EU antitrust law infringements and private damages actions: how to hold cartelists liable for damages

Catalin S. Rusu*

1 Introduction

The EU antitrust provisions (i.e. the cartel and dominance abuse prohibitions embedded in Articles 101 and 102 TFEU) provide strict rules addressed to the undertakings which, via their behaviour, obstruct competition, stifle economic efficiency, create consumer welfare detriments, raise EU Internal Market integration obstacles, restrict innovation, etc.1 Given this wide array of interests at stake, the EU antitrust rules have always played an important part in EU law,2 being rightfully labelled as key elements of the EU’s economic constitution.3 Their real-world success however, depends heavily on their practical enforcement.4 Traditionally, Articles 101 and 102 TFEU have been enforced, within the public enforcement system, by the European Commission, and since the entry into force of Regulation 1/2003,5 also by the national competition authorities (hereinafter NCAs) and domestic courts. The EU antitrust rules may also be enforced by the consumers, customers, or competitors of the undertakings that infringed these rules, who have consequently suffered losses. This relates to the EU antitrust private enforcement system which, although considerably underdeveloped at EU level for decades, is lately catching ground in light of recent legislative developments.6

An important element in making good the losses created by antitrust law infringements is establishing the liability of the infringers

infringers, which is an issue that received much attention in the competition law and private law academic debates. In this article, without aiming to provide an exhaustive approach to the topic, I will focus on the development of the injured parties’ ability to claim compensation via actions for damages, and also on the functionality of (some of) the tools employed for holding the cartelists liable in this respect.

This contribution is structured as follows: Section 2 delves into the prerequisites of actions for damages. Section 3 explores the development of the EU right to claim damages, by analysing the case-law of the Court of Justice of the EU (hereinafter CJEU or Court). Section 4 dwells upon some of the key provisions of the Private Damages Directive (hereinafter the Directive). Section 5 concludes this contribution.

2 The prerequisites

In order to clarify what establishing the cartelists’ civil liability entails, it is first important to observe the place of private enforcement in the broader context of EU antitrust enforcement, and also to understand how the process of claiming damages unfolds.

2.1 EU antitrust public and private enforcement

The EU antitrust rules are enforced eminently via public law means. However, the Commission and the NCAs have limited resources for tackling cartels and dominance abuses. These entities regularly prioritise their work, and exercise discretion as to which cases they handle. Furthermore, these authorities often experience ‘information asymmetry’, since more often than not, the best information about alleged anti-competitiveness is in the hands of the actual alleged infringers. Private enforcement comes as a valuable supplement to the public enforcement activities, as it helps uncover antitrust infringements. Yet, the rationale of the public/private players involved differs: while public enforcers are concerned with fostering public interest and deterring infringers, which is an issue that received much attention in the competition law and private law academic debates. In this article, without aiming to provide an exhaustive approach to the topic, I will focus on the development of the injured parties’ ability to claim compensation via actions for damages, and also on the functionality of (some of) the tools employed for holding the cartelists liable in this respect.

This contribution is structured as follows: Section 2 delves into the prerequisites of actions for damages. Section 3 explores the development of the EU right to claim damages, by analysing the case-law of the Court of Justice of the EU (hereinafter CJEU or Court). Section 4 dwells upon some of the key provisions of the Private Damages Directive (hereinafter the Directive). Section 5 concludes this contribution.

2 The prerequisites

In order to clarify what establishing the cartelists’ civil liability entails, it is first important to observe the place of private enforcement in the broader context of EU antitrust enforcement, and also to understand how the process of claiming damages unfolds.

2.1 EU antitrust public and private enforcement

The EU antitrust rules are enforced eminently via public law means. However, the Commission and the NCAs have limited resources for tackling cartels and dominance abuses. These entities regularly prioritise their work, and exercise discretion as to which cases they handle. Furthermore, these authorities often experience ‘information asymmetry’, since more often than not, the best information about alleged anti-competitiveness is in the hands of the actual alleged infringers. Private enforcement comes as a valuable supplement to the public enforcement activities, as it helps uncover antitrust infringements. Yet, the rationale of the public/private players involved differs: while public enforcers are concerned with fostering public interest and deterring
future anti-competitive success, private parties aim to obtain compensation for the losses suffered.11

2.2 Actors in damages claims
Who can claim damages via private law? The consumers, customers, and competitors of the infringers are entitled to do so.12 First, competitors of a dominant undertaking, for example, may claim damages since the infringer’s behaviour hurts their business interests, if the competitors are eliminated from the market.13 However, the competitors may not always want to pursue such action if, as discussed in Section 3 below, they may increase their prices to the cartelised market pricing level. Second, the infringers’ customers, who purchase the cartelised products in the upstream market and sell them downstream to the end-consumers, may also claim damages if they absorb the cartel overcharge and do not incorporate it in their prices downstream. If they choose to ‘pass-on’ the cartel overcharge, the consumers ‘at the end of the line’ will actually ‘foot the bill’ of the cartelists’ anti-competitive behaviour. Therefore, third, the end-consumers also have a right to claim damages from the upstream infringers, as indirect purchasers. I will return to the status of indirect purchasers in Section 4 below.

Who can claim damages via private law? The consumers, customers, and competitors of the infringers are entitled to do so

2.3 The direct effect of the EU antitrust provisions
What is the basis of the injured parties’ entitlement to claim damages? When it comes to EU antitrust infringements, as discussed in Section 3 below, private parties enjoy the right to claim damages directly from EU law. They exercise this right before the domestic courts, since Articles 101 and 102 TFEU provide traditional mechanisms to bring claims.14 However, the competitors of the infringers are entitled to do so.15 First, competitors of a dominant undertaking, for example, may claim damages since the infringer’s behaviour hurts their business interests, if the competitors are eliminated from the market.16 However, the competitors may not always want to pursue such action if, as discussed in Section 3 below, they may increase their prices to the cartelised market pricing level. Second, the infringers’ customers, who purchase the cartelised products in the upstream market and sell them downstream to the end-consumers, may also claim damages if they absorb the cartel overcharge and do not incorporate it in their prices downstream. If they choose to ‘pass-on’ the cartel overcharge, the consumers ‘at the end of the line’ will actually ‘foot the bill’ of the cartelists’ anti-competitive behaviour. Therefore, third, the end-consumers also have a right to claim damages from the upstream infringers, as indirect purchasers. I will return to the status of indirect purchasers in Section 4 below.

2.4 Conditions for successful claims and types of domestic actions
What are the general conditions that must be fulfilled for damages claims based on EU antitrust infringements to be successful? Also, in what types of actions may the right to claim damages be exercised? Regarding the first question, classic private law theory prescribes a three-pronged formula: i) infringement of the law ii) loss iii) and causality between the two. However, certain domestic civil law systems add extra elements to this recipe, such as the infringer’s fault, or the statute’s intention to protect the victim against the suffered loss.16

Second, private enforcement actions may be categorized as follow-on or stand-alone actions. The former entail a public enforcement decision/judgment finding an EU antitrust infringement, which the victim ‘follows-on’, by proving the loss suffered and the causal relationship between the infringement and this loss. The latter are independent of enforcement actions of public authorities, and arise either because NCAs or the Commission will not deal with a complaint, or because the victim needs to take immediate court action to halt an alleged anti-competitive behaviour (i.e. an injunction). In this scenario, the injured party must prove all elements discussed above (infringement, loss, causation, etc.) in order to obtain redress.17 A different categorisation divides private actions in ‘sword’ and ‘shield’ actions. ‘Sword’ cases are brought against alleged infringers, in order to stop the practice and/or obtain compensation for the loss. ‘Shield’ actions function as defences against claims of the infringer, such as breach of contract, or money owed.18 Defensive actions stem specifically from Article 101 (2) TFEU, which provides that the agreements (or the parts of the agreements, in case severance is pos-

What are the general conditions that must be fulfilled for damages claims based on EU antitrust infringements to be successful?
2.5 The role of the domestic legal ambit

Lastly, in which jurisdictional ambit do actions for damages unfold? Although the right to claim damages resulting from EU antitrust infringements is grounded in EU law, the Commission cannot itself award damages. Individuals enforce this right in national civil courts, using domestic procedures and remedies, by virtue of the national procedural autonomy principle. In the absence of EU law on the matter, the Member States' legal systems designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to ensure the protection of rights which citizens have from the direct effect of EU law. However, this procedural autonomy is exercised while observing the EU effectiveness and equivalence principles: national rules may not make the exercise of the EU rights that domestic courts must protect virtually impossible or excessively difficult and national procedures for EU rights enforcement must be equivalent to domestic rights enforcement procedures. Consequently, these principles impose limits on the national rules' application, which is consistent with the Member States' duty of sincere cooperation, and with their obligation to guarantee effective judicial protection of the EU rights.

3 The EU right to claim damages: a case-law overview

How was the right to claim damages developed in EU law? The TFEU is silent on the matter of individual and Member State liability for damages for losses resulting from EU law infringements. Actually, Article 19 (1) TFEU provides that the Member States – and therefore not the EU – must provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. If a Member State breaches the EU law rules, the Commission may use the Article 258 TFEU infringement procedure against such a Member State that failed to fulfil its Treaties obligations. However, this procedure does not address the losses that result from the Member State's behaviour. In several cases, the CJEU clarified that defaulting Member States must compensate the victims, if the EU law rule infringed is intended to confer rights on individuals, the breach is sufficiently serious, and a direct causal link between the breach and the loss incurred by the victims exists. This principle of state liability for damages essentially forms the basis for establishing the EU right to damages stemming from EU antitrust infringements, acknowledged first in the Courage and Crehan case.

3.1 Courage and Crehan

In the 2001 Courage and Crehan preliminary ruling, the CJEU clarified whether a party to a (vertical supply) contract liable to restrict competition can rely in a 'shield'-type action on an Article 101 TFEU breach, to obtain relief from the other contracting party. Also, the question arose if EU law precludes national rules that deny the right to rely on one's own illegal actions to obtain damages. The Court ruled that EU law imposes burdens on, but also gives rights to, individuals (par. 19). According to Article 101 (2) TFEU, the nullity of agreements breaching the cartel prohibition is absolute and can be relied on by anyone: such anti-competitive agreements produce no effects between the contracting parties and cannot be enforced against third parties (par. 22). Since the EU antitrust provisions have horizontal direct effect, the domestic courts must safeguard the rights they create for individuals (par. 23, 25). It is therefore open to any individual to rely on breaches of these provisions, even as parties to contracts liable to restrict competition (par. 24). Such a right strengthens the full effectiveness and functionality of EU antitrust law (par. 26, 27). Lastly, the domestic legal ambit, via their national procedural autonomy, and while observing the effectiveness and equivalence principles (par. 29), must ensure that unjust enrichment is avoided (par. 30), and that litigants bearing significant responsibility for the infringement do not benefit from their unlawful conduct (par. 31-33).
Regarding EU antitrust private enforcement, this ruling is rightfully labelled as a landmark judgment. By establishing the EU right to claim damages, stemming directly from Articles 101 and 102 TFEU, the CJEU fostered a more meaningful enforcement of these rules, although the actual recovery of damages continued to depend on domestic law. The case-law developments after Courage and Crehan shaped further the domestic laws’ role in the private enforcement of EU competition law context.  

The case-law developments after Courage and Crehan shaped further the domestic laws’ role in the private enforcement of EU competition law context.

3.2 Manfredi
In the 2006 Manfredi31 preliminary ruling, the CJEU confirmed its Courage and Crehan stance and furthered the discussion on damages actions for EU antitrust infringements. The case concerned a follow-on action for repayment of cartel overcharges, based on the finding of infringements of the Italian and EU cartel prohibitions.  

The Court first repeated the Courage and Crehan rationale (par. 56-62): any individual can rely on the invalidity of an agreement prohibited under Article 101 TFEU and, where causality exists between the infringement and the harm suffered, claim compensation (par. 63). However, in absence of EU rules on the matter, the Court deferred to the domestic procedural ambit in which damages claims unfold, when discussing the application of the causality concept (par. 64) and the issue of limitation periods for starting actions in the domestic courts (par. 77, 81), for which the equivalence and effectiveness principles must be observed. In paragraphs 78, 79, the CJEU specifically detailed how short or non-suspensory domestic limitation periods infringe the effectiveness principle. Lastly, the Court used the same (absence of EU law/effectiveness and equivalence) rationale when discussing the issue of punitive damages that ensure deterrence from engaging in anti-competitive practices (par. 83 et seq.): the EU right to claim damages improves the EU antitrust rules’ full effectiveness and functionality (par. 90, 91); however, designing criteria for awarding damages pertains to the domestic legal ambit (par. 92), which must ensure that unjust enrichment is avoided (par. 94, 99) and that the heads of damages, that the compensation should cover, include the actual loss – damnum emergens, the loss of profit – lucrum cessans, plus interest (par. 95, 100).  

The Manfredi ruling thus developed the EU right to claim damages discussion, by clarifying how the Member States’ legal systems should design important (procedural) elements of damages actions based on EU antitrust infringements. This ruling strongly highlights the role of national procedural autonomy and of the effectiveness and equivalence principles, thus drawing a more concrete dimension of the EU law/national law interaction in the private enforcement of EU antitrust infringements.34  

The Manfredi ruling developed the EU right to claim damages discussion, by clarifying how the Member States’ legal systems should design important (procedural) elements of damages actions based on EU antitrust infringements.

3.3 Otis
The 2012 Otis35 and 2014 Kone36 CJEU preliminary rulings, related to the infamous elevators and escalators bid-rigging cartel,37 further qualified the EU right to claim damages for loss resulting from EU antitrust infringements. The Otis case concerned the principle of effective judicial protection38 and also private enforcement of the EU antitrust rules, since the Commission acted as both public enforcer (having adopted an Article 101 TFEU infringement decision) and as a representative of the EU institutions which were victims of the said cartel, in a follow-on civil action for damages before the Belgian competent court.

The Court first recalled the key items of the Courage and Crehan and Manfredi rulings (par. 40-44): the EU right to damages, the full effectiveness and practical effect of the cartel prohibition, and the causal link between the infringement and the loss. The Court concluded that under the Courage and Crehan and Manfredi conditions, the Commission too enjoys this EU right to claim damages.30
damages (par. 77), without the defendants’ (i.e. the cartelists) right to effective judicial protection being infringed. The Masterfoods ruling and Article 16 of Regulation 1/2003 oblige national courts ruling on agreements under Article 101 TFEU, which are already subject of a Commission decision, not to take decisions contrary to the Commission decision (par. 50-54). However, this does not deny the defendant’s right of access to a tribunal (par. 55), since the EU system of judicial review of Commission decisions (i.e. Art. 263 TFEU and the Court’s unlimited review jurisdiction regarding the public law penalty’s lawfulness) offers sufficient safeguards (par. 56-63). Neither does this outcome breach the equality of arms principle, since Article 28 (1) of Regulation 1/2003 prohibits the Commission from using information gathered during investigations, for other purposes (par. 71-74). Lastly, and interestingly, the CJEU emphasized that civil damages actions require establishing not only the occurrence of i) a harmful event, but also ii) the existence of loss, and iii) the direct link between the two. In Otis, the national court was bound to accept the finding of the first element by the Commission, however it had to still assess the second and third elements of the formula (par. 65, 66). The Otis ruling expands the scope of the EU right to claim damages: it now also includes situations in which administrative authorities establishing an EU antitrust infringement start follow-on domestic actions, to hold the cartelists liable for the damages caused to that authority.

The Otis ruling expands the scope of the EU right to claim damages: it now also includes situations in which administrative authorities establishing an EU antitrust infringement start follow-on domestic actions

3.4 Kone

The Kone case dealt with the same elevators and escalators cartel. The CJEU ruled on the so-called ‘umbrella pricing’ phenomenon and clarified whether domestic legislation is consistent with Article 101 TFEU if it categorically excludes, for legal reasons, any civil liability of cartelists towards customers of non-cartelists, for loss caused by the non-cartelists who, having regard to the practices of the cartel, set prices higher than would otherwise have been expected in the absence of the cartel (par. 19). Austrian law categorically excluded compensation in ‘umbrella pricing’ situations, because the causality between the victim’s loss and the cartel was missing, due to the inexistence of direct (i.e. contractual) link between cartelist and victim, and also due to the non-cartelists’ autonomous decision of applying ‘umbrella pricing’ (par. 31).

The Kone ruling further elaborated on the EU right to claim damages and expanded the cartelists’ liability for damages: they are now liable to their direct and indirect customers, and also to the non-cartelists’ customers.

The Court repeated again the key elements of Courage and Crehan and Manfredi: Articles 101 and 102 TFEU have direct effect (par. 20); this strengthens the EU antitrust law’s full effectiveness (par. 21, 23); consequently, any person is entitled to claim compensation where causality exits between the harm suffered and the prohibited practice (par. 22); then, the domestic procedural autonomy and the effectiveness and equivalence principles are recalled (par. 24, 25), while emphasising that domestic law must not jeopardize the EU antitrust rules’ effective application (par. 26).

Paragraph 28 et seq. dwell upon ‘umbrella pricing’ as a potential cartel consequence. The causality between harm and infringement however, is still a domestic procedural autonomy matter (par. 32). Still, the Court concluded that compensation may be claimed, even in absence of a contractual link between the victim and the cartelists, when the cartel was (given the circumstances of the case and the relevant market’s specific aspects), liable to result in ‘umbrella pricing’ being applied by independent third parties, and if the cartelists could not ignore such circumstances (par. 34). Consequently, the Kone ruling further elaborated on the EU right to claim damages and expanded the cartelists’ liability for damages: they are now liable to their direct and indirect customers, with whom
a direct or indirect contractual relationship exists, and also to the non-cartelists’ customers, due to the effects of ‘umbrella pricing’. Thus, the cartelists (if detected) must factor in the public law fines which they may incur, and also the damages payable to a larger group of victims. In this respect, their incentives to apply for leniency are altered, since doing so transforms them in ‘sitting ducks’ for private damages suits initiated by the cartelists’ and non-cartelists’ customers and consumers alike. Furthermore, the non-cartelists’ incentives to complain about their competitors’ misconduct have shifted, since they are more likely now to shelter under the ‘umbrella effect’ in order to boost their own profits.43

Although barely any of the plaintiffs in the cases discussed above obtained compensation, these CJEU rulings, as a matter of principle, created the much-needed premises for furthering the EU antitrust private enforcement

3.5 Summing up
The analysis above shows that when EU law was silent on antitrust private enforcement, the CJEU shaped the right to claim damages, while aiming to maintain the coherency and effectiveness of EU law, on the one hand, and relying heavily on domestic procedures, on the other hand. Although barely any of the plaintiffs in the cases discussed above obtained compensation, these CJEU rulings, as a matter of principle, created the much-needed premises for furthering the EU antitrust private enforcement. On several occasions, I emphasized the ‘absence of EU law on the matter’ issue. This was the Court’s way of signalling a legislative lacuna, and of inviting the EU legislator to develop EU legislation on (key matters of) EU antitrust private enforcement, a legal area which up until very recently seemed underdeveloped and fragmented. I will now turn to these legislative developments, in order to evaluate the new dimensions of the EU antitrust private enforcement phenomenon.

4 The Private Damages Directive and its added value for establishing liability of cartelists
Before delving into the Directive’s main points, it is worth mentioning that attempts to further facilitate damages claims resulting from EU antitrust breaches were made after the CJEU’s Courage and Crehan ruling: the Commission’s 2005 Green Paper44 and 2008 White Paper45 identified the obstacles which limit EU antitrust private enforcement in the Member States, and proposed actions for improving the legal conditions to exercise the EU right to reparation. These soft-law documents were not always well-received by the stakeholders,46 and consequently, no legislative action was undertaken at the time. Still, the Commission did not abandon its plans of developing EU antitrust private enforcement: a legislative proposal for a Directive on damages actions,47 a Communication on quantifying harm in such actions,48 and a Recommendation on collective redress49 were tabled in 2013. In November 2014, the Directive was adopted, giving the Member States an approximately two-year implementation deadline.50 Before discussing the Directive’s key provisions on the cartelists’ liability for damages, in the next section I will discuss a few general aspects about the Directive’s setup.

A legislative proposal for a Directive on damages actions, a Communication on quantifying harm in such actions, and a Recommendation on collective redress were tabled in 2013. In November 2014, the Directive was adopted

4.1 General remarks
First, the Directive is built on dual legal bases, namely Articles 103 and 114 TFEU. The former allows adopting measures (directives or regulations) giving effect to the EU antitrust principles, designed to ensure compliance with the cartel and dominance abuse TFEU prohibitions. The latter allows approximating domestic rules which have as their object the establishment and functioning of the Internal Market. Since the differences in the Member States’ applica-
ble liability regimes may negatively affect both competition and the Internal Market’s proper functioning, constructing the Directive on these dual legal bases is appropriate.51 Indeed, Article 1 (1) states that it intends to foster undistorted competition in the Internal Market and remove obstacles to its proper functioning, by ensuring equivalent protection throughout the EU for anyone who suffered harm resulting from antitrust infringements.

Second, the Directive aims to coordinate the EU antitrust enforcement performed by NCAs and these rules’ enforcement in damages actions before national courts.52 It harmonises the respective domestic rules non-exhaustively, since it deals with actions for damages only, while avoiding other controversial issues – i.e. collective redress, fault requirements, and legal costs.53 These private enforcement items, not dealt with in the Directive, remain within the Member States’ national procedural autonomy, in ‘absence of EU law on the matter’. Recital 11 speaks in this respect of causality, and also of other national law conditions for compensation, such as imputability, adequacy, or culpability. The Member States may maintain such qualifications in their legal regimes, if the CJEU’s case-law is respected, especially with regard to the effectiveness and equivalence principles, which continue to shape all national rules and procedures for the exercise of damages claims.54

The Directive deviates from the Manfredi rationale regarding punitive damages, since any overcompensation should be avoided.

Third, the Directive thus ‘codifies’ these principles (as they stem from Courage and Crehan and Manfredi), as well as other private enforcement elements, such as: the EU right to claim damages, put forward in Courage and Crehan (Art. 1 (1)) and the heads of damage, i.e. actual loss, loss of profit, and interest (acknowledged in Manfredi), which are confirmed within the right to full compensation (Art. 3). However, the Directive deviates from the Manfredi rationale regarding punitive damages, since any overcompensation should be avoided (Art. 3 (3)). Consequently, the effectiveness and equivalence assessment of punitive damages in Manfredi is no longer tenable since the Directive entered into force. The same stands for the Manfredi approach to limitation periods, now harmonised by Article 10 of the Directive. The punitive damages and limitation period items thus now fall outside the ‘absence of EU law rules on the matter’ discussion.

Fourth, a brief note on the Directive’s added value for domestic follow-on damages actions: Article 9 provides that a final public enforcement infringement decision irrefutably establishes the existence of the breach (i.e. the infringement’s nature, its material, personal, temporal, and territorial scope)55 for the purpose of damages actions before the national courts of that Member State. If this decision stems from another Member State, it should have at least the value of prima facie evidence that an antitrust breach occurred, to be appraised as appropriate, along with any other evidence adduced by the parties, according to national law. This approach is consistent with Article 16 of Regulation 1/2003 and the Masterfoods ruling,56 and it should aid the victims starting follow-on actions, by providing them with a more concrete and even basis regarding the proof of antitrust infringements having occurred. This is so, especially if read in conjunction with Article 17 (2) of the Directive, which puts forward a rebuttable presumption that cartel infringements cause harm.

Fifth, the Directive also provides important rules for how damages claims should unfold before national civil law courts, i.e. disclosure of evidence (Articles 5, 6) and limits on evidence use and the penalties disclosure of evidence (Articles 5, 6) and limits on evidence use and the penalties attached.57 In contrast, the cartelists’ liability for damages, I will not elaborate further on these issues.57 In contrast, the cartelists’ liability for damages, I will not elaborate further on these issues. In stead, the next paragraphs will focus on the questions of who should pay the damages, to whom should the reparation be afforded, and lastly, what should be paid.

4.2 Who incurs the liability to pay damages? The straightforward answer here is those who infringed the antitrust rules. Even before the Directive’s enactment, the cartelists bore this responsibility, regardless of the public enforcement penalties imposed by the Commission or the NCAs, and regardless of fine reductions or immunity resulting from the application of the Leniency Notice.58 The cartelists’ incen-
tives to apply for leniency are connected to the likelihood of them being subsequently sued for damages, since confessing an EU antitrust infringement exposes them to such actions. This public/private enforcement equilibrium was further unbalanced by the Pfeiferder and Donau Chemie CJEU rulings:62 the victims’ access to leniency-related documents involving cartelists may not be precluded, and it cannot be made subject solely to the consent of all the parties to the proceedings, without allowing a weighing of interests exercise by the national courts. Thus, the CJEU seemed to favour private damages actions over leniency programmes, despite the potential chilling effect on leniency applications.60 This leniency/private enforcement balance was tackled extensively in the literature.61 I will therefore not elaborate on this issue, since it goes beyond this contribution’s scope. Still, it is important to observe that the Directive attempts to restore this balance, by fostering damages actions, while also maintaining the attractiveness of the leniency tools. How is the cartelists’ liability handled in this context?

The CJEU seemed to favour private damages actions over leniency programmes, despite the potential chilling effect on leniency applications

Recital 37 provides that where several undertakings infringe the competition rules jointly (e.g. a cartel) it is appropriate to hold those co-infringers jointly and severally liable for the entire harm caused. Article 11 (1) adds that each cartelist is bound to compensate the harm in full, and the victims have the right to require full compensation from any cartelist, until fully compensated. The co-infringer who covered the amounts due in this respect may sub- compensated. The co-infringer who covered the amounts due in this respect may sub- be excluded. The co-infringer who covered the amounts due in this respect may sub-

equivalence principles.64 The same stands for the parent company’s civil liability, for the wholly owned subsidiary’s EU antitrust infringements, matter which is not handled by the Directive.65

While the cartelists’ joint and several liability is probably the most likely scenario to achieve full compensation for the victims, it also pressures the infringers to cover up-front large amounts in damages. The Directive however, creates certain exceptions to this rule.

While the cartelists’ joint and several liability is probably the most likely scenario to achieve full compensation for the victims, it also pressures the infringers to cover up-front large amounts in damages

First, according to Article 11 (2), a small or medium-sized enterprise (hereinafter SME)66 is only liable towards its own direct and indirect purchasers, and not jointly and severally with the co-infringers to all the cartel’s victims, if its market share throughout the breach is less than 5% and its economic viability would be otherwise irretrievably jeopardised. However, this exception to the joint and several liability rule does not apply if the SME is a ‘ring-leader’ or repeat offender (Art. 11 (3)). Neither the Directive, nor the 2013 legislative proposal provide an indication as to the reasoning behind the SME exception. Therefore, one may search for answers in this respect, in the Commission’s ongoing general policy of supporting such undertakings, which make up for more than 99% of Europe’s businesses.67 Also Wils,68 while pointing to the pre-Directive negotiations and to Advocate General Geelhoed’s Opinion in Shoua Denko,69 argues that the SME exception mitigates the side-effects of the second exception (regarding immunity recipients, which I will discuss next): where the largest market competitor receives immunity from fines, while the remaining competitors (possibly SMEs) must pay hefty fines, such small undertakings may exit the market. This would severely damage the market structure, since the immunity recipient could become a monopolist.
Second, as previewed above, immunity recipients (i.e. the first undertaking to submit information and evidence which enable the Commission to carry out ‘dawn raids’ or find an infringement of Article 101 TFEU) are also exempted from the joint and several liability rule. They are liable only to their direct and indirect purchasers or providers, unless full compensation cannot be obtained from the co-infringers. Thus, immunity recipients sit at the end of the queue, when establishing the co-infringers ‘list’ from whom the victims may claim damages. Furthermore, if a co-infringer has actually covered the full compensation for all the cartel victims, this co-infringer could only recoup from the immunity recipient the amount pertaining to the harm this immunity recipient caused to its own direct or indirect purchasers or providers (Art. 11 (5)). Next, the position of immunity recipients regarding the Kone ‘umbrella pricing’ scenario is embedded in Article 11 (6): if the infringement caused harm to injured parties other than the infringers’ direct or indirect purchasers or providers, the immunity recipient’s contribution to compensating such damages is determined in light of its relative responsibility for that harm. Recital 38 explains the rationale behind these rewards granted to the immunity recipients (which essentially prevent their undue exposure to damages claims), by pointing to the valuable contribution that leniency applicants have to uncovering secret cartels, and consequently to mitigating the harm which could have been further caused had the infringement continued. Lastly, the immunity recipient exception from the joint and several liability rule pertains also to the public/private enforcement equilibrium discussed above. When viewed in conjunction with the absolute prohibition of disclosing leniency statements for the purpose of damages actions (Art. 6 (6)), the Directive’s immunity recipient exception resets the unbalance created by the Pfeiderer and Donau Chemie rulings: immunity recipients are no longer the ‘sitting ducks’ they were after these rulings (and also Kone, for that matter) were handed down. Furthermore, the recent Evonik Degussa CJEU ruling, dealing with leniency information publication and corporate statements protection, grants even further protection to immunity recipients, to the detriment of the other co-infringers, even when they are beneficiaries of fine reductions via leniency programmes.

Third, the infringers that consensually settled with the victims, on subsequent actions for damages, cannot be held by the non-settling co-infringers to contribute to the remaining claim, except where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party (Art. 19 (2), (3)). The latter possibility may however be expressly excluded under the terms of the consensual settlement. This exception for settling co-infringers from the joint and several liability rule is obviously driven by the desire to foster alternative dispute resolutions regarding the damages owed to the cartel’s victims.

In economic reality, cartelised products are purchased and then resold on the markets downstream. The end-consumers therefore have no direct contractual relationship with the cartelists.

4.3 Who should be compensated?

The EU right to claim damages stemming from EU antitrust infringements (Art. 3 (1)) entails that any natural or legal person who suffered harm caused by an antitrust infringement may claim and obtain full compensation. This generous formulation entails that the direct purchasers of a cartelised product are entitled to damages, provided that the other liability criteria are met. Indeed, Article 12 (1) and Recitals 13 and 44 (specifically) refer to this category of legal/natural persons, as a corollary to the full effectiveness of the right to full compensation. Furthermore, following Courage and Crehan, infringers also enjoy this right, provided that no benefit is drawn from their own unlawful conduct, if they bear significant responsibility for the competition distortion.

However, in economic reality, cartelised products are purchased and then resold on the markets downstream. The end-consumers therefore have no direct contractual relationship with the cartelists. Should these ‘indirect purchasers’ still be able to claim compensation? The issue of passing-on the cartel overcharge downstream is essentially based on the idea that the direct
purchasers incorporate the cartel overcharge in the price they charge their consumers or customers. The US private enforcement system does not accept the cartelists using the passing-on defence, nor the indirect purchasers’ standing, when claiming that the overcharge was passed-on to them. The 2005 Commission Green Paper adopted a similar approach. However, the 2008 White Paper reversed this stance, by suggesting that infringers may rely on the passing-on defence, and indirect purchasers should enjoy a rebuttable presumption that the overcharge was passed-on to them.

Passing-on can thus pertain to both ‘defensive’ actions (by the cartelists) and ‘offensive’ actions (by the indirect purchasers). In EU law, passing-on may be read between the lines as early as Courage and Crehan and Manfredi: first, both rulings speak of any individual who has suffered harm (consequently, indirect purchasers too should be included in this broad category of claimants); second, the Member States may prevent the occurrence of unjust enrichment (thus hinting that cartelists may use the passing-on defence against the direct purchasers, who otherwise could become unjustly enriched).

The Directive acknowledges both these scenarios: compensation for harm can be claimed by indirect purchasers (Art. 12 (1), Rectical 44), and the defendant can invoke that the claimant fully or partially passed-on the overcharge (Art. 13, Rectical 39). Furthermore, the Directive insists, in the context of realising the right to full compensation, that compensation for actual loss and loss of profit due to passing-on of overcharges is indeed possible. Last but not least, in connection to the unjust enrichment issue, the Directive clarifies that overcompensation and absence of liability must be avoided.

Since the defendants (cartelists) invoke the passing-on defence, they bear the burden of proving that the cartel overcharge was actually passed-on downstream.

Since the defendants (cartelists) invoke the passing-on defence, they bear the burden of proving that the cartel overcharge was actually passed-on downstream. To this end, the infringer may reasonably require disclosure of evidence from the direct purchaser (i.e. the plaintiff) or from third parties (Art. 13). It makes sense to allow the infringers to use this defence, especially when reading Article 15 and Rectical 44, both aiming at preventing multiple liabilities or absence of liability. Indeed, when faced with multiple damages claims from direct and indirect purchasers, the defendant should not be obliged to compensate all plaintiffs, if the overcharge was fully passed-on, as otherwise some of the claimants may be unjustly enriched.

It also makes sense to place the burden of proof on the cartelists, since they are aiming to defend themselves from paying multiple or overlapping amounts to both direct and indirect purchasers, whereas not all these claimants may have actually suffered losses from one and the same infringement.

When the cartel overcharge reached the indirect purchasers downstream, they may use the passing-on argument as an ‘offensive’ tool. Where the existence of a damages claim, or the compensation amount depend on whether, or to what degree, the overcharge was passed-on downstream, the claimants bear the burden of proving the existence and scope of such passing-on. To this end, they may reasonably require disclosure of evidence from the defendants (i.e. the cartelists) or from third parties (Art. 14 (1)). It makes sense to approach the burden of proof issue this way, since the plaintiffs claim they suffered harm, and not the direct purchasers, who incorporate (part of) the overcharge in their prices downstream. Thus, the indirect purchasers too enjoy the ‘Courage and Crehan right’ to compensation, if the cartel harm reached them in the downstream market. However, the causation between the infringement and the harm is more remote than in the Courage and Crehan or Manfredi-type situations. Since the Directive does not deal with causality in damages actions, the difficulty for the indirect purchasers to prove causation still depends on the legal and factual circumstances, governed by national law, under the cap of the effectiveness and equivalence principles. Nevertheless, the indirect purchaser enjoys a rebuttable presumption that passing-on occurred, if the defendant committed an infringement, which resulted in an overcharge for the direct purchaser, and the indirect purchaser bought the cartelised (or derived) goods or services. This presumption however, only speaks of the existence of passing-on, while it is silent on the causation issue regarding the rate of passing-on (i.e. the extent to which the over...
charge was passed-on). Consequently, this causal link, much like the estimation of the share of the overcharge passed-on, remain within the domestic autonomy ambit, governed by the national rules and procedures, under the effectiveness and equivalence principles.

The compensation must ensure that the victims are placed in the position in which they would have been, had the infringement not been committed, without them being overcompensated.

4.4 What should the compensation consist of and how should it be calculated?

The compensation that the victim should receive must be connected to the harm incurred. Whereas the classic approach to private actions would render an expectation that the claimant must prove that harm was incurred, the Directive shifts the weight onto the cartelists’ shoulders, who may rebut the presumption that cartels cause harm (Art. 17 (2)).

In this context, the matters of the qualification and quantification of harm should be discussed. The former issue concerns the available heads of damages, i.e. what the victims can hold the cartelists liable for. Throughout this contribution I pointed to the victims’ right to full compensation, covering the actual loss, the loss of profit, and the payment of interest. However, after the Directive’s entry into force, this right does not cover punitive, multiple, or any other types of damages. Essentially, the compensation must ensure that the victims are placed in the position in which they would have been, had the infringement not been committed, without them being overcompensated. This liability level (which excludes punitive damages) is consistent with the EU fundamental principle of *ne bis in idem*, especially when thinking of follow-on actions, and also with Article 16 of Regulation 1/2003 and the *Masterfoods* judgment, when it comes to stand-alone private actions.

Regarding the latter issue (i.e. quantification of harm), the question is: how should the compensation be calculated? First, the victim must prove the extent of the harm in order to obtain damages. Wilman emphasizes that this is one of the key practical bottlenecks for successful damages litigation in private enforcement cases. Quantification of harm is a costly and fact-intensive process, requiring complex economic modelling (Recital 45). Furthermore, EU law does not regulate the quantification of harm, thus the effectiveness and equivalence principles continue to shape the national courts’ determination of the requirements that the claimant must meet when proving the amount of the harm suffered, of the methods used in quantifying the amount, and of the consequences of not fully meeting those requirements (Recital 46). Lastly, the information asymmetries between the parties, and the application of the counterfactual principle (i.e. estimating how the market would have evolved had there been no infringement) further complicate the achievement of completely accurate quantification results.

Quantification of harm is a costly and fact-intensive process, requiring complex economic modelling. Furthermore, EU law does not regulate the quantification of harm.

In order to alleviate (some of) the quantification of harm complexities, the Directive provides that the burden and standard of proof that the claimants must meet regarding the quantification of harm, and the national courts’ powers to estimate the amount of the harm according to national procedures, should be consistent with the effectiveness principle, especially when it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the evidence available (Art. 17 (1)). To this end, where requested and if considered appropriate, the NCAs may provide guidance and assistance to the domestic courts on the determination of the quantum of damages.

In order to ensure coherence and predictability, the Commission’s Communication on quantifying harm, and especially the attached Practical Guide, may be specifically useful for the domestic bodies.

Lastly, Wilman argues that the Directive’s provisions on calculating the damages amounts are not that impressive. Nonetheless, Article 17 shows that EU law can...
address the quantification-related difficulties flexibly, while using rebuttable presumptions and estimates, rather than rigid concepts such as fixed rates for setting the damages. Such flexibility may indeed be appropriate, because the national courts will be less likely to award overcompensation, which is, at the end of the day, an important goal to be achieved.

The Directive has added value when establishing liability for the infringers, and to appropriately compensating the victims. Yet, in the bigger picture, there is much more that could be achieved when it comes to private damages actions.

4.5 Summing up
The Directive thus furthers the EU antitrust private enforcement in the domestic ambit: it builds on the key points of the CJEU’s rulings, while also harmonising important elements of private damages domestic actions. When speaking of the cartelists’ liability for damages, the Directive puts forward important developments regarding the infringers’ and the victims’ situations: it stipulates strict rules for, and exceptions from the joint and several liability the cartelists should be held to; it also clarifies the passing-on defence and the indirect purchasers’ position, thus attempting to give proper meaning to the victims’ right to full compensation. Regarding the harm that the compensation should cover, the Directive is telling primarily in relation to the heads of damages put forward. The quantification of harm however, remains chiefly a matter of national law. In this last regard, much like in relation to the other private enforcement aspects the Directive does not touch upon, the relevance of the effectiveness and equivalence principles remains untouched.

5 Conclusions
EU antitrust private enforcement has come a long way since the Courage and Crehan landmark ruling. Until the Directive entered into force, the private enforcement system seemed fragmented and severely underdeveloped, especially when compared to the achievements of the (EU and domestic) public enforcement system(s). The different domestic liability regimes for cartelists yielded considerable problems not only for the injured parties requiring reparation, but also for those liable to cover the damages. The Directive irons out some of these problems: it creates a more level playing field for the actors in private damages actions, it is likely to prevent forum shopping between the EU jurisdictions, and at the end of the day, it is meant to encourage such actions. This makes sense, given the important contribution of private damages claims to the full effectiveness of EU antitrust law. To conclude, the Directive has added value when establishing liability for the infringers, and to appropriately compensating the victims. Yet, in the bigger picture, there is much more that could be achieved when it comes to private damages actions, and generally speaking, to the private enforcement of Articles 101 and 102 TFEU; meaningful collective redress in the EU is probably the most evident item that comes to mind in this respect.