that, after all these years – at least 20 years of ‘hard core cartel’ rhetoric in Europe – price fixers do not serve jail time here. Those prison sentences that have been handed down have almost all been suspended (in this respect, Ireland is the leading EU jurisdiction,³⁸ although recent legislative changes seem to invite judges to show no quarter³⁹). Will legislatures and courts be ready, in the future, to turn the screws and get serious about incarcerating individuals? My answer is that this will indeed happen, but on a gradual basis – punctuated, perhaps, by occasional bombshell cases catching responsible executives quite off guard. As Baker reminds us, although criminal law penalties appeared in the Sherman Act from the very beginning – riding a populist wave, with no debate or reflection – it was not until watershed events transpired in the 1960s (the electrical equipment

³⁶ Section 47 ERRA appears at <http://www.legislation.gov.uk/ukpga/2013/24/section/47/enacted>.

³⁷ The UK’s bitter experiences under the Enterprise Act 2002 were largely due to a ‘dishonesty’ requirement in criminal cartel cases. This requirement has now been abolished (while excluding from prosecution *unconcealed* cartel behavior, oxymoronic as that may seem). However, as a concession apparently granted to overcome business interests fiercely opposed to the reform, the new provisions allow an accused colluder to exonerate herself if, prior to entering into or implementing a cartel arrangement, ‘she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or implementation’.

If UK courts apply this defense literally – the statute does not stipulate that the cartel must have followed the lawyer’s (bad) advice for the defense to succeed – it will probably make a mockery of the cartel offense, hardly an intended consequence of the reform; on the other hand, particularly where collusion is pursued by rogue employees (unless they cunningly seek legal advice without tipping off their employers; this may become a more common risk as the defence becomes better known by businessmen), the defense may be immaterial. And of course, for what they are worth, administrative sanctions and remedies will still be available to the Competition and Markets Authority, and the wrongdoing company may still face exposure to private claims. For an early criticism of the ‘legal advice’ defense, see Peter Whelan, ‘Does the UK’s New Cartel Offence Contain a Devastating Flaw?’, UEA/CCP blog post, 21 May 2013, <http://competitionpolicy.wordpress.com/2013/05/21/does-the-uks-new-cartel-offence-contain-a-devastating-flaw/>. Less pessimistically (ie, hoping that the UK courts will put a gloss on the defense), see also Andreas Stephan, ‘The UK’s New Cartel Offence: It Could Be Alright on the Day’, UEA/CCP blog post, 9 July 2013, <http://competitionpolicy.wordpress.com/2013/07/09/the-uks-new-cartel-offence-it-could-be-alright-on-the-day/#more-836>.

³⁸ As of June 2013, prison sentences totalling 84 months for 10 individuals had been successfully secured in the Irish courts, but all sentences were suspended. See further Patrick Kenney, ‘Making Cartel Crime Not Pay’, speech of 27 September 2012, <http://www.tca.ie/images/uploaded/documents/2012-09-27%20Making%20Cartel%20Crime%20Not%20Pay.pdf>.

³⁹ See Kenney, ‘Crime Not Pay’, cited previous footnote, pages 6–10; Peter Whelan, ‘Strengthening Competition Law Enforcement in Ireland: The Competition (Amendment) Act 2012’, 4(2) *Journal of European Competition Law & Practice* 175–181 (2013) (interpreting the increase of maximum jail time from 5 to 10 years as a message to judges). This institutional ‘dialogue’ is perhaps in some respects mirrored in Canada. Up to and including 2012, cartelists in Canada convicted in criminal cases were generally able to avoid or reduce prison sentences, in part via plea agreements, and instead were given ‘conditional sentences’: community service tasks and/or house arrest (and individual fines have amounted to paltry sums). However, as a result of amendments to the Criminal Code introduced in March of 2012, Canada has made incarceration mandatory for persons convicted of cartel behavior. See, eg, Mark Katz, ‘Punishing Cartels in Canada: Is a ‘Sea Change’ on the Horizon?’, CPI Cartel Column, 31 January 2013, <https://www.competitionpolicyinternational.com/assets/Uploads/Cartel1-31-2013-1-1-1.pdf>.

cartel cases) and 1970s (especially the 1974 amendment upgrading Sherman Act violations to felonies) that the criminal side of US antitrust law came of age. I submit that social change occurs at a rather faster pace today than it once did, and I don't expect the 'criminalization' of cartel conduct in Europe will take 70 or 80 years to hit its stride; but *ce n'est pas demain la veille*.

While we wait patiently for change, inaction is not an acceptable option. Two observations should be made in this respect. First, the fact that individuals do not go to prison in Europe does not mean that individuals cannot be subject to targeted penalties. An obvious and sensible example is that Member States can provide for director disqualification orders, as jurisdictions such as the UK, Australia and now Ireland have done.⁴⁰ Australia has also prohibited companies from indemnifying company officers for cartel behaviour, another sensible measure. Baker provides several other examples of administrative measures that can implement the 'polluter pays' principle better than the brute force of high corporate fines can do.⁴¹ Furthermore, as Baker points out, administrative sanctions can be adopted under a lower standard of proof, and they can potentially be adopted more quickly compared to criminal cases.⁴² The second observation is that the fact that cartelists are not going to jail in Europe does not mean that criminal laws are not being applied. Apart from the suspended sentences in Ireland, the authorities in some Member States have become quite active in imposing criminal fines on natural persons for breach of cartel laws. For example, in 2012, criminal fines were imposed on 31 individuals in Germany. In the Netherlands, six more unlucky individuals got the same treatment.⁴³ This is perhaps the shape of things to come.

JAMES VENIT AND ANDREW FOSTER: 'Competition Compliance: Fines and Complementary Incentives'. Like Don Baker's chapter, Venit and Foster stress the importance of rethinking the essentially one-dimensional approach to sanctions under EU competition law. As these authors state: 'Despite the consistent imposition of increasingly higher fines, it is not clear that the Commission has successfully instilled a culture of compliance in Europe or elsewhere. In the absence of material consequences for individuals and additional affirmative obligations on undertakings, the incentives to develop a pro-active, firm-wide

⁴⁰ On disqualification orders, see, eg, Andreas Stephan, 'Disqualification Orders for Directors Involved in Cartels', 2(6) *Journal of European Competition Law & Practice* 529–536 (2011); OFT, Director disqualification orders in competition cases (2010), http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/of510.pdf.

⁴¹ See page 59. See also Venit and Foster, 'Competition Compliance', this volume (discussed below in the main text).

⁴² For this reason he suggests that, where administrative and criminal sanctions co-exist, criminal cases should be reserved for particularly momentous cases, while run of the mill cases should be subject to sanctions easier to administer; calibrating enforcement in this way can potentially achieve both the wake-up call of possible imprisonment and an enhanced sense, on the part of actors deciding whether to collude, that the enforcer can process more numerous cases.

⁴³ See Marco Slotbloom, 'Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield', Kluwer Competition Law blog post of 25 April 2013, <http://kluwercompetitionlawblog.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/>.

sense of accountability may still not be sufficient.⁴⁴ Whereas Baker questions the deterrent effect of corporate fines and affirms the need for individual penalties on the basis of personal experience, Venit and Foster make similar points but link them more specifically to EU practice, referring for example to enforcement statistics (see section 2 of their paper). Like Baker, they recommend alternative means of enhancing deterrence and compliance, but they dwell in further detail on the possibilities of ‘complementary incentives’, in particular those arising from other areas of law (eg, securities law and rules against public disclosures that ‘cook’ the books) and from benefits that could conceivably be granted to first-in leniency applicants to reduce their exposure to private damages claims. As they point out, private enforcement may also encompass not just antitrust damages actions but also securities fraud litigation (where shareholders recover compensation from the corporation and/or the managers or directors engaged in fraudulent acts, including by way of company disclosures failing to disclose that profits have been artificially elevated by cartel overcharges) and shareholder derivative suits (where shareholders sue fiduciaries such as managers or directors for their misdeeds but any sums recovered in restitution are paid to the corporation).

In section 3 of their paper, Venit and Foster refer to ‘undesirable side-effects’ that may follow from the reliance of the Commission on very high fines. On the one hand, it is claimed that high fines can stunt innovation and market entry too. Without stronger empirical evidence one should perhaps be cautious about such conclusions. First of all, one would think that in most highly innovative sectors cartel behavior may be both illogical (since the drive for innovation is in principle to outpace rivals) and in any case difficult to sustain, although it is also undeniable that collusion has occasionally occurred in sectors where innovation is important. Second, the claim that high fines reduce or eliminate the ability of a cartelist to innovate presents an *ex post* view of the sanction, whereas from an *ex ante* perspective a prudent firm might want to preserve its capacity to innovate by eschewing illegal collusion and avoiding the related penalties. This latter argument, however, makes exactly the same assumptions about ‘rational’ firm behaviour that often seem to be mistaken: high corporate fines may mean that antitrust compliance is the best strategy for the firm, but that fact may not be internalized by individual corporate actors. Third, the cost of cartel fines is often financed after the fact by consumers, meaning that if innovation is a necessary parameter of competition in a given industry, the firms may be able to at least partially fund R&D through higher prices on today’s generation of products. Empirical evidence would also be necessary with regard to the authors’ claim that high fines inhibit market entry in industries of high fixed costs because they cut deeply into returns on investment. As a matter of policy, it would seem imprudent to begin checking whether fines will undermine the performance of cartelists and then making adjustments to soften the blow, as this may engender moral hazard. But again the problem with the current ‘architecture’ of EU sanctions is a more fundamental one, if indeed it fails to secure sufficient compliance with the law.

⁴⁴ Page 64.

Drawing inspiration from U.S. law, and noting an international trend, Venit and Foster sensibly recommend that non-criminal individual penalties should be made available under EU law. The authors' discussion in this respect is brief, and researchers should direct their creative energies toward the broader debate about 'smart sanctions' for cartel conduct in the EU.⁴⁵ Absent Treaty amendments, how far can the EU legislator go with the rationale that non-criminal penalties for natural persons are required for the effective enforcement of the prohibition of cartels in Article 101?⁴⁶ What exactly do the principles of *effet utile* and teleological Treaty (and now Charter⁴⁷) construction demand?

Venit and Foster also address certain issues that bear on the integration of public and private enforcement. One issue that can be highlighted here is the way the risk of exposure to civil liability can not only diminish the incentive to seek immunity, in the *Pfleiderer* sense; it can also enhance the incentive to do so. The clearest example is in the United States, where the ACPERA statute of 2004 de-trebles, and thus de-punitizes, damage recoveries under the Clayton Act as a reward for successful corporate amnesty applicants who also assist plaintiffs going after co-cartelists.⁴⁸ Given that in much of continental Europe⁴⁹ the recovery of punitive damages is often an unthinkable taboo,⁵⁰ it may be unrealistic to include in an EU Directive measures to de-punitize damages as a leniency sweetener.⁵¹ However,

⁴⁵ Commentators have given thought to this, but there still seems to be ample room for discussion. For one notable paper discussing some of the issues, see Douglas Ginsburg and Joshua Wright, 'Antitrust Sanctions', 6(2) *Competition Policy International* 3 (Autumn 2010).

⁴⁶ As noted above, I doubt that the Commission could punish (non-undertaking) natural persons by way of administrative fines or other non-criminal penalties under the current legislative framework. On this view, the Commission could only have the option of imposing individually targeted penalties if Regulation 1/2003 were revised, as it one day inevitably will be.

⁴⁷ Most notably, Article 47 of the EU Charter on Fundamental Rights guarantees the right to an effective remedy from an impartial tribunal. Given that the principle of effectiveness (*effet utile*) is a horizontal general principle of EU law, it applies equally to the Charter (subject to the Charter's various qualifications and provisos).

⁴⁸ More precisely, the limitation of recovery is to 'actual damages sustained' (no trebling and no joint and several liability). In order to qualify, the company must actively cooperate in the lawsuit against the other cartel participants, for example by submitting relevant documents and making witnesses available for depositions and testimony. See Section 213(b) ACPERA.

⁴⁹ With regard to the UK, see *2 Travel v Cardiff Business* [2012] CAT 19, paras 448 et seq. (allowing exemplary damages in the amount of GBP 60,000; *Albion Water v Dŵr Cymru Cyfyngedig* [2013] CAT 6, paras 229 et seq. (possibility to claim exemplary damages affirmed as in *Cardiff Business* but the test is 'very stringent' (para 287) and plaintiff was denied such damages on the facts). Contrast *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2007] EWCH 2394 (Ch), [2008] EWCA Civ 1086 (denying such damages on *ne bis in idem* grounds where a fine had nominally been imposed by the Commission, notwithstanding a leniency reduction to zero). The legislation on private damages actions proposed by the UK Government would specifically disallow the recovery of exemplary damages in collective redress cases, which may at least in part reflect the influence of Continental attitudes.

⁵⁰ The aversion to punitive damages may be seen, for example, in Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, cited above note 18, para 31 (recommending to the Member States that they prohibit punitive damages in the context of bundled claims arising from 'mass harm situations').

⁵¹ One might conceive of an analogous rule precluding recovery of pre-judgment interest, which would represent a substantial reduction of damages in cases of protracted infringements. Such a rule is simply not on the table.

the institution of treble damages is not strictly necessary for the shaping of civil damages rules in a way that aims to preserve and even reinforce the attractiveness of leniency programs. Building on earlier ideas that appeared, for example, in connection with the 2008 White Paper,⁵² the Commission in its draft Directive of June 2013 has proposed to require Member States to introduce limited exceptions to the general rule of joint and several liability for cartelists. The proposal is clearly motivated by the need to press forward with stronger national systems of antitrust damages litigation without giving the immunity applicant cold feet, especially since immunity applicants may well be the first targets in plaintiffs' line of fire.⁵³ Article 11 of the draft Directive provides in pertinent part as follows:

2. Member States shall ensure that an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall be liable to injured parties other than its direct or indirect purchasers or providers only when such injured parties show that they are unable to obtain full compensation from the other undertakings that were involved in the same infringement of competition law.
3. Member States shall ensure that an infringing undertaking may recover a contribution from any other infringing undertaking, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement. The amount of contribution of an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers. [The Council seeks to suppress the second sentence.]
4. Member States shall ensure that, to the extent the infringement caused harm to injured parties other than the direct or indirect purchasers or providers of the infringing undertakings, the amount of contribution of the immunity recipient shall be determined in the light of its relative responsibility for that harm.

Article 11 of the Commission's draft thus provides double insurance for successful first-in leniency applicants: a limited suspension of liability *vis-à-vis* cartel victims outside the vertical supply chain; and a limitation on the amount that a successful immunity applicant may have to pay as a contribution to joint tortfeasors (if the latter have paid more than their fair share) to those damages it caused within that

⁵² Cf. Commission, White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final of 2 April 2008, page 10, final paragraph; Commission, Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC(2008) 404 of 2 April 2008, paras 304–306. It has been suggested, though, that limiting leniency recipients' follow-on liability for damages 'is not necessary for the effective functioning of leniency. If there were a need to enhance the attractiveness of leniency, this could always be done by increasing the level of fines or other public penalties from which leniency applicants are granted immunity or reductions.' Wils, 'Relationship between Public Antitrust Enforcement and Private Actions for Damages', cited above note 4, at 25.

⁵³ See Jochen Burchrichter and Enno Ahlenstiel, 'Legal and Jurisdictional Issues – The German Perspective', this volume, pp 99–100 (providing a vivid example of how a successful immunity applicant can find itself all alone in civil litigation with potential responsibility for damages caused by all its co-cartelists' conduct as well as its own). See also recital 28 of the draft Directive of June 2013 (a decision (or the relevant part of a multi-party decision) of a competition authority finding that the successful immunity applicant has infringed the law may become final before decisions (or parts of the same decision) against the other cartelists become final, an asymmetry which again could *ceteris paribus* dampen the incentive to confess).

supply chain.⁵⁴ These benefits for companies that waste no time coming clean are among the subtler features of the Directive, but they may have a significant practical impact in the agencies' fight against cartels. Reasonably enough they also have the effect of shifting part of the 'cost' of compensating victims to infringers that fail to qualify for leniency. From an alternative and less positive point of view, it is said that Article 11(2) of the draft may dampen the incentive to self-report because of the proviso restoring the possibility of joint and several liability *vis-à-vis* a successful immunity applicant if an injured party shows that he is unable to recover full compensation from co-cartelists.⁵⁵ The nightmare scenario for an immunity recipient would be to be sued for the entire harm caused by the cartel (ie, sued by direct and indirect purchasers but also by claimants outside the vertical chain invoking the exception in draft Article 11(2) above) only to find that seeking contribution from the other companies concerned is legally impossible because, in the meantime, the infringement decision as applied to all of those other companies (but not as applied to the leniency recipient, who did not lodge an appeal) has been annulled – eg, for failure to respect essential procedural requirements – by a final judicial decision and therefore 'legally did not exist'.⁵⁶ Geradin and Grelier suggest that the EU legislator could address this anomaly by eliminating the exception according to which joint and several liability for an immunity recipient is restored if victims are unable to obtain full compensation from its co-infringers.⁵⁷ The problem just outlined does amount to a glitch in the

⁵⁴ Member States that so desire could go even further than what is ultimately required under the Directive. Hungary, for example, exempts successful immunity applicants from paying damages to any claimant in a follow-on action (ie, including direct or indirect purchasers or providers) unless the claimant is unable to obtain full compensation from the other co-infringers. See Section 88 D of the Hungarian Competition Act.

⁵⁵ See Sebastian Peyer, 'Is the New EU Private Enforcement Draft Directive Too Little Too Late?', UEA/CCP blog post of 15 June 2013 ('In the worst case scenario the leniency applicant has to await the end of all (!) private damages claims before he knows whether or not the claimants have obtained full compensation from other cartel members, or are likely to pursue him. This may reduce the incentives for firms to voluntarily disclose information to the agencies.' A similar concern is expressed by Luis Morais in section 6.2 of his contribution to this volume (but on balance he regards as 'very positive' the way in which the draft Directive treats the specific issue of the civil damage exposure of successful immunity applicants; another positive assessment is provided by Veljko Milutinović in the postscript to his chapter).

Peyer's overall assessment is that the draft Directive neglects the core issues of costs, funding of claims and 'class actions'. The omission of the latter two issues is deliberate, as the Commission has chosen to deal with them (satisfactorily or not) in Recommendation 396/2013, cited above note 18. Peyer's other overarching point is that the slow construction of the draft Directive has been outpaced and made largely redundant by rapid developments at the national level. It is true, of course, that several Member States have either amended their procedural regimes to better address issues of private antitrust litigation or are at present contemplating such amendments. Nevertheless, when one considers the EU as a whole it is not clear that such matters are a priority for many Member States. Uncoordinated legislative activity across Europe, despite the potential it presents for creative solutions, would seem likely to exacerbate the existing fragmentation of regimes while leaving behind aggrieved but poorly resourced parties in the less proactive Member States.

⁵⁶ See Pinar Akman, 'Period of limitations in follow-on competition cases: the elephant in the room?', CCP Working Paper 13-8 (2013), at 18–20 (quote at 18), discussing *Deutsche Bahn AG v Morgan Crucible* [2011] CAT 16; Geradin and Grelier, 'Tip of the Iceberg', cited above note 9, at 11–12.

⁵⁷ See Geradin and Grelier, *ibid.*, at 19–20.

proposal of June 2013, but one whose relevance is probably limited to quite rare (not to say inconceivable) concrete cases. Furthermore, although Article 16(1) of Regulation appears to brook no decision by a national court that contradicts a Commission infringement decision, and since, in the scenario above, that decision remains unannulled as regards the non-appealing immunity recipient, a national court under the circumstances would surely – or rather it *should* surely request a preliminary ruling from the Court of Justice; and one may doubt whether the ECJ would insist on a reading of Article 16(1) so inflexible as to require the national court to ignore the infirmity of the Commission’s decision.

Part 2 Integrating Public and Private Enforcement in Europe. Legal and Jurisdictional Issues

FRED LOUIS: ‘Promoting Private Antitrust Enforcement: Remember Article 102’. This paper has two principal features. First, it seeks to redirect attention from the routine debate on the EU’s private enforcement initiatives, which tend to revolve around private claims brought in cartel cases, and to point out that the measures adopted by the EU will also have important consequences for litigating abuse of dominance cases. As a definitional matter, it is argued that the term ‘private enforcement’ should not even be used with regard to follow-on claims brought by private litigants, since it is in this case the dog wagging the tail – significant issues may be litigated, such as causality and damages, but it is the public authority that *enforces* the competition rules. Private litigation that follows an authority’s final decision merely draws the corresponding civil consequences. Second, an updated part of the paper reacts to the Commission’s proposed Directive on antitrust damages actions, published in June of 2013.⁵⁸

If follow-on actions are removed from the concept of ‘private enforcement’, it may be that Article 102 cases (and/or cases alleging breach of equivalent national rules) constitute the main area of private enforcement. In a pure exploitative abuse scenario, private damages claims may not always be brought before national courts, although there is evidence of significant litigation in this context.⁵⁹ Where those exploited by exorbitant prices are individual consumers or small or micro businesses, the familiar problem of dispersed harm may imply, in a manner similar to many cartel cases, that unless an efficient method of pooling similar claims is

⁵⁸ Some of the other chapters herein, including notably those of Luis Silva Morais and Veljko Milutinović, also provide early assessments of the Commission’s draft Directive. A small but growing number of analyses of the draft by practitioners are also emerging. See, eg, Anneli Howard, ‘Too little, too late? The European Commission’s Legislative Proposals on Anti-Trust Damages Actions’, 4 *Journal of European Competition Law and Practice* 455–464 (2013).

⁵⁹ See the Commission, Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003, SEC (2009)574 final of 29 April 2009, point 270. Philip Lowe also refers to the ‘many claims of exploitative abuse at national level’ in his contribution. See ‘Conclusions’, point 7.

available, the cost of litigation may be inordinately high for potential plaintiffs compared to the small stakes. Under those conditions, a customer suspecting that a dominant firm's prices are excessive within the meaning of Article 102 might in some cases be better off seeking to persuade a competition authority to take the case. If the exceptional conditions of actionable exploitative conduct appear to be satisfied,⁶⁰ the enforcer can possibly put enough pressure on the putative infringer to secure some kind of prospective price relief, although absent litigation or ADR the customer would have no means in this case of obtaining compensation for any illegal rents she may have paid to the dominant firm. As for exclusionary abuses, private enforcement is of potentially immense significance. First of all, it is rather exceptional for public enforcers to pursue full-blown exclusionary abuse cases all the way to an infringement decision. Many such cases are filtered out, either at an early stage or – in light of the complexity and controversial nature of such cases, not to mention the fact that prolonged investigations may become superfluous due to rapid market evolution – at an intermediate stage by means of an Article 9 decision or its national equivalent. The rarity of final infringement decisions in this context implies that private enforcement may be a better option for aggrieved parties, who may well be companies with large claims and sufficient means to vindicate them. (Of course, the helpfulness of such litigation depends to a large extent on whether the substantive law of abuse of dominant is sufficiently rational and clear that legitimate, aggressive competition can be distinguished from anticompetitive conduct within a tolerable margin of error; the ECJ's guidance will be utterly crucial in this regard in the coming decades.) Furthermore, the nature of exclusionary conduct is such that expeditious intervention may make the difference between life and death in the market. But as Louis points out, it is difficult to get competition authorities to impose interim measures, above all at the level of the EU, where Article 8 of Regulation 1/2003 provides that such measures may adopted solely at the discretion of the Commission. For these reasons, national courts are likely to be the port of call when time is of the essence. Of course, depending on the jurisdiction it may be difficult to secure rapid injunctive relief in court as well, but perhaps the principles of effectiveness and effective judicial protection imply that it should not be too difficult.

With regard to the Commission's draft Directive of June 2013 (as well as the Commission's Communication on the quantification of harm in private damages actions and the corresponding Staff Working Document, each of which formed part of the June 2013 package), Louis offers a positive early evaluation (stating that the proposed Directive is 'overall a very commendable attempt to facilitate private damages actions while seeking to maintain a balance between the rights of victims to obtain redress, the rights of defence and the need to avoid deterring

⁶⁰ For extensive descriptive and normative discussions relating to the prohibition of exploitative conduct by dominant firms, see various contributions (eg, those of: Lars-Hendrik Röller; Emil Paulis; Marc van der Woude; and Amelia Fletcher) in Claus-Dieter Ehlermann and Mel Marquis, eds., *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, 2009.

leniency applications [...]’⁶¹). He underlines, in particular, the importance of the proposed rules on disclosure of evidence (Articles 5–8 of the draft text): ‘The system of court-ordered disclosure [...] constitutes a true revolution for many if not most Continental legal regimes. The possibility to force the allegedly dominant defendant (as well as third parties) to divulge information is crucial to establish some balance and equality of arms in damages actions for abuse of dominance’.⁶² In part, the boldness of the proposal relates to the not-yet-precisely-resolved matter of how much protection from disclosure will be accorded to a defendant’s business secrets. As Louis points out, Article 5(4) of the draft Directive indicates that courts would have to walk the thin line between too much protection and not enough: ‘Member States shall ensure that national courts have at their disposal effective measures to protect confidential information from improper use [an undefined term] to the greatest extent possible whilst also ensuring that relevant evidence containing such information is available in the action for damages.’ Preliminary references to Luxembourg might be expected with respect to delicate issues such as this one. But while Louis generally praises the Commission’s proposal on damages actions, he reiterates his point concerning the need for swift injunctive relief in exclusionary abuse cases because the draft Directive does not address this.⁶³ Considering that there remains significant uncertainty in relation to the private enforcement of Article 102, Louis compiles a list of issues that could be addressed in a guidance document to assist courts as well as litigants when relevant cases arise.

JOCHEN BURRICHTER AND ENNO AHLENSTIEL: ‘Integrating Public and Private Enforcement in Europe: Legal and Jurisdictional Issues – The German Perspective’. Together with the UK and the Netherlands, Germany has come to be known as one of the few EU Member States in which private antitrust litigation really happens. This positive development owes much to the amendments made in 2005 to the German Act against Restraints of Competition (ie, the GWB). Burrichter and Ahlenstiel begin their paper with a review of the most relevant provisions of the Act in this context, Sections 33(3) and 33(4). Together, these provisions provide a crucial basis for bringing damages actions before the German courts, and especially so in the case of follow-on actions. With regard to the latter, the German legislator took the daring, or even revolutionary step of declaring German courts that hear and adjudicate antitrust damages claims to be bound by any prior finding of an infringement either (i) by a competition authority of any Member State (or court acting as such), or (ii) by an appellate court that upholds such a finding in a final judgment. This rule now serves as the model that would apply

⁶¹ Page 90.

⁶² Ibid. Cf. also Morais, ‘Legal Issues’, this volume, page 130, footnote 62 (similarly observing the innovative nature of the provisions *vis-à-vis* ‘Romanistic-Germanic systems’).

⁶³ Injunctive relief is specifically addressed in Commission Recommendation 396/2013 (cited above note 18), but the Recommendation is geared toward ‘mass harm situations’; few exclusionary abuse cases would qualify.

to all Member States if the corresponding provision in the draft Directive of June 2013 is adopted by the Council and the Parliament.⁶⁴ In the German courts and in Member State courts following the adoption of the Directive, plaintiffs will still have to satisfy the conditions of tort law including, in particular, fault on the part of the defendant, damages sustained, and causality.⁶⁵ Nevertheless, this envisaged pan-European rule of mutual recognition will establish a remarkable system of cross-institutional and ‘diagonal’ trust. The particulars with regard to the German version of the rule are discussed in section II of the paper.

In section III, the authors consider the position of leniency applicants in follow-on damages actions, and recall that successful leniency applicants under the EU leniency program (or under similar national leniency programs) may often be easy targets for follow-on claims because the decisions against them become final earlier than do decisions against co-cartelists who keep fighting their case. (The Bundeskartellamt does not address infringement decisions to companies that qualify for full immunity under the German leniency program,⁶⁶ but the point remains relevant for leniency applicants later in the queue.) Combined with the normal rule of joint and several liability, the accelerated exposure of leniency applicants can put them in a very awkward position. As an illustration, Burrichter and Ahlenstiel discuss a follow-on case in the German courts that arose from the prominent EU investigation in the carglass cartel case. However, as noted above the draft Directive of June 2013 would attenuate this conflict between the private and public enforcement systems.⁶⁷ Another conflict is discussed in section IV, namely that between access to evidence and the need to protect sensitive documents within the possession of competition authorities. In this context, the *Pfleiderer* case and a similar scenario in the coffee roasters case are mentioned, with the German courts in each case attaching somewhat more weight to the need for a safety zone for leniency applications than the Court of Justice did in *Pfleiderer* and *Donau Chemie*.

⁶⁴ Article 9 of the draft Directive provides that ‘Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty.’ Recital 25 of the draft Directive states that the binding effect of national decisions established in Article 9 ‘should apply to the operative part of the decision and its supporting recitals’. (emphasis added) The reference to the decision’s supporting recitals seems to suggest that even the reasoning of the authority that adopted the decision, so long as it supports the operative part, should be treated as ‘binding’ (or more aptly, preclusive). To that extent, recital 25 seems to go beyond the position expressed by the Commission in 2000 with regard to the conflict rule that later became Article 16 of Regulation 1/2003. The Commission at that time stated that ‘the potential for conflict depends on the operative part of the Commission decision and the facts on which it is based’. Commission, Explanatory Memorandum attached to the 2000 Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2000 OJ C365E/284.

⁶⁵ See, eg, *Enron Coal Services Ltd. v English Welsh & Scottish Railway Ltd.*, [2011] EWCA Civ 2 (sectoral regulator had found an infringement but later damages action failed for failure to prove causation).

⁶⁶ See OECD Roundtable on Private Remedies 2007 (2006), cited above note 11, at 307.

⁶⁷ See above notes 64-66.

Although cross-border litigation issues concerning, for example, rules of personal jurisdiction, recognition of judgments, conflicts of laws and forum shopping were unfortunately not examined in depth at the Workshop, Burreichter and Ahlenstiel touch on some of these areas of interest in section VI of their chapter.⁶⁸ With respect to personal jurisdiction, for example, they recall Articles 5(3) and 6(1) of Council Regulation 44/2001 (the ‘Brussels I’ Regulation on jurisdiction and enforcement), now reincarnated as Regulation 1215/2012.⁶⁹ Article 6(1) is of particular importance in cross-border cartel cases (and not just those brought in Germany), as it enables a plaintiff to sue a group of cartelists in any Member State in which one of them is domiciled, assuming the claims against them are closely connected. The more geographically heterogeneous the group of cartelists, the wider the range of possible venues for litigation, and hence the greater the scope for ‘forum shopping’ – the great equalizer or the great scourge, depending on one’s point of view.⁷⁰ The authors cite an example of a Belgian company (CDC) taking advantage of Article 6(1) to sue multiple defendants in Germany, with only one anchor defendant domiciled in the forum State.⁷¹ Since the sole defendant based in Germany settled out of court, the Landgericht Dortmund in June 2013 asked the European Court of Justice, *inter alia*, whether the anchor of Article 6(1) is still lodged deeply enough to justify consolidated administration of the case in that forum.⁷² As Burreichter and Ahlenstiel explain, the answer under German law would be that the Landgericht by virtue of *perpetuatio fori* retains jurisdiction notwithstanding the awkward procedural posture of the case.

ASSIMAKIS KOMNINOS: ‘The Relationship between Public and Private Enforcement: *quod Dei Deo, quod Caesaris Caesari*’. Komninios begins his chapter with a description of the goals of competition law enforcement, which in his view correspond to an *injunctive-restorative-punitive* triad of objectives that can be and are pursued in various ways. He rejects any neat categorization, or any ‘antinomy’,

⁶⁸ For rich assortments of papers addressing such issues, see Beaumont, Becker and Danov, eds, *Cross-Border EU Competition Law Actions*, cited above note 29; Jürgen Basedow, Stéphanie Francq and Laurence Idot, eds., *International Antitrust Litigation: Conflict of Laws and Coordination*, Hart Publishing, 2012. For extended discussion and further references, see also Mihail Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, Hart Publishing, 2011.

⁶⁹ See 2012 OJ L351/1. Regulation 1215/2012 is scheduled to enter into force on 10 January 2015. In order to take account of developments linked to the future Unified Patent Court and to the Benelux Court of Justice, the Commission has proposed more amendments to the Regulation. See COM(2013) 554 final of 26 July 2013.

⁷⁰ Seen in a positive light, forum shopping may be an indicator that claimants are enjoying the benefits of the internal market; the likely reality, however, is that the plaintiffs that have real choices about where to sue are likely to be only well-resourced companies. In this sense, the undesirability of (too much scope for) forum shopping is not because of a vague feeling that plaintiffs are somehow cherry picking and eroding national preferences but because effective access to judicial process can in practice only be realized by a privileged class of (potential or actual) litigants.

⁷¹ Analogous cases have been brought elsewhere as well, in particular in the UK. See Ian Forrester and Mark Powell, ‘Market Forces and Private Enforcement: A Start But Some Way Still To Go’, this volume.

⁷² See Case C-352/13, *Cartel Damage Claims Hydrogen Peroxide SA (CDC) v Evonik Degussa GmbH and others*, not yet decided.

according to which private antitrust litigation necessarily advances the goal of corrective/restorative justice, while public enforcement is necessarily limited to injunctive and punitive functions. There are overlaps, and Komninos is at pains to point out the quasi-Smithian dual nature of private claims: their immediate relevance concerns the particular dispute they bring before courts; but they also form part of a system of justice that has a wider public purpose.

At least two implications might follow from these considerations. First, if private antitrust litigation can contribute significantly to the general interest, then its non-existence – and even now in some Member States it is *practically* non-existent – should not be accepted. Private enforcement as an institution should be cultivated and harnessed by means of appropriate mechanisms that capitalize on its virtues while mitigating or avoiding its less desirable characteristics. In the best conditions, the development of a culture of authentic corrective justice feeds into the development of a competition culture, which is one of those projects never fully attained, in any jurisdiction. Second, if the pursuit of private interest through litigation presents a complementary means of advancing the public interest, then arguments to the effect that public enforcement is categorically to be privileged over private enforcement may be based on faulty assumptions and should at least be tested. But these are my words; Komninos presents an even stronger version of this idea, arguing from the premise that although in the EU there is a hierarchy of supranational law over national law (established in the classical jurisprudence of the 1960s), there is no foundation for a hierarchy of public enforcement of the EU competition rules over private actions to recover damages for the breach of those rules.⁷³ These modes of enforcement are ‘institutionally independent’. And though it is not stated explicitly, one can accept that national courts enforcing directly effective Treaty rules, and doing so under the duty of sincere cooperation imposed by Article 4(3) TEU (and bound moreover to respect the general principles of EU law), are in functional terms agents of the Union.⁷⁴ According to Komninos, ‘[i]ntroducing

⁷³ For this proposition Komninos also cites paragraph 40 of the Advocate General’s Opinion in Case C-360/09, *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161. The Advocate General adds, and few could doubt, that as a strictly factual matter it is public enforcement in Europe, and not private litigation, that makes the most impact in terms of securing compliance with Articles 101 and 102. And, as noted earlier, private claims may be contingent on prior public actions in a way that does not really apply vice versa: no public investigation will live or die according to what occurs in civil or commercial litigation before national courts.

⁷⁴ See, eg, Case C-344/98, *Masterfoods Ltd v HB Ice Cream Limited* [2000] ECR I-11412, para 56 (‘application of the Community competition rules is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Community Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty’). Similarly, see Case C-199/11, *Europese Gemeenschap v Otis NV and others*, judgment of the ECJ of 6 November 2012, not yet reported, para 52. The Commission’s lawsuit for damages before the *Rechtbank van koophandel* (Tribunal de Commerce) of Brussels has been interpreted as the Commission’s response to the stalled efforts to bring forward EU-level proposals on private enforcement. See case note, Case C-199/11, *Commission v Otis*, 50 *Common Market Law Review* 1105, 1114 (2013) (‘The relevance of the *Otis* judgment should be assessed in view of the difficulties encountered by the Commission to achieve a minimum harmonization of the national procedural rules relevant for the private enforcement of competition law. In view of such difficulties, the Commission might have decided to explore a ‘new road’ to promote private enforcement of competition law in Europe; rather than ‘improving the

a rule of primacy [of public enforcement] would be problematic because it would undermine the role of courts as enforcers of equal standing'.⁷⁵ If it is objected that Article 16(1) of Regulation 1/2003 establishes the hierarchical superiority of the Commission by precluding national courts from adopting decisions running counter to the Commission's actual or contemplated decisions, Komminos replies that Article 16(1) and the jurisprudence on which it is based do not relate to any *institutional* hierarchy but rather give expression to the supremacy of EU law over national law. Also relevant here is the principle that national courts generally have no competence to rule on the validity of any instrument of EU law.⁷⁶

With regard to the principle of primacy, Article 288 TFEU states that '[a] decision which specifies those to whom it is addressed shall be binding only on them'. One might therefore claim that a literal reading of Article 288 leaves national courts free to adopt decisions contrary to a Commission decision, since the latter is addressed to (in the antitrust context) undertakings, and not courts. EU law cannot 'take precedence' over national law where they do not come into conflict. This interpretation is certainly a cheeky one, and its validity is highly doubtful in particular where a Commission decision imposes a fine, since Article 299 TFEU provides that an act of the Commission imposing a pecuniary penalty on persons other than states 'shall be enforceable' in national court in accordance with the relevant rules of civil procedure (which must be applied in conformity with Article 4(3) TFEU); although this obligation flows directly from Article 299 of the Treaty and not from the decision, it nonetheless endows the decision with binding authority *vis-à-vis* the national court in which enforcement is sought. However, quite apart from the defects of the 'no conflict, hence no operation of primacy' interpretation described above, the rule established in *Masterfoods* and enshrined in Article 16(1) of the Regulation

environment' in which private enforcement of EU competition law takes place in national courts through the harmonization of national procedural rules, in *Otis* the Commission 'tested the possibility' to directly start a damage compensation action in a national court.' It is not explained why the Commission would have found it unnecessary to seek damages on behalf of the EU for losses sustained from collusive tendering if efforts to harmonize national rules on damages actions had proceeded more smoothly.). For discussion of some of the open procedural issues following the *Otis* case, see Ruchit Patel and Paul Stuart, 'Now the Commission Wants Compensation Too ... The Commission as Private Damages Claimant and its Implications', *CPI Antitrust Chronicle*, July 2013 (1).

⁷⁵ Page 146.

⁷⁶ The limits of judicial competence in this respect are clear from Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15 (national courts 'do not have the power to declare acts of the Community institutions invalid. [...] [T]he main purpose of the [preliminary reference procedure, now provided for in Article 267 TFEU] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.'). See also *ibid*, paras 17–19 (pointing out that in a preliminary reference proceeding the institution that authored the act in question has the opportunity to defend it before the Court; but leaving open the possibility for an exception to the *Foto-Frost* rule where a national court has to decide whether to adopt interim measures; on the strict conditions that must apply when a national court seeks to rely on the exception, see Case C-465/93, *Atlanta Fruchthandels-gesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761).

(‘no decisions running counter’) does not derive from the primacy of EU law⁷⁷ but is based, originally, on the principle of sincere cooperation.⁷⁸ As the Court states in *Masterfoods*, ‘[w]hen the outcome of a dispute before the national court depends on the validity of [an existing Commission decision subject to appeal before the EU Courts], it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.’⁷⁹ Recently, the Court described the *Masterfoods* rule, partly in light of the exclusive jurisdiction of the EU Courts (in most cases⁸⁰) to review the legality of the acts of the institutions, as a ‘specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts’.⁸¹ For its part, the Council has attached to Article 16 of Regulation 1/2003 the label of ‘Uniform application of Community competition law’, which is also of course a central objective on which the judge-made doctrine of primacy is based. But from the point of view of the Court, although the *Masterfoods* rule is a conflict rule, it is one that appears to flow

⁷⁷ This misperception persists even in recent scholarship. See case note (cited above note 74), 50 *CMLR* at 1116 (‘In *Masterfoods*, the requirement for the national courts to comply with the Commission Decision was justified by the *supremacy of the EU legal order* and by the need to guarantee a consistent enforcement of EU competition rules throughout the EU Member States.’ (emphasis added)).

⁷⁸ Although the principle of sincere cooperation is formally a reciprocal obligation, national courts cannot help but notice that under EU law there is no ‘reverse’ or symmetrical *Masterfoods* rule requiring the Commission to abstain from adopting a decision running counter to an actual or contemplated decision by a national judge. See *Masterfoods v HB Ice Cream*, cited above note 74, para 48. This asymmetry does not constitute a formal hierarchy but may in practice resemble one quite closely.

⁷⁹ *Masterfoods*, *ibid*, para 57 (and para 59). See also Steven Preece, case note, *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* (C-344/98) [2000] E.C.R. I-11369 (ECJ), 22 *European Competition Law Review* 281–288, at pp 284–285 (‘[T]he ECJ in *Masterfoods* has not established that a Commission decision will *bind* the national courts, at least not in the strict sense of the term. The ECJ’s finding seems to be based upon the general principles of E.C. law and arguably makes a great deal of logical sense. National courts must apply the general principles of Community law when they are implementing Community law. Furthermore, Article 10 [EC] applies to all institutions of the Member State government, including the national courts. A judgment of a national court on the direct effect of Articles 81(1) or 82 [EC] is a national measure implementing Community law and the Member State court therefore has an obligation to comply with the principle of legal certainty. A judgment which fails to comply with this principle will infringe Community law, by virtue of Article 10.’ (emphasis in original; footnotes omitted)).

The *Delimitis* rule, according to which a national court must not adopt a decision that would conflict with a decision *contemplated* by the Commission (also enshrined in Article 16 of the Regulation) was based on the requirement of legal certainty to which Preece refers. See *Masterfoods*, *ibid*, para 51. See also Veljko Milutinović, ‘The ‘Right to Damages’ in a ‘System of Parallel Competences’: A Fresh Look at *BRT v SABAM* and its Subsequent Interpretation’, this volume, footnote 66. In addition to legal certainty, the principle of sincere cooperation is also relevant: that principle implies that a national court ‘should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings [or seek a preliminary ruling from the ECJ]’. *Masterfoods*, para 57.

⁸⁰ See above note 76 *in fine*.

⁸¹ *Commission v Otis*, cited above note 74, para 54.

from institutional roles, assignments and interplay rather than from primacy.⁸² Of course, once the Commission adopts a decision the latter is an act under the Treaties and benefits from primacy *vis-à-vis* any rule of national law,⁸³ as is true of (to use anachronistic terms) ‘first-pillar’ and ‘third-pillar’ EU law in general.

But – for purposes of establishing the scope of the ‘binding’ effect (ie, the preclusion/estoppel effect) of a Commission decision, and conversely the margin for manoeuvre on the part of a national court hearing claims for damages, when would a decision of the latter ‘run counter’ to the decision of the Commission? Komninos explains that a national court is only obliged to avoid ruling in such a way as to prevent an addressee of a Commission decision from complying with the *operative* part of the decision; only in this scenario is there a ‘real conflict’,⁸⁴ because only the operative part of the decision can produce legal effects.⁸⁵ With regard to the very live issue of the legal effects of the conclusions contained in a decision (to the extent that they are not repeated in the operative part), on which I should think the ECJ sooner or later will have to speak, Komninos believes the parties to national proceedings should remain free to contradict those conclusions and to persuade the national court to do likewise. ‘An unqualified binding effect would essentially subjugate private to public enforcement; it would also withdraw from the ambit of national courts a substantial part of competition law disputes, in particular those referring to the infringement of the antitrust norm [...].’⁸⁶ With regard to the Commission’s idea of ‘universalizing’ *Masterfoods* so that (as in the German example) the conflict rule would also apply with respect to the final infringement decisions of national competition authorities and national review courts, it would be better, according to Komninos, if a finding of infringement made by a competition authority gave rise to a *presumption* of antitrust liability that could then be rebutted before the national court.

⁸² What can rightly be claimed is that the duty of sincere cooperation and the ‘division of powers’ to which the Court refers in *Otis* share, with the principle of primacy, a fundamental preoccupation for the (ideal of a) uniform application of EU law.

⁸³ See, eg, Case C-119/05, *Lucchini* [2007] ECR I-6199 (Commission’s decision finding state aid to be incompatible with the Treaty was an act of Community law and thus prevailed over a national rule of *res judicata*; a national court’s decision barring the Italian State’s attempt to recover the illegally granted aid on the basis of *res judicata* was therefore itself unlawful, as the national court had failed to give full effect to the Community act by disapplying the contrary national rule or at least by seeking a preliminary ruling from the ECJ as to the validity of the Commission’s decision).

⁸⁴ Cf. Lars Kjøbye, case note, Case C-344/98, *Masterfoods v HB Ice Cream*, 39 *Common Market Law Review* 175–184 (2001), at page 182 (‘[...] it could be argued that it is of significance that the Court of Justice does not employ the term ‘conflict’ but rather the term ‘running counter’ or ‘allant à l’encontre’ in the original French version. This term might be broader than the term ‘conflict’, which in the strict legal sense of the term would require that the operative parts of the instruments are irreconcilable. It is submitted, however, that such an interpretation would go too far. It is likely that the Court only had in mind the true legal conflicts that would put into question the uniform application of Community competition law and that, consequently, the obligation established in *Masterfoods* is limited to conflicts at the level of the operative parts of the instruments.’).

⁸⁵ On the latter proposition that only the operative part of a decision can create legal effects, see Case T-138/89, *NBV and NVB v Commission* [1992] ECR II-2181.

⁸⁶ Page 148.

He may therefore be disappointed to see that Article 9 of the draft Directive of June 2013 would impose a seemingly unqualified obligation (without prejudice, of course, to Article 267 TFEU) on Member States to give preclusive effect, in the sense of *Masterfoods*,⁸⁷ to final infringement decisions of competition authorities and review courts (but not to decisions merely contemplated, à la *Delimitis*, as compliance by courts would likely be quite burdensome).⁸⁸ To make matters ‘worse’, as it were (at least from the perspective of the independence of private litigation and the courts), recital 25 of the draft Directive suggests that, not only must the operative part of the national decision be respected, so too must the recitals of the decision that support it. If recital 25 of the draft text were applied literally, and if the recitals supporting the operative part of a national decision were sufficiently comprehensive, national courts could perhaps become, as Komninos fears, ‘mere assessors of damages’. However, like other institutions, courts have survival instincts. If the Commission’s version of Article 9 is preserved in the final text, it can be expected that any perceived assault on their decision-making power would provoke defensive strategies, subtle or less subtle, so as not to give up too much ground.⁸⁹ On the other hand, the European Parliament and the Council are both seeking to dilute Article 9; but if they do this the final text might be more conservative than what Komninos advocates. The Council, in particular, prefers simply to scrap the *Masterfoods* concept as far as cross-border cases are concerned. While a finding of an infringement by NCA X could be used as irrefutable evidence before a court of the X’s own Member State, courts of other Member States would merely be required to treat X’s decision as admissible evidence; not even a rebuttable presumption would be established. If this approach is adopted the Directive will be irrelevant for a dozen Member States, which already fit that pattern. Of course, Member States would in any event be able to go beyond this modest approach, for example by adopting a German-style rule or by adopting a presumption along the lines of what Komninos suggests. (For its part, the Parliament has discussed a presumption that could be rebutted where an infringement decision of an authority from another Member State is tainted by error or failure to respect procedure.)

⁸⁷ The draft Directive uses the deceptively soft term ‘probative’ effect. As pointed out by Bruno Lasserre in his contribution to this volume, ‘the civil judge would still be responsible for adjudicating a number of pivotal issues, in particular by deciding [in the context of a collective action] whether or not to certify a group of claimants, by checking whether certain firms which were not addressees of the NCA decision can also be held liable and whether group structures have evolved, by assessing the causal link between the infringement and the injury, and by setting the level of damages’ (pp 321–322).

⁸⁸ Other aspects related to the subject of the cross-border ‘binding effect’ of final infringement decisions in the courts of other Member States are discussed below in connection with the chapter written by Veljko Milutinović. See notes 205–207 and accompanying text.

⁸⁹ On the possibility that the decisions of national judges may be guided in part by the perceived need to correct or deviate from (due process) shortcomings in the Commission’s infringement decisions, see Ian Forrester and Mark Powell, ‘Market Forces and Private Enforcement: A Start But Some Way Still to Go’, this volume.

Komninos also considers the relationship between EU action in the field of private enforcement and leniency programs. First, he accepts the desirability of limiting the civil liability of successful immunity applicants, in particular because the joint and several liability of the remaining cartelists should provide adequate insurance that injured parties will obtain full compensation (thus ensuring compliance with the ‘constitutional’ principles spelled out in *Courage* and *Manfredi*). He would even exclude recovery of damages by direct and indirect purchasers (or suppliers, in the case of a buyers’ cartel), again on the joint and several liability rationale, a rule that could be disappplied in case the other cartelists turned out to be ‘judgment-proof’ or living on faraway tropical shores. It may be presumed that he embraces the somewhat toned down – but still bold – proposal of June 2013, which as noted above would require national laws to shield a successful immunity applicant from claims made by injured parties other than its direct or indirect purchasers or providers unless such injured parties show that they cannot obtain full compensation from the other infringers.⁹⁰ As a second point concerning the relationship between private enforcement and leniency programs, Komninos also weighs in on the ECJ’s judgment in *Pfleiderer*. I will merely note here that his reaction to *Pfleiderer* is more positive than mine. He correctly identifies the rigidities that might have posed problems if the Advocate General’s categorical approach had been adopted; but he does not consider alternative options besides the solution proposed by the AG and the unstructured balancing of interests required of national judges by the Court of Justice. Komninos is not alone in defending *Pfleiderer*, however: Luís Morais considers that the chorus of criticism for the judgment is unfair because, in the absence of a stronger legal base, the Court could not go much further than it did.⁹¹ In my view, the ECJ only made a poor solution worse in its judgment in *Donau Chemie*.⁹² Arguably, whatever may become of the other features of the draft Directive, one can expect that a better defined framework for the court-ordered disclosure of evidence in the possession of competition authorities will emerge in the final legislation, and that at least in some Member States this will improve the chances that a plaintiff’s claim will be assessed on its merits and not by operation of procedural rules. Some commentators, and some within the Parliament, read *Donau Chemie* expansively and conclude that, since it prohibited a far-reaching rule under Austrian law, it equally precludes the EU legislator from granting absolute protection against disclosure for corporate leniency statements and settlement submissions, which is precisely what the Commission has proposed

⁹⁰ See above notes 51–52.

⁹¹ Morais, ‘Legal Issues’, this volume, page 125.

⁹² Case C-536/11, *Bundswettbewerbsbehörde v Donau Chemie AG and others*, judgment of the ECJ of 6 June 2013, especially para 48, which states: ‘It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified.’ On a strict interpretation of this paragraph, the implication is that a presumption applies in favour of disclosure; if this reading is correct it means that, until such time as the EU adopts legislation to regulate access to evidence, a national judge, when in doubt, must resolve the uncertainty *against* protection for the given document. On a different reading (ie, not mine), the loose wording (what is a ‘risk?’) may be interpreted as the Court giving national courts substantial discretion, which would soften or neutralize the presumption just described.

in Article 6(1) of the draft Directive. Although this syllogistic interpretation is not downright implausible, I doubt that *Pfleiderer* and *Donau Chemie* necessarily must be taken as controlling precedents that pre-determine the way the ECJ would rule if it were called on to consider the validity of Article 6(1) in its present form.⁹³ But there is also reason to doubt that the ECJ would ever have to decide that precise issue: preliminary indications are that the European Parliament itself subscribes to the broad reading of the above case law and is seeking to relax the relevant provision so that corporate statements and settlement submissions would only enjoy relative and not absolute protection.⁹⁴

⁹³ My caution on this point is largely linked to the premise on which *Pfleiderer* and *Donau Chemie* were decided, ie, that national judges are expected to balance interests to determine disclosure in the absence of governing EU rules. This conditional reading of the case law is said bluntly to be incorrect by, among others, Christian Kersting, ‘Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants’, forthcoming, *Journal of European Competition Law and Practice*, at page 2 of the advance access version (‘[I]t cannot be argued that the ECJ explicitly ruled against the background of ‘the absence of EU rules governing the matter’ [...] The ECJ has based its decisions on the primary law principle of effectiveness. This also binds the EU legislator. The Member States cannot be forced by secondary EU law to introduce the very measures which primary EU law forbids them to introduce.’ (emphasis in original; footnotes omitted) Apart from the technical and subsidiary point that Article 6(1) is not ‘the very measure’ that was challenged under Austrian law in *Donau Chemie*, Kersting may be looking at the issue through a narrow lens. The future Directive is expected to soften a quite restrictive tradition of evidence disclosure – ie, a rigidity Member States have the prerogative to maintain, absent EU rules, under the principle of procedural autonomy – and thereby introduce a significantly more liberal regime. In this respect, the Commission’s proposal rules on evidence disclosure enhance access to justice to some extent, even in their present graduated form. I am therefore more sympathetic to a discussion put forward by Hirst, which seems to illustrate the ambiguity of the present situation: ‘[T]he statements of the [ECJ in *Donau Chemie*] do lead to the conclusion that, were it essential for evidencing a damages claim, victims ought to have access to leniency applicants’ self-incriminating corporate statements. This in turn raises the question of whether the [Commission’s] own proposal, absolutely prohibiting any access to corporate statements, would fall foul of the case law. In its defence, the Commission may point to the other initiatives taken in the proposal which *facilitate* claims, including the opening up of disclosure rules.’ Nicholas Hirst, ‘*Donau Chemie*: National Rules Impeding Access to Antitrust Files Liable to Breach EU Law’, 4 *Journal of European Competition Law and Practice* 484–486 (2013), at 486 (emphasis added). A more principled argument could also be raised by drawing on the point made by Milutinović in the final chapter: if the right to damages derives from the imperative of effectiveness of the competition rules, as it certainly seems to do in the case law, then it may be fallacious to conclude that the risk of undermining the effectiveness of the derivative right (and the principle of effectiveness does apply to the right to damages, and not only to the competition rules that constitute the foundation for that right – see *Manfredi*; see also Article 3 of the proposed Directive) should be accorded as much or more weight to the risk of undermining the effectiveness of Article 101 more generally by tampering with the device that secures, better than other tools by far, the exposure of cartels. Having said all of that, as noted immediately below in the main text, the self-assured interpretation adopted by Kersting may never be tested judicially if the European Parliament succeeds in diluting Article 6(1) of the draft text.

⁹⁴ A possible middle ground, for those who are concerned with preserving adequate incentives for leniency applicants but who also feel that absolute and permanent protection from disclosure for corporate leniency statements and settlement submissions denies injured parties their right to damages, is to relax the degree of protection for such materials (by replacing the principle of permanent protection with a ‘grey list’-style, temporary protection) while simultaneously reinforcing the degree of (qualified) insulation of successful leniency applicants from liability, in particular *vis-à-vis* their direct and indirect purchasers. For the modalities of such a solution, see Caroline Cauffman, ‘The European Commission Proposal for a Directive on Antitrust Damages: A First Assessment’, MEPLI Working Paper Series 2013-13 (October 2013), at § 4.

Luís SILVA MORAIS: ‘Integrating Public and Private Enforcement in Europe: Legal Issues’.⁹⁵ Like the Komninos chapter, this one too is rich and thoughtful. It is a bit longer than most of the other chapters, and the reader might more easily discern the structure from the following crude ‘table of contents’: (i) introduction; (ii) foundations relating to the interplay between public and private enforcement; (iii) access to information in the context of public enforcement (ie, access to the enforcer’s case file and to sensitive contents of infringement decisions) and its interaction with private enforcement; (iv) leniency programs and their reciprocal impact on private enforcement; (v) incentives that could encourage private enforcement in cases unlikely to be addressed through public enforcement; and (vi) a possible incrementalist approach to foster private antitrust litigation without undermining public enforcement.

Not every section of the chapter can be recounted and discussed here; only a few points will be made. Morais’ nuanced argument might be depicted as one that: praises the Commission for abandoning the occasionally wild-eyed ambitions of the 2005 Green Paper and turning to a less ambitious agenda (eg, an agenda which leaves deterrence to the public authorities and which relies to some extent on soft law); while, at the same time, criticizing the Commission for not being ambitious enough, or more precisely for neglecting a range of subtle measures that may gradually strengthen private enforcement not at the expense of, but with the assistance of public enforcement mechanisms. As a normative theme running through the chapter, Morais argues that public enforcement should remain the dominant driver of European competition law, and that private enforcement should play a ‘strictly complementary and subsidiary’ role.⁹⁶ This conception of the relationship between the two modes of enforcement implies that it is inappropriate to recast or reformulate the foundations of competition enforcement as we know them in Europe, but Morais acknowledges that proper coordination mechanisms may be needed to ensure that public and private enforcement are working with and not against each other.

The introduction to the chapter (section 1) provides a narrative of the development of EU initiatives in the field of private antitrust litigation since *Courage* was decided in 2001. It also discusses fundamental questions relating to EU action in this area, including not least the issue of which legal base or bases are appropriate for such action.⁹⁷ The draft Directive of June 2013 invokes

⁹⁵ The chapter written by Morais actually precedes that of Assimakis Komninos. I shuffle the order slightly here to facilitate the flow of the discussion.

⁹⁶ Page 110.

⁹⁷ For discussion of the possible range of legal bases, and with reference to the Commission’s (withdrawn) draft Directive of 2009, see also Mel Marquis, ‘Cartel Settlements and Commitment Decisions’, in Claus-Dieter Ehlermann and Mel Marquis, eds., *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Hart Publishing, 2010, at page lxix, footnote 148. More recently, discussion of the Commission’s choice of a dual legal base for the proposal of June 2013 is provided by Cauffman, ‘A First Assessment’, cited above note 94, at § 3.2 (discussing the ECJ’s case law on the legitimacy of dual/multiple legal bases (and on the criteria that apply where Article 114 is invoked) and concluding, given the relatively flexible approach of the ECJ where it is clear that no attempt is being made to circumvent the Treaty’s essential procedures and where the

Articles 103 and, ‘transcendently’, 114 TFEU⁹⁸ as its twin legal base, as the Commission considers that the Directive ‘pursues two equally important goals which are inextricably linked, namely (a) to give effect to the principles set out in Articles 101 and 102 of the Treaty and (b) to ensure a more level playing field for undertakings operating in the internal market, and to make it easier for citizens and businesses to make use of the rights they derive from the internal market’.⁹⁹ Morais also refers to the possible relevance of Article 81 TFEU.¹⁰⁰ The introduction is also concerned, as other contributions to this volume are, with how private enforcement is to be understood, since it is not a monolithic concept. In section 1.4.1 of the chapter, Morais provides his taxonomy of the different kinds of claims that might be pursued with the aim of seeking damages, or injunctive relief, or, on the side of defendants, the claims that may have to be raised on the basis of antitrust law when they are accused of breaching contractual obligations or intellectual property rights. Similar to Fred Louis and others, Morais considers

provisions in question are mutually compatible, that the draft Directive does not appear unlawful from that point of view).

⁹⁸ Article 103 provides for the adoption of EU directives and regulations that ‘give effect’ to the principles contained in Articles 101 and 102. Article 114 provides for the adoption of EU measures, where appropriate for the establishment and functioning of the internal market, which approximate national provisions of law in a given field. The subtext to the Commission’s use of a twin legal base is that Article 103 contemplates the adoption of EU measures exclusively by the Council of Ministers, which is only obliged in that case to consult the Parliament. Needless to say, the Parliament insists that it must be involved as a co-equal legislator so far as harmonizing measures in the field of private antitrust litigation are concerned, and politically the Commission had little choice but to cast the latest initiative as an internal market instrument. (For further background, see Marquis, cited previous footnote.) To achieve this, the Commission relies on and discusses at length the (growing) fragmentation of procedural rules at the national level, which tilts playing fields on both supply and demand sides of markets, and even portrays the diverse regimes of the Member States as interfering with the EU right of cross-border establishment. See pp 9–10 of the Explanatory Memorandum attached to the draft Directive (Annex I to this volume). The Commission also explains that the scope of the draft Directive exceeds the limits of Article 103 because it requires minimum rules at the national level that pertain not just to infringements of the EU antitrust rules but also the antitrust rules of the Member States, to the extent that they are applied (in parallel with the EU rules) to agreements and practices that affect trade between Member States. See *ibid*, page 10.

⁹⁹ See Explanatory Memorandum, *ibid*, page 8.

¹⁰⁰ Article 81, which could conceivably be relevant for future EU initiatives in the field of private enforcement, provides that the Union will develop judicial cooperation in civil matters that have ‘cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases’. This may entail the adoption, via the ordinary legislative procedure, of measures that approximate national laws. Such action is envisaged in particular when necessary for the proper functioning of the internal market, and the range of possible measures concern:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement; and
- (h) support for the training of the judiciary and judicial staff.

that too much attention is reserved for follow-on damages actions when the real complementarity between public and private enforcement lies in what Morais calls private enforcement *stricto sensu*: stand-alone actions (eg, relating to rules on the abuse of dominance) and the sorts of defensive claims described above.

With regard to private enforcement *stricto sensu*, Morais stresses the importance of commercial arbitration, under the shroud of which significant antitrust disputation occurs. It is well known that in the context of arbitration, the principles driving the EU antitrust rules are a matter of public policy, and that an arbitral award incompatible with those rules should be unenforceable notwithstanding the usual rule precluding judicial review of the award's merits.¹⁰¹ It is poorly known what transpires within an arbitrator's dark sanctum, other than anecdotally or on the rare occasions when parties partially or totally waive confidentiality. This may result in a submerged legal order, bound by principles of EU law but where the application of those principles tends to elude verification,¹⁰² and where the compilation of empirical data and the drawing of lessons become difficult or impossible. Of course, it is the very nature of arbitration and some of its inherent advantageous characteristics – opacity and inoculation in ordinary circumstances from judicial review – that can be problematic. Easy answers are unlikely to be found, but Morais suggests that more could be done in this regard, consistent with both the fundamental EU jurisprudence and national prerogatives in this area, and perhaps without upsetting the institutions of arbitration too much.¹⁰³ Without

¹⁰¹ See Case C-126/97, *Eco Swiss v Benetton* [1999] ECR I-3055 (adoption by an arbitrator of an award incompatible with Article 101 TFEU (and *ex hypothesi* with Articles 102 and 106) obliges national courts, on grounds of public policy, to set aside or refuse to enforce the corresponding arbitral award if domestic law requires them to observe national rules of public policy); Joined Cases C-430 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705 (national courts must in principle apply Articles 101, 102 and 106 at their own initiative where those rules are relevant to a civil case but the parties fail to invoke them; but not if introducing the issue of a possible breach would oblige them to go beyond the scope of the dispute defined by the parties and to rely on facts and circumstances other than those pleaded by the party with an interest in having the relevant competition rules applied). A variety of related literature is cited in Morais' chapter. For further discussion and references to literature relating to arbitration of EU (and US) antitrust claims, see, eg, Gordon Blanke, 'EU Competition Arbitration', in Luis Ortiz Blanco, ed., *EU Competition Procedure*, 3rd edition, OUP, 2013, chapter 29; Colette Downie, 'Will Australia Trust Arbitrators with Antitrust?', 30(3) *Journal of International Arbitration* 221–266 (2013); Assimakis Komninos, 'Arbitration and EU Competition Law', in Basedow et al., eds., *International Antitrust Litigation*, cited above note 68, chapter 9; Gordon Blanke and Phillip Landolt, eds., *EU and US Antitrust Arbitration*, Wolters Kluwer, 2011; Mihail Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, Hart Publishing, 2011, chapter 7.

¹⁰² It has been pointed out, however, that arbitration is not used, at least nowadays, as a subterfuge to facilitate cartel activity. See Laurence Idot, 'Arbitration and Competition', OECD background note, DAF/COMP(2010)40, pp 51–86, at page 53 (with reference to Jacques Werner, 'Application of Competition Laws by Arbitrators: The Step Too Far', 12(1) *Journal of International Arbitration* 21–26, at 23 (1995)).

¹⁰³ 'I believe that some incremental measures or steps may reinforce the important status [...] of arbitration procedures in order to foster *stricto sensu* private enforcement of competition rules. Such measures include, eg, the encouragement, through soft harmonization impulses, of legislative changes of national laws on arbitration that give more weight to *public policy* considerations [...] as an element of possible annulment or non-enforceability of arbitral awards [...]. Another possible measure could be the extension or adaptation of Articles 15(1) and 16(2) of Regulation 1/2003 in

knowing if Morais would agree, in my view it remains desirable, as several Workshop participants believed in 2001, for the Court of Justice to retreat from its *Nordsee* judgment¹⁰⁴ and to allow arbitrators to submit preliminary references, perhaps with unique admissibility and confidentiality criteria (and perhaps to the General Court), if they consider it useful for the resolution of a dispute.¹⁰⁵ The wisdom of opening up such an option is arguably underscored by the substantial economic significance of modern commercial arbitration.¹⁰⁶ Although arbitrators are not bound by the duty of sincere cooperation¹⁰⁷ and would not be *formally* obliged under EU law to respect the ruling issued by the ECJ (or the GC), an award that failed to comply with such a ruling would be unenforceable by the courts of the Member States, to whom the duty of sincere cooperation clearly does apply.¹⁰⁸ (As an aside, the arbitration of antitrust claims under U.S. law has been the subject of significant seismic activity, especially as regards class arbitration

order to cover information and opinions to be addressed to arbitral courts and a systematic effort to identify and collect arbitral awards in which competition law issues have been discussed and considered as a basis for the final decision.’ Morais, ‘Legal Issues’, page 117 (emphasis in original; footnote omitted).

¹⁰⁴ Case C-393/92, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095, paras 10–12. See also Case C-125/04, *Denuit, Cordenier v Transorient – Mosaique Voyages et Culture* [2005] ECR I-923, paras 13–16.

¹⁰⁵ See Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, 2003, at pp 295, 297–298 and 300, interventions of Carl Baudenbacher, Walter van Gerven and Jürgen Basedow, respectively. See also Baudenbacher, ‘Enforcement of EC and EEA Competition Rules by Arbitration Tribunals Inside and Outside the EU’, in *ibid*, pp 341 et seq., at pp 358–360. Of course, the Court of Justice is not fond of directly reversing its own jurisprudence. Alternative options, including ‘indirect’ preliminary references, are discussed by Assimakis Komninos, ‘Assistance to Arbitral Tribunals in the Application of EC Competition Law’, in *ibid*, pp 363 et seq., at pp 367–379.

¹⁰⁶ For the view that the ECJ’s position in *Nordsee* should be maintained, see, eg, Idot, ‘Arbitration and Competition’, cited above note 102, page 67. As Idot remarks: ‘Contrary to a portion of the [legal scholarship], we are not in favour of a reversal. Besides it being difficult on a practical level to impose an additional burden on the Court of Justice [ie, to exacerbate its workload], it does not seem justified to us for two reasons. In the first place, in case of difficulty, at some time or another one will go before the national judge and the latter may [submit a preliminary reference to the Court], as was illustrated in the *Commune d’Almelo* and *Eco Swiss* decisions. This may [occur only after some delay], but in any case, it makes it possible to preserve the uniformity of European Union law, which remains the objective of [the preliminary reference procedure]. In the second place, the immense majority of arbitration in Community law concern competition disputes and, in this case, it is cooperation with the competition authorities which must be developed if the need to do so is felt.’ These are valid points (and the last point about expanding the involvement of competition agencies is not necessarily incompatible with overturning *Nordsee*), and some tradeoffs seem undeniable. However, with respect to the concern that the ECJ (or GC) would receive too many requests for rulings, there may be practical mechanisms available that could avoid docket overload. For example, as suggested in the main text, the admissibility of a request for a preliminary ruling could be made subject to stricter standards than the relatively liberal standard that applies under Article 267 TFEU and the corresponding jurisprudence. Furthermore, the preliminary rulings issued to arbitrators could in general be decided by a single judge, unless the responsible judge saw fit, in light of the importance of the dispute, to have the case transferred to a chamber.

¹⁰⁷ See, eg, Komninos, *ibid*, pp 369–370.

¹⁰⁸ See *ibid*, page 301, where Mario Siragusa remarks that, ‘[i]f the arbitration tribunal were to ignore the answer received from the ECJ to their request for a preliminary ruling, then the award is not enforceable by the courts of the EC Member States’.

and as regards the ‘bindingness’ of arbitration clauses. This subject is taken up in following chapter by Hawk and Seaton – see below.)

In sections 3 and 4 of his chapter, Morais discusses the tension between the need for public enforcers to protect confidential materials (eg, sensitive information in their files, and in particular, leniency materials) and the need for private litigants to have sufficient evidence to vindicate meritorious claims, whether access is sought through court order, *Pfleiderer* or *National Grid*-style, or by way of the transparency provisions and exceptions thereto contained in Regulation 1049/2001 (read in light of Articles 15(1) and 15(3) TFEU and Article 42 of the EU Charter of Fundamental Rights), where the jurisprudence of the Court of Justice in the field of merger control (*Editions Odile Jacob* and *Agrofert*, establishing a rebuttable presumption against disclosure of ‘external’ documents, ie, those not generated internally by the Commission’s services) and its contrast with the way the General Court has handled analogous issues in antitrust cases may imply future adjustments.¹⁰⁹ The basic argument put forward, consistent with Morais’ overall position, is that in the presence of a conflict the risks posed to the effectiveness of public enforcement by easy access to evidence should weigh heavily in the balance. From that general orientation, Morais discusses the *Pfleiderer* and *Donau Chemie* cases and concludes (at section 4.3.2 *in fine*), as many if not most do, that legislators are better placed than judges to reconcile the opposing long-term needs of public (and private) enforcement and the short-term *access to justice* considerations that may justify the disclosure of certain materials to particular claimants.

With regard to the legislative proposal now on the table, it has already been mentioned that Morais takes a generally critical view,¹¹⁰ in particular because he considers that important details are lacking and because, as he seems to intimate, a relatively liberal regime for post-investigation access to sensitive documents (the so-called ‘grey list’ category) could be risky. However, Morais also recognizes that the draft Directive incorporates some ‘important solutions’ aimed at enhancing the possibility that victims of antitrust infringements may obtain relief in national courts. Sections 6.2 and 6.3 provide a brief point-by-point reaction to the Commission’s proposed text and a series of suggestions as to other measures that could be employed, either by means of amendment to the draft or by means of other, essentially soft or informal techniques (relying, in particular, on

¹⁰⁹ This would be so if, for example, the Court of Justice decides, in Case C-365/12 P, *Commission v EnBW Energie Baden-Württemberg*, to annul the judgment of the General Court. For discussion of these issues, see Küllike Jürimäe, ‘The Interaction between EU Transparency Policy and the Enforcement of EU Competition Law: Who Should Strike the Balance and How Should it be Struck?’, in Philip Lowe and Mel Marquis, eds., *European Competition Law Annual 2012: Public Policies, Regulation and Economic Distress*, Hart Publishing, forthcoming; Gaëtane Goddin, ‘Access to Documents in Competition Files: Where Do We Stand, Two Years after TGI?’, 4(2) *Journal of European Competition Law and Practice* 112–120 (2013). See also Gaëtane Goddin, ‘Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where does the Court of Justice of the EU Strike the Balance?’, 2(1) *Journal of European Competition Law and Practice* 10–23 (2011).

¹¹⁰ See above note 25 and accompanying text.

soft harmonization across the Member States) that build, gradually, on the EU's nascent *acquis* in this area.

BARRY HAWK AND YOLAINE SEATON: 'U.S. Antitrust Arbitration'. With a title such as this the natural point of departure is the 1985 *Mitsubishi* judgment of the U.S. Supreme Court,¹¹¹ which capsized the then-conventional judicial wisdom that antitrust law was not a proper subject of commercial arbitration. In *Mitsubishi* and subsequent cases the Supreme Court, interpreting the U.S. Federal Arbitration Act (FAA), has ascribed to Congress a strong policy in favor of arbitration where contracting parties have agreed, even in boilerplate language, that disputes arising from their contractual relations are to be decided finally and exclusively by an arbitrator. Such compulsory arbitration clauses are thus, according to this judicial philosophy, to be broadly construed.

The liberal approach to arbitrability, with its strong 'freedom of contract' bent, sets the stage for a particular trajectory of jurisprudence highlighted by Hawk and Seaton in section IV, the centerpiece of the chapter. This section discusses the arbitrability of class action claims and the enforceability of class action waivers where arbitration is the stipulated method of dispute resolution.¹¹² If I may jump right to the end of the section, the authors there conclude: 'In sum, *AT&T Mobility LLC v Concepcion* strongly suggests that although the FAA can be regarded as a statute favoring arbitration, the FAA disfavors class arbitrations.'¹¹³ In *AT&T Mobility*,¹¹⁴ a husband and wife had concluded an agreement with a mobile phone company for the sale and servicing of cellular phones. The agreement obliged each customer to pursue any claims solely through arbitration, and solely in an 'individual capacity'. The amount of money at stake for the married couple was about 30 dollars (a sales tax on what were supposed to be 'free phones'), but they brought a class action against AT&T in a California federal district court. When the defendant company sought to compel arbitration exclusively on the basis of individual claims, first the District Court and then the Ninth Circuit found the class action waiver to be unconscionable and thus unenforceable under California state law. In a five-to-four opinion written by Justice Scalia, the Supreme Court held that under the circumstances the FAA pre-empted California law; not even

¹¹¹ *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), effectively overturning the judgment of the Second Circuit in *American Safety Equipment Corp. v J.P. Maguire & Co.*, 391 F.2d 821 (1968). The finding that international arbitral tribunals could properly decide claims under the Sherman Act was echoed, with regard to domestic arbitration, in *Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹¹² Although the main focus of the chapter is on the use of arbitration in the context of private disputes, Hawk and Seaton also discuss, in section VII of the chapter, the use of arbitration by the federal enforcers. Overall, arbitration has been used sparingly in this context, for reasons explained by the authors. This is especially true as regards the U.S. Federal Trade Commission, whose powers are circumscribed by particular principles of constitutional law.

¹¹³ Page 171.

¹¹⁴ *AT&T Mobility v Concepcion*, 563 U.S. ____ (2011). For further discussion of the case, see Mark Mandich, 'AT&T v Concepcion: The End of the Modern Class Action', 14 *Loyola Journal of Public Interest Law* 205–236 (2012).

unconscionability – the residual paternalism reserved under state contract law used historically as a corrective for dramatic asymmetry of bargaining power – could withstand the overriding will of Congress.¹¹⁵

Notwithstanding the conclusion drawn by Hawk and Seaton on the basis of the views of a majority of the Supreme Court – that the FAA disfavors class arbitrations – the Second Circuit decided to interpret *AT&T Mobility* much more narrowly when deciding the *American Express* case in 2011. According to the Second Circuit, *AT&T Mobility* turned on the conflict between state and federal law, and state law had to submit. Distinguishing *AT&T Mobility* in this way enabled the Second Circuit to conclude, in *American Express*, that a class action waiver was void as a matter of *federal* law because, given the low value of the plaintiffs’ claims relative to the high cost of obtaining the economic expert evidence that would be required to substantiate the alleged adverse competitive effects of tying under Section 1 of the Sherman Act, it would be economically irrational to pursue them on an individual basis. This reasoning drew on dicta contained in *Mitsubishi* according to which an arbitration clause should be deemed void if its application would preclude the vindication of federal statutory rights. We now know, in light of the Supreme Court’s judgment in *American Express v Italian Colors*,¹¹⁶ decided on 20 June 2013, that Hawk and Seaton were better at reading tea leaves. In this remarkable judgment, Justice Scalia and a 5-3 majority rebuke the Second Circuit; ignore a well-reasoned *amicus* brief underlining that arbitration agreements precluding ‘effective vindication’ of federal antitrust claims should be deemed contrary to public policy;¹¹⁷ and invite businesses in countless industries, to the extent they have not yet done so, to immunize themselves from class litigation by incorporating waivers systematically in the contracts they sign with small businesses and individual consumers incapable of bargaining over terms and conditions. In a part of the opinion that tests the line between serious and disingenuous, the Supreme Court opines that while the ‘effective vindication’ passage in *Mitsubishi* sought to avoid prospective waivers of a claimant’s right to pursue statutory remedies, ‘the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy’.¹¹⁸ Justice Scalia attributes great weight to the fact that there was no

¹¹⁵ Unconscionability remains a possible argument, however (as do other contract defences such as fraud, duress, etc.), with respect to the question of whether there is a valid agreement to arbitrate in the first place (ie, not the more specific question of whether compulsory *bilateral* arbitration is unconscionable or contrary to the public policy of a US state). This follows the FAA itself, which states at 9 U.S.C. § 2 that a written provision in any commercial contract whereby the parties agree ‘to settle by arbitration a controversy thereafter arising out of such contract [...] shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*’. (emphasis added)

¹¹⁶ *American Express Co. et al. v Italian Colors Restaurant et al.*, 570 U.S. ____ (2013).

¹¹⁷ The brief was prepared by a number of eminent scholars and it united traditional defenders of robust private enforcement, such as Eleanor Fox, with others that have been critical of private antitrust litigation, including notably Herb Hovenkamp.

¹¹⁸ *American Express v Italian Colors*, cited above note 116, page 7 of the slip opinion (emphasis in original). See also *ibid*, page 4 (‘[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.’)

hand-wringing about the absence of class action litigation in the four decades that elapsed between the adoption of the Sherman Act and the introduction of class action procedures (FRCP 23) in 1938. This anachronistic reasoning is buttressed by what is perhaps a more respectable argument. As Scalia writes:

The regime established by the [Second Circuit] would require – before a plaintiff can be held to contractually agreed bilateral arbitration – that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.¹¹⁹

The latter argument is independent of the formalistic proposition that the right to pursue a remedy and the feasibility of doing it may be neatly distinguished. One can even read the quoted passage above as a frank admission that what the Supreme Court has really done in *American Express* is to decide the tradeoff between the benefit of a quick *res judicata* at the lowest private and social/judicial cost, on the one hand, and the individual and aggregate costs of the non-compensation of antitrust-related harm and, more generally, lower-intensity antitrust enforcement.¹²⁰ One question that springs from the judgment is whether the way individual claims have in practice been traded off is a faithful expression of congressional will. One cannot say with certainty, but what is known is that some legislators were disturbed by the Supreme Court's judgment in *AT&T Mobility*, and must be equally concerned by *American Express*. Pending bills in Congress are designed to substantially redraw the lines laid down by the Court in its recent case law interpreting the FAA,¹²¹ but the bills are by no means bipartisan efforts. Fierce and possibly fatal opposition from Republican lawmakers can be expected.

¹¹⁹ Ibid, page 9 of the slip opinion.

¹²⁰ Of course, *American Express* would not reduce to *zero* the intensity of antitrust enforcement, in those sectors where waivers of class action proceedings are used in compulsory arbitration agreements and where individual claims do not justify the cost of pursuing them vigorously, since federal and/or state antitrust authorities – not being bound by arbitral decisions – might intervene in some cases.

¹²¹ For the proposed 'Arbitration Fairness Act', see S.878 in the U.S. Senate and H.R. 1844 in the House of Representatives. Section 2 of S.878, for example, states that '[a] series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress'. Further, '[a]rbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises'. A new Section 402 of the FAA, if it were to survive and be enacted in its current form, would provide that 'no *predispute* arbitration agreement shall be valid or enforceable if it requires arbitration of an [...] antitrust dispute [...]'. (emphasis added)

Part 3 Options for Collective Redress in the European Union

J. THOMAS ROSCH: ‘Designing a Private Remedies System for Antitrust Cases – Lessons Learned from the U.S. Experience’. As the title suggests, in this chapter Tom Rosch draws on the experience he has gained since he started practicing law in 1965 in order to identify the flaws of private antitrust enforcement in the U.S. (which have led to the well-known ‘equilibrating tendencies’ of the federal courts to raise substantive and procedural bars ever higher, for private plaintiffs and agencies alike¹²²) and to collect his recommendations for the EU as it strives to promote more effective damages actions and collective redress. His observations and advice may be summarized as follows.

Main flaws of private antitrust enforcement in the United States

First, Rosch considers, like many on both sides of the Atlantic, that treble-damage antitrust class actions in the United States are out of control.¹²³ He accepts that plaintiffs and especially plaintiffs’ attorneys require adequate incentives to bring legal actions if private claims are to be effective. But he recalls that, in general, the incentives to bring individual claims under the Sherman Act seemed to be sufficient in the days before class actions became the norm. Under Section 4 of the Clayton Act, the plaintiff was able to recover three times the loss she sustained plus costs and attorney’s fees. Section 4 is indeed potent even when it is not combined with the additional leverage gained when a class action is brought. On the other hand, Europe has no Section 4, which suggests that comparisons should be considered with caution. Furthermore, as Rosch explains very well, the *in terrorem* effect of a treble-damages class action under federal law, which famously induces defendants to settle cases that sometimes may not be meritorious in order to avoid an even larger payout following trial by juries that may sometimes be bewildered by antitrust law, is potentially amplified by the possibility of state-law based class actions brought by indirect purchasers against the same defendants. Since ‘passing on’ theories are disallowed in federal court, the combination of claims by direct purchasers who may have passed on overcharges and claims by indirect purchasers under state law may lead to, or threaten to lead to, exposure to damages well beyond the trebling foreseen in Section 4 of the Clayton Act and hence in some cases, ‘extortionate settlements’.¹²⁴ In short, the lack of coordination

¹²² In section III of the chapter, Rosch discusses some of the famous judgments in which the Supreme Court has refashioned antitrust law and litigation in the United States, including, eg, *Twombly*, *Trinko* and *Credit Suisse*. As has been highlighted by various commentators, the hollowing out of American antitrust law by the Supreme Court has spilled over (or has even ‘slopped over’, in American parlance) and has to some extent raised the cost of enforcement for the federal antitrust agencies, even though the concerns driving the ‘hollowing’ effect may not apply in all respects in the context of public enforcement.

¹²³ A similar view is advanced vigorously by James Keyte, ‘Collective Redress: Perspectives from the U.S. Experience’, this volume.

¹²⁴ Page 185.

between the judicial interpretation of federal antitrust law by the Supreme Court and the more populist antitrust legislation in a number of U.S. states has resulted in a dysfunctional private enforcement system.

The second flaw of the U.S. system is the rule according to which antitrust defendants that do not settle a case and are ultimately found to have infringed the Sherman Act are jointly and severally liable and have no right to any contribution from defendants that did settle.¹²⁵ The pre-trebled amount of a settlement will be subtracted from the damages the plaintiff may recover from the non-settling defendants, but the latter will bear the rest of the damages burden even if it exceeds the trebled amount of the harm they caused. *Ceteris paribus*, this would appear to be another element that distorts the choice of whether or not to settle a case.

The third flaw relates to the asymmetric costs of automatic discovery rules, the brunt of which is again borne by defendants. Those who have experienced document reviews in the United States may appreciate how wasteful much of the discovery process can be in terms of manpower, time and money. The need to review electronic files adds a further layer of cost and effort. Rosch's concern about the asymmetry of costs, which tends to favor plaintiffs, should be considered in light of the equally sensible principle that defendants are often more apt to possess evidence and information that is relevant to the merits of the case. Nevertheless, the U.S. discovery rules seem poorly designed in light of their purpose.

The final flaw highlighted in this chapter is the 'opt out' approach used in class litigation in the United States where damages are sought. Rosch clearly describes the main disadvantage of 'opt out' class actions: if some potential members of the plaintiff class are well-resourced businesses, they may indeed opt out and proceed with separate lawsuits against the same defendants, thus multiplying procedures and costs for (courts and) defendants, including in cases where a defendant in fact exonerates itself in the class action but must then continue defending itself.¹²⁶ As Rosch explains, '[b]ecause the opt-out mechanism does not distinguish between the needs of individual consumer plaintiffs and corporate plaintiffs, the class action vehicle fails to achieve its purpose of minimizing an antitrust defendant's exposure to multiple lawsuits and multiple liabilities'.¹²⁷

Recommendations for the European Union

Taking account of the above criticisms, Rosch's recommendations for a more balanced system of private antitrust enforcement are these:

1. Avoid 'opt out' class actions. Rosch will be pleased that the Commission has advised Member States, in Recommendation 2013/396, to base collective action instruments on 'opt in' procedures, unless they can justify a deviation

¹²⁵ See *Texas Industries, Inc. v Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

¹²⁶ The Supreme Court has not provided guidance as to whether, as a matter of constitutional law, plaintiffs who opt out of class litigation must have the opportunity to re-litigate a case if the class loses in court or if the case settles. See Rosch's discussion of *Ticor Title Insurance v Brown*.

¹²⁷ Page 187.

on grounds of sound administration of justice. But, undoubtedly conscious of the incentivization problem that arises where plaintiffs must opt in rather than opting out, Rosch suggests that if a plaintiff chooses not to opt in to the collective action she will surrender any claim she may have under EU law. In a sense, this may restore an incentive that could be lacking, either where a plaintiff is sophisticated and has sufficient resources to litigate separately, or where a plaintiff's stakes in the case are small or trivial. The advantages to such a 'one shot' system would be enhanced certainty and the elimination of the risk of duplicative litigation. However, it is not clear that EU Member States, or, in the future the EU itself if it should proceed with harmonizing legislation, would be able to introduce the system envisaged by Rosch without breaching the European Convention on Human Rights and the EU Charter of Fundamental Rights and Freedoms.

2. Do not recognize standing for indirect purchasers in circumstances where their claims may result in multiple liability. This recommendation flows from the problem described above, ie, the combination of (i) a federal rule in the U.S. precluding defendants from claiming that the plaintiff has not sustained the claimed harm because the latter passed on some or all of the illegal overcharge to its own purchasers (which thus tends to reinforce the incentives of direct purchasers to bring claims under the antitrust laws, while tolerating a deficit of compensation for some injured parties), and (ii) a rule under the laws of many states which, incoherently with (i), allows indirect purchasers to sue, including by way of class actions. This risk of a defendant paying out more than once, coupled with the risk of unjust enrichment on the part of direct purchasers, does not have an exact parallel in Europe. Under EU law, the Court of Justice has insisted that 'any person' harmed as a consequence of the breach of Article 101 or Article 102 (which in a given case might even extend to non-purchasers outside the vertical chain) must be entitled to claim damages they have sustained, including any lost profits.¹²⁸ The most likely claimants – indirect purchasers (eg, purchasers that purchase a product that incorporates a cartelized input) and direct purchasers – are thus given *de jure* equal standing for purposes of admissibility, subject to the relatively light substantive burden borne by an indirect purchaser to show that he paid an overcharge passed on to him.¹²⁹ Potentially, this 'democratic' admissibility rule could, if left in isolation,

¹²⁸ The landmark judgments, *Courage* and *Manfredi*, have dealt with claims arising from restrictive agreements. The judgments are also broad enough to cover abuse of dominance scenarios. (The principle that in Europe indirect purchasers must have standing to claim damages (insofar as they are legally able, taking account of other national (substantive) rules, to bring such claims), which derives from the 'any person' standard laid down in those judgments, would be codified by Article 13 of the draft Directive published on 11 June 2013.) The 'private enforcement' of Article 106 (typically read together with Article 102) is also possible. See Case C-242/95, *GT-Link A/S v De Danske Statsbaner (DSB)*, [1997] ECR I-4449; and recital 3 of the draft Directive.

¹²⁹ See Article 13(2) of the draft Directive (onus of showing that the overcharge was passed on is deemed to be discharged where the indirect purchaser has demonstrated that the defendant infringed

present significant risks of duplicate litigation and hyper-restitution.¹³⁰ It is true that the Court has recognized the validity of Member State rules designed to avoid unjust enrichment,¹³¹ which would include rules allowing defendants to advance ‘passing on’-type arguments and thereby defeat or weaken claims brought by direct purchasers. However, assuming that all Member States implement on a more harmonized basis the passing-on defense¹³² as foreseen in the draft Directive of 11 June 2013,¹³³ the

the law; that this resulted in an overcharge for the *direct* purchaser; and that he (ie, the indirect purchaser) purchased the subject products to which the infringement relates, or derivatives thereof). See also Article 15(1) of the draft Directive, which seeks to coordinate damages actions by claimants at different levels of the supply chain (including those brought by direct purchasers) by providing that national courts hearing an action for damages brought by an indirect purchaser must take into account, when applying Article 13(2), any damages actions (and/or resulting judgments) related to the same infringement but brought by claimants at other levels of the supply chain. Article 15(2) would preserve the rights and obligations of courts under Article 30 of the ‘Brussels I’ Regulation on jurisdiction and enforcement (Council Regulation 44/2001, now re-numbered, when it takes effect on 10 January 2015, as Regulation 1215/2012). According to the latter provision, parallel actions brought by claimants at different levels of the supply chain are considered to be related and courts may either adjourn proceedings to avoid irreconcilable judgments or consolidate the claims to resolve the coordination problem.

¹³⁰ See Geradin and Grelier, ‘Tip of the Iceberg’, cited above note 9, at 12–13. On the other hand, if safeguards can keep this risk within tolerable bounds, the recognition of standing for indirect purchasers can be useful, for example in cases where the incentives of direct purchasers to enforce their claims are dampened – either because they pass on most or all of any overcharge they have paid, or because they do not wish to disrupt commercial relations with their suppliers. See Reindl, Secretariat Note, cited above note 11, at 14 (recounting the arguments raised in an OECD roundtable by Andy Gavil).

¹³¹ See *Courage*, para 30 (with references to case law); *Manfredi*, paras 98–99. In a non-antitrust context, see also Case 199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, para 13.

¹³² It has been contended that passing-on is not properly conceptualized as a defense but rather should be regarded as a mitigation of damages to be taken into account when assessing – subsequent to a finding of liability – the proper quantum of damages. See Frank Maier-Rigaud, ‘Towards a European Directive on Damages Actions’, forthcoming, *Journal of Competition Law and Economics*. A version of the paper dated 22 July 2013 was consulted at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296843.

¹³³ See Article 12 of the draft Directive (assigning to the defendant, unsurprisingly, the burden of proving that the claimant passed on the illegal overcharge). An exception to the general recognition of passing-on arguments is provided for in Article 12(2), which precludes such arguments if it is ‘legally impossible’ for the person at the next level of the supply chain to claim compensation for the harm suffered from the passing on of the overcharge, the rationale for this exception being, of course, to avoid creating a legal zone of impunity, even if the effect may be to overcompensate direct purchasers. (On this point, see, eg, Reindl, cited above note 11, at 5–6.) The reference to ‘legal impossibility’ may be deliberately elastic (and vague) in light of the diversity of procedural rules across the Member States. However, the primary example of legal impossibility is where an indirect purchaser would be excluded from recovering damages – assuming the principle of effectiveness is respected – on tort law grounds of foreseeability or remoteness. As recital 30 of the draft Directive states: ‘The court seized of the action should [...] assess, when the passing-on defence is invoked in a specific case, whether the persons to whom the overcharge was allegedly passed on are legally able to claim compensation. While indirect purchasers are entitled to claim compensation, national rules of causality (including rules on foreseeability and remoteness), applied in accordance with the principles of Union law, may entail that certain persons (for instance at a level of the supply chain which is remote from the infringement) are legally unable to claim compensation in a given case. Only when the court finds that the person to whom the overcharge was allegedly passed on is legally able to claim compensation will

following scenario might arise. In one Member State a court may decide that a defendant has not met its burden of showing pass-on and thus grants damages to a direct purchaser, while the court of another Member State rules that a customer of that direct purchaser is entitled to damages because the overcharge was passed on.¹³⁴ The result – multiple liability – is essentially the same as problem noted by Rosch in the U.S. context, albeit in a different configuration. It remains to be seen whether the Directive, if adopted as is, provides adequate means to avoid this. Much will depend on Article 13 of the draft, which would require Member States to ensure that their courts can estimate how much of an overcharge has been passed on to an injured party, which could provide a basis for damage deductions where orders to pay compensation have already been secured against the same defendant by other claimants at a different level of the supply chain.¹³⁵ Article 13 is to be read together with Article 15(1), according to which national courts should be required under national law to ‘take due account’ of action relevant judgments or actions that have been brought which would raise the risk of overpayment. With regard to the passing-on defense in the Directive, it should be noted in passing that the defense can be only partial, if only part of the overcharge was passed on; and significantly, the fact that an overcharge was applied by a direct purchaser to its own customers may have resulted in diminished sales and possibly lost profits for the direct purchaser, for which the defendant may be liable.¹³⁶

it assess the merits of the passing-on defence.’ The passing-on defense would therefore be available only to those defendants that withstand this judicial screen.

The approach just outlined has been criticized by Josef Drexl in the following terms: ‘This [...] approach [...] collides with fundamental principles of civil procedure including the one on *inter partes* effect of private court proceedings. The Proposal does not require that these subsequent purchasers have become parties [to] the proceedings. Nor does the Proposal take account of the fact that these requirements raise major issues of evidence and, therefore, would also require rules on the burden of proof.’ Drexl, ‘The Interaction between Private and Public Enforcement in European Competition Law’, draft presented at the EUI in Florence on 27 June 2013, page 15. Drexl is undoubtedly right to warn that inquiries into the hypothetical legal position of indirect purchasers could raise major issues of evidence. It is not clear, though, from an EU law perspective, why the fact that the proposed EU rule would collide with the traditional rule of *inter partes* effects of litigation (also a basis for Drexl’s criticism of Article 15(1) of the draft) constitutes a compelling reason why the judicial check would be inappropriate. The risk of upsetting national procedural traditions of this kind is surely outweighed by (and as a strict legal matter could not even be weighed against) the risk that the passing-on defense could prove to be *too* powerful and thus negate, in the ‘legal zone of impunity’ scenario to which I referred above, the effectiveness of Article 101 or Article 102 (at least where public enforcement does not pick up the slack).

¹³⁴ See Geradin and Grelier, ‘Tip of the Iceberg’, cited above note 9, at 12–13.

¹³⁵ See Daniele Calisti and Luke Haasbeek, ‘The Proposal for a Directive on Antitrust Damages Actions: The European Commission Sets the Stage for Private Enforcement in the European Union’, *CPI Antitrust Chronicle*, August 2013 (1), at 5.

¹³⁶ See Article 14(1) of the draft Directive (rules set forth in Chapter IV on the passing-on defense ‘shall be without prejudice to the right of an injured party to claim compensation for loss of profits’). See also section 4.4 of the Explanatory Memorandum, at page 17 (‘[W]here a loss is passed on, the price increase by the direct purchaser is likely to lead to a reduction in the volume sold. That loss of

3. Avoid a rule that makes defendants jointly and severally liable but precludes them from seeking, from any settling defendants, contribution for their share of liability. As Rosch explains, such a rule, which again can result in overpayment by non-settling defendants (assuming the settling defendant pays to the settling claimant an amount less than that defendant's full liability, leaving non-settling defendants on the hook for the difference), may be unnecessary, at least in terms of maintaining proper incentives for plaintiffs and their lawyers to invest in the litigation. From a quite different perspective, however, it might be argued that a defendant considering whether to settle will have less incentive to do so, *ceteris paribus*, if he knows the settlement will not relinquish him from subsequent residual liability depending on the outcome of pending or prospective court claims. If significant value is attached to consensual settlement, as it is in Europe, a tradeoff favoring incentives to settle may be made at the potential expense of non-settling defendants. This tradeoff seems to be embodied in Article 18 of the draft Directive.¹³⁷ However, the impact of the tradeoff – that is to say, the risk that co-infringers would be obliged to pay more than their share of the harm they caused – is mitigated in the following sense. With regard to the court action against the non-settling defendants, the injured party's claim would be reduced, pursuant to Article 18(1), by the settling defendant's share of the harm caused to that injured party.
4. Permit discovery only upon a showing of good cause, and deem good cause to be shown where the party seeking discovery cannot obtain the relevant information from law enforcement authorities. Such a rule presupposes that the authority has a case file and that it is therefore more efficient to obtain the documents or other materials needed from the authority than from the other party. One would think that such a rule would be inapplicable in circumstances where public authorities have not taken any investigative steps, such as may be the case in private contract disputes, or in some private claims of abuse of dominance, etc. But such scenarios would apparently be excluded by Rosch's recommendation number 5, to wit:

profit, as well as the actual loss that was not passed on (in the case of partial passing-on) remains antitrust harm for which the injured party can claim compensation.'). The possibility to recover lost profits caused by an antitrust infringement is in fact guaranteed by the seminal case law cited earlier. In addition to the 'without prejudice' proviso in Article 14(1), the right to claim lost profits would be codified by Article 2(2) of the draft Directive as part of the concept of full compensation.

¹³⁷ Article 18(1) provides that 'Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party. *Non-settling co-infringers cannot recover contribution from the settling co-infringer for the remaining claim.* Only when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim can the settling co-infringer be held to pay damages to the settling injured party.' (emphasis added) Article 18(2) provides that, '[w]hen determining the contribution of each co-infringer, national courts shall take due account of any prior consensual settlement involving the relevant co-infringer'. See also recitals 40 and 41 of the draft Directive.

5. Limit private actions to those that follow public enforcement actions in the EU. As Rosch explains, ‘[h]aving someone else do the work (including gathering the relevant evidence [...]) should be a powerful incentive for plaintiffs’ antitrust attorneys to invest in private collective action litigation’.¹³⁸ Rosch’s concern for establishing an adequate risk/reward ratio that makes suits for compensation worth the effort is understandable. However, this does not provide a rationale that would explain the surprising exclusion of stand-alone actions, such as those mentioned in the preceding paragraph.
6. Award to prevailing plaintiffs not only damages for their losses but also pre-judgment interest dating back to the time the infringing conduct or transaction began. According to Rosch, ‘[b]y making an award of pre-judgment interest mandatory, the EU (and its Member States) could help ensure that most damage awards equal or exceed treble-damages awards in the United States, which would promote convergence on the private enforcement front’.¹³⁹ The common-sense notion that damages should include pre-judgment interest is consistent with the EU case law (in particular, *Manfredi*) and is reflected in Article 2(2) of the draft Directive, which states that ‘[f]ull compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore include compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid.’¹⁴⁰ It is empirically an open and complex question, however, whether Rosch is right to suppose that the foregoing definition of compensable damages will ensure that most damage awards match or exceed treble-damages awards in the U.S.¹⁴¹
7. Avoid ‘loser pays’ rules when designing the allocation of parties’ litigation costs. In order to maintain proper litigation incentives, Rosch says, it is better if a plaintiff bears his own costs but no more than this, so that he is not deterred from bringing a meritorious suit because of the prospective risk that if he lost the case he would lose far more than his investment. However, this final recommendation goes against the general European grain. Most Member States are comfortable with ‘loser pays’ rules (and with the inevitable *ex ante* uncertainty associated with them), since a painful

¹³⁸ Page 194.

¹³⁹ Page 195.

¹⁴⁰ Similarly, see recital 11 to the draft Directive. It therefore seems that Article 2(2) would require payment of both pre-judgment and post-judgment interest as essential components of full compensation.

¹⁴¹ Cf. Commission, Impact Assessment Report (Annex II to this volume), para 67, footnote 58 (‘[O]n average, single damages with pre-judgment interest can be said to equate roughly to double damages without pre-judgment interest.’). A realistic way of considering the issue is that the recovery of pre-judgment interest in a successful damages suit restores the victim to the status quo ante, ie, it compensates her for the true cost of her injury. One may therefore question whether terms such as ‘double damages’ or ‘treble damages’ in such circumstances are really an unhappy epithet that distorts discussion.

loss is commonly perceived as filtering out frivolous lawsuits; and the draft Directive does not call on the Member States to innovate in this area, even through the introduction of, for example, cost protection orders at a court's discretion. Indeed, apart from a passing reference in Article 8, and in contrast to the Commission's 2005 Green Paper and 2008 White Paper, the text is quite silent on the subject of costs.¹⁴² One must acknowledge that in several Member States there is significant flexibility that enables judges – usually on grounds of equity or because the other side has acted unreasonably – to deviate from the general rule and to exempt an unsuccessful plaintiff from payment of a prevailing defendant's costs.¹⁴³ It is equally true, however, that courts tend to decide matters of costs when the litigation is concluded, which could be many years after the initial 'investment' decision was made by the claimant.¹⁴⁴ It may be appropriate, when contemplating future iterations of the Directive on antitrust damages actions, to revisit the issue of the adequacy and diversity of national rules in relation to cost allocation rules and, relatedly, the issue of court fees.¹⁴⁵

Following his appearance at the June 2011 Workshop, Rosch proceeded, in a speech in September of that year, to put forward some additional views.¹⁴⁶ The tenor of that speech is seemingly even more skeptical of private antitrust claims than that of the paper that appears in this volume. However, an important qualification which appears in footnotes 2 and 82 of the text of that speech,

¹⁴² The text has in fact been criticized for ducking cost issues. See Peyer, cited above note 55. The 2005 Green Paper and the accompanying Staff Working Paper had identified the costs of court actions as being among the main obstacles to the enforcement of legitimate private antitrust claims. Taking account of stakeholder views collected following the Green Paper, the 2008 White Paper and the 'white' Staff Working Paper were somewhat reluctantly conservative with regard to 'loser pays' rules. See, eg, paras 243, 245 and 252–263 of the Staff Working Paper; and see Horst Butz, 'Integrating Public and Private Enforcement in Europe: Issues for Courts', this volume (Commission's suggestion of cost orders derogating exceptionally from the usual loser pays rule 'is quite opposite to [Germany's] whole traditional system of court fees'). The issue of how 'loser pays' rules are properly structured from the perspective of the effectiveness of EU law may ultimately be considered by the Court of Justice, but the Court may be hesitant to require radical changes unless a significant clutch of Member States spontaneously reshape their own rules first. The prospects for this are not terribly bright.

¹⁴³ See the 2008 Staff Working Paper, *ibid*, paras 255–259 (referring to flexible cost rules in Finland, Italy, the UK, France, Germany; and citing also Article 69 of the Rules of Procedure of the European Court of Justice, which allows the Court to deviate from 'loser pays' in exceptional circumstances).

¹⁴⁴ See *ibid*, paras 260–261. In light of the general tendency of courts to decide costs at the end of procedure, the 2008 White Paper (section 2.8 *in fine*) and Staff Working Paper stated, quoting the latter (para 261 *in fine*), that 'Member States are encouraged to provide national courts with the possibility to issue cost orders derogating from the normal cost rule, preferably upfront in the proceeding. Such cost orders would guarantee that a claimant, even if unsuccessful, will not have to bear all costs incurred by the other party.'

¹⁴⁵ See the 2008 Staff Working Paper, paras 262–263, pointing to the possibility that court fees in some Member States are disproportionately high and stating that 'Member States are encouraged to set their court fees in an appropriate manner so that they do not constitute a disincentive for antitrust damages claims'. On the possibility of reducing court fees in Germany where a plaintiff demonstrates financial hardship, see Butz, 'Issues for Courts', this volume.

¹⁴⁶ See J. Thomas Rosch, 'Does the EU Need a System of Private Competition Remedies to Supplement Public Law Enforcement?', speech, Christ Church, Oxford, 23 September 2011.

is that Rosch was ‘addressing only the stated goal of using private damages actions and collective redress mechanisms as a means of supplementing public enforcement of EU competition law’.¹⁴⁷ It emerges (subtly) from his remarks that the ‘supplementing’ of which he speaks (significantly, he does not use the term ‘complementing’) concerns the reliance on private enforcement to achieve a level of deterrence beyond that resulting from the efforts of competition authorities. His multifaceted critique of private enforcement, which he considers to have run amok in the United States, should be understood in that light. By contrast, with regard to private enforcement as a means to ensure the compensation of victims of anticompetitive behavior, Rosch says ‘I don’t take issue with this goal (except to note that private, treble damages actions can lead to overcompensation for reasons I have previously stated [...])’.¹⁴⁸

JAMES KEYTE: ‘Collective Redress: Perspectives from the U.S. Experience’. In this chapter Keyte sings harmony with Tom Rosch with regard to most criticisms of class action litigation, in the U.S., which he presents as a ‘natural experiment’ with lessons for the EU. The main lesson is the old adage: be careful what you wish for. Keyte’s overall argument appears to depend on the following dilemma. First, consistent with the observations of Rosch, he stresses the importance of having adequate incentives that will appeal to the animal spirits of plaintiffs and their lawyers; if the incentives are insufficient, the goal of ensuring fair compensation for victims will remain illusory because the available tools will languish unused. And yet, in Keyte’s view, when the incentives are strong enough – which they may well be if an opt-out class action with high stakes is possible – then the train will go off the rails and the spoils of lawsuits and out-of-court settlements will foster the litigation culture that most of us would prefer to avoid.¹⁴⁹ The message is clear: the risks of pervasive class actions and their pathologies are too substantial; the EU would be better advised not to tempt fate.

In presenting his argument, Keyte reviews the prerequisites that must be satisfied in order to secure court permission to take a class action forward. These famous prerequisites (‘numerosity’, commonality, typicality and adequacy of representation) are set forth, as he recalls, in Rule 23(a) of the Federal Rules of Civil Procedure. Rule 23(c) requires the party representing the class to serve notice on absent class members to make them aware of the litigation, to advise them of their rights, and give them the opportunity to opt out and, in doing so, avoid being bound by legal decisions made in the context of the subject litigation. Keyte argues that, despite the filters embedded in Rule 23, frivolous suits still “sneak’ by – and defendants are still forced to settle these frivolous claims’.¹⁵⁰ The pressure to settle dodgy claims that by some *type I error* have been certified by the judge

¹⁴⁷ Ibid, page 2, footnote 2.

¹⁴⁸ Ibid.

¹⁴⁹ See, eg, page 197 (‘[I]t is important to view the United States class action model through the lens of the litigation culture it has created.’).

¹⁵⁰ Page 198.

results from the dysfunctional elements of U.S. procedural rules, as highlighted by Rosch (see above) and by Keyte.¹⁵¹ But whereas Rosch emphasizes the difficulty of making it past the Rule 23 hurdle,¹⁵² Keyte points out that ‘many cases are now routinely settled *before* a class has even been certified, and parties agree to settlement without even considering the procedural thresholds [...] imposed by Rule 23’.¹⁵³ The relatively low chance of getting a certification denied does seem to have conduced to pre-certification settlement in the past,¹⁵⁴ and even today this may occur occasionally, for example if a defendant is keen to avoid the significant costs of costs of pre-certification discovery; but it may also be that, nowadays, defendants will see the certification stage as a key opportunity to challenge plaintiffs’ evidence.¹⁵⁵ More generally, and looking forward, potential defendants will often have means at their disposal to avoid unmeritorious settlements of the kind Keyte describes if they take advantage of the Supreme Court’s rulings in cases such as *AT&T Mobility v Concepcion* (judgment of 27 April 2011)¹⁵⁶ and *American Express v Italian Colors* (judgment of 20 June 2013),¹⁵⁷ which uphold the enforceability of class action waivers in arbitration agreements, as discussed above. In other cases, where no arbitration clause applies, plaintiffs may still face formidable obstacles. The main obstacles in many antitrust cases will be the scrutiny of the merits of the case at certification stage (ie, taking account of the requirements of the Clayton Act¹⁵⁸), and the application of Rule 23(b)(3), which requires would-be class plaintiffs to show that common issues predominate and that class litigation is superior to other possible methods of resolving the dispute. Beyond these, there is also the increasingly rigorous application of Rule 23(a), as illustrated in *Wal-Mart v Dukes* (judgment of 20 June 2011),¹⁵⁹ where the

¹⁵¹ See Keyte’s list of factors at page 199. Whereas Rosch suggests that ‘loser pays’ rules present too much of an obstacle to the filing of potentially meritorious claims, Keyte would be delighted to import such rules into the U.S. litigation context.

¹⁵² Amendments to FRCP 23 entered into force in 2003 and accentuated the responsibility of courts to carry out a thorough examination of the class certification criteria. The importance of a ‘rigorous analysis’ of the aptitude of a case for class certification is illustrated by *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), and a similar trend has unfolded in most federal Circuits. Although it has been said that ‘[o]ne of the critiques of private class actions is that judges too readily ‘rubber stamp’ settlements and fee requests that they are required as a matter of law to review carefully’ (Deborah Hensler, ‘Goldilocks and the Class Action’, 126 *Harvard Law Review Forum* 56, 59–60 (2012)), in the specific context of antitrust, at least, rubber-stamped class certification is no longer accepted by appellate courts. See, eg, Steven Bizar and Allison Khaskelis, ‘Wal-Mart v Dukes: A Non-Event for Antitrust Defendants’, 26 *Antitrust* 25, 27 (Fall 2011).

¹⁵³ Page 199 (emphasis in original).

¹⁵⁴ Cf. Bizar and Khaskelis, cited above note 152, at page 28 (‘With many courts seemingly unwilling to afford the defendants’ opposition to the class motion the careful scrutiny defendants desired, the strategy debate on joint defense group conference calls often centered on whether it even made sense to oppose class certification at all.’).

¹⁵⁵ As observed above in note 152, the federal courts today are more likely than they were in the past to engage in a rigorous analysis of the evidence offered by the prospective class representative and whether it satisfies the prerequisites of Rules 23(a).

¹⁵⁶ Cited above note 114.

¹⁵⁷ Cited above note 116.

¹⁵⁸ To prevail under the Clayton Act a plaintiff must prove that a violation of the antitrust laws caused him injury, and must prove the amount of damages sustained. 15 U.S.C. § 15.

¹⁵⁹ Cited above note 18.

Supreme Court in effect instructed federal courts to be tougher when applying the ‘commonality’ test. This is not to suggest that the problems identified by Keyte are about to vanish. But the tide seems to have turned, and the future trajectory in the U.S. is likely to be one of decline: the rampant class action litigation that motivates Rosch and Keyte’s chapters will likely be looked back upon as a high water mark.¹⁶⁰ In any event, in cautioning against the excesses of the American example, Keyte in his conclusion leaves a sliver of hope for the EU. ‘Perhaps,’ he says, ‘it may be as simple as reducing damages to single or double; or in some manner capping contingency fees; or precluding certain financing arrangements that support a plaintiffs’ bar.’¹⁶¹ These are suggestions that will go down easy for many in Europe.

BRIAN FACEY AND BRIAN ROSNER: ‘Collective Redress for Cartel Damages in Canada’. Facey and Rosner here provide a chapter-sized mini-treatise on antitrust class actions brought before the Canadian provincial courts, including the jurisdictions where the battles are mostly fought – Ontario, Quebec and British Columbia. The fundamental legal base for such actions is section 36 of the Competition Act, which in its first paragraph establishes a cause of action for any person who has suffered loss or damage caused by a violation of the criminal provisions of the Act, which include classic cartel behavior (‘conspiracy’), bidrigging and misleading advertising.

As background to this chapter, a trend had seemingly developed in Canada marked by several denials of class certification following the 2003 judgment of the Ontario Court of Appeal in *Chadha v Bayer*, which may have seemed to be the beginning of the end of indirect purchaser suits in Canada.¹⁶² However, especially since 2010 the Canadian courts appear to be moving in a direction quite different from that of the federal courts in the United States, where the class action apparatus is increasingly under strain from recent U.S. Supreme Court judgments (see discussion above). Indeed, following a significant judgment by the Supreme Court of Canada in 2013, despite a rule precluding defendants from claiming a passing-on defense against direct purchasers, the offensive use of passing-on to support suits by indirect purchasers is fair game in Canada.¹⁶³ The Supreme Court seems to accept this apparent contradiction (and by the same token shuns the

¹⁶⁰ See also Robert Klonoff, ‘The Decline of Class Actions’, 90 *Washington University Law Review* 729–838 (2013).

¹⁶¹ Page 204.

¹⁶² *Chadha v Bayer Inc.*, [2003] O.R. 3d 22 (C.A.), leave to appeal to the Supreme Court of Canada refused. As Facey and Rosner explain, since the Supreme Court soon thereafter decided that a defendant had no possibility under Canadian law of claiming a pass-on defense against direct purchasers in tort or restitution, this logically (ie, under the logic of *Hanover Shoe* and *Illinois Brick*) foreclosed the offensive use of pass-on theories to support indirect purchaser claims. In Canada there is no parallel to the ‘*Illinois Brick* repealer’ problem, which, as lamented by Tom Rosch and others, leads to actual or potential overexposure of antitrust defendants in the U.S. The corollary to Canada’s approach is that – again, in accord with *Illinois Brick* – direct purchasers may seek to recover the full extent of the overcharge, irrespective of any possible pass-on.

¹⁶³ See *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57.

logic of *Illinois Brick*) because of its greater concern for ensuring that wrongdoers cannot maintain any ill-gotten gains. Private enforcement in this sense thus contributes prominently to the goal of deterring the infringement of the Canadian competition rules.

As Facey and Rosner point out, judicial ‘hospitality’ to class actions also reflects the lighter statutory conditions for class certification that apply in Canada under the class action legislation adopted by the various provinces, such as Ontario’s Class Proceedings Act of 1992.¹⁶⁴ One significant statutory difference, for example, is that unlike FRCP 23(b)(3), which in general limits class certification in U.S. federal antitrust cases to those where the common issues raised by the claims of the class members predominate over individual issues (a criterion distinct from the prerequisite of ‘commonality’ under Rule 23(a) – see above), in Canada the Class Proceedings Act requires common issues but has no ‘predominance’ test. From the perspective of class plaintiffs, it might perhaps be argued that the lower certification threshold is something of a counterpart to Canada’s rules on damages in antitrust cases, which are limited to single damages only. In the case of infringements of substantial duration the incentive to bring suit would probably be adequate in any event, as pre-judgment interest may be recovered; other cases may be more ambiguous.

The most wide-ranging part of the paper is section III (‘Procedural considerations’), which discuss numerous practical issues that come up in Canadian class litigation. The authors cover jurisdiction over claims and the main principles governing class actions, including: the criteria applied for class certification; discovery, including cross-border discovery; the opt-out, opt-in and hybrid models used in different provinces; recovery of litigation costs; third-party funding; standing; the occasional certification of ‘national’ and ‘international’ classes and related constitutional constraints; the relatively more relaxed certification of cases for purposes of settlement; the recognition and enforcement in Canada of foreign settlements and judgments; the (non)enforceability of arbitration agreements purporting to forbid class litigation; and coordination between plaintiff’s firms in Canada and plaintiff’s firms in the United States. Running through the wide gamut of these issues, Facey and Rosner highlight not only significant differences between Canada and the U.S., for example as regards the use of class action waivers and compulsory arbitration clauses in contracts of adhesion (where the Supreme Court of Canada interprets provincial consumer protection legislation as overriding and rendering void such prospective waivers); but also differences from one province to the next, a reflection of Canada’s federal political and legal structure. This divergence often concerns procedural rules somewhat technical in nature but with potentially important consequences. On the other hand, as far as class actions are concerned, some semblance of coherent application of the Class Proceedings Act in different cases by different courts is arguably facilitated by three frequently invoked statutory objectives: judicial economy, access to justice

¹⁶⁴ In addition to Ontario, each of the other Canadian provinces has its own legislation (or, in the case of Prince Edward Island, equivalent rules) that govern the administration of class proceedings.

and, most intriguingly or controversially from a foreign perspective, ‘behavior modification’.¹⁶⁵

MARIO SIRAGUSA: ‘Options for Collective Redress in the EU’. Siragusa’s contribution dates from around the time the Commission was soliciting comments in 2011 on how to proceed with an EU initiative, binding or otherwise, in the field of collective redress.¹⁶⁶ It also provides a useful look back at the Commission’s controversial ‘non-proposal’ of 2009, an initiative never officially launched and quietly laid to rest, very likely by the Commission’s top leadership.¹⁶⁷ Together with the following chapter by Silvia Pietrini (see below), Siragusa’s paper serves as an introduction to the Recommendation that the Commission ultimately issued in June 2013, which I have already characterized as a strategically timid step in the direction of a future European landscape in which each Member State will have legislation or other rules enabling aggrieved consumers to bring some form of collective legal action against undertakings causing them injury, including but not limited to antitrust-related harm.¹⁶⁸

Siragusa accomplishes essentially two things in this chapter. At one level he reviews the central issues raised by the prospects of instituting forms of collective redress in Europe¹⁶⁹ and synthesizes the clashing views of big business (eager

¹⁶⁵ The role of behavior modification was discussed in a 1990 report by an advisory committee to the Attorney General, which served as a basis for the 1992 Act. According to the report, the objective of behavior modification related to a need to promote a ‘sharper sense of obligation to the public by those whose actions affect large numbers of people’. Quoted in Michael Eizenga, Dany Assaf and Emrys Davis, ‘Antitrust Class Actions: A Tale of Two Countries’, 25 *Antitrust* 83, 89 endnote 11 (Spring 2011).

¹⁶⁶ In response to the Commission’s consultation, the ‘bindingness’ issue was presented by many stakeholders as an issue of subsidiarity. As Siragusa explains, ‘many respondents [...] pointed out that several Member States have already enacted national class actions laws, and [...] superimposing an EU model of class action would fail to respect the principle of subsidiarity’. Page 240. Although subsidiarity is frequently depicted as a one-way argument opposed to centralized solutions, the principle in fact cuts two ways, and it does not necessarily follow from the existence of national solutions in a large number of Member States (ie, about half of them) that subsidiarity dictates a non-binding initiative. Excessive and chronic fragmentation can equally support subsidiarity arguments in favor of binding common rules.

¹⁶⁷ See sections 2 and 5.3.1 of the paper. The withdrawn draft Directive of 2009 is included as Annex III to this volume. See also Marquis, ‘Cartel Settlements and Commitment Decisions’, cited above note 97.

¹⁶⁸ For the proposition that the Commission’s ‘retreat’ to opt-in mechanisms as the strongly recommended default approach, see above note 18 *in fine*.

¹⁶⁹ The scope of the chapter extends beyond the subject of collective redress, and thus beyond Siragusa’s title. For example, it covers cross-cutting issues such as the quantification of damages (on which, see also the chapter by Komninos; and for discussion from an economic perspective of various Italian appellate judgments in follow-on actions, see Pierluigi Sabbatini, ‘Interesse private e interesse pubblico al risarcimento del danno antitrust’, 12(2) *Mercato concorrenza regole* 335, 349–357 (2010)) and access to evidence as essential parts of private damages claims, irrespective of whether they are brought on a bundled or individual basis. Another cross-cutting issue, the passing-on defense, is also discussed, with particular reference to Italian case law and to the application of Article 1227 of the Civil Code (claimant’s contribution to own injury and duty to mitigate harm). Siragusa also briefly refers to ‘negative declaratory actions’, sometimes called ‘Italian torpedoed’ (even if equivalents certainly exist elsewhere), which have not yet been used extensively in antitrust cases but which provide firms facing the strong prospect that they will be sued for damages the possibility to act as ‘plaintiffs’ and to

to dilute the effectiveness of collective action mechanisms) and of those entities and individuals who, often rationally ignorant/apathetic and/or lacking bargaining power, are most likely to need the possibility of collective redress if effective access to justice is to be served.¹⁷⁰ Behind these diverging interests that need to be reconciled there lurks, if I may, the status quo- or inertia-bias that takes the code name ‘national constitutional and legal traditions’. On the other hand, collective redress systems can present risks, not just for business insofar as a disorderly system can create unjust and disproportionate costs if unmeritorious claims are encouraged, but also for consumers with valid claims, insofar as ill-conceived rules can incite class representatives to exploit those they are supposedly protecting and to raid any sums acquired on behalf of the latter through judgments or out-of-court settlements. Any reasonable proponent of collective redress would hope for and welcome solutions finely honed to minimize both kinds of risks. Most Europeans are in full consensus that the U.S. model minimizes neither. But I must repeat myself and add that ‘opt out’ should not be reductively equated to the complex constellation of rules in the U.S. (considered also in light of the judicial rebellions they have provoked) that makes us all apprehensive.

At a second level, Siragusa presents the early experience of Italy with its own form of collective redress, the ‘consumer class action’ established by Article 140-*bis* of the Italian Consumer Code. This provision enables consumers to band together (including in the form of associations or committees) and to sue collectively, on an *opt-in* basis, for breaches of contract or for torts occurring after 15 August 2009. In such a case the court at an early stage screens the case to make sure the claim is not manifestly unfounded; that the class members are not divided by conflicting interests; that the rights alleged to have been infringed appear to be identical; and that the first claimant is able to protect the interests of the class in an adequate manner. If one or more of these conditions fails the action is declared inadmissible. If however the case is admitted, the court proceeds to set the ground rules for its continuation, including for example rules requiring the first claimant to provide notice to other class members and the deadline by which the latter may elect to opt in. Those who do not opt in may bring separate actions but once the opt-in period expires any such actions by such claimants must be pursued individually. As Siragusa explains, there have in fact been cases brought as consumer class actions under Article 140-*bis* of the Code. Siragusa refers to five such cases, although none of them was an antitrust dispute (see section 4.2 of the chapter). One may conclude that this early sampling of cases is inconclusive, as all but one of them were dismissed at the admissibility stage, for various reasons; in these cases it was therefore impossible to know for certain whether, if

ask a court to declare that they bear no liability. The Italian torpedo is thus a significant strategic tool; it enables such ‘plaintiffs’ to turn the tables on the other party and to influence, in conjunction with the Brussels I Regulation, the determination of which court will exercise jurisdiction over the case.

¹⁷⁰ See in particular page 241 (summarizing the contrasting visions of collective redress advocated in the public consultation of 2011 by trade associations on the one hand and consumer organizations on the other).

the admissibility conditions had been fulfilled, how the collective action dynamics would have unfolded. Would the full range of injured plaintiffs have signed on, hoping that their rights would be vindicated through the class action mechanism? The experience with an ‘opt in’ consumer representative action in the UK was disappointing,¹⁷¹ and that approach has now been duly discarded by the UK Government. But if the Italian approach proved to be more promising it would be a significant case study now that ‘opt in’ is, notwithstanding some wayward Member States, Europe’s officially sponsored *Sonderweg*.

SILVIA PIETRINI: ‘The Future of Collective Damages Actions in Europe’. In the first part of this chapter, Pietrini too reviews the milestones passed in the walk-a-thon toward harmonized collective redress rules in Europe. We now know that this process will be limited, for the foreseeable future, to soft harmonization, due not least to the fact that some Member States still resist the idea of binding EU rules in this area.¹⁷² However, the position advanced by Pietrini in this chapter, which was completed prior to the Commission’s adoption of Recommendation 2013/396, is that soft measures will only result in the perpetuation of divergent approaches across the Member States, and that this will ‘reinforce a disturbing trend toward multi-tiered justice in Europe’.¹⁷³ For this reason she emphasized the need for a serious, binding initiative, and finds that the ensemble of mechanisms proposed by the British Government for the development of private damages in the UK is persuasive and should be adopted as a broader model for the EU. As noted earlier,¹⁷⁴ the envisaged UK model will include exclusive jurisdiction by a court of competition specialists (ie, the CAT); judicial discretion about whether to proceed on an opt-out or opt-in basis; an active role for the court in certifying a class, including a preliminary review of the merits of the claims; a limitation of the opt-out rule, where it is used, to claimants domiciled within the UK (while those outside the UK may opt in); and various other safeguards, such as ‘loser pays’ cost rules absent exceptional circumstances, a ban on exemplary damages and a ban on contingency fees (without prejudice to the possibility of using conditional fee arrangements and after-the-event insurance). In addition, the UK system will provide for the possibility of (judicially approved) ‘opt out’ collective settlements

¹⁷¹ See above note 22, and for discussion see, eg, Barry Rodger, ‘A License to Print (Monopoly) Money? Replica Football Kit and Toys and Games, Resale Price Maintenance and the Competition Act 1998’, in Barry Rodger, ed., *Landmark Cases in Competition Law: Around the World in Fourteen Stories*, Wolters Kluwer, 2013, chapter 13, pp 339–343; Erik Werlauff, ‘Class Action and Class Settlement’, cited above note 13, at page 175 (less than 0.0008 percent of affected consumers, ie, a thousand out of about two million, opted in to the consumer representative action); and citing its own experience in the same case, see Which?, Consultation Response to European Commission Consultation on Collective Redress (prepared by Deborah Prince), dated 26 April 2011, for example at pp 7–8 (referring to the UK’s opt-in rule under section 47B of the Competition Act 1998 as a ‘fundamental flaw’).

¹⁷² See Commission, ‘Towards a European Horizontal Framework’, cited above note 18, at page 6 (reaction of Member States to the 2011 ranging from ‘support’ for binding EU rules to ‘strong scepticism’).

¹⁷³ Page 267.

¹⁷⁴ See above notes 16 and 22.

analogous to the 2005 Dutch Act on the collective settlement of mass damages claims,¹⁷⁵ subject to a territoriality limitation on the ‘opt out’ element, in line with the one described above. Additional features of an eclectic European approach might be inspired by other European and non-European jurisdictions. For example, conscious of the general aversion in Europe to third party funding of collective actions, Pietrini suggests public funding devices, and points to the example of the Quebecois Class Action Assistance Fund, a program that has worked successfully and without incentivizing abusive litigation (the Commission, however, has not gone down this road¹⁷⁶).

In sum, Pietrini would push for a more assertive approach than the one the Commission has in fact adopted in its Recommendation. Indeed, Pietrini advocates not only binding harmonization rules based on minimum criteria and residual diversity; she would prefer to go all the way, crystallizing a collective action regime in a directly applicable European regulation (see section II of the chapter). Some in Europe would undoubtedly bristle at this, and perhaps point to Article 67(1) TFEU, which states that ‘[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights *and the different legal systems and traditions of the Member States*’ (emphasis added),¹⁷⁷ which would appear to call, at least in principle, for some allowance for variation at the national level. Most of those who would not fall back on the ‘do nothing’ or the ‘soft harmonization’ options would probably assume that a directive would be the natural choice of instrument for establishing common rules on collective redress, since, under Article 288 TFEU, a directive only binds Member States as to the results to be achieved while leaving the forms and methods in the hands of the national authorities, so long as these forms and methods are compatible with Union law. Pietrini rejects this conventional wisdom on the ground that, instead of promoting harmonization, directives have often institutionalized a subtle fragmentation of the internal market.¹⁷⁸ It may be true that regulations are superior instruments in terms of clarity, predictability and effectiveness, as Pietrini says, and they are no doubt more apt for pursuing the ideal of a uniform application of Union law. However, the long-running battle the Commission has fought over the prospect of overriding cherished traditions of civil procedure at the national level

¹⁷⁵ See above notes 13 and 14, and accompanying text.

¹⁷⁶ See Commission, ‘Towards a European Horizontal Framework’, cited above note 18, at page 15 (‘the Commission does not find it necessary to recommend direct support from public funds, since if the court finds that damage has been sustained, the party suffering that damage will obtain compensation from the losing party, including their legal costs’).

¹⁷⁷ Similarly, see the European Parliament’s Resolution of 2 February 2012, ‘Towards a Coherent European Approach to Collective Redress’, 2013 OJ C239E/32, para 16 (underlining the ‘need to take due account of the legal traditions and legal orders of the individual Member States’).

¹⁷⁸ See page 268 (impact of harmonization directives ‘has not been the creation of a single, consistent and coherent body [...] of law common to all the EU Member States; instead, there are now 27 national rules on doorstep selling, distance selling and so on’, quoting Christian Twigg-Flesner, ‘Good-Bye Harmonisation by Directives, Hello Cross-Border Only Regulation? – A way forward for EU Consumer Contract Law’, http://ec.europa.eu/justice/news/consulting_public/0052/contributions/309_en.pdf, page 5).

suggests that, when the question of adopting EU legislation to govern collective redress reasserts itself a few years hence, the choice of legal instrument will be determined as much by political tactics and compromise as by logic or efficiency, or by what the best means to achieve effective access to justice would be.

Part 4 Drawing Lessons and Conclusions

JOHN RATLIFF: ‘Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies’. In this chapter Ratliff covers a variety of points where public and private enforcement intersect, including in particular: the stark differences between EU-level administrative investigations and appeals and national-level litigation; the relevance of and difficulties posed by the long time periods that elapse (ie, periods stretching to 20 years or more), in the context of follow-on antitrust damages claims, from the time material events occur to the time the facts are tried before a court; access to the files of competition authorities (including, *inter alia*, access to the Commission’s file via Regulation 1049/2001 and the rapidly evolving related case law); confidentiality issues, particularly as concerns which information must properly be redacted from the Commission’s published decisions; the ‘binding effect’ of decisions by national authorities; the insulation of successful immunity applicants from the full brunt of follow-on damages claims; and the idea of the reduction of public fines to account for and incentivize the payment of compensation by investigated firms to parties that have suffered harm, for example in the form of a trustee-administered fund. I will comment incidentally on only one of the many points just recited.

The comment pertains to the third part of the chapter, which should be highlighted for its discussion of the *Pfleiderer* case including not just the ECJ’s judgment but also the post-reference follow-up decision of the Amstgericht Bonn of 18 January 2012 and the judgment of the UK High Court in *National Grid v ABB Limited*, decided 4 April 2012. Among the notable points made is the way the ECJ’s judgment in *Pfleiderer* should be interpreted: ‘It may be argued that the Court had sympathy for the protection of the leniency materials and qualified that only to the extent that it considered that there might be a case for access, in the event that it was ‘excessively difficult or manifestly impossible’ for the plaintiff to bring his action otherwise.’¹⁷⁹ Following this line, reference is made to ‘the high standard set by the Court with the ‘excessively difficult or manifestly impossible’ test’.¹⁸⁰ From my own reading of the judgment I don’t think it can be excluded that at least some of the Court’s judges had sympathy for the need to limit access to sensitive leniency materials. However, I wonder whether one may draw from the judgment a test of this kind. The duty of the national judge under *Pfleiderer*,

¹⁷⁹ Page 285.

¹⁸⁰ *Ibid.*

it seems, is to balance opposing interests and only where the balance tips toward non-disclosure of the materials sought must he or she test that conclusion by verifying whether the party seeking disclosure would in consequence be deprived, or effectively deprived, of the right to recover damages resulting from the breach of EU law. By contrast, if the balance favours the claimant in the first place, then under *Pfleiderer* the principle of effectiveness of EU law – if it is reduced, as the ECJ seemingly would have it, to the question of whether a particular claimant’s right to damages would be abridged, as opposed to effectiveness of the law in broader and more dynamic terms – is in a sense redundant. But I have also raised the possibility that in the *Donau Chemie* judgment (decided several months after Ratliff prepared his chapter) the ECJ may arguably have created a *presumption in favor of disclosure* operating to the benefit of claimants where the balance of interests would otherwise be inconclusive.¹⁸¹ Having said all that, nuances as to the precise interpretation of *Pfleiderer* may potentially become of merely historical significance if the draft Directive of June 2013, or some modified version of it, introduces a new framework to assist national judges – and if that framework survives any challenge that might be brought against it on grounds of the effectiveness of the Treaty’s competition rules.¹⁸²

IAN FORRESTER AND MARK POWELL: ‘Market Forces and Private Enforcement: A Start But Some Way Still To Go’. The overarching point of the chapter by Forrester and Powell seems to be that, just as in the days of Regulation 17/62 and its now-quaint idiosyncrasies, there remains, as we step forward into a world of enhanced private enforcement, the possibility and likelihood that decision-making by national courts will reflect perceptions about the legitimacy of EU-level procedures and the degree to which the latter deliver correct and just outcomes. Of course, national courts cannot tailor the substance of Treaty rules as the U.S. Supreme Court might do with U.S. antitrust law (for example, as concerns its scope of application) if that court considers that treble-damage class actions and asymmetric discovery lead to settlements completely unconnected to the merits of the underlying claims. But there are nevertheless more subtle tactics that national courts in Europe might employ to achieve desired results in a manner that eludes both appeals and, in the most dramatic case, infringement proceedings against the Member State concerned. As Forrester and Powell state in their introduction, ‘[n]ational courts will seek to escape the constitutional consequences of European competition law if the consequences of strictly applying it seem unpalatable’.¹⁸³ The tactics that could be used are undoubtedly many, and the authors discuss, as one means available, the way a national court might interpret Commission decisions. National courts are of course precluded from taking decisions running counter to the operative parts of Commission decisions, which must also mean that corresponding elements of the decision have to be respected if failure to do

¹⁸¹ See above note 92.

¹⁸² See the discussion above at note 93 and accompanying text.

¹⁸³ Page 297.

so would call into question those operative parts.¹⁸⁴ But the weight given by the national court to the other parts of a Commission decision – those that do *not* have irrefutable ‘probative’ effect, to use the language of the draft Directive – may depend on the perceived quality and fairness of the ‘federal’ procedures used in Brussels.¹⁸⁵ This constitutes the authors’ last point in the paper as well.

Between fore and aft, the authors cover selected topics that include the passing-on defence and the line between too much collective redress and not enough. But another subject highlighted by Forrester and Powell, which may be characterized as their second principal point, is that – in the absence of any hard EU legislation, and while we swim in a small sea of reports, resolutions, consultations and now *travaux préparatoires* – private antitrust enforcement in Europe has in fact already come of age.¹⁸⁶ The genie is out of the bottle in England and Wales, in the Netherlands and in Germany, and it may soon be roaming free elsewhere in Europe too.¹⁸⁷ Forrester and Powell refer to a ‘shift in attitudes’, and to the rise of a competitive European ‘marketplace’ for the litigation of private antitrust claims. In this regard they present a roundup of various means by which such litigation is financed, including private investment and litigation insurance. One wonders what sort of backlash will occur if and when the phenomenon is caricatured by critics as an abusive means of circumventing the ‘loser pays’ principle, cherished as a great sentinel keeping out frivolous litigation. Already the standard assumption is that third-party funding must be properly regulated when it makes collective legal action possible.¹⁸⁸ The point of the authors is that, as a cause and consequence of the competitive marketplace, private antitrust enforcement – especially business-to-business litigation – is indeed expanding. That expansion feeds into the argument outlined above because, as private antitrust claims and the engagement of national judicial institutions in antitrust disputes become ever-more prevalent, the problem of flawed procedures at the EU level may have unexpected

¹⁸⁴ Cf. above notes 84–88 and accompanying text.

¹⁸⁵ The possibility of a perceived legitimacy problem at the level of the Commission could also conceivably lead to more indirect ‘spillover’ adjustments, even unconscious ones, at national level. For example, such problems could affect the way national courts treat non-binding principles and methods contained in Commission guidelines, which could in turn affect litigation outcomes.

¹⁸⁶ John Ratliff likewise points, in his contribution, to significant levels of litigation in a number of Member States. See also Geradin and Grelier, ‘Have We Only Seen the Tip of the Iceberg?’, cited above note 9. The submerged part of the iceberg represents the litigation of private damages claims without any assistance from EU rules, which is said to be ‘mushrooming’. To put all of these portraits in perspective: in the period 2006–2012, the number of Member States from the EU-28 reporting zero follow-on actions brought on the basis of a Commission infringement decision was 20. See Daniele Calisti and Luke Haasbeek, ‘The European Commission Sets the Stage’, cited above note 135, at 3; Commission, Impact Assessment Report (Annex II to this volume), para 52. Furthermore, even in Member States where private antitrust litigation flourishes, it may be necessary to consider how that litigation is composed. In Germany, for example, only 20 percent of the cases brought before the national courts concern claims for damages or unjust enrichment; cases most often aim at securing the nullity of contract clauses or obtaining injunctions in a business-to-business context. See Sonja Keske, ‘Collective Redress’, cited above note 18.

¹⁸⁷ Taking the UK as the leading forum in the EU for follow-on damages actions (typically following a finding of infringement by the European Commission), the authors provide a helpful chart listing 25 such cases before the UK High Court and the UK Competition Appeal Tribunal.

¹⁸⁸ See Commission Recommendation 2013/396, paras 14–16 and recital 19.

impacts in an ever-growing number of cases and may build into a quiet cacophony of competition law as applied.

BRUNO LASSERRE: ‘Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies’. It is well known that Europe’s efforts to establish a competitive market order made it necessary to have competition rules embedded within the framework of a common market, and that, partly because of the Commission’s broad powers and because of the central role given to the competition rules by the Court of Justice, competition enforcement became Europe’s first genuine ‘supranational’ policy.¹⁸⁹ However, it is equally clear that supranationalism was not a destination or end-point for Europe in this context but a dimension of what has become, now more than ever, a multi-level regulatory landscape. The enforcement of competition law has become a significant part of national regulatory activity, with certain Member States leading the way. ‘Multi-levelism’ bears risks, including in particular, fragmentation and incoherence. But as Lasserre points out in this chapter, the competition field in Europe is characterized, in the main, by a process of convergence. This process may be thought of as both an input for and an output of a socialization process, or of a construction of culture. The idea of convergence in Europe should not be oversold, as differences between Member States will probably always persist, for as long as the EU persists. Furthermore, it is arguable that, since the emergence of the question ‘What has competition ever done for us?’, roughly associated with debates over the Constitutional Treaty that never was – and in light of the global economic malaise, competition policy in Europe is more politicized than ever before, another guarantee of heterogeneous preferences as opposed to a wide consensus on what competition law and policy should mean and how they should be executed.¹⁹⁰ Interestingly, Lasserre is confident that the convergence process, which has generally been a public sphere phenomenon, has managed to pave the way for bolder steps in the private sphere. As he says, ‘EU antitrust law has become a privileged and fitting area for the development of European standards for collective redress’.¹⁹¹

With regard to collective redress, Lasserre points to a substantial change of scenery between 2004, when only three Member States (Portugal, the UK and Sweden) had collective redress mechanisms, and 2011, when the number had nearly quadrupled (and as of today it has quintupled). But in many Member states it is still not clear whether the legal possibility to bring collective damages actions for antitrust infringements is translating into actual recovery of compensation for

¹⁸⁹ Lee McGowan and Stephen Wilks, ‘The first supranational policy in the European Union: Competition policy’, 28 *European Journal of Political Research* 141–169 (1995).

¹⁹⁰ Attitudes toward collusion may be a way of illustrating this point. One could speak of a consensus in the United States as to the opprobrium attached to classic cartels. In Europe, while competition authorities are on the same page it is still not clear that a broad consensus has emerged that collusion should be condemned with severity or treated, loosely speaking, as a felony as opposed to a misdemeanor.

¹⁹¹ Page 317.

victims of those infringements. The combination of instrument design, institutions and shared value codes or habits within Member States varies substantially, and as many realize the effectiveness of collective redress can vary widely in different parts of Europe. The difference between Member States where collective actions can really secure adequate outcomes and Member States that simply do not have the legal means to aggregate claims is starker still. Lasserre underlines the point that the status quo is unacceptable, above all because of the problem highlighted earlier: while some cartel victims – namely, those businesses with sufficient money and resources – can shop until they find a European jurisdiction in which to file a collective action, common citizens with low-stake claims are economically speaking deprived of any real possibility of recovering their losses if they do not reside in a Member State with an adequate system of collective redress. The market mechanism of forum shopping therefore appears to provide only suboptimal solutions that fall short from a variety of perspectives, whether it is the right to an effective remedy or the establishment of a common Union-wide area of justice or, in some cases (ie, where public authorities do not pick up the slack) the effectiveness of the competition rules.

Lasserre thus has no doubt that the EU is well advised to act resolutely in the field of collective redress and to establish common rules that can ensure satisfactory outcomes in this area in all Member States. Wisely, Lasserre sees past the deceptive dichotomy of opt-in/opt-out and explains that ‘intermediate options might draw their inspiration from the proposals of the British Civil Justice Council or from the Danish example, which leave some degree of discretion to the judge on a case-by-case basis depending on the size of the class, its representativeness, the level of financial stake, and the status of the claimant’.¹⁹² As we have seen, the UK Government is moving in this general direction; the European Commission has decided not to do so and rather has established an improvident hierarchy that privileges opt-in class actions as a blanket principle. On a somewhat different issue, Lasserre advocates private litigation that puts predominant emphasis on cases brought on the heels of infringement decisions by competition authorities. He does not seem to go so far as to suggest that stand-alone actions are best forgotten, but he firmly subordinates them to follow-on claims, perhaps not surprisingly for the head of an agency.¹⁹³ In this context one should guard against categorical views, since public authorities are neither infallible¹⁹⁴ nor blessed with

¹⁹² Page 326 (footnotes omitted).

¹⁹³ Pointing to a negative experience of the Conseil (now the Autorité) de la concurrence, Lasserre states that ‘stand-alone actions may undermine the efficiency of antitrust enforcement [and legal certainty] if a concurrent administrative investigation by an NCA is already underway and if it has led to on-site inspections’. Page 320.

¹⁹⁴ For example, type II errors are possible. If one considers a Commission decision, national courts cannot validly adopt decisions running counter to it. However, the Commission does not adopt ‘constitutive’ exemption decisions (although Article 10 non-infringement declarations are possible). Therefore, when the Commission makes a type II error, there is (putting aside Article 10) no decision to which the decision of a national court would run counter. The nature of the type II error might be a failure to detect an infringement, or an erroneous finding of no infringement. However, the incidence of each set of errors is likely to be quite low. In the first scenario, if the Commission initially fails

limitless resources.¹⁹⁵ The cases that will sooner or later slip through the public net are probably those which require significant time and energy on the part of enforcers but which defy predictable outcomes due to their complexity, their rigorous evidentiary burdens or the difficulty they pose in fashioning relief. Abuse of dominance cases may sometimes fit this description of high-hanging fruit, and indeed at the national level there is significant stand-alone litigation in this area.¹⁹⁶ The point is perhaps more muted if one is only considering the necessity of stand-alone private litigation in the collective redress context, since most (but not all) claims arising from abuse of dominance allegations will take the form of business-to-business litigation.¹⁹⁷

Lasserre also advocates the extension of the *Masterfoods* rule (discussed above¹⁹⁸) to decisions of national competition authorities, which again accords with his role as an enforcer. Since a rule of this kind would facilitate follow-on claims, he must be pleased to see that Article 9 of the Commission's draft Directive would transpose *Masterfoods* in the way he suggests. Lasserre adds, though, that the 'no decisions running counter' rule does in itself guarantee success in court unless other evidentiary challenges are met, which may go beyond the standard tort prerequisites of causation and damages, depending on the circumstances. He also weighs in on other related issues such as whether it should be the role of competition enforcers to quantify anticompetitive harm, particularly with respect to the damages of particular victims, as opposed to aggregate harm. The answer, in his view, is that there should be no such duty but that furnishing such information in infringement decisions is often very desirable and can lead to 'downstream' efficiencies if generating it is not too costly. Another issue touched on briefly is access to evidence held by competition authorities in the EU, when such information is sought not only by litigants in European courts but also by plaintiffs suing in third countries; as with most other authors, Lasserre considers EU legislative action to be a logical necessity following the ECJ's judgment in *Pfleiderer*. Finally, is it unduly severe and hence unjust to punish an undertaking for infringing competition law when it has already, or surely will, pay substantial damages to plaintiffs in private litigation? As we saw

to detect a cartel, for example, but a private case is launched, the Commission will undoubtedly become aware of the alleged infringement, possibly via receipt of leniency applications or from media reports. The national court would then be precluded from taking a decision that would run counter to any decision the Commission may be contemplating, and may stay the proceedings – effectively turning the case into a follow-on action. As for the second scenario, it is difficult to know exactly how often anticompetitive agreements and practices are misdiagnosed as benign; but to be generous to competition agencies, it may be assumed that this is a rare event. The practical conclusion is therefore that type II errors in this context will tend to arise, if at all, from resource constraints and not from the mistakes described above.

¹⁹⁵ On the limited resources of public agencies, see Philip Lowe, 'Conclusions', this volume, point 7.

¹⁹⁶ See Fred Louis, 'Promoting Private Antitrust Enforcement: Remember Article 102', this volume.

¹⁹⁷ On the possibility of and difficulties with consumer-to-business litigation in the context of excessive pricing cases, see above note 60 and accompanying text.

¹⁹⁸ See above notes 77-88 and accompanying text.

above, Ottervanger speaks of ‘disproportionate double deterrence’,¹⁹⁹ and other commentators have raised similar concerns. According to Lasserre, however, ‘the right to compensation for a tort is a fundamental principle of law. It would therefore be illegitimate – and probably contrary to ECHR principles – to grant full or partial ‘civil immunity’ to a firm just because it has already been fined in antitrust administrative proceedings.’²⁰⁰ He explains furthermore that crediting a company in administrative proceedings for damages paid or to be paid in private proceedings improperly confuses the aims of public and private enforcement. If the aims are different and independent, as they should be held to be, then the two types of proceedings must not be substitutes and a zero-sum outcome would be illogical.

HORST BUTZ: ‘Integrating Public and Private Enforcement in Europe: Issues for Courts’. This concise but revealing chapter highlights the legal and cultural distance between the sphere of national traditions and the sphere of EU law with its imperialistic DNA, programmed to interact with, hybridize and at the limit even displace those traditions unless the conflict can be mediated by doctrine-shaping and political finesse. Ticking off a 10-point list of issues that emerge from Europe’s longed-for turn toward private enforcement, Judge Butz repeatedly asserts that however much certain reforms may or may not be wise or expedient, their path is obstructed by deep-rooted procedural and constitutional principles, at least in Germany. The issues he addresses are the following: the implications of significant court fees for plaintiffs and the discretion of judges to reduce them; *locus standi* in class action cases; the usefulness of agency decisions in national litigation given asymmetric information about evidence; the access courts and litigants have to pertinent documents, and limits thereto; burden and standard of proof; the use of expert (economic) evidence; the difficulty of, but also the variety of means used for, quantifying damages; the famous tension between plaintiffs’ access to leniency materials and enforcers’ tight grip on them; and finally the rarely discussed problem of how complex, multi-player antitrust litigation presents such enormous challenges for a trial judge that Dworkin’s Hercules himself, let alone an inexperienced judge, might find it a daunting task.²⁰¹ With this inventory of

¹⁹⁹ Tom Ottervanger, ‘Designing a balanced system: Damages, Deterrence, Leniency and Litigants’ Rights’, this volume, at page 20.

²⁰⁰ Page 324. On the other hand, Lasserre seems open to the introduction of some finely honed mechanism that limits the liability of a successful immunity applicant, provided that it does not leave claimants without adequate compensation. This issue too has now been addressed by the draft Directive, although it is unknown whether the approach espoused by the Commission (see above notes 52–54 and accompanying text) will be retained in the final version of the legislation.

²⁰¹ In its *VEBIC* judgment, which concerns a challenge brought against an infringement decision by the (now historical) Belgian Competition Council, the ECJ seems to acknowledge that it is only the adversarial nature of such proceedings that serves to counter the risk that a national court could be overwhelmed by the complexity of a competition law case if the proceedings were *ex parte* and that its capacity for independent judgement could thus be compromised. As the Court states, ‘if the national competition authority is not afforded rights as a party to proceedings and is thus prevented from defending a decision it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly ‘captive’ to the pleas in law and arguments

issues Butz puts a useful perspective on the conflicts that will either erupt or be submerged (only to surface later, perhaps in the context of preliminary references) as the 2013–2014 legislative procedure unfolds. Short as it is, the chapter functions as its own adept summary.

PHILIP LOWE: ‘Conclusions’. Another brief contribution is provided by my conference co-organizer, who once again demonstrates his skill at capturing the salient points made during our day and a half of discussions in Villa La Fonte. I leave Philip’s conclusions for the reader to consider directly. Let us turn without delay to the next and final contribution, a provocative epilogue for this book.

Part 5 Private Damages Claims and the Elusive Future

VELJKO MILUTINOVIĆ: ‘The ‘Right to Damages’ in a ‘System of Parallel Competences’: A Fresh Look at *BRT v SABAM* and its Subsequent Interpretation’.²⁰² Milutinović’s chapter serves two functions. First, it furnishes a fitting conclusion to the present collection. Second, it contains, as a last-minute postscript, an initial reaction to the Commission’s proposal of June 2013 on private damages actions. The essay begins with the observation that the system of parallel competences associated with the ECJ’s *Delimitis* and *Masterfoods* judgments (which permit national courts, subject to their options or obligations under Article 267 TFEU, to hear cases raising competition issues in parallel with or in anticipation of public enforcement by the Commission) and the *Courage*-fertilized right to damages for breaches of EU competition law have led to complexity and confusion. For example, a system of parallel competences seems to contradict a Hart-oriented concept of a (supranational) legal ‘order’, and thus is something of a hangover from the less orderly system of public international law. But Milutinović points to other problems as well. His discussion is organized around the following themes: the ‘binding’ legal effect of the so-far-unused ‘non-infringement decisions’ that the Commission (and none but she) can adopt under Article 10 of Regulation 1/2003, and other issues arising from the binding effect of public enforcement decisions; the relationship between leniency programs and follow-on damages claims in national courts; and limitations on such claims (or, conversely, *limitations* on limitations, such as curbs on permissible rules on standing). Some parts of the

put forward by the undertaking(s) bringing the proceedings’. Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewaterkers (VEBIC) VZW*, [2010] ECR I-12471, para 58. However, it appears from the remarks of Judge Butz that at least in some cases heard by trials courts, adversarial argumentation is not in itself a sufficient guarantee that a case will be manageable.

²⁰² For extensive discussion of issues arising from the *Courage*-based private litigation of the EU antitrust rules, see the author’s monograph, *The Right to Damages under EU Competition Law: from Courage v Crehan to the White Paper and Beyond*, Kluwer, 2010.

story, including, for example, the author's discussions of access to evidence under *Plfeiderer* and *CDC Hydrogene Peroxide*, will be skipped here.

The history of the system of parallel competences and of the right to damages is traced back to the case mentioned in the title of the chapter, *BRT v SABAM*,²⁰³ which is the standard citation for the (bold) proposition that Articles 101 and 102 are of sufficient precision, clarity and 'unconditionality' to qualify for direct effect under EU law ('direct rights [...] which the national courts must safeguard').²⁰⁴ It is in the *BRT* judgment that the ECJ sets down its 'foundational myth' of a double sphere of enforcement, public and private, in which each is in principle of equal rank. Cracks in the myth appeared in *Delimitis*, however, since the possibility of dual enforcement brought with it a need to resolve private-public conflicts, and as noted earlier in this chapter it is national judges, unsurprisingly, who must yield to (contemplated or actual) Commission decisions, and not the reverse. Notwithstanding this set of conflict rules, the purportedly equal stature of public and private enforcement was later, as Milutinović says, 'completed through the *Courage* turn' and its rights-based discourse', in part by transposing principles from the *Francovich* and *Brasserie du Pêcheur* judgments to the domain of horizontal liability (ie, liability for breach of duty as between persons, as distinct from state liability) for infringement of EU competition law. The introduction of a rights discourse in *Courage*, which was not strictly necessary in order for the ECJ to decide the case, appears to be a critical juncture in the sense that private remedies are discovered in the penumbras and emanations of the Treaty itself – which means, among other things, that the EU legislator can promote them and shape their pursuit in a variety of ways, but generally it cannot abridge them (one can even imagine breaches engaging vertical liability here, though such cases are likely to be hypothetical). Nor may they be compromised by national (constitutional or ordinary) laws, or by national courts. However, while these consequences may logically follow from the notion of equal stature, the latter approach in the author's view fails to reflect the fact that the effectiveness of private enforcement, and more precisely the 'right to damages', is derived from, instrumental to and conditional on the effectiveness of Articles 101 and 102.

After explaining why, if the Commission ever adopted an Article 10 decision it would indeed have preclusive legal effects in a national court despite its 'declaratory' nature, Milutinović discusses what he calls merely 'apparent' versus 'real' problems relating to the 'binding effect' concept. The merely apparent problems concern fears about the independence of the judiciary, in a division of powers sense, and about the possibility that creating a system where an infringement decision by any NCA must be respected by courts in other Member

²⁰³ Case 127/73, *BRT v SABAM* [1974] ECR 51.

²⁰⁴ *Ibid*, para 16. As Milutinović points out, though, it was not in *BRT* but in *Delimitis* (para 50) that the ECJ made it clear that national courts are competent to apply the full substantive content of Article 101(1). Milutinović also explains that the direct effect of Article 101(1) could not have been inferred from Article 101(2) because nullity has the character of a sanction imposed in the public interest, and not of a (waivable) remedy for breach and personal injury.

States could turn the courts into mere assessors of damages, to use the coined phrase.²⁰⁵ A more serious problem with the binding effect of national decisions is its uneasy fit with due process requirements.²⁰⁶ An infringement of Article 6 ECHR (Article 47 EU CFR) might potentially arise because a civil defendant before a court that must respect an infringement decision of another Member State's competition authority is seemingly deprived of its right to a fair trial, at least as to the allegation of infringement, by an independent and impartial tribunal (which would not seem to be the case, however, if the decision has been upheld on appeal by a court with full jurisdiction to review factual and legal findings; and the most serious infringement decisions *are* appealed most of the time²⁰⁷). Furthermore, putting the 'independent tribunal' issue aside, and considering that the national competition authorities exhibit astonishing diversity, it is only by way of legal fiction that it can be said all the relevant enforcement systems follow a common fundamental rights standard; doubts remain, even post-*Menarini*, precisely because of that diversity. This explains why the European Parliament is presently considering a relaxation of the European Commission's proposed rule, which would make all such NCA decisions binding in private litigation, with no emergency brake.²⁰⁸ (And as noted earlier in this chapter, the Council's position is the most timid of all, as its favoured rule would go no further than requiring Member States to ensure that cross-border final infringement decisions are admissible as evidence.) Milutinović would take a different approach by launching a thorough review of respect for fundamental rights standards in all the public enforcement systems across the Member States; to mess about with the 'binding effect' rule, without a more comprehensive review, is to leave the source of the problem unaddressed.

²⁰⁵ The cross-border 'binding effect' of final infringement decisions are also discussed above at notes 87–89 and accompanying text.

²⁰⁶ See also, eg, Stefano Grassani, 'The Binding Nature of NCA Decisions in Antitrust Follow-on Litigation: Is EU Antitrust Calling for Affirmative Action?', *CPI Antitrust Chronicle*, August 2013(1). For the contrary view, ie the view that a cross-border 'binding effect' would not undermine fundamental rights protection, see Wils, 'Relationship between Public Antitrust Enforcement and Private Actions for Damages', cited above note 4, at 17.

²⁰⁷ Grassani argues, however, that in reality there may be cases in which review courts fail to engage in sufficiently rigorous review of an NCA's infringement decision; he points to the Italian administrative courts in this regard (where they control a decision's 'legality', as opposed to reviewing fines, where unlimited jurisdiction applies) and states that 'the attribution of a binding nature to an NCA's decisions – as Article 9 of the Proposal suggests – should be measured against the extent of such judicial review; and to how, in practice, the latter review is run by courts in their daily activity. If appellate judges are empowered to merely monitor the legality of [an] NCA's decisions, lacking (or being reluctant to exercise) the ability to fully second-guess or retry ex novo the case, then the right to a fair antitrust trial at the 'upstream' public enforcement stage is not wholly safeguarded.' *Ibid.*, at 5 (footnote omitted). If the application of a weak version of *contrôle de légalité* results in a defective finding of infringement, and if the Article 9 of the draft Directive endows that decision with preclusive effect, then the lower standard of judicial review may effectively be exported to Member States, such as Germany or the UK, where judicial control can be much more rigorous. This appears to create some scope, as Grassani argues, for forum shopping. See *ibid.*, page 4.

²⁰⁸ As far as an emergency brake is concerned, see the Staff Working Paper accompanying the Commission's White Paper of 2008, at para 162 (and *cf.* Article 45 of Regulation 1215/2015). In the June 2013 proposal, the idea of an exception to the rule of preclusive effect is gone.

The author's conclusion states that 'EU antitrust law should be allowed to develop in a manner that best suits the effectiveness of its provisions – which must have primacy over rights *derived* from that effectiveness (eg, the 'right to damages').'²⁰⁹ He says that the binding effect of NCA decisions is 'socially useful' and 'should not be precluded by intellectual constructs that seek to make public and private enforcement 'equal' at all costs.' The primary intellectual constructs to which he refers are the system of parallel competences and the right to damages. These must be seen as derivative, not self-justifying; when one peers through the myth of equality and the teleological 'retrodictions' of jurisprudential accretion, a number of legal principles in the field of private enforcement which are now almost taken for granted may appear to rest on shaky foundations.

As for the elusive future, Milutinović's postscript on the proposed Directive published by the Commission in June 2013 contains further perceptive commentary that I leave to the reader's meditations and pleasure.

Conclusions regarding the proposed private enforcement package of June 2013

Regardless of how the Council and the European Parliament proceed to modify the draft Directive published by the Commission in June of 2013 (and on the assumption that they will indeed adopt some compromise version of the text), two trends can be expected to continue. First, private claims for damages will continue to be brought before courts with greater frequency in cases where the alleged victims of anticompetitive behaviour are large or medium-sized businesses that have the means to pursue their own cases and do not really need a collective redress mechanism,²¹⁰ or where (in some Member States where the law so allows) the claims of such businesses have been transferred to a claims aggregator in exchange for consideration and a percentage of any recovery. That trend can also be expected to extend 'horizontally', spreading from Germany, the Netherlands and the UK to a few other Member States, perhaps not many.²¹¹ This horizontal effect will be in part a spontaneous spillover that would likely occur in the absence of the Directive, particularly if Article 19(1) TEU were given serious consideration;²¹² but the Directive's most useful provisions will likely lead to a

²⁰⁹ Emphasis in original. The sentiment also reflects arguments made in the author's monograph, cited above note 202.

²¹⁰ See Keske, cited above note 18, page 7 of the draft paper (discussing the claims brought by Deutsche Bahn and a number of municipalities in Germany in the rail track cartel case).

²¹¹ Where damages actions arise in different EU Member States involving the same alleged infringements by the same defendants, the separate claims may well be joined under the Brussels Regulation, and such consolidated actions may well proceed in those Member States (currently three of them) that already have a 'head start' in private antitrust litigation. To some extent, this tendency may be one factor among others that curbs the horizontal spread of private damages litigation. See Howard, 'Too little, too late?', cited above note 58, at 464 (forecasting 'a concentration of jurisdiction in certain preferred Member States in any event, thwarting the Commission's aspirations of an internal market for competition litigation across the EU').

²¹² The second sub-paragraph of Article 19(1) TEU requires Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

wider and deeper spillover than otherwise might occur. In turn, the increase in litigation before the courts of the Member States will yield an increasing number of requests for preliminary rulings by the ECJ. *Ideally*, the resulting judgments will be coherent and provide clarity with regard to subjects both within and beyond the scope of the Directive-to-be.²¹³ The feedback loop institutionalized by Article 267 TFEU will thus be able to develop further; and, particularly as those preliminary references increasingly prompt the ECJ to speak on substantive issues, a significant impact on public enforcement (and on enforcers' ubiquitous soft law) can be expected as well. The importance of coherent and systemically sensitive substantive principles is particularly important – as if this needed to be said – since wrongheaded liability rules can be even more problematic when they contaminate a system encompassing active private as well as public enforcement.²¹⁴ As a tentative prediction, with secondary law in place, the ECJ will be emboldened to enunciate rules and principles to guide private antitrust litigation even as regards interstitial matters left untouched or barely regulated by the Directive, as opposed to merely 're-affirm[ing] the *Rewe* effectiveness case law' and waiting for further action by the EU legislator.²¹⁵ More generally, across Europe and compared to past experience, control over how to frame and resolve competition law issues will migrate, in some measure, from competition authorities in part to courts and in part to the parties that drive and shape litigation, a shift that may well influence the ways in which authorities and courts operate.²¹⁶ To mitigate the possibility of disruptive fragmentation, particularly where judicial expertise remains underdeveloped, institutional cooperation – particularly in the form of participation, in appropriate cases, by the national competition authorities and by the European Commission in national litigation – may become ever more important.²¹⁷ Yet this does not diminish the need for effective public enforcement as such, which remains of the highest interest for the public. The reasons for this are many but they relate, *inter alia*, to the links between public and private enforcement as highlighted in this and other chapters herein, and to the fact that even a *perfectly* functioning private enforcement system fails to address issues

²¹³ Coherence has become, increasingly, a significant challenge for the Court of Justice, with its various chambers and configurations. But at the same time, coherence at the ECJ has perhaps never before been so important, now that a greater number of interlocutors (exhibiting, *inter alia*, extreme linguistic diversity) are making their entrance on stage. The risk of fragmentation is described by Gerber, 'Private enforcement of competition law', cited above note 4, at 450 ('The goals and concepts of competition law are likely to become both less clear and less coherent. [...] Rather than having one administrative office and, perhaps, one or two courts using concepts and articulating and interpreting goals and norms, private enforcement is likely to mean that many voices will use concepts and participate in the process of defining the goals of the system. This is likely to lead to less consistency in conceptual usage and less clarity in the articulation of goals.')

²¹⁴ See Reindl, Secretariat Note for OECD, cited above note 11, at 10–11; and in more detail, Richard Epstein, 'The Coordination of Public and Private Antitrust Actions', in *ibid*, 36–45.

²¹⁵ Less optimistically, see Howard, 'Too little, too late?', cited above note 58, at 464.

²¹⁶ *Cf.* Gerber, 'Private enforcement of competition law', cited above note 4, at 448 (trend toward greater incidence of private antitrust enforcement 'will mean that administrators no longer control the operation and development of competition law. [...] [C]ourts that make decisions in these cases will influence legal development and effectiveness as much or more than administrators.')

²¹⁷ See Reindl, Secretariat Note, cited above note 11, at 12.

such as the deadweight loss caused by anticompetitive conduct, or the complex task of developing coherent policies.

Second, the trend of a growing gap between the foregoing claimants and other alleged victims of anticompetitive harm – chiefly small businesses and individual consumers – can also be expected to persist. For this latter category of unfortunates, the Directive and its overall positive features will be of limited impact. Abstracting from reality, so to speak, we might even imagine a definitive version of the Directive requiring the Member States to introduce the most plaintiff-friendly procedural rules in the world. Without sufficient economic incentives for small antitrust damages claimants to go to court, it is difficult to see how the objectives of full compensation and meaningful access to justice for this group have any remote chance of being achieved.²¹⁸

²¹⁸ Since it seems unlikely that the EU, or the Member States acting spontaneously, will address this incentive problem in the foreseeable future, it seems worthwhile to consider and discuss further possible second best mechanisms (or third-best, to be technical, since litigation and ADR should be pathological and compliance the norm) that may serve as imperfect proxies for restoration of loss for dispersed, small-damage victims. One such mechanism – ‘public compensation’ – is proposed in Ariel Ezrachi and Maria Ioannidou, ‘Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation’, 3 *Journal of European Competition Law and Practice* 536-544 (2012) (discussing the benefits of authorizing competition authorities to order infringing undertakings to compensate victims – not as a means of obtaining a fine discount but in addition to the fine as calculated under the standard criteria of the authority concerned).

