Effective private enforcement of EU competition law

A justification for legislative harmonization of national procedural rules?

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This work aims at analysing whether the aim of an effective private enforcement of the Union competition policy justifies a legislative harmonization of national procedural rules concerning private damages for competition law breaches, as suggested by the Commission. The question will be analysed with regards to basic Union principles of effectiveness, equivalence and national procedural autonomy. The answer will depend on whether considerations on national procedural autonomy, subsidiarity, and proportionality can be considered to outweigh the benefits gained in the form of a more effective private antitrust enforcement.

Introduction

The Treaty of the European Union (TEU) stipulates that ‘[t]he Union shall work for the sustainable development of Europe based on […] a highly competitive social market economy’. The competition policy is implemented through the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) which prohibit anti-competitive agreements and abuse of dominant positions on the market. The enforcement may be carried out through public arms of government or by private parties before national courts. Though traditionally based on actions from the part of the European Commission, the enforcement system of the EU antitrust rules has become increasingly reliant upon individual actions before national courts. This is a result of a long series of modernization actions from the part of the Commission as well as progressive case law issued by the Court of Justice of the European Union (CJEU). A strengthening of private enforcement has been deemed necessary mainly to enhance the effectiveness of the competition law system and to guarantee that victims of antitrust infringements get compensated for the harm they have suffered.

Since the famous ruling of the CJEU in Courage in 2001 it is clear that, by relying on basic Union law principles, a claimant can receive damages from another private party as a result of the defendant’s breach of the Union antitrust rules. Nevertheless, there are still today few cases where private damages have been awarded for breaches of Articles 101 and 102 TFEU. According to the European Commission, one of the main reasons for the small number of claims for damages is the inconsistent application of national procedural rules throughout the Union. For example, the Member States use different rules to designate the parties with standing in domestic courts and the
national legal systems show different tendencies as to which arguments that are accepted from the defendants whose illegal anticompetitive behaviour is alleged to have caused damage.  

Stressing the importance of private enforcement, in 2008 the Commission issued a White Paper containing specific proposals to facilitate private actions in the EU as a complement to public enforcement. The proposals involve a harmonization of certain national procedural rules throughout the Union, something which has become a subject for critique by many stakeholders who believe the proposals are too intrusive and insufficiently analysed as to their consequences. Furthermore, in 2009, a draft proposal for a directive based on the White Paper was leaked out from the Commission. This Draft Directive never resulted in any legislation, but together with proclamations in recent Work Programmes it gives an idea of the Commission’s agenda for a harmonization of national rules on private actions for competition law breaches. The Commission still advocates a positive harmonization of national procedural rules on private damages for breaches of Union competition law, and most probably such a legislation will be composed in a near future.

Any European legislation regulating procedures that will take place in national courts must be thoroughly analysed and well framed. Such legislation must have the potential of ameliorating the perceived deficit in the legal situation as well as respect the differences between the legal orders of the 27 EU Member States. To put it simple, the strive to create an effective competition policy in the Union must not result in a precipitate legislative harmonization quite regardless of legal and cultural differences between the Member States.

Enforcement of EU competition law

This work treats the subject of a potential harmonization of national rules on private enforcement of Union competition law. Yet, before setting the focus on that specific issue of antitrust enforcement, the reader will be given an overview of basic objectives, definitions and ideas behind the two different main means of enforcing the EU competition policy, public and private enforcement. This chapter starts with the setting out of some important distinctions regarding private enforcement. The following sections describe the overall objectives of enforcing EU competition law, and point at the differences between private and public enforcement as well as the advantages of the former.

Private enforcement: definition and forms

According to Komninos, private enforcement could possibly be defined in two different ways, one broad and one narrow. If one were to define it in broad terms one could say that private enforcement includes all actions taken by private parties in order to enforce the competition law policy of the Union. That definition would include cases where, for example, an individual reports an undertaking’s behaviour to the Commission or to a national competition authority, or where an individual is conferred the role of intervenent in a public procedure against an anticompetitive agreement. However, those situations where enforcement is facilitated or initiated through initiatives of private parties but later carried through mostly by public authorities primarily help the effective execution of public antitrust enforcement, and
are normally referred to as “privately triggered public enforcement”. Instead, Komninos chooses to define private enforcement narrowly, as litigations in which private parties act as claimants or counterclaimants against undertakings that are alleged to have acted in breach of the Union antitrust rules. For the litigation to constitute private enforcement, the claim should be based on the actual competition rules. Normally the claim also leads to some kind of civil remedy, such as nullity of agreement, damages or restitution. This definition of private enforcement is the one most commonly used, also by the Commission, and covers in an accurate way the actions of interest for this work. Hence, that narrow definition of private enforcement is also the definition that will be used throughout this work.

Furthermore, the invocation of Articles 101 and 102 TFEU in a private litigation can serve several purposes for the claimant. The provisions can be used as a ‘shield’, invoked as a defence against a contractual claim from the defendant regarding for example performance or damages for non-fulfilment of the contract. The court’s finding of a breach of, say, Article 101 will in those cases result in the anticompetitive agreement being void, and the claimant will have succeeded in defending himself from the contractual relation by nullifying the contract. The provisions can also be used as a ‘sword’, the metaphor of which refers to the proactive use of the provisions by private parties as a basis for claiming damages or injunctive relief. This kind of proceedings add considerably more to the effectiveness of the private enforcement system, and it is to this use of competition law provisions as a sword that this work will attribute most of its discussion.

A last distinction can be made between so-called stand-alone and follow-on litigations. Stand-alone litigations, as the name suggests, are litigations in which a private party sues another party for having violated the Union antitrust rules where no breach has earlier been established by public authorities. In those cases it is up to the claimant in the proceeding to prove that there has been a breach of the antitrust rules in the first place, a task that can sometimes be very dire. The same applies to cases where the private party is not suing for damages but raises the other party’s breach of the competition rules as a point in his claim or counterclaim. Follow-on actions, on the other hand, take place where a public entity has already taken a decision where it condemns the particular anticompetitive behaviour. Here the earlier finding of a competition law breach can facilitate the litigation initiated by the private party, who will not have to bear as heavy a burden of proof.

The objectives of competition law enforcement

Normally, competition law enforcement is designed to achieve three main objectives: to bring the infringements to an end, to compensate the victims who have suffered a loss because of another party’s anticompetitive behaviour, and to punish the perpetrators and thus deter them and others from future transgressions of the rules. These three main objectives are addressed by a combination of public and private enforcement. Private enforcement is mainly promoted for the objective of compensation but can contribute to injunction and deterrence as well. However, as will be shown further on in this work, the Commission has received criticism for paying too much attention to the deterrent objective of private enforcement and has been forced to emphasize its primary objective of compensation.
Private and public enforcement

The differences between public and private enforcement lie in the form of administration, the actors and the remedies. Public enforcement is carried through by public authorities, such as specialized national competition authorities, national courts and the European Commission. The remedies for a breach of the EU competition rules are in these cases administrative sanctions, structural remedies and other penalties provided for in national laws. Private enforcement on the other hand takes place in horizontal relations before national courts in claims based on EU competition law. The sanctions are of a civil character, aimed mainly at compensating the victims of the antitrust breach. The majority of scholars agree that the two methods complement each other and that a combination of both private and public enforcement is necessary for the functioning of the European competition policy.

As mentioned, the aims of private enforcement differ to those of public enforcement. Where the latter primarily proves effective for deterrence and injunction, private enforcement mainly serves the objective of compensation. A system where private and legal persons are able to enforce, before their national courts, the rights conferred to them by directly effective provisions of EU law gives individuals an easily accessible means of reparation and places the benefits of Union law closer to the citizens. Finally, private enforcement also helps to fill the gaps in public enforcement that are a natural result of a the heavy workload of the Commission and the national competition agencies that have to prioritize their work and thus ignore some illegal anticompetitive behaviour. Hence, private enforcement outweighs the institutional intervention-oriented system of enforcement where public authorities are exclusive enforcers. Having said that, there is a need for balance between the two kinds of enforcement. From now on, this work will focus exclusively on private enforcement, and the next chapter will deal with one of its most important elements: the right to damages in cases of breach of the Union antitrust rules.

Development of a private right to damages

The application of Union law by national courts is governed by several important general principles. Over time, these principles have generated a right for individuals to claim damages before national courts from other private parties who are believed to have violated the Union competition rules. This chapter aims at describing the development of a Union right to damages in the field of competition law and analysing the reasons for the CJEU’s creation of a uniform and progressive policy on the matter.

Section 3.3 will introduce the first doctrine of damages acknowledged to individuals under EU law, Member State liability, and Section 3.4 will deal more specifically with the legal basis for and development of a Union right to private damages in the competition law area. Finally, Section 3.5 provides with some tentative conclusions on how the Union law on damages has been developed so far. Specifically, that section aims at displaying the balance that the CJEU has tried to create between the need of an effective application of EU law and national procedural autonomy. Hopefully, the analysis will provide a useful basis for the later questions on how to improve the private enforcement of competition law and whether a harmonization of national procedural rules is desirable de lege ferenda. But before that, Sections 3.1 and 3.2 will offer an overview of two important principles that have to be kept in mind.
when discussing the doctrine of antitrust damages: the principle of national procedural autonomy and the principle of effective judicial protection of Union law.

**National procedural autonomy**

When individuals seek to vindicate or protect their Union rights before the national courts, the general principle is that of national procedural autonomy, meaning that in absence of common Union rules on the matter it is for national law to determine the procedural conditions under which the Union rights should be enforced. The principle was established by the CJEU in *Rewe-Zentralfinanz* where it explicitly stated that it is for the domestic legal system of each Member State to ensure the legal protection that citizens derive from the direct effect of the provisions of Union law. Furthermore, according to *Rewe-Handelsgesellschaft Nord*, the national courts do not have to come up with other, new, remedies than those already laid down by national law, in order to guarantee the observance of EU law. However, the applicable procedural rules must meet two criteria. Firstly, the national rules, procedural as well as substantive, must not be less favourable than those relating to similar claims of a domestic nature (the principle of equivalence). Secondly, the national rules must not make it virtually impossible or excessively difficult to exercise the rights guaranteed to the individuals by Union law, which the national courts are obliged to protect (the principle of practical possibility).

As a result, in proceedings concerning damages for competition law breaches, rules on liability, procedure and remedies are normally considered a subject for national law as long as they provide a sufficiently effective protection of the Union rights equal to that of national rights. However, over time the principle of national procedural autonomy has been further modified and additional demands to those of equivalence and practical possibility have been laid upon the national rules on procedure and remedies.

**The principle of effective judicial protection**

Seemingly generous towards domestic rules on procedure, national procedural autonomy sometimes has to step aside for another general principle of Union law, commonly referred to as the principle of effective judicial protection. In the case *Simmenthal*, the Court added further requirements on national procedural rules in addition to those posed by the principles of equivalence and practical possibility. There, it stated that ‘any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [Union] law […] are incompatible with those requirements which are the very essence of [Union] law.’ The demand of an effective judicial protection of Union rights had earlier been displayed by the Court in *Sagula*, where it required penalties for breaches of Union law to be ‘effective, proportionate and dissuasive’. Later, in the case *Von Colson*, the Court stated that if a Member State has chosen to sanction breaches of a certain Union law provision with damages, in order for them to be deterrent and effective the damages must be *adequate* in relation to the harm caused. It did not suffice that the national rules met the requirements posed by the principles of equivalence and practical possibility laid down in *Rewe-Zentralfinanz*. This judgement was confirmed in *Marshall*, where the Court declared that national rules must not prevent victims of
breaches of Union law to get full compensation. Finally, in Factortame I, the Court abandoned the previous case law on 'no new remedies', when it interpreted the principle of effective judicial protection together with the principle of loyal cooperation as a justification for requiring the national judicial system to make available a possibility to lay down interim decisions against the State.

The doctrine of effective judicial protection of Union rights has emerged from the CJEU's interpretation and elaboration of the principle of direct effect. By setting out limits to national procedural autonomy, the doctrine aims at producing a sufficiently consistent application of EU law throughout the Union. The demand of effectiveness restricts the national autonomy as to the goals designated by the substantial Union norms, and the cases above, along with others, prove that the principle of effective judicial protection may demand that national court should make available a number of certain remedies, or even a specific remedy to a specific wrong, in order to give an adequate effect to the EU law. Subsequent to the later cases Peterbroek and van Schinjdel it may be argued that the range of procedural rules that belong to the national autonomy have been further narrowed. In those cases, the CJEU balanced the aim of the national procedural rules and the benefits of their application with the interest of an intact application of the relevant Union rules. The rulings may be an indication of the CJEU's intention to move further into the harmonization of national remedies against Member States. At the same time, other recent case law suggests that the 'no need for new remedies' doctrine is still in principle valid. This opposition indicates difficulties in defining the reach of the principle of national procedural autonomy.

The requirements upon national courts to make available a certain remedy to breaches of Union norms for the sake of the effective protection of Union rights has later proved to be of great importance for the development of the Union right to damages for breaches of EU competition law, which is the topic for the rest of this chapter.

**Member State liability**

The first time the CJEU declared a right for individuals to be compensated for having suffered from a breach of Union law was in the judgement San Giorgio in 1982. In San Giorgio the claimants were found to be entitled to the repayment of taxes levied by the state of Italy contrary to the Union provisions prohibiting charges having an equivalent effect to customs duties. In order to reach this conclusion, the Court reasoned upon the effectiveness of the relevant rules and found that the effective enforcement of the subjective rights guaranteed by the provisions motivated an intrusion in the state's procedural autonomy. The reasons of effectiveness, however, were not considered to prevent national laws to rule upon potential unjustified enrichment, and thus some room was left for national provisions to apply.

The idea of a right to restitution was transposed into a principle of Member State liability in the case Francovich in 1991. With that judgement the Court created a universal civil obligation in Union law, stating that 'it is a principle of [Union] law that the Member States are obliged to make good loss and damage caused to individuals by breaches of [Union] law for which they can be held responsible.' The Court based its judgement on the doctrines of the effet utile of Union law and the effective judicial protection of rights thereunder. The Court ruled that '[t]he full effectiveness of [Union] law would be impaired and the protection of the rights which they grant
would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [Union] law.42 The relevant breach of Union law in Francovich was the failure of the Italian state to transpose the Insolvency Protection Directive into national law.43 Still, the doctrine of Member State liability was later introduced in the field of competition law with the judgement GT Link in 1995, based on today’s Article 106 TFEU concerning state aid.44 Nowadays, Member State liability stretches to all breaches of EU rules that confer rights to individuals, as long as the transgression is sufficiently clear and there is causality between the Member State’s breach and the harm suffered by the litigant.45 Other criteria for liability are set out by national laws in accordance with the principle of national procedural autonomy, as long as they comply with the principles of equivalence and effectiveness.46

Private damages for breaches of Articles 101 and 102 TFEU

Subsequent to the Francovich case law, the CJEU started to develop the possibilities for individuals to initiate private proceedings in national courts, and to be awarded damages from other private parties who have acted in breach of the EU law. Through its judgement in BRT v SABAM in 1974 the Court made clear that Articles 101 and 102 TFEU can be relied upon by individuals directly before national courts, not only against Member States but also in proceedings against other individuals.47 The establishment of this horizontal direct effect of the competition rules marked the beginning of the private enforcement of Union competition law. By relying upon the horizontal direct effect of Articles 101 and 102, all individuals could now act as private attorneys and question before national courts the compatibility of agreements or actions of anticompetitive behaviour with EU competition law. However, it was not until years later that the Court established that the direct effect of Articles 101 and 102 brings with it a Union right for individuals to be compensated through damages for a found breach of the said articles.

The Courage judgement

For many years there was a debate on whether to award damages based on private companies’ breaches of Union competition law, and one could see three ways of arguing on the matter. In its 1993 Notice on Cooperation, the Commission seemed to vouch for the idea that national courts should have to award damages against undertakings when the national legal systems provided for such remedies for breaches of similar domestic norms, but not otherwise.48 This assumption showed signs of reasoning upon the principle of equivalence, as described earlier in Section 3.2. Others interpreted the principle of effectiveness as a justification of wider intrusions into the national procedural autonomy, especially when it came to Articles 101 and 102 TFEU.49 Advocates of this way of reasoning meant that EU law should decide the criteria for liability of private undertakings.50 Finally, the third way of reasoning was recommended by Advocate General Van Gerven in Banks, where he expressed the opinion that liability to pay damages should be invoked within the overarching framework of the Francovich case law, and thus be seen as a direct result of breaches of the Treaty as such.51

The Court eventually came to decide how to deal with the question in its judgement of 20 December 2001 in Courage, a preliminary ruling based on a reference from the Court of Appeal of England and Wales.52 In Courage, the main issue to be decided by the Court concerned whether a party to a potentially illegal
anticompetitive agreement could rely on the breach of Article 101 TFEU to obtain relief from the other contracting party and claim damages for the loss which he alleged to have suffered because of him acting according to the illegal agreement. The Court started its judgement by referring to the doctrine of Van Gend en Loos and Costa v ENEL, stating that the Treaty has created its own legal order which confers rights and obligations not only on the Union and its Member States but also on its nationals, and that it is up to the national courts to apply the European legal system that thus forms part of the national legal systems. The Court then proceeded by emphasizing the fundamental status of the competition rules in EU law and the direct effect of Article 101. Then it went on by stressing the importance that national courts ensure the effective protection of the rights that these provisions confer on individuals. Therefore, it should be 'open to any individual' to claim damages from other parties before national courts for breaches of Article 101 TFEU. The CJEU further highlighted the need of private actions for the effective enforcement of the EU competition policy, a clear demonstration of the principle of effectiveness.

An interesting detail of the case was that the claimant had himself been part of the anticompetitive agreement, the validity of which he questioned and the reason for his claim for damages. According to English domestic law, a plaintiff cannot claim damages from his contractual partner if both parties are 'at equal fault'. In this regard, the Court pointed at the autonomy of the Member States, stating that as long as the principles of effectiveness and equivalence are respected, Union law does not prohibit the application of such a national procedural rule.

Looking back, it is clear that Advocate General Van Gerven was right in his prediction in Banks in 1994. The ruling in Courage followed the outline of the Court's reasoning in Francovich, based on the idea that a right to reparation for harm suffered because of an anticompetitive conduct can be derived from the Treaty as such. By relying on the doctrine of horizontal direct effect the Court explicitly used that doctrine as a legal ground for the subjective right to reparation. Furthermore, the Court declared that a Union right to damages for breaches of EU competition rules is required to ensure that victims of anticompetitive actions get compensated for their loss, and to strengthen the working of the competition rules to discourage anticompetitive actions. These considerations show that the Court deemed necessary the use of private actions for the sake of the effective protection of Union rights. These considerations are of present interest, as they constitute the Commission's main argument for harmonizing national procedural rules on antitrust damages.

The Manfredi judgement

Three years after its ruling in Courage, the CJEU confirmed and developed its reasoning in Manfredi, where it clarified the demand for a causal relationship between the damage and the anticompetitive agreement or conduct in order for an individual to act as a claimant, something that had not been outspoken in Courage. Building upon the ruling in Courage, the Court further declared that the principle of effectiveness requires national courts to guarantee that injured persons are able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest. The principles of effectiveness and equivalence, however, did not prevent national courts from taking steps to ensure that the protection of Union rights did not entail the unjust enrichment of those who enjoyed them. The idea of full compensation is something that the Commission has later come to emphasize in its
work for a more effective enforcement of the competition rules, as will be shown later in this work.

**Tentative conclusions: Harmonization through case law**

Thanks to its primacy and direct effect, the Union legal order puts aside conflicting national norms and can sometimes be relied upon by individuals in national courts. In those proceedings, national procedural autonomy lays the practical enforcement of the Union rights in the hands of national courts and administrative organs, except when the principles of effectiveness and equivalence demand otherwise. Thus, in *Courage*, the Court laid down that Article 101 gives rights to individuals, even parties to an anti-competitive agreement, and that ‘any breach’ of Article 101 is sufficiently serious to trigger an EU right to damages. For the same reasons, it ruled in *Manfredi*, that the victims of anticompetitive behaviour have a right to full compensation for their loss. Scholars agree that the same reasoning applies to cases of breaches of Article 102.

The current possibility for individuals to claim damages on the basis of EU law from another private party before national courts is the result of a long series of case law, originally built upon the doctrines of primacy and direct effect. Through reasoning upon effective judicial protection of Union rights the Court has come to demand that certain remedies are made available in every Member States’ legal order and has called for a sort of harmonization of national rules on procedure and remedies. The CJEU has thus made clear that the effectiveness of the competition law policy is an imperative that may justify intrusions in the national procedural autonomy. In the following, a few words should be said on the reasons behind the development of a private Union right to damages in the competition law area as well as on the relation between effectiveness and national procedural autonomy.

**Effectiveness**

The principle of effective judicial protection has long been the driving force behind the development of private enforcement of European competition law. Already in *Van Gend en Loos* the Court enounced that ‘[t]he vigilance of individuals concerned to protect their rights amounts to an *effective supervision* […] to the diligence of the Commission and the Member States,’ which suggests that the Court considered a strong private enforcement of Union law necessary to ensure that the Member States comply with the provisions on which they have agreed. Jacobs believes effectiveness to have been the most important reason for the Court to develop the principle of direct effect:

‘The Court’s approach, historically at any rate, has not been to promote the rights of individuals for their own sake or as a matter of ideology; its approach has been essentially pragmatic and the *recognition of individual rights has been almost instrumental, being seen as necessary to ensure the effectiveness of the legal order*. That is, at any rate, the way in which direct effect is explicitly justified in *Van Gend en Loos* itself. *The underlying notion is effectiveness.*’

About 40 years after the establishment of direct effect in *Van Gend en Loos*, the effective protection of Union rights still constitutes an important factor for the
development of EU law, which showed when in *Courage* the Court used effectiveness as a justification for letting individuals enforce their rights directly before national courts and thus have a real chance for reparation.

**National procedural autonomy**

By creating an autonomous action for compensation in the *Courage* judgement the Court seems to have gone further than before as regards intrusions on the national procedural autonomy. In the rulings that have led to the establishment of a Union right to damages, the Court has focused primarily on the substantive rights of the claimants instead of the principle of national procedural autonomy. According to Craig and De Búrca, this focus indicates the Court’s willingness to override restrictive national procedural rules, especially in cases in which the Court is concerned with remedial rights, such as damages, injunction and compensation. Nevertheles, according to Dougan, the Court’s reasoning in *Courage* is still based on a presumption of national procedural autonomy, though limited on a case-to-case basis by the principles of effectiveness and equivalence. As Craig and De Búrca put it, national courts are currently required under Union law to ‘strike an appropriate, proportionality-based, case-by-case balance between the requirement of effective judicial protection for EU law rights and the application of legitimate national procedural and remedial rules.’ Whether a national rule should be considered to undermine Union law depends on the need of effectiveness of the Union right, assessed in the light of the aim and function of the national provision.

**Harmonization through case law**

It is clear that the CJEU has played a big part in the construction of the private enforcement of competition law by issuing case law based on the doctrine of direct effect. The principles that govern national courts’ application of EU law have to a large extent been developed by the CJEU, driven by the ideas of a coherent effective Union legal system as well as the protection of individual Union rights.

The principle of effectiveness has often been interpreted in a negative way, as to allow diverging national laws as long as they do not result in applications contrary to the effectiveness of EU law. This must be considered to be the case in *Von Colson*, where the Court stated that the damages provided for in national law must be adequate in relation to the harm causes, but where it did not set out any detailed requirements as to how the national laws should be composed. Early CJEU case law could be said to have opened for a negative harmonization of domestic procedural rules, where obstacles to the effectiveness of Union law are removed, but where not unified EU rules are created for this purpose. In those cases, Union law to will provide with solutions to the effectiveness deficit, but only insofar as the national rules are considered contrary to Union law.

However, the harmonization in the case of damages and other remedies could be said to have turned into positive harmonization where the Court has required national courts to provide with damages for competition law breaches. Positive harmonization is at hand when domestic rules are replaced with harmonized European rules to be applied in all Member States. The creation of a Union remedy in the form of antitrust damages might show that the Court has found the negative interpretation
of the principle of effectiveness insufficient for the aims of private enforcement. According to Dougan, this mirrors a trend where case law is increasingly used for setting out positive harmonization also in other areas of law than that of antitrust damages, and he foresees a positive harmonization in the future.72

Whether correctly named as negative or positive, the harmonization through case-to-case rulings by the CJEU often leaves room for national procedural rules to continue to apply, partially or fully, at the same time as it enhances the effective judicial protection of Union rights. Whether the future of the private enforcement of competition law can be dealt with through harmonization through case law or whether there is now a need for ‘stronger measures’ is the question for the analysis in subsequent chapters.

The Commission initiatives in private enforcement

This chapter aims at displaying the recent actions from the part of the European Commission regarding private enforcement of EU competition law. Section 4.1 presents the Commission’s effort to rationalize the public enforcement performed by the national competition authorities and courts in the Union by Regulation 1/2003. It will show that the tendencies of encouraging private enforcement have affected also the decentralization of public enforcement. Section 4.2 describes the latest official publication from the part of the Commission as regards antitrust damages, the White Paper on Damages Actions for Breach of the EC Antitrust Rules.73 Section 4.3 concludes the latest development on the matter and introduces the Commission’s unofficial proposal for a directive that would harmonize national procedural laws in order to facilitate the private enforcement of Union competition law. The last Section 4.4 presents some thoughts on the latest work of the Commission and acts as a bridge to the next chapter in which there will be a more thorough analysis of the proposals for a harmonization laid forward by the Commission.

Regulation 1/2003

When it comes to public enforcement, the EU has seen a rather recent development that has come to push forward the parallel development of a private right to damages. For a long time, the Commission held a monopoly of granting individual exemptions under Article 101(3) TFEU whereas national competition authorities had a very small role and rarely used their jurisdiction to apply the rest of the competition rules.74 This system proved ineffective, and in 1999 the Commission initiated a modernization programme for a decentralised enforcement of EU competition law, which eventually led to the enactment of Regulation 1/2003.75 Apart from the general aim of decentralizing the enforcement of Union competition law, the modernization programme had as an objective to enhance the possibilities for individuals to invoke the antitrust rules before national courts.76 Article 6 of the Regulation provides that national courts shall have the power to apply the whole of Articles 101 and 102 of the Treaty. This is meant to include both actions where the claimant uses the provisions as a ‘shield’ and actions where the provisions are used as a ‘sword’, something which becomes apparent when reading Recital 7 of the Regulation. There, the role of national courts is mentioned in relation to protecting subjective rights under EU law, ‘for example by awarding damages to the victims of infringements’.77 Before the enactment of the Regulation, national courts could not rule in any case already in the hands of the
Commission. Neither could they undertake an assessment under Article 101(3) on the merits. The abolition of the notification system and the Commission's monopoly in applying Article 101(3) have removed obstacles to the private enforcement of the Union competition policy and it is no longer practically possible to halt proceedings in national courts by lodging a notification with the Commission.\textsuperscript{78}

\textbf{The 2008 White Paper}

Despite the initiatives for increasing the role of national courts provided by Regulation 1/2003, the current system of damages for antitrust infringements in the Union has been said to present 'a picture of total underdevelopment', and the Commission has deemed it necessary to initiate further development of private actions.\textsuperscript{79} In 2008, the Commission issued a White Paper on Damages Actions for Breach of the EC Antitrust Rules, preceded by a Green Paper in 2005.\textsuperscript{80} In the White Paper, the Commission states that despite the fact that \textit{Courage} and \textit{Manfredi} made clear an individual right to compensation in cases of antitrust breach, victims of antitrust behaviour are rarely compensated for their losses.\textsuperscript{81} In its Green Paper three years earlier, the Commission had concluded that this failure was largely due to 'various legal and procedural hurdles' in the Member States' procedural rules concerning the right to damages.\textsuperscript{82} The Commission is of the opinion that national rules rarely provide satisfactory solutions to the difficult procedural questions regarding \textit{inter alia} standing, limitation periods, and evidence in Union competition law litigations. This is held to lead to legal uncertainty in the application of the \textit{acquis communautaire}.\textsuperscript{83}

The Commission deems it important for the fulfilment of the internal market to achieve a high level of substantial uniformity of competition regulatory regimes among the Member States.\textsuperscript{84} By establishing a European system of private antitrust enforcement with a uniform use of remedies and procedural rules among the Member States, it hopes to create a well-functioning competition system that guarantees an effective minimum protection of individuals' right to damages under Articles 101 and 102 TFEU as well as 'a more level playing field and greater legal certainty across the EU'.\textsuperscript{85} The guiding principle is that of full compensation, but the Commission also recognizes that the improvement of compensatory justice would be beneficial for the deterrence of future infringements and possibly lead to greater compliance with [EU] antitrust rules.\textsuperscript{86}

The proposals in the White Paper concern different procedural issues. For example, it is suggested that the national procedural systems should provide for two forms of collective redress and that a finding of a competition law breach by a national competition authority should be binding upon national courts. Moreover, the Commission proposes uniform rules on fault assessments for damages, common European limitation periods, and a unified lenience programme.\textsuperscript{87}

The reactions to the White Paper were varied. Some expressed disappointment as the thought the proposals were lacking in force. For example the editorial of \textit{Common Market Law Review} in June 2008 demanded 'a little more action',\textsuperscript{88} and the plaintiffs' organisation CDC Cartel Damage Claims were of the opinion that the proposals were inappropriate or even detrimental to the aim of guaranteeing full compensation for the victims and for a practically effective private enforcement of the competition rules.\textsuperscript{89} However, most of the Member States and other stakeholders were more sceptical to the Commission's competence to introduce a harmonizing legislation to facilitate damage claims.\textsuperscript{90} The German government declared that they
could not see any convincing reasons for introducing special civil procedural rules for the enforcement of EU antitrust law.\textsuperscript{91} Similarly, the Austrian government opposed to the aim of creating a special Union law on damages for these reasons.\textsuperscript{92} The European Parliament also had its doubts. A report presented by the Parliament’s Economic and Monetary Affairs Committee questioned the finding of the Commission that the Member State’s private enforcement mechanisms are underdeveloped and wondered whether the Commission has the competence to make these proposals.\textsuperscript{93} The parliamentary resolution that followed also showed scepticism but welcomed further investigations, especially of the initiatives on collective redress.\textsuperscript{94} Overall, the reception of the White Paper seems to have been tepid and the proposals seem to have raised concerns on subsidiarity, proportionality and national procedural autonomy throughout the Member States.\textsuperscript{95}

**After the White Paper on damages**

In 2009, the Commission prepared a proposal for a Council Directive based on the inputs received before and after the issuing of the White Paper.\textsuperscript{96} Compared to the White Paper, the Draft Directive is significantly less ambitious when it comes to the extent of harmonization. For example, in practice it will only affect follow-on cases, where an antitrust infringement has already been established by a competent competition authority. Instead of attaching as great importance to the deterrent effects of a potential legislation as it must have been said to do in the White Paper, the Commission now further emphasizes the compensatory approach of the directive.

Disputes regarding the legal basis of the directive as well as other issues, however, led to the turning down of the proposal before commissioner Neelie Kroes left office in 2010.\textsuperscript{97} The Commission work for a more effective private enforcement continued, and its Work Programme of 2012 foresaw a legislative proposal for actions for damages.\textsuperscript{98} However, there are still no signs of a proposal for legislation and, though surely still in process, the development is going slowly. Nevertheless, there will most probably be a next try to put forward a legislative proposal by the Commission as the Draft Directive and the Commission’s agenda for last year show that there are still plans on a minimum harmonization of the procedural rules governing actions for damages for breaches of the EU antitrust rules. Until the next try for a harmonization, it is up to the national courts to apply the *acquis communautaire* when awarding private damages to their claimants.

**Tentative conclusions: Harmonization through legislation**

The Commission wants to see a positive harmonization and thus interprets the principle of effectiveness as meaning that it is up to the Union to lay down rules in order to maximize the effectiveness of Union competition law. This is another way of harmonizing national procedural law than the harmonization carried through in case law by the CJEU in cases such as *Courage* and *Manfredi*.

One important difference between legislative harmonization and harmonization through case law lies in the fact that a legislation would force the Member States to align their procedural rules and adapt them in a specified way, whereas harmonization through case law, at least until now, has left more room for domestic solutions for reaching the goals set forward by the general principles of Union law. There is a risk
that a legislation would introduce to the domestic procedural systems rules that are significantly different, or even contrary, to the rest of the procedural systems. Differences in legal culture and procedural systems of the Member States would possibly need to be diminished, and that is a sensitive area for the Member States.

Nevertheless, the principle of national procedural autonomy cannot be used as an argument for the unlimited application of domestic procedural rules, not the least since the principle itself only allows for domestic rules to apply insomuch as Union law does not govern the matter, be it by means of legislation or case law. Due to the principles of effective judicial protection, equality and practical possibility, national courts already have to refrain from applying rules that are contrary to the effective enforcement of Union competition law. Also, the principle of loyal cooperation in Article 4(3) TEU puts pressure on the domestic courts to apply Union law effectively. Finally, many Member States’ national antitrust rules are similar or identical to those provided for at Union level, and even though the EU does not have the competence to govern internal competition law as such, especially the principle of equivalence will in these cases demand that claims based on Union law are dealt with as effective as domestic cases and vice versa. Hence, the national courts of these Member States might even find harmonized rules on procedure facilitating the enforcement of domestic rules and clarifying the relation between those and EU law.

Finally, a positive harmonization provides more effective means of unification than negative harmonization, something which might be needed for the situation to improve in any near future. A uniform application of the EU competition rules would presumably be good for the effectiveness of the Union legal system. It would increase the legal foreseeability of the international actors on the market who would know which procedural rules that would govern a potential claim lodged by them or against them. The same reasoning applies to consumers and small to middle-sized undertakings that are normally the parties considered vulnerable in competition law cases. Further aspects of a potential harmonization will be given in the next chapter.

Analysis

The Commission deems it important for the effectiveness of private enforcement to lay down uniform rules on procedural and remedial issues. This chapter aims at analysing the suggestions for harmonization made by the Commission in its White Paper and Draft Directive. It is important to remember that the Draft Directive has not been officially published and thus cannot be considered to represent the latest official policy or standpoints of the European Commission. However, it is the most recent source of interpretation that can be used for the purpose of this work, and with that, hopefully, the best up-dated instrument of use for the analysis.

This chapter begins with the question of whether an increased private enforcement is a goal to strive for over all in Section 5.1. After those introductory remarks, there follows in Section 5.2 a discussion on whether the effectiveness of private enforcement would be enhanced through some kind of harmonization of national procedural rules. As will be clear, I do believe a harmonization would be desirable for this purpose. Hence, Section 5.3 is devoted to an analysis of what sort of harmonization there should be. In that analysis, I will use the issues of subsidiarity, proportionality and national procedural autonomy as benchmarks. The last Section 5.4 provides with some considerations on the choice of instrument that could be used for a potential legislative harmonization.
Increased private enforcement

Private enforcement has certain advantages. First of all, and most importantly, the victims of antitrust enforcement can make up for their losses in national courts whereas public enforcement merely prevents further harm. The aim of compensation is a special feature of private enforcement and a function that belongs to the domain of the courts and civil law procedure. Secondly, private enforcement increases the number of enforcements actions, leading to a wider application of competition law, which in turn relieves enforcement pressure on public enforcement agencies that could instead focus on serious and heavy antitrust breaches.

This last aspect is closely connected to an argument that has often been used for the sake of private enforcement, namely that private litigations indirectly enhance the deterrent effects of enforcement. The Commission writes in its 2008 White Paper that a more effective enforcement would most likely lead to more detected illegal behaviour and therefore inherently produce effects in terms of deterrence. The use of private actions as a means to increase deterrence, however, has been rejected by many European scholars and the Commission was heavily criticised for having paid too much attention for the deterrent effects of private enforcement in its White Paper. Wils, for example, claims that public antitrust authorities have more adequate investigatory and monetary tools to detect and punish antitrust infringements, and that public enforcement is therefore both a less costly and a more effective way to ensure that antitrust rules are not violated. Furthermore, he emphasizes that enforcement through private litigations will always be dependent on individual initiatives of private parties in the Member States. Such an initiative will often be absent since the antitrust victims might be afraid of the cartel members’ revenge, lack the resources for litigation, or they might even prefer to join the cartel or adapt to the anticompetitive behaviour. Finally, a model of private enforcement that incorporates deterrent mechanisms would possibly risk leading to overcompensation of the antitrust victims. Even those who are more positive towards an extensive use of private enforcement are requesting a cautious use of private litigations for this cause, often by referring to the American antitrust enforcement system where the culture of extensive private enforcement has sometimes been said to lead to the malfunctioning of the antitrust system a whole. Bearing this in mind, I find it important that private enforcement is not promoted for reasons of deterrence or corrective justice. The Commission seems to have paid attention to this critique, since in the Draft Directive it only seeks to justify a harmonization with the aim of full compensation of individuals. The fact that the directive mainly affects follow-on actions further indicates caution as to conferring too much importance to private claims as a means for promoting an overall compliance with Union competition law.

In its White Paper, the Commission concludes that victims of antitrust infringements rarely get compensated for their loss, and in the Impact Assessment Report the amount of compensation that the victims are forgoing is estimated to several billion euros a year. An increased private enforcement of EU competition law would probably lead to a more effective application of the European competition policy and more victims being compensated. A multitude of private actions for damages would also lead to a development of competition law pushed forward by national courts rather than by the Commission, as is the case today, which could in its turn develop to a culture of awareness of and greater respect for Union competition law. Jones predicts that an increase in private enforcement might eventually
contribute to social welfare.\textsuperscript{110} Finally, according to the Commission, ‘more effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers’, and not by the rest of society.\textsuperscript{111} There are great benefits of private enforcement when it comes to compensation and a more widespread enforcement of competition law. Private enforcement thus constitutes a necessary counter-balance to the enforcement gap caused by lacking resources of the public competition authorities at both Union and national level.\textsuperscript{112}

With regards to the positive aspects of private enforcement, as well as its present malfunctioning, I am convinced that private enforcement should be further encouraged and increased. An increase of private actions for breaches of Union antitrust law would be beneficial for the antitrust victims who currently have difficulties in claiming their Union rights and improve the effectiveness of the enforcement system as a whole. Having said that, however, there will always be different objectives and roles of private and public enforcement and it is important to separate these from each other. Private enforcement must not diminish the effects of the public enforcement, but there must be a balance between the two means of enforcement. Private enforcement should be further encouraged as a complement, not a substitute, to public enforcement.

A harmonization of national procedural laws?

Having concluded in the previous section that increased private enforcement is desirable mainly in that it optimizes the possibilities for victims of antitrust behaviour to obtain compensation, the question arises if such an increase could be achieved through a harmonization of national procedural laws. This section aims at answering the question of whether national procedural rules setting the frames for the private antitrust enforcement in national courts should be harmonized in order to increase the effectiveness of private enforcement of Union competition law.

Effectiveness has long played a big role in the Court’s reasoning upon harmonization and uniformity of the Union legal system. Already in Costa v ENEL, the Court stated that a divergent application of Union law in the Member States would undermine the basic function of the Union legal system and that ‘the executive force of the Treaty cannot vary from one State to another in deference to subsequent domestic laws.’\textsuperscript{113} A system of incoherent application of Union law by differing national courts would render impossible a practically effective legal order. When it comes to competition law, Van Gerven has argued that effectiveness requires a uniform application of the essential preconditions of the remedies for antitrust breaches and a sufficient comparability, based on the principle of effective judicial protection, as far as other rules are concerned.\textsuperscript{114} Marcos and Sánchez, on the other hand, question the need of a harmonization for individuals to receive compensation. They argue that the Commission’s proposals for harmonization might only be an attempt by the Commission to outsource its public enforcement tasks on individuals instead of providing solutions to a real lacuna when it comes to means of getting compensation in national tort law.\textsuperscript{115} In contrast to Marcos and Sanchés, I see no reason to doubt that the Commission’s initiatives for harmonization have as their primary aim to facilitate the compensation of individual antitrust victims, as stated in the White Paper. As mentioned, the amount of compensation missed out by antitrust victims today is immense.\textsuperscript{116} The fact that a harmonization might also lead to benefits in deterrence and overall compliance with the antitrust rules does not render less true that first
objective. Besides, the Commission stresses the importance of preserving a strong public enforcement mechanism according to Regulation 1/2003, and it suggests that the proposals in the White Paper should complement, not take over, the public enforcement.  

I believe that the effective protection of Union rights provided by the competition law requires similar application throughout the Union. A harmonization of national procedural and remedial rules would improve the effectiveness of private antitrust law, which I have earlier set out as a desirable goal. Without rules that are to some extent harmonized, there will be a legal uncertainty among antitrust victims in their chances to acquire compensation and regarding the rules applicable. The uncertainty would also affect undertakings that risk being held accountable for damages caused by their anticompetitive behaviour. Furthermore, too divergent domestic rules might lead to forum shopping, where proceedings are initiated in the Member States whose procedural system is more likely to generate rulings that benefits the claimants, or the defendants, according to their wishes. This, in turn, risks resulting in the procedural rules of the Member States developing in even more different directions.

Which method of harmonization?

The CJEU has begun the process of harmonizing national procedural rules by posing the requirement upon national courts to make available damages for competition law breaches and by stating that these damages should cover the total loss of the claimants. The recognition of a Union right to damages has led to national rules on both substance and procedure having to be tested for their compliance with the acquis communautaire. Each time the CJEU rejects national provisions of procedure for their inconsistency with the principles of equivalence and practical possibility or that of effective judicial protection, it thus aligns national rules and indirectly contributes to the development of a Union law of procedures under reasons of the effet utile of Union law. Milutinovic is of the opinion that, one could either imagine a continued Court practice of sporadic excursions into certain aspects of law through the notion of effectiveness of substantive Union law, or a positive construction of a coherent system of liability, ‘albeit within limited fields’. This section provides with an analysis of which method that should be used for a further harmonization of procedural rules on antitrust damages.

National procedural autonomy

Substantial and procedural rules on damages actions vary considerably throughout the Union. This is a result of differences in legal traditions that can be explained by reference to the complex process of creating domestic laws adapted to national particularities and problems. For a long time the Court seemed to have stuck to the basic principle of national procedural autonomy when applying the decentralized enforcement of Union competition law. This was reflected in a cautious negative harmonization. For example, in Courage, the Court stated that the principles of equivalence and practical possibility should not prevail a national legal system to prevent the unlawful enrichment of the claimant. Nor should domestic law be prevented from denying a litigant to profit from his own unlawful conduct, something which according to the Court follows from a principle that is recognized in most of the
Member States’ legal systems.\textsuperscript{122} Such a harmonization opens for the Member States to choose how they wish to achieve the aims set forward by the Court at the same time as it leaves room for national legal diversity and procedural autonomy.

Alfaro and Reher claim that it is important that each Member State gets the chance to develop its own procedural order for damages claims based on Union antitrust law. By doing that, the Member States will have the possibility to rely on their traditional systems of procedure and legal reasoning. A positive harmonization that would introduce to the national procedural systems rules that are substantially different or alien to the rest of the system might cause problems of application internally within the national legal system. \textit{Courage} and other case law shows that harmonization does not need to be initiated through legislative measures, but can be the result of CJEU rulings based on general principles and earlier case law on similar issues.\textsuperscript{123} It also shows that the harmonization must not be carried out in detail but can be left rather open and give room for national legal systems to adapt. A harmonization through case law that leaves room for national procedural autonomy opens for national legislators to deal with the issues of antitrust enforcement in a way that fits the internal procedural legal system. However, even the Court must now be considered to sometimes create positive harmonization, eliciting concrete and positive norms that have as sole reason to ensure the effectiveness of EU law.\textsuperscript{124} This speaks for a development also in case law towards yet an increased intrusion in national procedural autonomy. This would mean that also the a Court-led harmonization of national procedural rules risks being detailed and thus lack the benefits in terms of ‘loose’ harmonization.

\textbf{Effectiveness}

Indeed, a harmonizing legislation might risk introducing to the domestic procedural systems rules which are alien to them. Nevertheless, though it is clear that \textit{Courage} and following case-law has lead the way to a more effective enforcement of EU competition law, especially when seen together with the Commission modernization programme, it is hard to believe that the Court’s creation of minimum standards of judicial protection has facilitated a \textit{uniform} application of EU competition law.\textsuperscript{125} This is also where one notices the deficit with harmonization through case law in the sphere of Union competition policy.

According to Van Gerven, harmonization through case law has limitations in situations where uniformity is needed ‘to level the playing field for public and private actors, and to avoid artificial competition advantages’.\textsuperscript{126} The Commission claims that this is accurately the case within the Union competition law system, and thus it deems legislative action necessary.\textsuperscript{127} A coherent policy on damages would also, according to the Commission, render possible a better coordination between damages actions and public enforcement of the competition rules.\textsuperscript{128} Moreover, uniform rules might be beneficial not only for antitrust victims, but also for national courts. Since Regulation 1/2003 has given the right to national courts to apply the whole of Article 101 and 102, Van Gerven means that in order for the national courts to be able to perform their duty of applying Union competition law and enforcing the provisions effectively the courts also need concrete uniform rules on remedies.\textsuperscript{129} Finally, uniformity in remedies may be required to encourage the antitrust victims to help Union rules to be effective throughout the Member States.
Despite the possible difficulties in finding common rules that fit into all Member States’ legal systems, a legislative harmonization of procedural rules might be necessary for the uniformity and hence the effectiveness of the private enforcement of Union antitrust law. The extent of harmonization carried forward by the CJEU will always depend on the national courts’ will to turn to it for preliminary rulings and will depend upon the framing of the question on interpretation. Such a harmonization would only be fragmentary and dependent upon the initiative of national courts. In my opinion, sufficient uniformity can only be achieved by adding to the existing case law a harmonizing legislation.

**Subsidiarity**

Closely connected to the principle of national procedural autonomy is the principle of subsidiarity, declared in Article 5(3) of the TEU. The principle of subsidiarity means that the Union should only act in areas outside its exclusive competence 'if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.'

The Commission is of the opinion that the Draft Directive respects the subsidiarity principle. It claims that the objective of full compensation of antitrust victims cannot be achieved by Member States in a sufficient way and must therefore be dealt with on a Union level. Some scholars claim the opposite. Marcos and Sanchés believe that the compensatory goal can already be satisfactorily achieved through national law in the different jurisdictions. Alfaro and Reher maintain that the Member States are better placed and have more incentives to modify their domestic procedural systems to facilitate for damage claims. Furthermore, they argue that many of the obstacles to effective competition rules can effectively be solved by the market players themselves. That suggests that, in the absence of legislation, market participants would often solve the issues on their own and maybe come up with a solution better adapted to reality. Self-regulation would be beneficial for many reasons, but I do not share the optimism regarding its effectiveness in the case of antitrust enforcement. The Commission has pointed at problems of ineffective private enforcement since the 1990’s, and unfortunately the situation does not to have improved. The Ashurst Study provides with the view that the divergence of national rules inflicts on the effectiveness of Union antitrust enforcement. Self-regulation would not solve this issue of differing national rules. In addition, the construction of a system of self-regulation would require much time and seems unsuitable for the realization of the aim of full compensation.

The Commission means that the disparity between policy choices at national levels concerning damages for antitrust infringements could not ensure the full effect of Articles 101 and 102 TFEU. The effectiveness of Article 101 and 102 are crucial for the internal market, not the least since the right to damages is acknowledged in the acquis communautaire. The estimation of the effectiveness of Union law enforcement must be based on the values set forth by the EU, even though effectiveness might be estimated differently on a national level. Disparate policy choices throughout the Member States would possibly in the end lead to unequal protection throughout the Union even though the acquis communautaire undisputably confers a right for victims to effective compensation.

Based on the considerations above, I do not believe that the aim of full compensation would be sufficiently achieved by regulation on a national level. Letting the Member States choose their own policies on the subject of private enforcement
would diminish its effectiveness. Hence, the principle of subsidiarity seems not to raise concern in the case of a harmonizing legislation.

**Proportionality**

In order for any legislation on procedural rules to be legitimate, it also has to respect the principle of proportionality, as set out by Article 5 TEU. Hence, the content and form of a regulation must correspond to the aim pursued. In the Draft Directive, the Commission also declares that the suggestion is in line with the principle of proportionality since it ‘includes only the minimum necessary to effectively achieve its objective, namely to guarantee that across the EU victims of infringements of EC competition law have access to truly affective mechanisms for obtaining full compensation for the harm they suffered.'

As mentioned in the introduction, I will not discuss in detail the proposals in the White Paper or Draft Directive. Yet, the general point can be made that in order for a legislation to be proportionate I believe it has to take a balanced approach towards national rules and only regulate issues that are of real importance for the effective private enforcement of Union competition law. In other words, the institutions should refrain from any attempt to introduce rules that in reality have deterrent objectives. The issue of proportionality will be further dealt with in Section 5.3.5, when discussing which form a potential legislation should take.

**Legislation – an effective means of harmonization**

As concluded in the previous section, a more concrete unification of the minimum protection of individuals’ rights under the Union antitrust law would probably be beneficial for the effectiveness of the private enforcement of Union competition law. Legislation is a good way of harmonizing the rules when it comes to effectiveness, full compensation and deterrence. The negative aspects of harmonization through legal instruments is that it might inflict too much on the national procedural autonomy of the Member States and regulate matters that are better dealt with on a domestic level. In some aspects, I am sure that national legislators are best suited for adapting domestic rules to relevant legal traditions and culture. But if the alternative to legislation is to let the Court continue its ad hoc harmonization which will depend upon the scope of the questions referred to it by national courts, at the same time as also the Court shows signs of minimizing the national procedural autonomy, I believe that a thorough unification led by an expertise with representatives from each Member State would be preferable for the effectiveness of the antitrust enforcement. It is preferable that national courts are given a coherent guidance on the matter in a complete legal instrument. Despite such a legislative harmonization of certain procedural issues, it will still be for national rules on procedure and remedies to dictate the frames for the protection of substantive Union rights, in areas left untouched by the harmonization. Hopefully, such a legal document will take into consideration the national diversities on the matter.

After all, the Commission has declared the need to proceed cautiously with any harmonization of national rules. In a speech in 2005, the ex-Commissioner Neelie Kroes declared that:
‘the initiative is not about unnecessarily harmonising national procedural rules applicable to tort actions. The Commission wants to guarantee the effectiveness of the rights conferred by the Treaty. The lack of effectiveness often lies in the procedural rules of the Member States. But that does not mean we should tear them up completely. Instead, if, and only to the extent that, the procedural rules of the Member States do not guarantee effectively the substantive rights conferred by the Treaty, the Commission may seek some approximation of these rules. [Any proposals] will have to meet the strict tests of subsidiarity, proportionality and necessity.’

The 2008 White Paper confirms that the legal framework for more effective antitrust damages should be based on a genuinely European approach, formed by balanced measures rooted in European legal culture and traditions.

**Choice of instrument**

The White Paper, and Draft Directive, suggests procedural rules that are often different from those provided for in the Member States. The diversities of the Member States’ legal systems require the choice of legal instrument to be made carefully. The form of legislation that would intrude the least in national procedural autonomy would be a non-binding guiding recommendation. Though, if, as suggested in the Draft Directive, the legal basis for a harmonization would be Article 103 TFEU, the Commission could initiate the drafting of either a directive or a regulation.

The finding of the best method for harmonization would require a study of the different possibilities. Nevertheless, I believe that a regulation risks being too unconditional as to the discretion of the Member States. A directive could better set a frame for the procedure which could be interpreted on a domestic level as to fit the national legal systems. Even though the interpretation and implementation of secondary law can be costly, I believe a directive would better respect the principle of proportionality. Nevertheless, a directive on procedural rules should not be framed too vaguely since it might then lack in terms of unification and thus suffer from the same limitations as harmonization through case law.

**Conclusions**

The Union’s work for a ‘highly competitive social market economy’ requires an effective enforcement of the competition policy. It seems that a harmonization of national procedural rules throughout the Union is necessary for private enforcement to be practically effective and to guarantee that victims of antitrust violations are fully compensated. However, effectiveness must not be used as an unconditional reason for intruding into the national legal systems. A system based on a balance between reasoning upon effectiveness and national legal traditions is better suited for a coherent system than a legal order that imposes itself on the national legal systems in order to render itself effective. Any action for further harmonization must respect the general principles of national procedural autonomy, subsidiarity and proportionality.

A continued practice of harmonization through case law, carried forward by the CJEU, no longer seems to guarantee the effective judicial protection of the rights that
Articles 101 and 102 TFEU confer to individuals. Instead, the objective of an effective private enforcement of the Union competition policy seems to be better achieved by a legislation that establishes uniform procedural rules that apply to all civil proceedings concerning breaches of Union competition law.

The Court’s harmonization with reference to the effet utile of Union law has so far paid respect to national legal diversity. That should also be a guiding principle for any harmonizing legislation. The Union legislator should derive from the different legal orders solutions which can be said to constitute common values of the Union. It remains to be seen whether a proposal for such a legislation is presented in the near future, as foreseen in the Commission Work Programme of 2012.

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1 Throughout this work, the term harmonization is used when discussing both a total unification of national laws and an alignment of national laws through directives or case law. For further reading about different kinds of harmonization, see Van Gerven, Harmonization of Private Law: Do We Need It?, CMLR 41: 505-532, 2004.
2 Article 3(3) TEU. See also Protocol (no 27) on the Internal Market and Competition, annexed to the Treaties.
4 Hereinafter mostly referred to as ‘the Commission’.
6 See Study on the conditions for claims for damages in case of infringements of EC competition rules, a comparative report prepared by the law firm Ashurst in 2004 on behalf of the European Commission. (hereinafter called the Ashurst study).
7 Ashurst study, above n 4.
13 Komninos, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts, p. 2. The use of Article 101 as a ‘shield’ in contractual relations follows from Article 101(2) TFEU which provides that ‘any agreements […] prohibited pursuant to this article shall be automatically void’. More generally for both Article 101 and 102, in Case 127/73, BRT v SABAM [1973] ECR 51, para. 16, the CJEU stated that the direct effect of Articles 101 and 102 can lead to the voidness sanction.
14 Wils, Principles of European Antitrust Enforcement, p. 112. The Treaty gives no clear support for such a proactive use of the antitrust provisions, but this interpretation has been established through case law, see Case C-453/99 Courage [2001] ECR I-6314, para. 26.
18 The administrative sanctions normally have the form of fines and periodic penalties.
19 Komninos refers to several scholars who, besides with him, have expressed this opinion, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts, p. 9.
 Damages” under EU Competition Law: from Courage v. Crehan to the White Paper and Beyond,

The principle is reaffirmed in Article 47 of the Charter of Fundamental Rights.


Case C-14/83, Vonolson [1984] ECR 181, para. 28.


Article 4(3) TEU.

Case C-213/89, Factortame I [1990] ECR I-2433. The Court thus reformed its view as set forth in


Hetteme, Rättssprinciper som styrmedel. Allmänna rättssprinciper i EU:s domstol, p. 213.


Article 101 was here used both as a ‘shield’ and as a ‘sword’.


Case C-6/64 Costa v ENEL [1964] ECR 585.


60 Milutinovic, The “Right to Damages” under EU Competition Law: from Courage v. Crehan to the White Paper and Beyond, p. 69.
67 Dougan, National Remedies Before the Court of Justice – Issues of Harmonisation and Differentiation, p. 381.
68 Craig and De Búrca, EU Law – Text, Cases, and Materials, p. 231.
69 Courge, national law was allowed to govern the handling of unjust enrichment, whereas Union law sees to that the national laws are applied in a reasonable manner, see Dougan, National Remedies Before the Court of Justice – Issues of Harmonisation and Differentiation, p. 382.
70 Craig and De Búrca, EU Law – Text, Cases, and Materials, p. 231.
71 Case C-14/83, Von Colson [1984] ECR 181, see above n 27.
72 Dougan, National Remedies Before the Court of Justice – Issues of Harmonisation and Differentiation, p. 384.
77 Wils, Principles of European Antitrust Enforcement, p. 113.
84 Dougan, National Remedies Before the Court of Justice – Issues of Harmonisation and Differentiation, p. 360.
86 White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final. Throughout the White Paper, the Commission reasons on the idea that ‘all victims of infringements of EU competition law should have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered’. The other guiding principle in the White Paper is that there should remain a strong system of public enforcement of Articles 101 and 102.
87 In total, the White Paper includes nine different proposals for harmonization of national procedural and remedial rules.


See also the Draft Directive, para. 1.2. This is the reasoning adopted by the American legislator. In the US, where there is a long tradition of vast use of private enforcement, individuals are seen as private general attorneys who, by litigation, help the overall compliance with the antitrust rules, see Komninos, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts, p. 9.

Basedow, Private Enforcement of EC Competition Law, p. 17.

See e.g. Marcos and Sanchés, Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door?, p. 10.

See e.g. Wils The Relationship between Public Antitrust Enforcement and Private Actions for Damages (2009) 32 World Competition 3.

Jones and Sufrin, p. 1189.


Van Gerven, Bridging the Gap Between Community and National Laws, p. 698.

Marcos and Sanchés, Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door?, p. 12.


Already the Court’s ruling in Francovich had sounded of the theme of unification of remedies, enouncing that Member State liability demanded that the national courts apply a Union law equal throughout the Union (para 35). Also, the Courage and Manfredi judgements and the White Paper have all come to take part of the acquis communautaire.

Jones and Beard, Co-contractors, Damages and Article 81: The ECJ Finally Speaks, [2002] ECLR 246, 253-5.


For example, in GT Link, the Court left it to national law to determine the burden of proof for the conditions of applications of Articles 101 and 102 TFEU, Case C-242/95 GT-Link [1997] ECR I-4449.

In the Case C-360/09 Pfeiderer AG v Bundeskartellamt [2011] ECR I-000, for example, the Court has overruled the principle of national procedural autonomy with the reason the all victims of antitrust infringements have the right to claim damages and thus need access to documents. See also Dougan, National Remedies Before the Court of Justice – Issues of Harmonisation and Differentiation, p. 368-9.

Dougan, National Remedies Before the Court of Justice – Issues of Harmonisation and Differentiation, p. 387.

Van Gerven, Harmonization of private law: do we need it?, p. 524.

The Commission has set out as a goal the creation of a ‘more level playing field for businesses’ and the reduction of legal uncertainty that is allegedly currently caused by the big differences in the Member State’s procedural regulations. See Draft Directive, section 3.2.

Draft Directive.

Van Gerven, Harmonization of private law: do we need it?, p. 524.

See also Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaties.

TEU, Article 5(3). In the Draft Directive, Article 103 TFEU is suggested to form the legal basis for harmonization. Competition law is an area of so-called shared competence between the EU and the Member States.

Explanatory memorandum to the Draft Directive, p. 3.


Ashurst, Study on the conditions for claims for damages in case of infringements of EC competition rules.

Draft Directive.

Draft Directive.
See also the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaties.

Explanatory Memorandum to the Draft Directive, point 3.3.

Kroes (2007), Speech/07/128, Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe, Commission/IBA Joint Conference on EC Competition Policy. Brussels, 8 March 2007.


Lidgard, Konkurrensrättsligt skadestånd, p. 34.

Article 103(1) TFEU.

Article 3(3) TEU.

See Milutinovic, The “Right to Damages” under EU Competition Law: from Courage v. Crehan to the White Paper and Beyond, p. 89.