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I. Introduction

Antitrust law in the U.S.[1] has a century-long history, and even German[2] and European[3] antitrust law is over 50 years old. It aims at reducing anti-competitive behaviour which causes economic harm.[4] Examples of such behaviour include cartels, abuse of a dominant market position, and abusive mergers. From the outset, regulatory agencies[5] were created to enforce antitrust rules and impose considerable fines. Modern economic law has recognized, however, that public enforcement is not sufficiently deterrent and must be complemented by private pursuits.

This essay aims at giving an overview of private enforcement in competition law. It will first explain how civil liability is established (II.). It will then highlight the obstacles which limit an effective enforcement of damages claims by the impaired. These include limited access to information and leniency statements (III.), as well as other judgments' binding effects and limitation periods (VI). Finally, the calculation of compensation and the problems associated with the so-called "passing-on-defence" will be discussed (V.).

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1 Sherman Act, 26 Stat. 209 (1890); Clayton Act, 38 Stat. 731 (1914); Federal Trade Commission Act, 38 Stat. 717 (1914).

2 For an overview of the Act against Restraints in Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) of 27.7.1957, BGBl. I, 235; cf. *Fikentscher*, Deutsches Kartellrecht – ein systematischer Überblick, in: Fikentscher (ed.), Recht und wirtschaftliche Freiheit, 1991, vol. 1, pp. 160 et seqq.

3 Art. 85 et seq. TEEC.

4 Cf. the overview of historic models in competition policy by *I. Schmidt/Haucap*, Wettbewerbspolitik und Kartellrecht, 10th ed. 2013, pp. 1 et seqq.

5 *Bundeskartellamt*. The commission was only granted the authority to prosecute competition law violations on an European level in 1962 with the implementing regulation no. 17, Art. 9 regulation (ECC) no. 17/62, OJ no. P 13, 204 et seqq., s. *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 2nd ed. 2004, § 2 marginal no. 21 et seqq.

II. The Development of Civil Damages Claims in the US and the E.U.

In the U.S., private enforcement of competition law has a longstanding history. As early as 1890, sec. 7 of the Sherman Act provided that

> "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefore in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee".[6]

It is remarkable in an international context that both court and attorney fees are considered damages in the U.S. and that compensation can amount to three times as much as the actual detriment.[7]

The Treaty of Rome dedicated art. 85 and 86 to a common antitrust law. These sections have been transformed into art. 101 and 102 TFEU.[8] Art. 101 § 2 TFEU declares that all cartel agreements are void. It does not, however, provide which consequences the participating enterprises face.[9] Before the ECJ confirmed such claims,[10] legal scholars disagreed on whether civil damages claims for breach of European competition law were at all possible. The same dilemma existed in German law: Sec. 35 of the Act against Restraints in Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) provided a damages claim if a "protective rule" was violated. Rules are considered "protective" if they are intended to protect the legal interests of other individuals as opposed to general

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6 Sec. 7 Sherman Act (note 1) was codified in sec. 4(a) Clayton Act (note 1); now 15 U.S.C. sec. 15. As to that *Buxbaum*, Private Enforcement of Competition Law in the United States – Of Optimal Deterrence and Social Costs, in: Basedow, Private Enforcement of EC Competition Law, 2007, p. 41 (43 et seqq.); *Meeßen*, Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht, 2011, pp. 13 et seqq.

7 *Hempel*, Privater Rechtsschutz im Kartellrecht, Eine rechtsvergleichende Analyse, 2002, pp. 173 et seq., 186 et seqq.; *Areeda/Hovenkamp*, Fundamentals of Antitrust Law, 4th ed. 2012, 2011, §§ 3.03 et seqq.

8 See further Merger Regulation (EEC) No. 139, 2004 of 20.1.2004, OJ No. L 24, 1 and Regulation (EC) No. 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ No. L 1, 1.

9 This regulation is a good example to disprove the comparative law theory that codified continental European legislation is more detailed than Anglo-American common law. Another example see *Möllers*, Die Haftung der Bank bei der Kreditkündigung, 1991, p. 158.

10 The ECJ affirmed such protection act capacity as late as 1974, cf. ECJ, Case C-127/73 (BRT/Sabam), [1974] ECR 51, 62 (marginal no. 16).

interests. The problem with sec. 35 was that it remained contested whether any of the rules in question were indeed protective.[11]

All this taken into account, it was a pleasant surprise that the ECJ stepped in and correctively extended the law. In several judgments, it affirmed the plaintiff's civil claim for damages. In particular, its *Courage/Crehan* decision stated:

> „The full effectiveness of Article 85 of the Treaty [now Art. 101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article 85(1) [now Art. 101 (1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. (...) However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (...)."[12]

The principal reason for developing the law in this way was to guarantee effective legal protection – a principle which the ECJ had previously substantiated for many years.[13] Following its *Courage/Crehan* decision, the ECJ further specified the requirements for a damages claim.[14]

It then became subject to a vivid discussion in all of Europe how the ECJ's requirements for civil enforcement were to be implemented in detail.[15] Two

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11 BGH, BGHZ 64, 232 (237) – Krankenhaus-Zusatzversicherung. See also *Steindorff*, Anmerkung zu BGHZ 65, 68 (Vorspannangebot), JZ 1976, 26 (29 et seqq.); *Baur*, Schadensersatz- und Unterlassungsansprüche bei Verstößen gegen die Kartellrechtsvorschriften des EWG-Vertrags, EuR 1988, 257 (261).

12 ECJ, Case C-453/99 (Courage Ltd./Crehan), [2001] ECR I-6297. The protection of consumers was previously affirmed by the ECJ, Case 41/73 (Générale Sucrière/Commission), [1973] ECR 1465 marginal no. 7.

13 See ECJ, Case. 50/76 (Amsterdam Bub) [1977] ECR 137 marginal no. 8 et seq., 30 (32); *Streinz*, Der „effet utile" in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, in: Festschrift Everling, vol. 2, 1995, pp. 1491 et seqq.; *Möllers*, Doppelte Rechtsfindung contra legem? – Zur Umgestaltung des Bürgerlichen Gesetzbuches durch den EuGH und nationale Gerichte, EuR 1998, 20 (31 et seqq.).

14 ECJ, Case C-295/04 – C-298/04 (Manfredi), EuZW 2006, 529; ECJ, Case C-360/09 (Pfleiderer AG/Bundeskartellamt), [2011] ECR I-5161 para. 28, [with comments *Kersting* JZ 2012, 41 (42)].

15 *Stockenhuber*, in: Grabitz/Hilf/Nettesheim, EUV/AEUV, 51st ed. Munich 2013, Art. 101 AEUV marginal no. 252 et seq.; *Kern*, Private Law Enforcement versus Public Law Enforcement, ZZPInt 12 (2007), 351 et seqq.; *Möllers/Heinemann (eds.)*, The Enforcement of Competition Law in Europe, 2007, pp. 387 et seqq. *Foer/Cuneo (eds.)*, The International Handbook on Private Enforcement of Competition Law, 2010; *Meeßen*, Der Anspruch auf Schadenersatz bei Verstößen gegen EU-Kartellrecht, 2011.

questions are essential: Should these private claims be regulated on a European or a national level? And: Should the specific factual requirements be defined by the judicial or legislative branch?[16] As to the first question, regulation on the European level is to be preferred, as it would promote further harmonization. As to the second question, it is clear that the legislature is better equipped to make more comprehensive and consistent laws than the courts. A legal act is of abstract and general value, whereas, without stare decisis,[17] court decisions can always be overturned.

Consequently, for the past ten years, legislative solutions on a European level were also discussed by lawmakers.[18] Most recently, a directive was drafted in June 2013.[19] It was accompanied by the Commission communication on quantifying harm in actions for antitrust damages[20] and extensive guidelines.[21] The proposed directive raises several legal questions which will be discussed in this paper.

16 *Basedow*, Perspektiven des Kartelldeliktsrechts, ZWeR 2006, 294 (296); *Roth*, Das Kartelldeliktsrecht in der 7. GWB-Novelle, in: FS für Ulrich Huber, 2006, p. 1133 (1135 et seq.).

17 *Hay*, US-amerikanisches Recht, 5th ed. 2011, marginal no. 20 et seq.

18 White Paper on Damages actions for breach of the EC antitrust rules of December 12, 2005 COM (2005) 672 fin.; Commission Staff Working Document: Executive Summary of the Impack Asessment White Paper on Damages actions for breach of the EC antitrust rules of April 2, 2008, COM (2008) 165 final – SEC (2008) 404.

19 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final of 11.6.2013. Also *Mederer*, Richtlinienvorschlag über Schadensersatzklagen im Bereich des Wettbewerbsrechts EuZW 2013, 847 et seqq.; *Weiden*, Kommission treibt kollektiven Rechtsschutz in Europa und Schadensersatz in Wettbewerbssachen voran, GRUR 2013, 906 et seqq.

20 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ no. C 167, 19.

21 Commission Working Staff, Practical Guide on Quantifiying Harm in Actions for Damages Based on Breaches of Artcile 101 or 102 TFEU, http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf, download of 5.3.2014.

III. Access to Information

1. Plausibility Assessment and Access to Information according to Art. 5

Commonly, defendants in all E.U. member states are not generally required to disclose information to the plaintiff before the main proceedings.[22] Pre-trial discovery, common to U.S. law, is considered illegal "fishing for evidence" by German courts.[23] Courts instead use selective dependent rights to disclosure or reverse the burden of proof for disputed factual requirements.

European law as well does not allow fishing for evidence. Art. 5 § 1 of the proposed directive takes one step further than German law. It is crucial whether plaintiff presents

> "that reasonably available facts and evidence showing plausible grounds for suspecting that he, or those he represents, has suffered harm caused by the defendant's infringement of competition law".

If he does,

> "national courts can order the defendant or a third party to disclose evidence, regardless of whether or not this evidence is also included in the file of a competition authority, subject to the conditions set out in this Chapter."

Essentially, the legislator offers dynamic criteria[24] by stating that plaintiff must have

> „(a) shown that evidence in the control of the other party or a third party is relevant in terms of substantiating his claim or defence; and (b) specified either pieces of this evi-

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22 Detailed on the importance of pre-trial-discovery *Wright/Miller,* Federal Practice & Procedure, 3rd ed. 2011, § 2001 et seqq.; *Junker,* Discovery im deutsch-amerikanischen Rechtsverkehr, 1987; *Knöfel,* Beweisermittlung durch electronic discovery, RIW 2010, 403 et seqq.; *Schack,* Einführung in das US-amerikanisches Zivilprozessrecht, 4th ed. 2011, marginal no. 109 et seqq.; *Hay,* US-amerikanisches Recht, 5th ed. 2011, marginal no. 184 et seqq.; *Peter,* Warum die Initiative "Law – Made in Germany" bisher zum Scheitern verurteilt ist, JZ 2011, 939 (940).

23 KG, NJW-RR 1999, 1369; critically *Lüderitz*, Ausforschungsverbot und Auskunftsanspruch bei Verfolgung privater Recht, 1966; *Schlosser*, Das Bundesverfassungsgericht und der Zugang zu den Informationsquellen im Zivilprozeß, NJW 1992, 3275; *R. Koch*, Mitwirkungsverantwortung im Zivilprozess, 2013. More positively BGH, NJW 1995, 1160.

24 On the method of a dynamic system see *Wilburg*, Die Elemente des Schadensrechts, 1941, pp. 26 et seqq.; *Wilburg,* Entwicklung eines Beweglichen Systems im Bürgerlichen Recht, 1950, pp. 12 et seqq.; *Möllers*, Rechtsgüterschutz im Umwelt- und Haftungsrecht, 1996, p. 138; *Nilsen*, Die Struktur des Haftungsrechts, 2003, pp. 594 et seqq.; *Schilcher*, Das bewegliche System wird Gesetz, in: Festschrift Canaris, vol. 2, 2007, pp. 1299 et seqq.

> dence or categories of this evidence defined as precisely and narrowly as he can on the basis of reasonably available facts. 3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider: (a) the likelihood that the alleged infringement of competition law occurred; (b) the scope and cost of disclosure, especially for any third parties concerned; (c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; and (d) in cases where the infringement is being or has been investigated by a competition authority, whether the request has been formulated specifically with regard to the nature, object or content of such documents rather than by a non-specific request concerning documents submitted to a competition authority or held in the file of such competition authority."

Finally, legitimate reasons for nondisclosure must be considered.[25]

Such criteria conduce to individual justice. Due to their dynamic character, however, the outcome of a case is barely predictable. It remains to be seen whether plaintiffs' rights will indeed be improved. Most likely, the ECJ will have to prevent member states from interpreting the requirements too strictly.[26]

2. Limitations and Leniency Statements

In addition to the above-mentioned extensive criteria, the draft provides a number of limits as to when disclosure of evidence may not be asserted. A right to disclosure does not exist during the course of investigation, art. 6 § 2, since it could otherwise interfere with the decision-making process and information could be misunderstood.[27]

Disclosure is also prohibited for certain kinds of evidence according to art. 6 § 1, namely for leniency corporate statements and settlement submissions. Clearly, the legislator seeks to maintain the attractiveness of such statements by privileging them. The potential conflict between leniency statements and duties of

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25 Art. 5 para 5: "Member States shall take the necessary measures to give full effect to legal privileges and other rights not to be compelled to disclose evidence."

26 Comparable experience with Directive 2003/4/EC of the European Parliament and of The Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ no. L 41, 26, see also ECJ, Case C-217/97 (Commission/Germany), [1999] ECR I-5087.

27 Comparable elements of an offense may be found in § 4 Abs. 1 Freedom of Information (IFG – Informationsfreiheitsgesetz), s. RegE of the IFG BTDrucks. 15/4493, 12; *Möllers/Wenninger*, in: KK-WpHG, 2nd ed. 2014, § 8 marginal no. 79.

disclosure had been particularly controversial in the past.[28] In its *Pfleiderer* decision, the ECJ had affirmed access to information despite existing leniency programs and assigned it to national courts to create requirements for the right to information.[29] This was openly criticized.[30] The German competition authority and the Commission had previously rejected the very idea of access to information in leniency programs.[31] The draft directive now does without complicated assessments and completely denies all rights. Thus, if entering into force, it would rightly "overrule" the ECJ's guidelines. An identical rule was proposed as a new German sec. 81b § 1of the Act against Restraints in Competition (GWB), which never entered into force.

3. Publication of Decisions and Access to Documents

On the European level, art. 30 Council Regulation EC no. 1/2003 on the Implementation of the Rules of Competition (Implementation Regulation)[32] requires the Commission to publish closed antitrust decisions, such as penalties imposed to stop infringement. This procedure is intended to inform third parties for whom the Official Journal's publication often constitutes the first source of information about antitrust measures.[33] The publication is, however, also intended to have a general deterring effect, raising the awareness of market participants, and to help

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28 See e.g. AG Bonn, NZG 2010, 60 and *Meeßen*, Der Anspruch auf Schadenersatz bei Verstößen gegen EU-Kartellrecht, 2011, p. 147. On a new preliminary ruling see now AG Bonn, NJW 2012, 947.

29 ECJ, Case C-360/09 (Pfleiderer AG/Bundeskartellamt), [2011] ECR I-5161 para. 31.

30 *Fornasier/Sanner*, Die Entthronung des Kronzeugen? – Akteneinsicht im Spannungsfeld zwischen behördlicher und privater Kartelldurchsetzung nach Pfleiderer, WuW 2011, 1067 (1069 et seqq.); *Kersting*, Notes on ECJ, Case C-360/09 (Pfleiderer), JZ 2012, 42 (44).

31 See official statement of the *Bundeskartellamt*, Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen – Bonusregelung of 7 March 2006, marginal no. 22; Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8 December 2006 (2006/C 298/11), OJ no. C 298, 17, marginal no. 33, 40; *Engelsing*, Die neue Bonusregelung des Bundeskartellamts von 2006, ZWeR 2006, 179 (194); *Kersting*, JZ 2012, 42 (43).

32 See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ no. L 1/1.

33 *Ritter*, in: Immenga/Mestmäcker, Wettbewerbsrecht, 4th ed., Munich 2007, Art. 30 VerfVO marginal no. 1.

prevent similar behaviour in the future.[34] It includes the names of the parties and the decision's basic content, including the imposed sanctions, art. 30 sec. 2 Implementation Regulation. The competition commission's website provides more detailed information, including the names of concerned companies and the amount of penalties imposed.[35] Since any publication infringes the companies' rights to confidentiality, they must be consulted before publication, art. 30 sec. 2-2 Implementation Regulation.[36]

European agencies take a step further than the German competition authority: Publications by the Commission explicitly point out that private damage actions are possible.[37] For many impaired parties, this is the incentive to file a claim.

If a Commission decision leads an impaired person to file suit, he or she can request access to Commission documents based on Regulation 1049/2001[38]. The documents in question must have been written or received by the Commission and be in its possession. However, art. 4 of Regulation 1049/2001 provides nu-

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34 ECJ, Case 41/69 (ACF Chemiefarma NV), [1970] ECR 661 (695); ECJ, Case 85/76 (Hoffmann-La Roche & Co. AG), [1979] ECR 461 (553 et seqq.).

35 For a comparison, see the decisions listed at http://ec.europa.eu/competition/cartels/cases/cases.html. The complete non-confidential version in all procedural languages can be found at the Directorate General for Competition's website, see *Ritter*, in Immenga/Mestmäcker, Wettbewerbsrecht, 4th ed. Munich 2007, Art. 30 VerfVO, marginal no. 7.

36 Some therefore believe that corporate confidentiality has priority over publication interests, see *Weiß*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, 2nd ed. Munich 2009, Art. 30 VerfVO, marginal no. 7; similarly *Ritter*, in Immenga/Mestmäcker, Wettbewerbsrecht, 4th ed. Munich 2007, Art. 30 VerfVO, marginal no. 6.

37 Cf. the Commission's statement on the occasion of publishing the fine decision of 19.10.2011, IP/11/1214, CRT-Glas: "Any person or firm affected by anti-competitive behavior as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behavior took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine. The Commission considers that meritorious claims for damages should be aimed at compensating, in a fair way, the victims of an infringement for the harm done." Additionally, general information on damage actions is given. See also http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1214&format=HTML&aged=0&language=DE&guiLanguage=en, download of 6.3.2014.

38 Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ No. L 145, 43.

merous exceptions and circumstances under which the request can be denied.[39] The ECJ considers a general denial of access inadmissible and requires the Commission to "carry out a concrete, individual assessment of the content of the documents referred to in the request".[40] If the Commission considers such an assessment excessive, it may not simply deny the request, but must consult with the applicant to consider his or her specific interests. Also, the Commission must consider alternatives to the concrete, individual assessment.[41]

IV. Binding Effects of Judgments and Limitation Periods

1. Probative Effect of Final Infringement Decisions

Already,[42] facts and documents named in the Commission's penalty decision constitute a major simplification for the plaintiff's presentation of evidence, since Commission findings are binding for national courts. Therefore, the impairing measure and its illegality no longer need to be proven.[43] The impaired party can base its own national damage action on the Commission's decision.[44] The probative effect of a competition authority's infringement decision (sec. 33 § 4 of the German Act against Restraints in Competition, GWB) are of particular importance in this context. According to this principle, the court is bound by the

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39 Access can be denied if necessary for the protection of public interest, privacy or an individual's integrity. The protection of legal procedures and corporate interests can also justify a denial, Art. 4 § 2.

40 ECJ, Case T-2/03 (Verein für Konsumenteninformation/Commission), [2005] ECR II-1121, marginal no. 74.

41 ECJ, Case T-2/03 (Verein für Konsumenteninformation/Commission), [2005] ECR II-1121, marginal no 114.

42 See *Möllers/Pregler*, Civil Law Enforcement and Collective Redress in Economic Law – A comparison between collective redress actions in competition, antitrust, company and capital markets law, Europa e diritto private 2013, 27 et seqq., also available at www.juscivile.it, 2013, (6) 358 et seqq.

43 See the Commission's statement on the occasion of publishing the fine decision of 19.10.2011, IP/11/1214, CRT-Glas. The English version is more precise than the German version because it explicitly mentions the proceedings in national courts: „The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal", available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1214&format=HTML&aged=0&language=DE&guiLanguage=en download of 6.3.2014.

44 In agreement *Ritter*, in Immenga/Mestmäcker, Wettbewerbsrecht, 4th ed. Munich 2007, Art. 30 VerfVO, marginal no. 1.

legally valid assessment of unfair competition when an impaired person files a damages suit. This is true whether the breach of competition rules has been found by the Commission, the Federal Competition Authority of Germany (*Bundeskartellamt*) or another member state's competition authority[45] and for both legal and factual findings.[46]

Art. 9 of the new draft directive takes upon these ideas and requires all member states to pass such rules. It reads:

> "Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the TFEU 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."

2. Suspending the Limitation Period

The impaired also benefit from the suspending effects on legal limitation of an antitrust action by the *Bundeskartellamt*, Commission or another member state's competition authority, sec. 33 § 5-1 GWB. Without fearing disadvantages, the impaired can await the authority's investigation before going to trial.[47] From their point of view, this presents a great simplification for filing follow-on suits and immensely strengthens the degree of legal protection in antitrust law. This is true especially since limitation only begins to elapse again six months after the antitrust action is terminated, sec. 33 § 5-2 of the Act against Restraints in Competition (GWB) and sec. 204 § 2 German Civil Code (BGB).[48]

Art. 10 of the draft directive takes one step further. It proposes to "allow victims sufficient time (at least five years) to bring an action after they became aware of the infringement, the harm it caused and the identity of the infringer; it

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45 *Rehbinder*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, 2nd ed. Munich 2009, § 33 GWB marginal no. 54.

46 *Schütt*, Individualrechtsschutz nach der 7. GWB-Novelle, WuW 2004, 1124 (1131); *Meyer*, Die Bindung der Zivilgerichte an Entscheidungen im Kartellverwaltungsrechtsweg – der neue § 33 IV GWB auf dem Prüfstand, GRUR 2006, 27 (32).

47 See Parliamentary Printing Matter, BTDrucks. 15/3640, p. 55. The introduction of sec. 33 § 5 GWB was seen as important measure to strengthen private follow-on actions, see *Hempel*, Private Follow-on-Klagen im Kartellrecht, Wirtschaft und Wettbewerb, WuW 2005, 137 (142, 145 et seqq.); *Schütt*, Individualrechtsschutz nach der 7. GWB-Novelle, WuW 2004, 1124 (1132 et seqq).

48 In agreement *Hempel*, Private Follow-on-Klagen im Kartellrecht, Wirtschaft und Wettbewerb, WuW 2005, 137 (142, 145 et seqq.); *Schütt*, Individualrechtsschutz nach der 7. GWB-Novelle, WuW 2004, 1124 (1132 et seqq.).

prevents a limitation period from starting to run before the day on which a continuous or repeated infringement ceases; and in case a competition authority opens proceedings into a suspected infringement, the limitation period to bring an action for damages relating to such infringement is suspended until at least one year after a decision is final or proceedings are otherwise terminated."[49] The legislation for the plaintiff in antitrust law is thus much more positive than in other areas of economic law, such as company, capital markets or unfair competition law.[50]

V. Compensation

1. Extend of Compensation

Art. 2 of the draft directive provides three positions of compensation for damages: actual loss, loss of profit, and payment of interest. Hence, it almost entirely copies the ECJ's *Manfredi* decision.[51] Contrary to U.S. law, the directive does not regulate the infringer's gain. It also does not allow for a damages claim three times the amount of actual loss,[52] even though the ECJ had originally permitted member states to award punitive damages if provided by national law.[53] The draft directive does not include such optional clause. In the end, the legislator therefore only partially defines the scope of damages.

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49 4.3.2 Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM/2013/0404 fin. – 2013/0185 (COD).

50 See detailled *Möllers/Pregler*, Europa e diritto private 2013, 27 et seqq., also available at www.juscivile.it, 2013, (6) 358 et seqq.

51 ECJ, Case C-295/04 – C-298/04 (Manfredi), [2011] ECR I-6619 para. 95: "Secondly, it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest."

52 Cf. above note 7.

53 ECJ, Case C-295/04 – C-298/04 (Manfredi), [2011] ECR I-6619 para. 93, 99: "In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law".

2. Indirect Purchasers and Passing-on-Defence

a) Current Disputes

Whereas sec. 33 GWB's practical importance used to be found mostly in injunctive requests, the ECJ judgment has been followed by an increased willingness to raise damages claims.[54] Triggered by the ECJ's *Courage/Crehan* and *Manfredi* judgments, a change can be observed as now, mostly ad hoc interest groups and litigation businesses are the ones to file suit after several claims were ceded to them.[55] They bear the fees and risks of the claims and, in turn, receive 20-25% of the gross margin.[56] The number of follow-on actions succeeding the official finding of an antitrust violation also increased.[57] It has been highly contested whether "indirect purchasers" may also file suit. This group includes individuals having obtained the product from the first buyer, e.g. from a shop-owner.

Admitting several plaintiffs carries the risk of overcompensation, which is foreign to German and European damages law. Furthermore, proving a damages claim on second or third level is difficult and might thus deter potential claimants from filing suit anyway.[58]

However, some arguments speak in favour of admitting an indirect purchaser as plaintiff. Legal enforcement as a whole would become more efficient if both

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54 See *Rehbinder*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, 2nd ed. 2009, § 33 GWB marginal no. 4.

55 The Belgian Cartel Damage Claims corporation (CDC), headquartered in Brussels, is well-known for its concentration on combined action for damages in antitrust cases.

56 *U. Classen,* Cartel Damage Claims, – CDC –, Schadensersatzklagen aus Kartellverstößen, Presentation at the ICC Round Table "Chefjuristen", 27.10.2009, p. 5, available at http://www.carteldamageclaims.com/Presentations/ICC%20Herzogenaurach%2027%2010%202009_.pdf download of 6.3.2014.

57 OLG Karlsruhe, NJW, 2004, 2243 et seqq.; LG Mannheim, GRUR, 2004, 182 et seqq.; LG Mainz, NJW-RR 2004, 478 et seqq.; LG Dortmund, EWS 2004, 434 et seqq.; OLG Düsseldorf, NJW-RR, 2000, 193 et seqq.

58 *Rehbinder*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, 2nd ed. Munich 2009, § 33 GWB marginal no. 15; *Koch*, Kartellrechtliche Schadensersatzansprüche mittelbar betroffener Marktteilnehmer nach § GWB n.F., WuW 2005, 1210 (1213 et seqq.); *Berrisch/Burianski*, Kartellrechtliche Schadensersatzansprüche nach der 7. GWB-Novelle, Eine Einschätzung der Zukunft privater Kartellrechtsdurchsetzung mittels Schadensersatzklagen in Deutschland, WuW 2005, 878 (886 et seq.); On the status of the dispute see *Fuchs*, Anspruchsberechtigter, Schadensabwälzung und Schadensbemessung bei Kartellverstößen, in: Remien (ed.), Schadensersatz im Europäischen Privat- und Wirtschaftsrecht, 2012, p. 55 (62 et seqq).

direct and indirect buyers could file suit.[59] More importantly, overcompensation could be prevented by passing-on-defence rules. These provide that the infringer can defend himself by arguing that plaintiff did not suffer any loss since he sold the product in question for the same high price and thus passed on the loss to the final buyer on a subordinate level.[60] This concept is considered by both the ECJ and the German Federal Court of Justice (BGH). In its *Manfredi* decision, the ECJ emphasized that all individuals can claim damages if their rights have been causally violated by anticompetitive behaviour.[61] Excluding those who suffered indirect infringement would be contrary to this rule.[62] The Federal Court of Justice recently affirmed a claim by an indirect buyer based on sec. 823 § 2 BGB in conjunction with art. 101 TFEU.[63] In this case, the indirect buyer was not the final purchaser and could pass on the excessive price. Therefore, the passing-on-defence was accepted by the court, as damages law prohibits unjustified enrichment and must thus take into account any obtained profits. These profits, however, must be proven by the defendant.[64] In other words: Passing on an excessive price does not prevent loss. The loss can merely be compensated with profits from re-selling the product.[65]

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59 The ECJ already spoke of a right to file a suit for everyone, cf. *Basedow*, Perspektiven des Kartelldeliktsrechts, ZWeR 2006, 294 (302).

60 U.S. District Court, W.D. Wisconin, 42 F.Supp. 369 (371). However, the U.S. Supreme Court rejects this defense in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, (489), 88 S.Ct. 2224 (2229). Cf. also *Meeßen*, Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht, 2011, pp. 458 et seqq.

61 ECJ, Case C-295/04 – C-298/04 (Manfredi), [2011] ECR I-6619 para. 61: "It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC (now Art. 101 TFEU)."

62 See also *Drexl*, Zur Schadensersatzberechtigung unmittelbarer und mittelbarer Abnehmer im europäisierten Kartelldeliktsrecht, in: Festschrift Canaris, vol. 2, 2007, p. 1339 (1354); *Bulst*, Zum Manfredi Urteil des EuGH, ZEuP 2008, 178 (187); *Wurmnest*, Schadensersatz wegen Verletzung des EU-Kartellrechts, in: Remien (ed.), Schadensersatz im Europäischen Privat- und Wirtschaftsrecht, 2012, p. 27 (45).

63 BGH, BGHZ 190, 145 para. 23 et seqq. – ORWI.

64 BGH, BGHZ 190, 145 para. 68 et seqq. – ORWI; cf. *Berg*, Violations of the Cartel Prohibition, Actions for Damages by Indirect Buyers and the Passing-On Defence, ZEuP 2013, 147 et seqq.

65 BGHZ 190, 145 para. 57 – ORWI, nowadays generally accepted.

b) Art. 12 et seq. of the Draft Directive

The E.U. draft directive allows the passing-on-defence in its art. 12. It states:

> "1. Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement."

For the indirect purchaser, art. 13 provides:

> "1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether — or to what degree — an overcharge was passed on to the claimant, the burden of proving the existence and scope of such pass-on shall rest with the claimant. 2. In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that: (a) the defendant has committed an infringement of competition law; (b) the infringement resulted in an overcharge for the direct purchaser of the defendant; and (c) he purchased the goods or services that were the subject of the infringement, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement. Member States shall ensure that the court has the power to estimate which share of that overcharge was passed on. This paragraph shall be without prejudice to the infringer's right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser."

The Commission thus firstly assumes that the infringer carries the burden of prove for his passing-on-defence (§ 1). Secondly, the indirect purchaser has to prove that he paid an excessive price for the product (§ 2). Thirdly, the infringer can exonerate by proving passing-off (§ 2 sub § 3).

c) Particular Cases

aa) Diverging Purpose of Provisions

Shifting the burden of proof will not suffice for an in-depth regulation of indirect purchasers' damages claims and the passing-on-defence. Common competition assessments must be considered in order to further specify the claims. Legal scholarship mostly discusses overcompensation and the prohibition of undue enrichment. In fact, the ECJ generally recognized the member states' right to ensure that the impaired is not enriched.[66] On the other hand, competition law is

66 ECJ, Case C-453/99 (Courage Ltd./Crehan), [2001] ECR I-6297, para. 30: "In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does

meant to efficiently compensate losses and have a preventive effect.[67] This, too, has been recognized by the ECJ.[68] In detail, cases with overcompensation may not be completely avoided. A general primacy of the prohibition of enrichment is not likely to be postulated; instead, the passing-on exoneration must remain an exception for preventive reasons.

bb) Admissible Overcompensation Objections

In order to avoid that an infringer is faced with claims exceeding the actually caused losses, some scholars suggest creating a community of the first and second purchaser as joint creditors.[69] Such a solution appears to be deterrent for the impaired, however.[70] Substantially, overcompensation exists if a certain type of damage is multiplied. The idea of multi-liability must be rejected.[71] The passing-on objection must be admitted whenever the cartel-related increase in price can be automatically transferred to the indirect purchaser. This may be different if the indirect purchaser has already received compensation by the infringer.[72] Then, the intermediate purchaser does not carry any risks and is only an "extended arm" to the cartel participants.[73]

not entail the unjust enrichment of those who enjoy them"; see also *Wurmnest*, Grundzüge eines europäischen Haftungsrechts, 2003, p. 231.

67 *Logemann*, Der kartellrechtliche Schadensersatz, 2009, pp. 324 et seqq.; in general *Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?, AcP 206 (2006), 352 et seqq.; *Wagner*, Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. DJT, in: Verhandlungen des Sechsundsechzigsten Deutschen Juristentages in Stuttgart 2006, vol. I, Munich 2006, A 77 et seqq.

68 ECJ, Case C-453/99 (Courage Ltd./Crehan), [2001] ECR I-6297, marginal no. 26.

69 *Säcker/Jaecks*, in: MünchKomm-Kartellrecht, vol. 1, 2007, Art. 81 EGV marginal no. 904; *Logemann*, Der kartellrechtliche Schadensersatz, 2009, p. 400 et seq.; *Drexl*, Zur Schadensersatzberechtigung unmittelbarer und mittelbarer Abnehmer im europäisierten Kartelldeliktsrecht, in: Festschrift Canaris, vol. 2, 2007, pp. 1339 (1356 et seqq).

70 Also critical *Meeßen*, Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht, 2011, pp. 489 et seq.

71 *Roth*, Das Kartelldeliktsrecht in der 7. GWB-Novelle, in: Festschrift Huber, 2006, p. 1133, 1163 et seq.; following this opinion *Meeßen*, Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht, 2011, p. 480 et seq.

72 *Fuchs*, Anspruchsberechtigter, Schadensabwälzung und Schadensbemessung bei Kartellverstößen, in: Remien (ed.), Schadensersatz im Europäischen Privat- und Wirtschaftsrecht, 2012, p. 55 (79 et seqq.).

73 *Meeßen*, Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht, 2011, p. 491.

3. Calculation of Damages

a) The Draft's Requirements

One difficulty of the claim is to prove substantial loss.[74] Unlike the U.S., the E.U. does not know a general pre-trial discovery,[75] i.e. no general action for disclosure to prove the relevant prerequisites of a claim. Art. 16 of the draft directive offers some assistance:

> "1. Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption. 2. Member States shall ensure that the burden and the level of proof and of fact pleading required for the quantification of harm does not render the exercise of the injured party's right to damages practically impossible or excessively difficult. Member States shall provide that the court be granted the power to estimate the amount of harm".

In detail, the legislator assumes that the infringement caused the loss. The court is authorized to estimate the amount of losses. Finally, the member states may not undermine these rules by opposite codes. The details for calculating the loss are included in the practical guidelines.[76] In the end, enforcing a damages claim is majorly simplified by the new rules, which must thus be considered positive.

b) German Experiences

In Germany, there is relevant experience with estimating the amount of loss: A case before the Dortmund Regional Court (*Landgericht*) assumed by means of prima facie that cartel prices were higher than actual market prices.[77] Likewise, the Federal Court of Justice (BGH) assumed that cartels increase prices and decided in a cement cartel case that the threshold for proving that the price remained balanced is higher if the cartel has existed over a long period of time and in a larger geographic area.[78]

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74 Quantifying antitrust damages — Towards non-binding guidance for courts, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf; *Abele/Kodek/ Schäfer*, 7 Competition L & Eco. 2011, 847 et seqq.

75 Cf. above note 22.

76 Cf. above note 21.

77 LG Dortmund, EWS 2004, 434 (Vitaminkartell III), 13 O 55/02 para. 26.

78 BGH, NJW 2006, 163 (Transportbeton).

4. Extension and Limitation of Liability

a) Joint Debtor Liability

The proposed directive extends liability in providing for a joint liability of several infringers. Thus, action can be filed for the entire sum of losses against each violator; compensation among them can be reached internally only. Art. 11 § 1 consequently states:

> "Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the damage caused by the infringement: each of the infringing undertakings is bound to compensate for the harm in full, and the injured party may require full compensation from any of them until he has been fully compensated."

German case law is identical.[79]

b) Limitation of Liability in Case of Leniency Statements

In leniency statement cases, the interests of the plaintiff and the principal witness collide. Admitting direct liability of the principal witness would prevent him from sharing his knowledge. Excluding liability for all leniency program cases, on the other hand, would be to the disadvantage of a third party, namely the impaired. The legislator wisely chose a compromise, considering the interests of principal witnesses and plaintiffs alike: Joint debtor liability is limited for principal witnesses. The witness itself may only be held liable if extensive compensation from the other infringers is impossible. Art. 11 § 2 provides:

> „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."

VI. Conclusion

Concluding, three aspects are remarkable:

79 BGHZ 190, 145 para. 80 (ORWI referring to §§ 830, 840 BGB).

1. On the one hand, the European draft does not merely copy its U.S. model: It includes neither class action, pre-trial discovery nor punitive and treble damages.[80] This is wise, as such conservative lawmaking can avoid U.S.-like excess.[81] Though German civil law includes preventive elements, penal considerations are foreign to German and European damages law.[82] The proposal thus takes into account the general principles of civil law common to the member states.
2. On the other hand, it also further develops some principles, albeit carefully. Several claimants can file suit, which at first risks overcompensation. Additionally, a claim for disclosure can be made under certain conditions and does not always constitute illegal investigation.
3. The limiting criteria included, member states will be able to cope well with the new law. This is particularly true since the new law is a directive, thus allowing the member states to implement the individual provisions in their own codes. Let us hope that the proposal will slowly further private enforcement of damages claims in cartel cases in Europe.

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80 On the higher burden of proof see US Supreme Court (*Bell Atlantic Corp. v. Twombly*) 550 US 544 (2007), 167 L.Ed.2d 929.

81 Cf. the assessment of *Wurmnest*, Schadensersatz wegen Verletzung des EU-Kartellrechts, in: Remien (ed.), Schadensersatz im Europäischen Privat- und Wirtschaftsrecht, 2012, p. 27 (53).

82 BGHZ 118, 312 (343 et seq.); *K. Westermann*, Das privatrechtliche Sanktionssystem bei Kartellverstößen, in: Festschrift H.P. Westermann, 2008, p. 1605 (1625); BGHZ 190, 145 para. 62 (ORWI).