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Material Abstract

In western market economies, it is generally accepted that competition is the key point of achieving social and economic welfare. Therefore, it is necessary to protect competition and there are, basically, two main approaches to deterring such socially harmful behaviour: an administrative public enforcement by public agencies and fine proceedings or a private enforcement through litigations by private parties and especially damage claims.

But, the work will show that private enforcement of European competition law is underdeveloped, but still necessary as access to individual justice with reference to the theoretical analysis by Aristotle and other moral philosophers

Because of the underdevelopment, the work argues in favour of a necessity to implement a general right of pre-action disclosure and access to files in the possession of the competition authorities to improve the effectiveness of private enforcement of European competition law. On the other hand, the given rights of the European Commission make its fine proceedings an effective information gathering system and thus an effective way of detecting and proving an infringement of European competition law, especially Art 101 TFEU. But, the Commission has to rely on members of cartels to apply for leniency and therefore to disclose a hidden infringement, i.e. cartel. Furthermore, an efficient leniency programme has to offer effective protection to its whistle-blowers. However, this protection policy is in conflict with an effective private enforcement because the private plaintiffs have to provide evidence of an infringement.

Recently, the European Commission gets the ball rolling again by introducing its Directive 2014/104/EU that focuses on the effectiveness of private enforcement of European competition law and especially of civil damage claims. Therefore, it is highly topical to highlight the theoretical and practical relationship between public and private enforcement and the main tasks and problems by implementing the European rules into national law.

Private v Public Enforcement of European Competition Law?

Relationship between effective enforcement of the law and individual justice

Rene Thomas Wieser

Master of Jurisprudence (M.Jur.)
Durham Law School
University of Durham
2016

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1. Introduction

> People of the same trade seldom meet together, even for merriment and diversion, but the conversion ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.[1]
>
> (Adam Smith)

Competition is key principle of gaining social welfare in western economies. Nevertheless, as the quote of Adam Smith mentioned, it is a natural behaviour of market players to maximise their profits. In western market economies, it is generally accepted that competition is the key point of achieving social and economic welfare. A working competition results in an optimal allocation of goods and resources as well as generally lower prices and hence a greater number of goods delivered to more people.

The first German Vice Chancler and Minister of Economic Affairs after the Second World War and the foundation of the Federal Republic of Germany, Ludwig Erhard, described the effect of cartels in the following way:

> There have never been as many unemployed in German, economic history as in the period when cartels flourished most strongly. Cartels always have to be paid for by a lower standard of living.[2]

Erhard made to the point that cartels as a way of elimination of competition leads to less innovation and less economic welfare and – for him in connection with unemployments – to less social welfair. This is linked to the economic functions of competition: control, coordination, encouragement, protection and selection of a market economy. Therefore, it is necessary to protect these functions by protecting competition.

Basically, there are two main approaches to deterring such socially harmful behaviour: an administrative public enforcement by public agencies and fine

[1] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Strahan & Cadell 1776) Book I, Ch 10 at para 82.

[2] L Erhard, *Prosperity through competition* (1958) 136-7.

proceedings or a private enforcement through litigations by private parties and especially damage claims. Although both approaches of competition law enforcement are in use in most countries, the emphasis varies between common law and civil law jurisdictions.[3] Whereas common law jurisdictions, such as the United States or the United Kingdom put the emphasis on private litigation, civil law jurisdictions, such as German law or other countries of continental Europe strengthen public enforcement by agencies.[4]

This distinction is attributed to the two main concepts of economic policy: Ordoliberlism and the Chicago School. Whereas Ordoliberalism (or Freiburg School) is the theoretical baseline of the economy especially in Germany, which is based between social liberalism and neoliberalism and emphasises the need for a state to ensure that the free market produces results close to its theoretical potential.[5] On the other hand, the Chicago School of economics is a neoclassical school of economic thought that emphasises the self-healing power of the market and have a large influence on US-American competition law and its focus on private enforcement by market players.[6]

Recently, the European Commission gets the ball rolling again by introducing its Directive 2014/104/EU of 27th December 2014. The Directive focuses on the effectiveness of private enforcement of European competition law and especially of civil damage claims. A main problem in the Directive is the relationship between public and private enforcement and especially the protection of applicants for the leniency regimes. Until 27th December 2016, the Member States of the European Union have the task to implement these rules into national law.

Therefore, it is highly topical to highlight the theoretical and practical relationship between public and private enforcement and the main tasks and problems by implementing the European rules into national law.

Based upon this, the first question is, if there is an underdevelopment of private enforcement of European competition law (Section 2.1) and if there is a need of an effective private enforcement with reference to access to individual justice (Section 2.3). This is based on the empirical reality of public and private enforcement in Europe and the theoretical analysis by Aristotle and other moral philosophers. With reference to the outcome of this basic question, the next task is to analyse the reasons for this underdevelopment (Section 2.2) and to discuss

[3]Segal I and Whinston M, 'Public vs private enforcement of antitrust law: a survey' (2007) 28 ECLR 306.

[4]Ibid.

[5]R Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy' in P Mirowski and D Plehwe (eds), *The Road From Mont Pélerin: The Making of The Neoliberal Thought Collective* (Harvard University Press 2009) 124-5.

[6]BE Kaufman, 'Chicago and the development of twentieth-century labor economics', in RB Emmett (ed), *The Elgar Companion to the Chicago School of Economics* (Edward Elgar 2010) 133.

whether the burdon of proof is the weak point of private enforcement (Chapter 3). Therefore, it is necessary to argue whether follow-on claims and access to files are the central mechanisms to fine-tune the relationship between public and private enforcement of competition law. Furthermore, it is factually and legally necessary to implement rules of getting access to files in the poesession of the defendant as well as the competition authorities. On the other hand, it is necessary to protect leniency documents to protect the leniency regimes and the effectiveness of public enforecement (Chapter 4).

2. The necessity of private competition law enforcement in Europe and the historical and structural reasons for its underdevelopment

This chapter begins by focusing on the necessity of private competition law enforcement in Europe and by highlighting the historical and structural reasons for its underdevelopment. In the first section, the chapter points out the underdevelopment of private enforcement on the basis of the analysis of the Directorate General of Competition on Directive 2014/104/EU and an empirical analysis about the quantitative and qualitative relationship between public and private enforcement of European competition law, especially Art 101 TFEU.

The second section of the chapter examines the reasons for this underdevelopment of private competition law enforcement and focuses on the history of competition law enforcement in Europe and its structure, starting with the first regulations about competition law in the ECSC-Treaty 1952 all the way to the Treaty of Lisbon 2009. This shows the privileged position of public enforcement to punish a breach of the relevant European competition regulations. A comparative analysis of competition law enforcement in the US illustrates how the US system compensates for the lack of specialised agencies (private litigants as 'private attorney-generals'[7]).[8] This section concludes that the US conditions and limitations of private actions cannot be uncritically transcribed into the European context.[9]

Besides the historical argument, the section analyses the structural reasons for the underdevelopment. For this purpose, the section first deals with the investigating possibilities of the competition authorities. Based on the principle of an inquisitorial system of administrative law enforcement, this section defines the term inquisitorial system. In doing so, it strengthens the distinction between an inquisitorial system

[7] *Associated Industries of New York State, Inc v Ickes* 134 F 2d 694 (2d Cir 1943) at 704 by Franck J.

[8] S Bourjade, 'The role of private litigation in antitrust enforcement' (2010) 3 GCLR 118.

[9] CA Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP 1999) 186; AP Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Pub 2008) 10-1.

in a wider sense as a proceeding conducted by a judge in a public inquisition or investigation of a crime and an adversarial system where a judge focuses on the issue of law and procedure and acts as a referee in the contest between the defence and the prosecutor. This part analyses the distinction between an adversarial and inquisitorial system and how this relates to the differences between a civil law and a common law system. Beyond this, the section also analyses the definition of the term inquisitorial system in a narrower sense as the unity of the investigating and deciding authority and its roots based on Roman and medieval criminal law. It highlights that this proceeding is not used in modern criminal law but is the main proceeding in administrative law and hence in the public enforcement of competition law. The section goes on to analyse the provisions on dawn raids and interviews by the Commission and national competition authorities as main investigating mechanisms.

Finally, this section focuses on the importance of whistle-blowers and their protection through leniency regimes. Related to this, the first section ends by focusing on the leniency programme of the European Commission as a reason for the underdevelopment of private enforcement of European competition law. The section will do this by considering the developments of the leniency regimes of the German and English competition authorities as well as the European Commission, its general requirements and its benefits and protection limits. In doing so, the section will reveal the vulnerability of leniency applicants because an applicant for a leniency programme has to disclose everything related to the breach of competition law and is therefore susceptible to civil claims. This is even more so as the fines protection of the leniency regime generally has no effect on the possibility of civil damages claims.

In its second part, the chapter focuses on the question of whether private enforcement is necessary alongside an effective public enforcement regime. With reference to an analysis of individual and universal justice, the section comes to the conclusion that there is a necessity for restitution and therefore private enforcement of European competition law.

2.1 The underdevelopment of private competition law enforcement in Europe

2.1.1 Perception of underdevelopment of private competition law enforcement by the European Commission

In its statement on the reasons for the most recent European Directive on Cartel Damage Claims 2014/104/EU, the European Commission – in particular the Directorate General for Competition – indicated that there had been considerable

underdevelopment of private enforcement of European competition law, especially by damage claims.[10]

In the legislative proceedings of the Commission before the proposal of the Directive, the Directorate General of Competition acknowledged a "total underdevelopment" of private proceedings for damages based on an infringement of European competition law.[11] With reference to a study by Ashurst LLP which was commissioned by the Directorate General of Competition, the European Commission identified the "astonishing diversity" of the legal frameworks of the Member States related to private cartel damage claims.[12] Based upon this, the European Commission concluded in its White Paper that there was currently a lack of "an effective legal framework for private actions seeking compensation for the damage caused to citizens and businesses as a result of infringements of EC competition law"[13] and this was the main obstacle that had prevented the development of private enforcement. With reference to the case law of the ECJ and its statement that in the absence of European law, the legal systems of the Member States had to provide the details of the legal proceedings,[14] the European Commission decided to start a harmonisation process that culminated in Directive 2014/104/EU.

2.1.2 Empirical reality of public and private enforcement

These theoretical arguments of the Commission and especially of the Directorate-General for Competition can be validated by empirical evidence. On the one hand, the number of cases shows that private damage claims plays a minor role in relation to public fine proceedings. On the other hand, the outcomes of the fine proceedings of the European Commission indicate highly efficient and deterrent public competition law enforcements.

Related to the decentralised private enforcement regime of European competition law, the data basis of private damage claims based on an infringement of European competition law is not comprehensive. However, Germany and England became the most important forum for damage claims and it is therefore sufficient to analyse both jurisdictions to get a broad picture of the relationship between public and private competition law enforcement.

[10] See Commision, '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, 2.

[11] Commision, 'Commission Staff Working Paper – Annex to the Green Paper Damages actions for breach of the EC antitrust rules' SEC(2005) 1732, at para 29; Commission, 'Green Paper on Damages Actions for Breach of the EC antitrust rules' COM(2005) 672 final, 4.

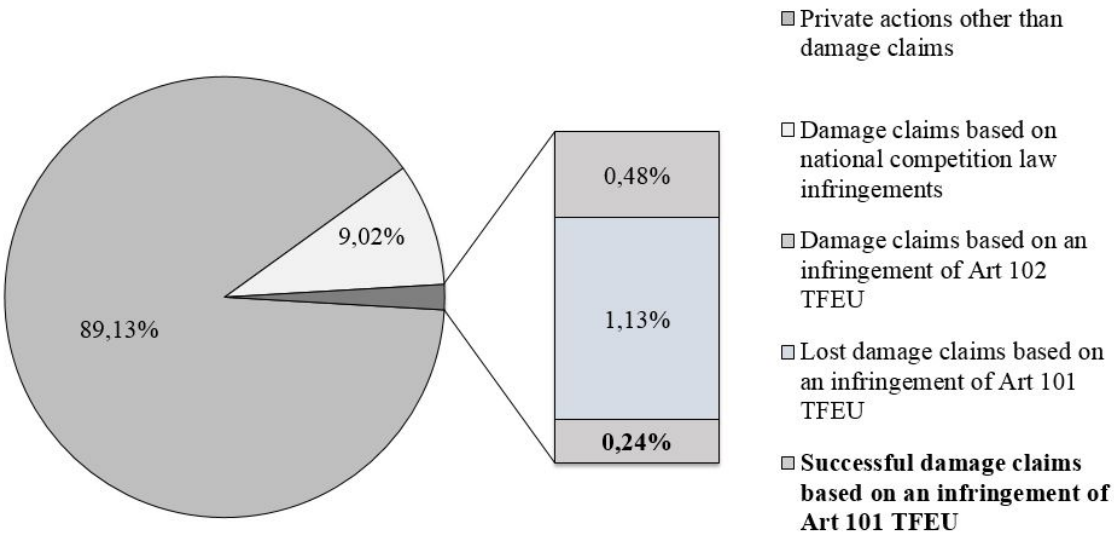
[12] See E Clark, M Hughes and D Wirth, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf> accessed 01/03/2016.

[13] Commision, 'Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules – Impact assessment' SEC(2008) 405 final, 5.

[14] See Commission, 'Green Paper on Damages Actions' (n 11) 4.

On the one hand, there has been no successful damage claim based on an infringement of European competition law in England.[15] On the other hand, in Germany, 368 private actions were claimed between 2005 and 2007,[16] but only 10,87% of these actions were private damage claims.[17] Only 17% hereof were based on European law and 13,3% on an infringement of Art 101 TFEU.[18] At the same time, the chances of winning (or even partially winning) the damage claim was 17,5%.[19] Therefore, approximately 1 damage claim out of an infringement of Art 101 TFEU was successful.

Figure: 1: Private actions in Germany 2005-2007



For the period 2009 to 2010, the German Federal Competition Office (Bundeskartellamt) listed 556 private actions,[20] and between 2011 and 2012 there were 311 private actions.[21] Transferred to this period, approximately 2 damage claims out of an infringement of Art 101 TFEU were successful.

On the other hand, the Commission has imposed around 20.4 billion Euros in 113 cases in the last 24 years. Between the years 1990 and 1999, the Commission came to approximately 2 positive fine decisions per year. Between 2000 and 2004, the number of cases leaped to 30 cases in 4 years (roughly 7.5 cases per year) and has remained at that level ever since.

[15]BJ Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005' (2008) 29 ECLR 96.

[16]S Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany' (Working Paper No. 10-12, Centre for Competition Policy 2010) 27.

[17]Ibid 48.

[18]Ibid 57.

[19]Ibid 54.

[20]Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2009/2010 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet [2011] BT-Drs 17/6640, 49.

[21]Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2011/2012 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet [2013] BT-Drs 17/13675, 42.

Figure: 2: Positive fine decisions of the European Commission between 1990 and 2014

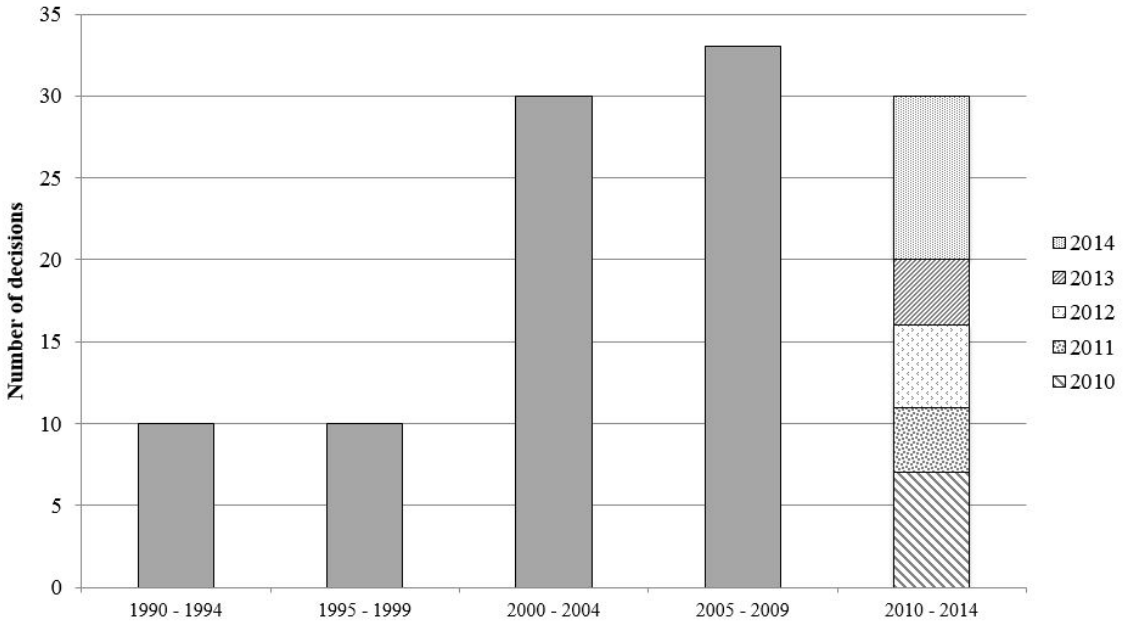


Tabelle 1: Number of positive fine decisions of the European Commission between 1990 and 2014[22]

	Number of positive fine decisions of the EC	
1990 – 1994		10
1995 – 1999		10
2000 – 2004		30
2005 – 2009		33
2010	7	30
2011	4	
2012	5	
2013	4	
2014	10	

At the same time, the amount of fines imposed by the European Commission correlates with amount of imposed fines but arose with a time difference. Before 2000, the Commission imposed less than half a million Euros in fines over a four year period. After an intermediate level of around 3 million fines in 2000-2004, the amount of fines imposed by the Commission nearly stagnated between 9 and 9.5 million Euros in a four year period.

[22] <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 01/03/2016.

Figure: 3: Fines imposed by the European Commission between 1990 and 2014

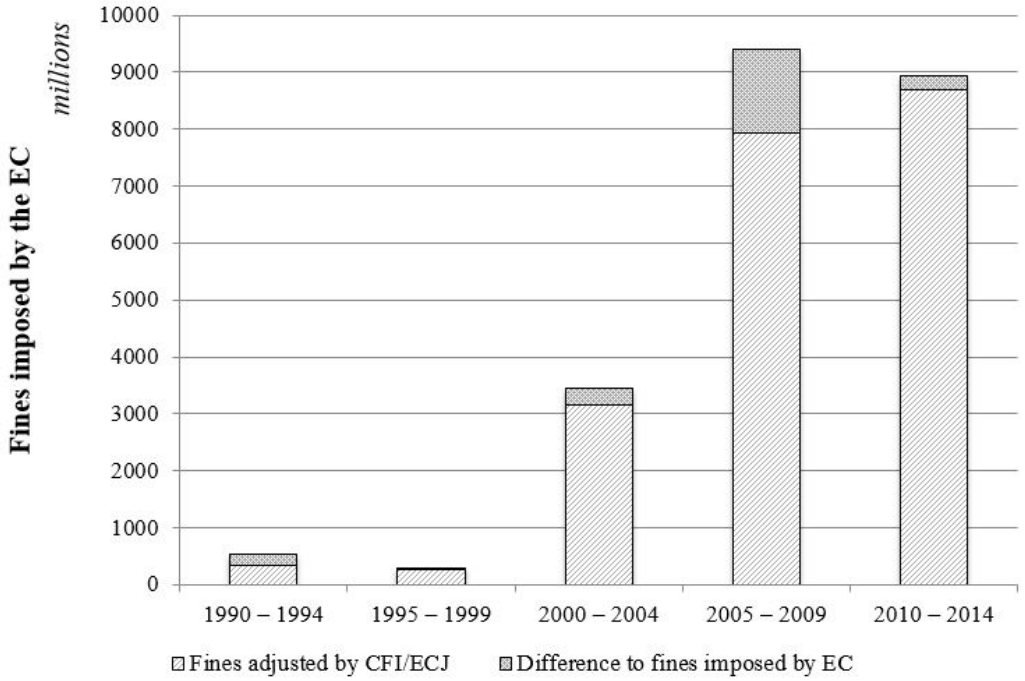


Tabelle 2: Amount of fines imposed by the European Commission adjusted and non-adjusted by the European Courts between 1990 and 2014[23]

	Fines imposed by Commission	Fines after adjustment by CFI/ECJ	Difference
1990 – 1994	539,691,550 €	344,282,550.00 €	195,409,000.00 €
1995 – 1999	292,838,000 €	270,963,500.00 €	21,874,500.00 €
2000 – 2004	3,462,664,100 €	3,157,348,710.00 €	305,315,390.00 €
2005 – 2009	9,414,012,500 €	7,928,868,156.50 €	1,485,144,343.50 €
2010 – 2014	8,930,678,674 €	8,700,344,579.00 €	230,334,095.00 €

On the other hand, this increase in fines is directly related to an increase in fines in particular cases (Leading Cases). The relevance of these Leading Cases can be illustrated in relation to the imposed fines of the minor cases per year.

[23]Ibid.

Figure: 4: Average fines per year and the distinction between Leading Case and other cases

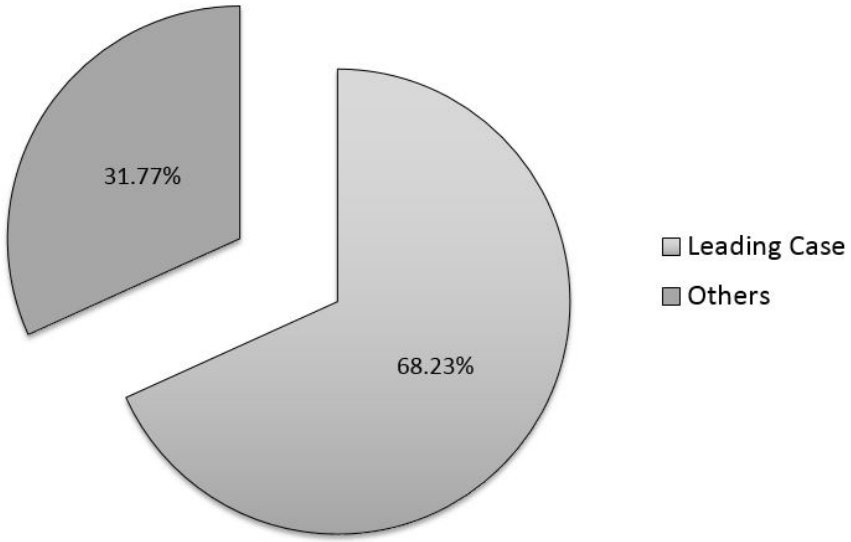


Figure 4 shows that the fines of Leading Cases represent approximately 68% of all fines imposed by the European Commission in a particular year. The proportion is based on the four Leading Cases between the years 2011 and 2014.

Tabelle 3: Amount of fines imposed by the European Commission between 2011 and 2014 as well as imposed fines in Leading Cases[24]

	2011	2012	2013	2014
Fines (sum of the year)	614,053,000 €	1,875,694,000 €	1,882,975,000 €	1,689,497,000 €
Case AT.39437 – *TV and computer monitor tubes*		1,470,515,000 €		
Case AT.39914 – *Euro Interest Rate Derivatives (EIRD)*			1,042,749,000 €	
Case COMP/ AT.39861 – *Yen Interest Rate Derivatives (YIRD)*[25]			669,719,000 €	
Case AT.39922 – *Automotive bearings*				953,306,000 €
Others	614,053,000 €	405,179,000 €	170,507,000 €	736,191,000 €

[24]Ibid.

[25]The Commission imposed fines with an amount of all in all 684,679,000 € in several decisions of the YIRD case in 2013 and 2015. Recognising that there was only 1 positive fine decision of the EC in 2015 until the official statistic has been published, and referring to the published amount of 14,960,000 € in 2015, the Commission imposed 669,719,000 € of the YIRD case in 2013.

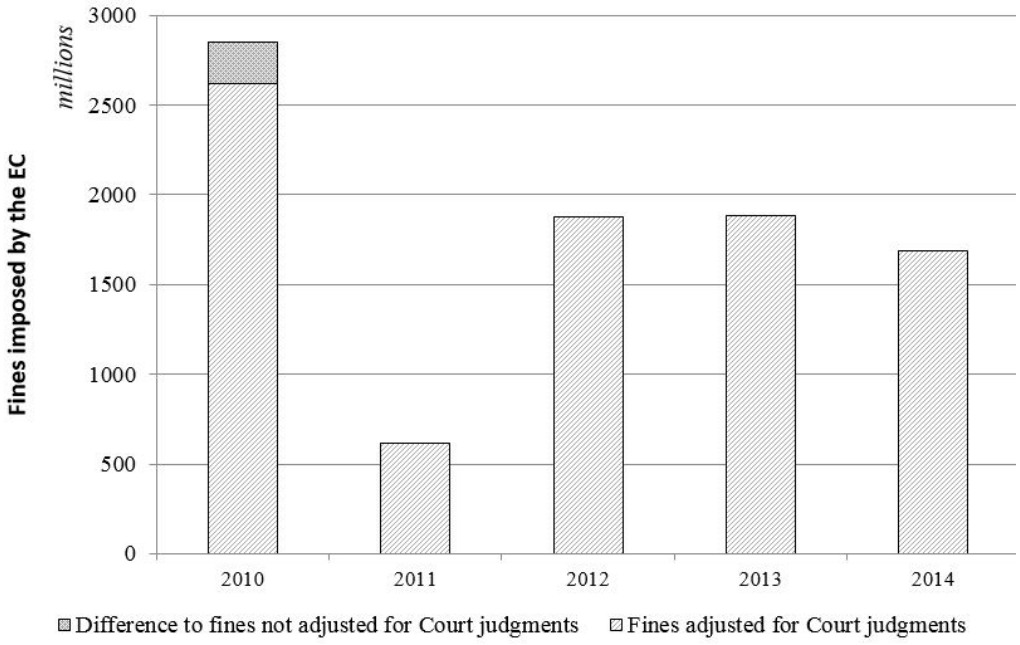
On the other hand, the top 6 cases with the highest imposed fines since 1969 were between 2008 and 2014. That directly correlates with the amount of the overall fine increases.

Tabelle 4: Top 6 cases with the highest imposed fines since 1969[26]

Year	**Leading Case**	**Imposed fines**
2008	Case COMP/39.125 – *Carglass*	1,185,500,000 €
2009	Case COMP/39.401 – *E.ON/GDF*	640,000,000 €
2010	Case C.39258 – *Airfreight*	799,445,000 €
2012	Case AT.39437 – *TV and computer monitor tubes*	1,470,515,000 €
2013	Case AT.39914 – *Euro Interest Rate Derivatives (EIRD)*	1,042,749,000 €
2014	Case AT.39922 – *Automotive bearings*	953,306,000 €

Alongside the purely quantitative decrease in decisions and fines, Figure 3 and Table 2 illustrate the effectiveness of public competition law enforcement by the European Commission. With reference to the adjustments by the European courts, the data show that the difference between the fines imposed by the European Commission and the adjusted fines after the decisions of the European Courts are less than 10% overall in relation to the amount of fines imposed by the European Commission. Furthermore, in the last four years only in 2000 was an adjustment by the European Courts.

Figure: 5: Fines imposed by the European Commission between 2010 and 2014



[26] <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 01/03/2016.

Tabelle 5: Amount of fines imposed by the European Commission adjusted and non-adjusted by the European Courts between 2010 and 2014[27]

	Fines imposed by Commission	Fines after adjustment by CFI/ECJ	Difference
2010	2,853,499,674 €	2,623,165,579 €	230,334,095 €
2011	614,053,000 €	614,053,000 €	–
2012	1,875,694,000 €	1,875,694,000 €	–
2013	1,882,975,000 €	1,882,975,000 €	–
2014	1,689,497,000 €	1,689,497,000 €	–

Another indicator confirming the efficiency of public competition law enforcement by the European Commission is the number of fined undertakings per fine decision of the Commission. Between 1990 and 2014 the European Commission imposed fines on 784 undertakings. Related to the number of positive fine decisions, the Commission imposed fines on average on 6.31 undertakings per positive fine decision.

2.1.3 Conclusion

In summary, it can be said that private enforcement of European competition law by damage claims based on an infringement of Art 101 TFEU is underdeveloped. With reference to a purely quantitative analysis, the number of cases of damage claims is marginal in relation to the number of fine decisions by the Commission and they are more in relation to the number of imposed undertakings. On the other hand, the relation between decisions and imposed undertakings and the minimum adjustments by courts show the high quality of public enforcement as an efficient enforcement proceeding.

2.2 Historical and structural reasons for the underdevelopment of private competition law enforcement

Given that private enforcement of European competition law is underdeveloped, the question of why this is so arises. The first reason for this underdevelopment could be historic. Competition law is traditionally 'public enforced' in Europe and thus public enforcement is well established and could develop an efficient structure. On the other hand, this structure of public enforcement could be the second reason for weak private enforcement. Strong and efficient public authorities and an effective leniency regime strengthen public enforcement but weaken private enforcement.

[27] Ibid.

2.2.1 History of competition law enforcement in Europe as a story of public enforcement

The enforcement of competition law in Europe is mainly characterised by the activities of the European Commission and the national competition authorities.[28] Although much of the legal basis of the European provisions about competition law, especially the regulations in Art 101 and 102 TFEU, are based on the decades-long experience of market concentration and competition law enforcement of the US,[29] the European regulations are – in contrast to the rules in the US[30] – shaped around a strong public enforcement through specialised agencies.[31]

To understand these different approaches of competition law enforcement, it is necessary to analyse the historical developments of European competition law. In contrast to the competition law regulation in the US, which is mainly based on the Sherman Antitrust Act 1890 and the Clayton Antitrust Act 1914,[32] the European provisions are very young and were established after the Second World War.

The first regulations about competition law in Europe were the provisions in the Treaty of European Coal and Steel Community (ECSC) from 1952 (Treaty of Paris).[33] After the experience in market concentration in the coal and steel industry – the main industrial sector at the time – and its utilisation in the Second World War, six countries in the middle of Europe wanted to find a way to decentralise the market as it was mainly dominated by German companies.[34] In addition, the coal and steel production was seen as key to the rapid reconstruction of Europe

[28] S Bourjade (n 8) 118.

[29] N Foster, *EU Law* (4th edn, OUP 2014) 482.

[30] *Associated Industries v Ickes* at 704 per Franck J calling private litigants in the US 'private attorney-generals'.

[31] C Harding, *European Community Investigations and Sanctions, The Supranational Control of Business Delinquency* (Leicester University Press 1993) 116; M Paulweber, 'The End of a Success Story? The European Commission's White Paper on the Modernisation of the European Competition Law; A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law' (2000) 23 WComp 3, 45; WPJ Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 WComp 473; D Wolf, 'European Political Integration, Comparative Law and Private Enforcement of Competition Law' in T Einhorn (ed), *Spontaneous Order, Organization and the Law, Roads to a European Civil Society, Liber Amicorum Ernst-Joachim Mestmäcker* (Asser 2003) 421-4; J Fingleton, 'De-monopolising Ireland' in C-D Ehlermann and I Atanasiu (eds), *European competition law annual 2003: What is an abuse of a dominant position?* (Hart Pub 2006) 60-1; W Möschel, 'Behördliche oder privatrechtliche Durchsetzung des Kartellrechts?' [2007] WuW 483; FG Jacobs, 'Civil Enforcement of EEC Antitrust Law' in MLR Association (ed), *The art of governance: Festschrift zu Ehren von Eric Stein* (Nomos 1987) 230 ff.; AP Komninos, *EC Private Antitrust Enforcement* (n 9) 8.

[32] B Leucht and M Marquis, 'American Influences on EEC Competition Law: Two Paths, How Much Dependence?' in KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013).

[33] C Harding and J Joshua, *Regulating Cartels in Europe* (OUP 2010) 94-8.

[34] DJ Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (OUP 2001) 336.

and its long-term economic prosperity.[35] Therefore, the political leaders of France, Germany, Italy, Belgium, Netherlands and Luxembourg wanted to establish a 'legal community' to regulate and balance the market power across Europe.[36]

Jean Monnet, a big personality during the initial stage of European integration, mainly shaped the principles of the ECSC-Treaty and its competition law provisions.[37] His main challenge was to balance German ordoliberalism and the French state focused approach.[38] He delegated the task of drafting such provisions to Robert Bowie, a professor of antitrust law at Harvard University.[39] This is one of the reasons why European competition law could make use of the US experience in competition law. Although the draft of the competition law provisions of the ECSC were commented on and reviewed by the US, the role of the US was not disclosed as much as possible to prevent the claim that the European project would be controlled by the US.[40]

Notably, these were the first supranational competition law regulations providing significant regulation on cartels.[41] The ECSC-Treaty provided a regulatory scheme for the protection of competition on the European market in Art 65 but through Arts 58, 61 and 63 it also offered the opportunity to organise cartel-like agreements through a public authority (the so-called High Authority).[42] The public enforcement of the provisions through the imposition of fines by the High Authority was complemented by the private nullity of the contracts. The regulations in the ECSC-Treaty can be seen as the basis of European competition law in two respects. On the one hand, the Treaty introduced an American-style prohibition on anti-competitive market behaviour and, on the other hand, it transferred the power to enforce the law mainly to a supranational authority.[43]

The Treaty of Rome was signed five years later, and the European Economic Community (EEC) was established on the 1st January 1958. Even though there had been no significant activity from the High Authority in terms of enforcing the competition law provisions of the ECSC, the competition policy was seen as an integral part of the project of a European Common Market.[44] The European

[35]Ibid 335.

[36]G Bebr, 'The European Coal and Steel Community: A Political and Legal Innovation' (1953) 63 YaleLRev 1.

[37]DJ Gerber (n 34) 337.

[38]SM Ramírez Pérez, 'The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]' in KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 24 ff.

[39]DJ Gerber (n 34) 338.

[40]Ibid.

[41]CD Edwards, *Control of Cartels and Monopolies: An International Comparison* (Oceana Pub 1967) ch 15; G Bebr (n 36); DJ Gerber (n 34) 335 ff.

[42]C Harding and J Joshua (n 33) 95-6; W Friedmann and P Verloren, 'International Cartels and Combines' in W Friedmann (ed), *Anti-Trust Laws: A Comparative Symposium* (Stevens 1956) 512.

[43]C Harding and J Joshua (n 33) 96; DJ Gerber (n 34) 335.

[44]C Harding and J Joshua (n 33) 110.

Commission – the so-called *Guardian of the Treaty* – is not only a union-wide competition authority but also has direct influence on the competition law legislation of the European Union.[45]

The competition regulation in the EEC-Treaty itself contained no provisions about its enforcement. Therefore, in 1962, the first executive order was introduced by the Commission with Regulation (EEC) 17/62.[46] For the first decade of European competition law enforcement, the power to do so was centralised by the European Commission.[47] Furthermore, Regulation 17/62 established the central investigation rights of the European Commission. In Art 11 No 1 it regulated the right of the Commission to obtain all necessary information from governments, competition authorities and undertakings related to a potential breach of the European competition law provisions. In Arts 13, 14 and 19, the Regulation established direct investigation and hearing rights of the Commission, and in Art 15 there is a penalty clause for supplying incorrect information. Additionally, the ECJ decided in the mid-1970s that Arts 85(1) and 86, the central provisions of European competition law, had direct effect on the citizens (and undertakings) of the European Community.[48] In this way, the ECJ established a dual enforcement mechanism because it declared the European provisions applicable by the national courts of the Member States as well as the European Commission.[49]

Almost 14 years after the establishment of the EEC, the Treaty of Amsterdam reorganised the legal structure of the treaty but it did not modify the central provisions of European competition law. The central innovation of the 1992 single market program was the introduction of a union-wide merger regulation.[50] Even more influential was the replacement of Regulation 17/62 with Regulation 1/2003 because the new Regulation mainly reordered the competition law enforcement and extended the dual public enforcement of the European provisions by the European Commission and the national competition authorities. Additionally, Regulation 1/2003 specified the rights of the Commission in investigating breaches of Art 85 ff. EC.[51] The administrative proceedings of the actions of the European

[45]SK Schmidt, 'European Commission' in E Jones, A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 342.

[46][1962] OJ 13/204.

[47]J Goyder and A Albors-Llorens, *Goyder's EC Competition Law* (5th edn, OUP 2009) ch 5; I Maher, 'Competition Law and Intellectual Property Rights: Evolving Formalism' in G de Burca and P Craig (eds), *The Evolution of EU Law* (OUP 1999) 597-624; I Maher, 'Competition Policy' in E Jones, A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 442.

[48]Case 127-73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECR 313; Case 155-73 *Giuseppe Sacchi* [1974] ECR 409.

[49]C Harding and A Sherlock, *European Community Law: Text and Materials* (Longman 1995) 410.

[50]I Maher, 'Competition Policy' (n 47) 442.

[51]MJ Frese, *Sanctions in EU Competition Law* (Hart Pub 2014) 123-4.

Commission in competition law are based on Regulation 773/2004. However, since the mid-1990s European competition policy has been characterised by a hybridity[52] of competition law.[53] This means that European competition policy has made use of legal formalism on the one hand and an extensive use of soft law on the other.[54] Moreover, the central aim of competition law enforcement has shifted to greater consumer welfare.[55] Moreover, with the Treaty of Lisbon in 2009 the provisions shifted from Art 81 ff. EC to Art 101 ff. TFEU but the substantive completion rules were not changed.[56]

In summary, it can be said that the Commission has extensive enforcement powers and is also mainly involved in the legislative setting of European competition law. With reference to the basis of European competition law in the antitrust law of the US, the strong position of the European Commission (and the other national competition authorities) in public enforcement is the key difference to US competition law which is largely based on private enforcement because it lacks public enforcement authorities.

2.2.2 Effectiveness of the European leniency programmes as a reason for a weak private competition law enforcement

Beside the historical argument, an effective leniency regime could be a reason for a weak private enforcement of European Competition law. After focussing on the general system of information gathering by the European Commission, this section highlights the necessity of whistle-blowers for investigations in competition law and its theoretical framework. Finally, the section analyses leniency regimes as a protection of whistle-blowers in public enforcement and its protection limits in private enforcement. In doing so, the section outlines the developments of the leniency regimes of the German, English and European competition authorities, the general requirements for a successful leniency application and its benefits for public enforcement as well as its limits related to private enforcement.

[52]G de Burca and J Scott, 'Introduction: New Governance, Law and Constitutionalism' in G de Burca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Pub 2006) 1-12.

[53]I Maher, 'Regulation and modes of Governance in EC Competition Law: What's new in Enforcement?' (2008) 31 FordhamIntlLJ 1713.

[54]F Snyder, 'The Effective of European Law: Institutions, processes, Tools and Techniques' in T Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Chancery Law Pub 1995) 64.

[55]DB Audretsch, W Baumol and AE Burke, 'Competition Policy in Dynamic Markets' (2001) 19 IntJIndOrgan 613; DJ Gerber (n 34) 233 ff.; I Maher, 'Competition Policy' (n 47) 446.

[56]N Dunleavy, *Competition Law: A Practitioner's Guide* (Bloomsbury Professional 2010) 61.

2.2.2.1 Information gathering of the competition authorities

2.2.2.1.1 Inquisitorial system of public competition law enforcement

With reference to the organisation of the courts and the applicable procedure rules, public enforcement through administrative authorities can best be described as an inquisitorial system.[57] This characterisation is often used as opposed to the adversarial system of private enforcement.

However, the characteristics of the inquisitorial system of public competition law enforcement must not be limited to the narrow definition of a 'procedural inquisitorial system'. On the contrary, the institutionalisation of public competition law enforcement itself can be described as an 'institutional inquisitorial system'.

On the one hand, a procedural inquisitorial system is shaped by a proceeding conducted by a judge in a public inquisition or investigation of a crime in contrast to an adversarial system where judges focus on the issue of the law and procedure and act as a referee in the contest between the defence and the prosecutor.[58] Based on the Roman *Corpus Iuris Civilis* of emperor Justinian I, the procedural principle of an investigation by an official institution enables the state to reveal a crime through its own initiative. A claimant, as found in an adversarial system, or a denouncer, as found in the old tribunal court system, is not necessary. The official institution investigating the crime does not need to be the court or a part of the court.[59]

The public enforcement of European competition law by the European Commission fulfils the indicators of a procedural inquisitorial system. The Commission is authorised to request information from governments, authorities and undertakings and can investigate firms.[60] In doing so, the Commission has to consider incriminating as well as exonerating evidence.[61]

On the other hand, the analysis of an institutional inquisitorial system focuses on the organisation of the investigating and deciding institutions. An institutional inquisitorial system can be defined as a combination of the investigating and deciding authority. Even if the first connotation of an institutional inquisitorial system suggests the religious medieval Inquisition, the roots are actually in Roman and early Germanic law. Although Roman law was based on a procedural inquisitorial system, the litigation itself was shaped by private claims and organised in the manner of a civil litigation with private plaintiffs and defendants.

However, the first introduction of a full institutional inquisitorial system was the implementation in the canon law by Pope Innocent III in 1215. Because of the

[57] AP Komninos, *EC Private Antitrust Enforcement* (n 9) 225-6.

[58] TL Kubicek, *Adversarial Justice: America's Court System on Trial* (Algora Pub 2006) 48.

[59] The organisation of the institutions is more a question of the Institutional Inquisitorial System.

[60] C Harding and A Sherlock (n 49) 139; D Edward and R Lane, *European Union Law* (Edward Elgar 2014) at para 13.89.

[61] N Dunleavy (n 56) 472.

morally doubtful success in the prosecution of heretics and other branches of canon law, secular courts adopted the system. In the Holy Roman Empire, the institutional inquisitorial system was implemented in the criminal court system by the *Constitutio Criminalis Bambergensis* (1507) and the *Constitutio Criminalis Carolina* (1532).

The key points of the medieval inquisitorial system were the unity of prosecutor and judge as well as the unity of investigation and main proceedings and therefore the repeal of every procedural separation of powers.[62] The accused had no right to be heard in the court and its participation in the proceeding was restricted by the arbitrariness of the court.[63]

Even though in modern times the institutional inquisitorial system has been replaced by a system of power separation between a (public) prosecutor and judge,[64] the institutional inquisitorial system is still the leading system of administrative fine proceedings and, therefore, of the public enforcement of the European Commission and the competition authorities of the Member States.[65] However, in contrast to the historical inquisitorial system, the accused has a right of defence and no torture is used to force confessions.[66]

2.2.2.1.2 Regulation of Commission's investigating power

As mentioned above, the European Commission has the power to investigate breaches of Art 101 or 102 TFEU. The central regulation about the investigation rights is Regulation (EC) 1/2003.[67] The most important actions[68] of the Commission are regulated in Art 18 (right to request information), Art 19 (right to take statements) and Art 20 (right to investigate, i.e. to dawn raids). In addition to the formal investigation powers, the Commission can gather information through complaints (Art 7) Art 9 and 10 proceedings, information exchange with national competition authorities (Art 12) as well as in administrative proceedings according to Art 27. It is also possible for the Commission to gather information unofficially.[69]

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[62] M Vallerani, *Medieval Public Justice* (SR Blanshei tr, CUoA Press 2012) 241-6.

[63] Ibid 231.

[64] Firstly replaced in Electorate of Saxony in 1770 and finally in the entire Holy Roman Empire by the introduction of the *code d'instruction criminelle* of the French code of criminal procedure by Napoléon Bonaparte in 1808.

[65] Case T-7/89 *SA Hercules Chemicals NV v Commission of the European Communities* [1992] 4 CMLR 84 (CFI) at 100-1 by AG Vesterdorf.

[66] See in detail G Miersch, 'Vorbemerkung Art. 17' in E Grabitz and M Hilf (eds), *Das Recht der Europäischen Union* (40th edn, CH Beck 2009) at paras 17-29.

[67] Recitals 23 and 24 of Regulation (EC) 1/2003.

[68] N Dunleavy (n 56) 473.

[69] G-K de Bronett, 'VO 1/2003, Vor Art. 17' in H Schröter et al (eds), *Europäisches Wettbewerbsrecht* (2nd edn, Nomos 2014) at para 2.

The central aim is to empower itself to gather the necessary information[70] and evidence[71] about a possible breach of Art 101 or 102 TFEU.

In practice, the most important vehicle that the Commission has to gather information is the requests for information under Art 18 Regulation (EG) 1/2003.[72] The reason for the preference for using the information request in contrast to, for example, formal interviews of Art 19, is the possibility of sanctioning for incorrect or insufficient information.[73] They are also less time-consuming than the investigation procedures of Art 20 or 21.[74] With reference to Art 337 TFEU and Art 18 Regulation (EG) 1/2003, the Commission is entitled to require 'all necessary information' from an undertaking from a set time period.[75] If there is no response or the undertaking delivers the wrong information, the Commission can impose fines of up to one per cent of the annual turnover (Art 23) or daily penalty payments of up to five per cent of the daily turnover (Art 24). However, the non-response of an undertaking cannot be used as evidence of a breach of Art 101 or 102 TFEU.[76]

The second most important investigation vehicles of the Commission are inspections or dawn raids. With reference to Art 20 of Regulation (EG) 1/2003, the Commission has the right to conduct 'all necessary inspections' of undertakings. In doing so, the officials of the Commission and other authorised accompanying persons (e.g. officials of national competition authorities assisting the Commission) can enter the premises of the undertaking and examine their books and business records, take copies and seal premises, books and records, and interview staff about facts or documents.[77] However, the Commission does not have the right to force entry onto the premises of an undertaking unless the assisting national competition authority has applied for a national search warrant.[78] The national courts are obliged to obtain such a search warrant (Arts 20(7) and 21(3)).[79]

[70] *National Panasonic (UK) Limited v Commission of the European Communities* [1980] ECR 2033 at para 21; Case 374-87 *Orkem v Commission of the European Communities* [1989] ECR 3283 at para 21; Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others* [1992] ECR I-4785 at para 18.

[71] G Miersch (n 66), vor Art. 17' at para 2.

[72] L Ortiz Blanco, *EU Competition Procedure* (3rd edn, OUP 2013) at para 7.21; S Hirsbrunner, 'VO 1/2003, Art. 18 ' in R Bechtold, W Bosch and I Brinker (eds), *EU-Kartellrecht* (3rd edn, CH Beck 2014) at para 1; S Barthelmeß and L-P Rudolf, 'VO 1/2003, Art. 18' in U Loewenheim, KM Meessen and A Riesenkampff (eds), *Kartellrecht* (2nd edn, CH Beck 2009) at para 3.

[73] J Burrichter and TT Hennig, 'VO 1/2003 Art. 18. Auskunftsverlangen' in U Immenga and E-J Mestmäcker (eds), *EU-Wettbewerbsrecht*, vol 1 (5th edn, CH Beck 2012) at para 6; no sanctioning in Art 19 proceedings (interviews), N Dunleavy (n 56) 474.

[74] S Barthelmeß and L-P Rudolf (n 72) at para 1; J Burrichter and TT Hennig (n 73) at para 7.

[75] See as well recital 23 of Regulation (EG) 1/2003.

[76] Case T-305, 306, 307, 313, 316, 318, 325, 328, 329, 335/94 *Limburgse Vinyl Maatschappij NV, et al v Commission of the European Communities* [1999] ECR II-931 at para 489.

[77] See eg Art 4(2) and (3) of Regulation (EG) 773/2004.

[78] N Dunleavy (n 56) 475.

[79] Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859; Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011.

2.2.2.2 Necessity of whistle-blowers for investigations in competition law and its theoretical framework

Although the Commission has the right to investigate a breach of Art 101 or 102 TFEU, in practice it is quite difficult to recognise a breach of competition law and to find evidence for it. The most difficult task for the competition authorities is the disclosure of a breach of Art 101 TFEU by undertakings forming a cartel.[80] With reference to the proceedings of the European Commission from September 2006 to June 2014, approximately every fine proceeding is based on a leniency application. In 2005-2014, the Commission imposed fines in 63 cases on 397 undertakings. This is a relation of approx. 6.31 undertakings per case. From September 2006 to June 2014, the Commission imposed fines on 299 undertakings and, therefore, ca. 47 cases. In the same period, the Commission received 46 applications of immunity.[81]

Cartels are coalitions of adversaries of several undertakings who have joined together to breach competition law, for instance by a price agreement.[82] This is the reason why the European Commission introduced a leniency programme. Since Julius Cesar, it has been common practice to break up such a coalition of adversaries by playing members off against each other (*divide et impera*).[83] Even nowadays:

> ... it is very rare that the EC or a national authority discovers cartels itself: if you look back on the ... [year 2010], all of the cases the EC adopted were via immunity applications.[84]

The basic idea behind leniency programmes in competition law is to destroy the trust between the members of the cartel.[85] A cartel needs a certain degree of trust between its members, and the competition authorities give an incentive to betray the other members of the cartel and disclose the breach of competition law by promising immunity from fines.[86] Theoretically, this approach is based on the

[80] C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161; Commision, *XXXIst Report on Competition Policy, 2001* (Brussels/Luxembourg, 2002) at para 36; K Hüschelrath, 'How Are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements' (2010) 1 JECL&P 522.

[81] For the basis of the data see 2.1.2.

[82] *Graphite electrodes* (COMP/E-1/36490) Commission Decision number 2002/271/EC [2002] OJ L100/1 at paras 47 and 59; JM Griffin, 'An inside view at a cartel at work: Common characteristics of international cartels' in A Sundberg (ed), *Fighting cartels – why and how?* (Swedish Competition Authority 2001) 29, 37 ff.

[83] G Spagnolo, *Divide et Impera: Optimal Leniency Programmes, Discussion Paper No 4840* (CEPR 2004) 2.

[84] Johan Ysewyn, cited by C Edmond, 'From whom the whistle blows' *Legal Week* (London, 22 September 2011).

[85] G Dannecker and J Biermann, 'VO 1/2003, Art. 23, Geldbußen' in U Immenga and E-J Mestmäcker (eds), *Wettbewerbsrecht*, vol 2 (5th edn, CH Beck 2012) at para 232; CT Feddersen, 'Art 23 VO(EG) 1/2003' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (30th (October 2009) edn, CH Beck 2009) at 236.

[86] W van Weert and M Maier, 'European Union' in J Buhart (ed), *Leniency Regimes: Jurisdictional comparisons* (4th edn, Sweet & Maxwell 2012) 123-4.

'prisoner's dilemma',[87] a special form of Game Theory and one which is also used in the fight against organised crime.[88]

In general, in Game Theory, a situation is modelled as a game where the decision making of some players is influenced by the decisions of other players of the game. With reference to the analysis of the behaviour of a *homo oeconomicus*, Game Theory tries to define rational ways of behaving in social conflict situations. One example of such a game setting is the prisoner's dilemma. Albert W Tucker was the first to describe it as a situation where two men are found guilty of a joint breach of the law with a maximum penalty of four years in prison. The police question them separately and so they have no possibility of communicating with each other. The police tell each of the prisoners that if only one of them were to confess then the confessor would be rewarded with one year whereas the other prisoners would get the maximum penalty of four years. On the other hand, if both prisoners were to confess then each of them would be imprisoned for two years. However, if both kept their side of the bargain and did not confess, they can assume that the police would find no evidence to arrest either of them.[89]

Transferred to a competition law scenario, the decision making of the members of a cartel is affected by the possibility of immunity or the reduction of fines if they confess and cooperate with the competition authorities to help to uncover and collect evidence of the breach of competition law.

To find a solution to the described game setting, it is important to look at the decisions of the players and to find a pair of decisions where it is a disadvantage to the players and hence not rational to choose another strategy, i.e. Nash Equilibrium.[90] In this given game, the Nash Equilibrium is if both prisoners choose to confess or not to confess because in any other situation it is better for one of them to change his decision. In those situations, both of them will be arrested for two years or not at all, and hence the penalty for both together is four or zero years. Every other situation of confessing and not confessing would result in a higher overall penalty (collective solution). The Nash Equilibrium is also pareto optimal because it is not possible to improve the situation of one prisoner unless the situation of the other prisoner deteriorates.[91] However, for the individual prisoner who does not know how the other prisoner is acting, it can be better to confess independently of the decision of the other prisoner. For him, the situation is the following: if only he confesses then he will get one year, if both prisoners confess then he will get two years. In that scenario, the confessing prisoner avoids the maximum penalty of four years. The

[87] CG Veljanovski, *Economic Principles of Law* (CUP 2007) 262.

[88] P Buccirossia and G Spagnolo, *Leniency Policies and Illegal Transactions, Discussion Paper No 5442* (CEPR 2006) 1.

[89] AW Tucker, 'The Mathematics of Tucker: A Sampler' (1983) 14 Two-YearCollMathJ 228.

[90] JF Nash, 'Non-Cooperative Games' (1950) 54 AnnMath 286; JF Nash, 'Equilibrium points in n-person games' (1950) 36 ProcNatAcadSci 48.

[91] M Martorana, 'Pareto Efficiency' (2007) 11 Region Focus 8.

only rational consideration he has to make is the probability of the situation where both prisoners do not confess. Even if we assume a consistent probability of both prisoners confessing or not confessing, the combined probability for the setting not confess/not confess is 25% and the probability for a setting where at least one of the prisoners confesses is all together 75%.[92] Therefore, it is always individually better for the prisoner to confess (individual solution). Although, this solution is not pareto optimal, both players have no reason to differ from its individual Nash Equilibrium and not confess.

In a competition law context, it is therefore always preferable for a member of a cartel to cooperate with the competition authorities and to apply for a leniency programme. That is also the reason why the Leniency Policy 1993 of the Antitrust Division of the US Department of Justice[93] has been described as the most significant innovation in antitrust policy and the reason why the number of discovered cartels has substantially increased.[94]

Besides the investigation effect, leniency regimes have a deterrent effect too. If a member of cartel cannot be sure that the other members of the cartel are not cooperating with the competition authorities, they are less likely to join a cartel.[95]

2.2.2.3 Leniency regimes as a protection for whistle-blowers in public enforcement and its protection limits in private enforcement

2.2.2.3.1 Developments of the leniency regimes under German, English and European law

Although the first leniency regime in competition law was established in the US in 1979,[96] the example which inspired the leniency regimes in Europe was the 'Leniency Policy' of the US Department of Justice, Antitrust Division (DoJ) 1993. That leniency regime is a key part of the enforcement system of US antitrust law. The enforcement mechanisms in this policy are shaped around three major

[92]Mathematical computation: *Decision A*: 'confess' (0,5) or 'not confess' (0,5); *Decision B*: 'confess' (0,5) or 'not confess' (0,5). Combined probabilities: 'confess' + 'confess' = $0{,}5 \cdot 0{,}5 = 0{,}25$; 'confess' + 'not confess' = $0{,}5 \cdot 0{,}5 = 0{,}25$; 'not confess' + 'confess' = $0{,}5 \cdot 0{,}5 = 0{,}25$; 'not confess' + 'not confess' = $0{,}5 \cdot 0{,}5 = 0{,}25$; Overall probability for at least one 'not confess' = $0{,}5 + 0{,}5 + 0{,}5 = 0{,}75$.

[93]<http://www.justice.gov/atr/public/guidelines/0091.pdf> (accessed 01/03/2016); DC Klawiter, 'Corporate Leniency in the Age of International Cartels: The American Experience' (2000) 14 Antitrust 13.

[94]M Blatter, W Emons and S Sticher, *Optimal leniency programs when firms have cumulative and asymmetric evidence, Discussion Paper No 10106* (CEPR 2014) 1; More critically on the positive effect of a leniency programme G Spagnolo (n 83) 2.

[95]Bundeskartellamt, *Erfolgreiche Kartellverfolgung: Nutzen für Wirtschaft und Verbraucher* (Bonn 2011) 11; C Seitz, 'Public over Private Enforcement of Competition Law?' [2012] GRUR-RR 137, 139.

[96]CT Feddersen (n 85) at para 237.

principles.[97] Firstly, the competition authority should impose high fines. Secondly, cartel members must realise that there is a risk of discovery and prosecution for the breach of competition law. Thirdly, leniency regimes must be as transparent as possible to allow the members of the cartel to calculate the consequences of a leniency application.[98]

The first leniency regime in Europe was introduced in 1996 by the European Commission.[99] However, even before the first formal adoption of a Leniency Notice, the Commission was always content to cooperate with whistle-blowers over a breach of competition law and to consider the cooperation by calculating the imposed fines.[100] Even the CFI confirmed the practice of the Commission and established a legal framework by deciding that it was not lawful only to reduce the fines by 10 percent if an undertaking fully cooperated with the Commission, and it would be much more difficult to investigate for the Commission without the information of that undertaking.[101]

On the 18th July 1996 the European Commission published the first formal 'Commission Notice on the non-imposition or reduction of fines in cartel

[97] SD Hammond, 'Cornerstones of an effective leniency program' *(ICN Workshop on Leniency Programs, Sydney, Australia*, 22nd/23rd November 2004) <http://www.justice.gov/atr/public/speeches/206611.htm> accessed 01/03/2016; OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (OECD 2002) 7.

[98] SD Hammond, 'Dettecting and deterring cartel activity through an effective leniency program' *(International Workshop on Cartels, Brighton*, 21st/22nd November 2000) <http://www.justice.gov/atr/public/speeches/9928.htm> accessed 01/03/2016; M Jephcott, 'The European Commission's New Leniency Notice – Whistling the right tune' (2002) 23 ECLR 378, 384; JD Medinger, 'Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence' (2003) 52 EmoryLJ 1439, 1458; P Hetzel, 'Die Vielzahl kartellrechtlicher Kronzeugenregelungen als Hindernis für die Effektivität der europäischen Kartellbekämpfung' [2005] EuR 735, 735-6.

[99] Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4; W van Weert and M Maier (n 86) 123-4; G Murray, 'European Union' in SJ Mobley and R Denton (eds), *Global Cartels Handbook* (OUP 2011) 188; P Chappatte and P Walter, 'European Union' in CA Varney (ed), *The Cartels and Leniency Review* (2nd edn, Law Business Research 2014) 104-6.

[100] *Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin* (IV29491) Commission Decision number 81/969/EEC [1981] OJ L353/33; *National Panasonic* (IV/30070) Commission Decision number 82/853/EEC [1982] OJ L354/28; *Polistil/Arbois* (IV/30658) Commission Decision number 84/282/EEC [1984] OJ L136/9; *Agreements and concerted practices in the flat-glass sector in the Benelux countries* (IV/30988) Commission Decision number 84/388/EEC [1984] OJ L212/13; *Zinc producer group* (IV/30350) Commission Decision number 84/405/EEC [1984] OJ L220/27 at para 104; *Wood pulp* (IV/29725) Commission Decision number 85/202/EEC [1985] OJ L85/1 at paras 148 and 410; *Sperry New Holland* (IV/30839) Commission Decision number 85/617/EEC [1985] OJ L376/21 at para 68; *British Dental Trade Association* (IV/31593) Commission Decision number 88/477/EEC [1988] OJ L233/15 at para 54; *Viho/Toshiba* (IV/32879) Commission Decision number 91/532/EEC [1991] OJ L287/39 at paras 28-9; *French-West African shipowners' committees* (IV/32450) Commission Decision number 92/262/EEC [1992] OJ L134/1 at para 74; *Viho/Parker Pen* (IV/32725) Commission Decision number 92/426/EEC [1992] OJ L233/27 at para 24.

[101] Case T-13/89 *Imperial Chemical Industries plc v Commission of the European Communities* [1992] ECR II-1021 at para 392-3; Commision, *XXIInd Report on Competition Policy, 1992* (Brussels/Luxembourg, 1993) at para 313.

cases' (Notice 1996).[102] Although the Notice was highly criticised, it became an important mechanism in competition law enforcement.[103] On the other hand, the Notice resulted in a self-commitment of the European Commission in its leniency practice.[104] Even though 80 undertakings applied for leniency during the five year application period of the Notice 1996,[105] the success of the Notice is not universally proclaimed. On the one hand, the non-imposition or immunity of fines constituted a miniscule minority.[106] On the other hand, the vague criteria of the Notice and the wide discretion of the Commission resulted in uncertainty for the undertakings and, thus, in a low incentive effect.[107] Therefore, many commentators concluded that the positive effects of the Notice on the investigation of cartels and the work relief of the Commission were insufficient.[108]

Considering the experiences in applying the Notice 1996, the European Commission adopted a new, fundamentally revised Leniency Notice on the 14th February 2002.[109] The main objective was to inject more transparency and predictability into the leniency proceeding.[110] As a result, the Leniency Notice 2002 regulated explicitly the requirements and proceedings for a successful leniency

[102][1996] OJ C207/4.

[103]JD Hunter and S Hornsby, 'New incentives for "whistle-blowing": will the E.C. Commission's notice bear fruit?' (1997) 18 ECLR 38; H Dieckmann, '§ 46 – Geldbußen und Zwangsgelder' in G Wiedemann (ed), *Handbuch des Kartellrechts* (1st edn, CH Beck 1999) at paras 18 ff.; A Weitbrecht, 'Die Kronzeugenmitteilung in EG-Kartellsachen' [1997] EuZW 555.

[104]Case T-322/01 *Roquette Frères SA v Commission of the European Communities* [2006] ECR II-3137 at para 223; Case T-59/02 *Archer Daniels Midland Co. v Commission of the European Communities* [2006] II-3627 at para 409; Joined cases T-101/05 and T-111/05 *BASF AG and UCB SA v Commission of the European Communities* [2007] ECR II-4949 at para 89; LMM Brokx, 'A patchwork of leniency programmes' (2001) 22 ECLR 35.

[105]M Sura, 'Art. 23 VO(EG) 1/2003' in E Langen and H-J Bunte (eds), *Kartellrecht*, vol 2 (14th edn, Luchterhand 2014) at para 55; Commision, *XXXIst Report on Competition Policy* (n 80) at para 37.

[106]Full immunity was granted by the Commission in *Luxembourg Brewers* (COMP/37800/F3) Commission Decision number 2002/759/EC [2001] OJ L253/21 at para 108; *Vitamins* (COMP/E-1/37512) Commission Decision number 2003/2/EC [2003] OJ L6/1 at para 742; *Methionine* (C37519) Commission Decision number 2003/674/EC [2003] OJ L255/1 at para 340; *Methylglukamin* (COMP/E-2/37978) Commission Decision number 2004/104/EC [2004] OJ L38/18 at para 272; *Flood flavour enhancers* (COMP/C37671) Commission Decision number 2004/206/EC [2004] OJ L75/1 at para 287; *Carbonless paper* (COMP/E-1/36212) Commission Decision number 2004/337/EC [2004] OJ L115/1 at para 443; *Electrical and mechanical carbon and graphite products* (C38359) Commission Decision number 2004/420/EC [2004] OJ L125/45 at para 13; *Copper Plumbing tubes* (C38069) Commission Decision number 2006/485/EC [2006] OJ L192/21 at para 39.

[107]M Jephcott (n 98) 380 ff.; M Klusmann, 'Internationale Kartelle und das Europäische Leniency-Programm aus Sicht der Verteidigung – Kritik nach fünf Jahren Anwendungspraxis' [2001] WuW 820, 824 ff.; U Soltész, 'Bußgeldreduzierung bei Zusammenarbeit mit der Kommission in Kartellsachen – "Kronzeugenmitteilung"' [2000] EWS 240, 244 ff.; A Weitbrecht (n 103) 558.

[108]A Winterstein, 'Art. 81 – Fallgruppen Marktabsprachen' in H Schröter, T Jakob and W Mederer (eds), *Europäisches Wettbewerbsrecht* (1st edn, 2003) at paras 106-7.

[109]Commission notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.

[110]Ibid at para 5; Commision, *XXXIst Report on Competition Policy* (n 80) at para 38; Commission, *XXXVth Report on Competition Policy, 2005* (Brussels/Luxembourg, 2006) at paras 174 ff.

application.[111] In contrast to the Notice 1996, the Commission focused more on investigation of unknown cartels and less on cooperation in the administrative proceeding.[112]

In 2006 the European Commission amended its Leniency Notice[113] to reduce the weak points of the Leniency Notice 2002 and to concretise the requirements for a successful leniency application.[114] A new instrument in the Leniency Notice 2006 is the 'marker system'. Now, it is possible for an undertaking to apply early for a marker to save its position in the queue of applicants and to hand in the necessary evidence later.[115] However, this system only applies to an application for full immunity from fines.[116]

All Member States of the European Union except Malta[117] concurrently implemented a leniency regime.[118] Although, the 'Commission's Notice on co-operation within the Network of Competition Authorities'[119] sets out that the European Commission is usually the best place to handle pan-European cases, or even cases with more than three jurisdiction involved, the application procedure for leniency in the EU is no 'one-stop-shop' and, therefore, applications for national leniency programmes should be necessary.[120] As a matter of soft-law harmonisation, the European Competition Network (ECN), a network of the national competition authorities and the European Commission, established shared principles generally followed by all the leniency programmes of the Member States.[121]

Based on the published general principles of leniency programmes by the European Competition Authorities (ECA) – another albeit informal forum of the national competition authorities of the European Union, the European Commission

[111] C Nowak, 'Art 23 VO(EG) 1/2003' in U Loewenheim, KM Meessen and A Riesenkampff (eds), *Kartellrecht* (2nd edn, CH Beck 2009) at para 37.

[112] M Sura (n 105) at para 54.

[113] [2006] OJ C298/17.

[114] C Nowak, 'Art 23 VO(EG) 1/2003' (n 111) at para 37.

[115] MJ Reynolds and DG Anderson, 'Immunity and leniency in EU cartel cases: current issues' (2006) 27 ECLR 82, 85.

[116] M Dreher, 'Kartellrechtliche Kronzeugenprogramme und Gesellschaftsrecht' [2009] ZWeR 397; E Panizza, 'Ausgewählte Probleme der Bonusregelung des Bundeskartellamts vom 07.03.2006' [2008] ZWeR 58, 85.

[117] The Maltese Competition Authority (Office for Competition) published on 14 June 2013 a draft for a leniency programme based on the Model Leniency Programmes: <http://www.mccaa.org.mt/loadfile/d545ac5a-c7d3-4c61-a6ac-82f8f795fba4> accessed 01/03/2016.

[118] See <http://ec.europa.eu/competition/ecn/leniency_programme_nca.pdf> accessed 01/03/2016; Croatia is not in the list because it became a Member State in 2013 but has a Leniency Regime since 2010: Regulation on immunity from fines and reduction of fines [2010] OG 129, accessible under <http://www.aztn.hr/uploads/documents/eng/documents/legislation/Regulation_on_immunity_from_fines_and_reduction_of_fines_CCA.pdf> accessed 01/03/2016.

[119] [2004] OJ C101/43.

[120] W van Weert and M Maier (n 86) 123-4; G Murray (n 99) 188; P Chappatte and P Walter (n 99) 104-6.

[121] Commision, 'Antitrust: European Competition Network publishes report on leniency convergence' MEMO/09/456 <http://europa.eu/rapid/press-release_MEMO-09-456_en.pdf> accessed 01/03/2016.

and the competition authorities of the EFTA States – from 2001,[122] the OECD set out the key principles of a successful leniency regime: firstly, the granting of full immunity for the first applicant and grading of leniency for the next applications with a distinctive gap for full immunity to encourage applications and, secondly, maximum transparency and confidentiality.[123]

In 2006 the ECN published its first Model Leniency Programme.[124] A revised version of the Model Leniency Programme was published in 2012.[125] Its main purpose was to introduce a harmonised summary leniency application if the undertaking had already applied for the leniency programme of the Commission and to harmonise the requirements for a successful leniency application. However, the national competition authorities could apply more generous policies.[126] Moreover, the Model Leniency Programme influenced the amendments of the leniency policy of the European Commission.[127]

In Germany, the Federal Cartel Office (FCO)[128] implemented its first Leniency Programme in 2000.[129] The latest amendment of the Leniency Programme in 2006 reflected the amended Leniency Regime of the European Commission and the Model Leniency Programme of the ECN.[130]

At the time of the first FCO Leniency Programme, the Office of Fair Trading (OFT) of the United Kingdom published its own leniency policy as part of its penalty guidance.[131] A revised guidance and leniency policy was published on 21st December 2004.[132] With the Leniency Guidance 2008 (OFT 803), the OFT refined its practice on how to handle leniency and immunity applications. The latest

[122] 'Principles for Leniency Programmes' Directors' General of European Competition Authorities meeting in Dublin on 3 and 4 September 2001 <http://www.tca.ie/images/uploaded/documents/2001-09-04\%20eca\%20leniency\%20principles.pdf> accessed 01/03/2016.

[123] OECD (n 97) 22 ff.

[124] <http://ec.europa.eu/competition/ecn/model_leniency_en.pdf> accessed 01/03/2016.

[125] <http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf> accessed 01/03/2016.

[126] W van Weert and M Maier (n 86) 124.

[127] G Dannecker and J Biermann (n 85) at para 243.

[128] Bundeskartellamt, BKartA.

[129] Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme – of 7 March 2006, <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice\%20-\%20Leniency\%20Guidelines.pdf?__blob=publicationFile\&v=5> accessed 01/03/2016.

[130] M Wirtz, S Möller and E Eden, 'Germany' in J Buhart (ed), *Leniency Regimes: Jurisdictional comparisons* (4th edn, Sweet & Maxwell 2012) 171; N Kredel and S Kiani, 'Germany' in SJ Mobley and R Denton (eds), *Global Cartels Handbook* (OUP 2011) 235-6.

[131] S Wisking and K Dietzel, 'United Kingdom' in J Buhart (ed), *Leniency Regimes: Jurisdictional comparisons* (4th edn, Sweet & Maxwell 2012) 357-8.

[132] OFT's guidance as to the appropriate amount of a penalty, OFT 423, September 2012 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf> accessed 01/03/2016.

amended Leniency Guidance was introduced in 2013.[133] On 1st April 2014 the OFT closed and passed its responsibilities to the Competition and Markets Authority.

2.2.2.3.2 General requirements for a successful leniency application

Because of the implementation of the ECN Model Leniency Regime, the general requirements for a successful leniency application are duplicated in national leniency programmes and the programme of the European Commission. As such, it is only necessary to examine the requirements for an application under the Commission's Notice.

The fundamental condition for a successful leniency application is regulated in para 8 of the Commission's Notice. The fulfilment of the requirements of its first alternative in para 8a leads automatically to full immunity from fines. It requires that the applying undertaking is the first to provide information and evidence about a cartel which enables the Commission to carry out a targeted inspection and that the Commission does not already have enough evidence to start such an investigation or has already started an investigation.[134] For this purpose, the undertaking has to provide a so-called corporate statement.[135] If the undertaking cannot provide enough evidence to carry out a target inspection but can provide information and evidence to uncover an infringement of Art 101 TFEU, the second alternative of para 8 provides another possibility to get fine immunity. This is in contrast to para 8a which requires that no other undertaking gets fine immunity.[136] As mentioned above, since the Leniency Programme 2006 it is possible for the undertaking to apply for a marker to save its position in the queue and provide evidence later.

If the undertaking cannot fulfil the fundamental condition because it is not the first to provide evidence, it can apply for a reduction in the fine.[137] For this, the undertaking has to provide evidence that adds substantial value to the Commission's investigation.[138]

In addition, the applying undertaking has to cumulatively fulfil the following four conditions. The Commission requires the undertaking to cooperate 'genuinely,

[133]Applications for leniency and no-action in cartel cases – OFT's detailed guidance on the principles and process, OFT 1495 July 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf> accessed 01/03/2016.

[134]Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C298/17 at para 10.

[135]Ibid at para 9.

[136]Ibid at para 11.

[137]Ibid at paras 23-30.

[138]Ibid at paras 24-5; Case T-347/94 *Mayr-Melnhof Kartongesellschaft mbH v Commission of the European Communities* [1998] ECR II-1751 at paras 309 and 330; Case T-48/02 *Brouwerij Haacht NV v Commission of the European Communities* [2005] ECR II-5259 at para 104; Case T-30/05 *William Prym GmbH & Co KG and Prym Consumer GmbH & Co KG v Commission of the European Communities* [2007] ECR II-107 at para 251; Joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré SA and Others v Commission of the European Communities* [2007] ECR II-947 at paras 677 and 716.

fully, on a continuous basis and expeditiously' in the administrative proceeding of the Commission.[139] Generally, it is not enough for the undertaking to do only what it has to do under the investigation rights of the Commission.[140] The Commission requires that the undertaking terminates its involvement in the cartel[141] and that it has not forced other undertakings to form or carry on the cartel.[142] Moreover, the applicant must not have destroyed, falsified or concealed evidence nor disclosed the fact or any of the content of its application except to other competition authorities.[143]

In applying the Leniency Programme, the Commission has to treat every applicant equally.[144] That does not mean that the Commission has to grant every undertaking the same benefits but it does have to treat every undertaking which provides the same evidence at the same time equally.[145] As set out in Art 31 of the Regulation 1/2003, the European Court of Justice can review the whole proceeding of the Commission.[146]

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[139]Commission Notice on Immunity 2006 at para 12a.

[140]Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities* [2005] ECR I-5425 at para 395; Case C-301/04 P *Commission of the European Communities v SGL Carbon AG* [2006] I-5915 at para 68; Case T-38/02 *Groupe Danone v Commission of the European Communities* [2005] ECR II-4407 at para 451; *Brouwerij Haacht v Commission* at para 106; Joined cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and Others v Commission of the European Communities* [2006] II-5169 at para 530; *BASF and UCB v Commission* at para 92.

[141]Commission Notice on Immunity 2006 at para 12b.

[142]Ibid at para 13.

[143]Ibid at para 12c.

[144]Joined cases T-45/98 and T-47/98 *Krupp Thyssen Stainless GmbH and Acciai speciali Terni SpA v Commission of the European Communities* [2001] ECR II-3757 at para 237; Case T-31/99 *ABB Asea Brown Boveri Ltd v Commission of the European Communities* [2002] ECR II-1881 at paras 65 ff.; Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd and Others v Commission of the European Communities* [2004] II-1181 at para 394; Joined cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp, formerly NKK Corp, Nippon Steel Corp, JFE Steel Corp and Sumitomo Metal Industries Ltd v Commission of the European Communities* [2004] II-2501 at para 411 ff.; *Brouwerij Haacht v Commission* at paras 109 ff.; *Bolloré v Commission* at para 689; Case T-410/03 *Hoechst GmbH v Commission of the European Communities* [2008] II-881; CT Feddersen (n 85) at paras 327-8; C Seitz, 'Grundsätze der ordnungsgemäßen Verwaltung und der Gleichbehandlung – Sanktionsreduzierung wegen Nichtbeachtung der im Gemeinschaftsrecht geltenden Verfahrensgarantien durch die Europäische Kommission' [2008] EuZW 525, 527-8.

[145]Case T-48/98 *Compañia española para la fabricación inoxidables, SA (Acerinox) v Commission of the European Communities* [2001] ECR II-3859 at para 140; *Krupp Thyssen Stainless v Commission* at para 245; Case T-44/00 *Mannesmannröhren-Werke AG v Commission of the European Communities* [2004] ECR II-2223 at paras 263 ff.; *Groupe Danone v Commission* at paras 453-4.

[146]Case T-224/00 *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities* [2003] II-2597 at para 310; CT Feddersen (n 85) at paras 322 ff.; G Dannecker and J Biermann (n 85) at para 248; R Bechtold, 'Zum Ermessen der Kommission in Bußgeldverfahren' [2009] WuW 1115.

2.2.2.3.3 Benefits and protection limits of the leniency regimes

The central benefit of a successful leniency application is the immunity or at least reduction in the fines imposed by the competition authorities. Although the leniency regime of the European Commission does not cover immunity from individual criminal liability or penalty – because European law does not impose any penalties on individuals – national leniency regimes can provide regulations about criminal immunity.[147]

Consequently, European law and the Commission's Leniency Notice does not protect the undertaking from any civil damage claims based on the infringement of Art 101 TFEU because the civil damage claim is not based on European law but rather on national law.[148] On the other hand, the leniency regimes of both the English and the German competition authorities have no effect and do not protect from the civil enforcement of competition law by civil damage claims (or even criminal investigations).[149]

Therefore, it is a crucial risk for leniency applicants to be claimed by victims in civil damage claims. A too low protection of the documents of a leniency applicant leads therefore to a lower willingness of the members of a cartel to apply for leniency and thus to provide information and evidence for the infringement of Art 101 TFEU to the Commission or national competition authority.[150] Consequently, the enforcement framework has to provide a minimum protection of the leniency documents to enable an effective public enforcement of competition law.

2.2.2.4 Conclusion

In summary, it can be stated that the effectiveness of the European leniency programmes is a reason for weak private competition law enforcement. The information gathering of competition authorities within public enforcement proceedings is based on a procedural and institutional inquisitorial system. The given rights of the European Commission make its fine proceedings an effective information gathering system and thus an effective way of detecting and proving an infringement of European competition law, especially Art 101 TFEU.

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[147] W van Weert and M Maier (n 86) 124-5.

[148] Commission Notice on Immunity 2006 at para 39; G Murray (n 99) 191; See chapter 4 and 5.

[149] N Kredel and S Kiani (n 130) 238; L Gomez and F Harrision, 'Global Cartels Handbook' in SJ Mobley and R Denton (eds), *Global Cartels Handbook* (OUP 2011) 621.

[150] C Canenbley and T Steinvorth, 'Kartellbußgeldverfahren, Kronzeugenregelungen und Schadensersatz – Liegt die Lösung des Konflikts »de lege ferenda« in einem einheitlichen Verfahren? ' in FIW (ed), *Wettbewerbspolitik und Kartellrecht in der Marktwirtschaft – Festschrift 50 Jahre FIW: 1960 bis 2010* (Heymanns 2010) 143 ff.; G Dannecker and J Biermann (n 85) at para 251.

Nevertheless, it has to be remarked that the Commission has to rely on members of cartels to apply for leniency and therefore to disclose a hidden infringement, i.e. cartel. On the other hand, the leniency programme is efficient because it gives psychological incentives to the members of the cartel to disclose the infringement and to obtain fine immunity. This psychological phenomenon is based on the so-called Prisoners Dilemma of the Game Theory.

On the other hand, an efficient leniency programme has to offer effective protection to its whistle-blowers. However, this protection policy is in conflict with an effective private enforcement because the private plaintiffs have to provide evidence of an infringement (see Chapter 3).

2.2.3 Conclusion

This chapter has shown how the history of competition law enforcement in Europe and the effectiveness of the European leniency programme are the main reasons for the underdevelopment of private enforcement of European competition law.

On the one hand, the extensive enforcement power of the European Commission and the meagre regulation of private enforcement, especially of private damage claims, are an outcome of the long standing tradition of public competition law enforcement in Europe. Unlike the enforcement of antitrust law in the US, and in order to distinguish European regulation from the fear of an extensive and misleading usage of private damage claims, the early lawgivers of European competition law mainly focused on public enforcement by powerful public competition authorities.

On the other hand, the European leniency programme is another crucial reason for the weak private enforcement of European competition law. It has to be acknowledged that the European Commission has to rely on whistle-blowers to detect an infringement of European competition law, especially of an infringement of Art 101 TFEU. Therefore, an effective leniency programme is necessary to protect whistle-blowers and give them incentives to betray the other members of the hidden cartel. However, the effective leniency programme could lead to overprotection, especially against private damage claims.

2.3 Necessity of private enforcement of competition law as access to justice

The previous chapter concluded that public enforcement is the common and traditional way of enforcing competition law in Europe. It also showed that the well-developed enforcement mechanisms of the competition authorities, especially the European Commission, are not only effective but also put obstacles in the way of effective private enforcement.

This leads to the question as to whether another system of private enforcement besides the administrative proceeding is needed. Often, the question is answered briefly[151] and sometimes with reference to justice and the rights of victims to claim compensation for their losses.[152] However, it is unclear whether it is possible to establish a damage claim on the basis of justice. To answer this question, it is first necessary to examine whether there is a right of damages beyond law, which arises out of the philosophical principle of justice. In particular, it is crucial to analyse what justice is within the meaning of a corrective, distributive, universal and individual justice by referring to the classical definitions of justice. Based on the distinction between distributive and corrective justice as well as universal and individual justice in the classical definition of Aristotle and the criticism and the negation of moral justice by Legal Positivism, this chapter argues in favour of a re-classification of justice based on the objectives of punishment as the central outcome of public law enforcement.

Furthermore, private enforcement of European competition law is sometimes described as a mechanism of deterrence.[153] Therefore, the chapter analyses, on the one hand, the possibility of deterrence in private enforcement and, on the other hand, the necessity of private enforcement as a corrective and a complement to public enforcement of European competition law.

2.3.1 Universal and distributive justice as the central aims of public law enforcement

2.3.1.1 Distinction between distributive and corrective justice, and universal and individual justice in the classical definition of Aristotle

It is Aristotle in his *Nicomachean Ethics* who has mainly shaped the classical definition of justice. Broadly speaking, Aristotle proclaimed a justice based on equality. The theory of justice in Aristotle's philosophy refers back to the older analysis of Plato in his theory of a just state in the *Republic*. For Plato, justice is the 'principle of doing one's own business'.[154] Therefore, justice is when everybody plays their own part in their own way for society. On the other hand, it is unjust if somebody interferes in the responsibilities of others. Transferred to a legal conflict, Plato argues that it is just if 'no one shall have what belongs to others or be deprived

[151] See Commision, 'Commission Staff Working Paper' (n 11) 7.

[152] H Stakheyeva, 'Removing obstacles to a more effective private enforcement of competition law' (2012) 33 ECLR 398, 399-400; T Eger and P Weise, 'Some limits to the private enforcement of antitrust law: a grumbler's view on harm and damages in hardcore price cartel cases' (2010) 3 GCLR 152, 154; P Nebbia, 'Damages actions for the infringement of EC competition law: compensation or deterrence?' (2008) 33 ELRev 23, 27; S Bourjade (n 8) 119.

[153] Commision, 'Commission Staff Working Paper' (n 11) 8.

[154] Plato, *Republic* (P Shorey tr, Harvard University Press 1935) IV 433b.

of his own'.[155] However, for Plato justice is merely an internal matter for a person. Thus, justice cannot be defined through relationships with other people. As such, Plato rejects the principle of *suum cuique* as a principle of justice.[156]

Based on that principle of justice, Aristotle established a definition of justice in society. His analysis is the most classical influence of the theoretical explanation of the law of damages from a moral perspective.[157] Even if the *Nicomachean Ethics*[158] and *Politics*[159] refer to separate academic departments, they can be read as a single theory of human affairs.[160] Also, Aristotle himself described the scope of both books as covering political science.[161] At the end of his *Nicomachean Ethics* he considers that the insight created by his ethical analysis certainly leads neatly into his political analysis as humans are political animals by nature.[162]

In his works, Aristotle developed his theory of special justice. In contrast to Plato, Aristotle argues that justice is not purely an internal matter but a system/institution of society. Justice is a human characteristic and refers to relationships with other people.[163] Furthermore, justice is not a pure abstract idea but a human behaviour.[164] Similarly to Plato, Aristotle generally argues that a person acts unjustly if he wants more than is due to him. Aristotle describes this as the common human urge of pleonexia; the voracious desire to own what rightfully belongs to others.

As a first step, Aristotle divides the phenomenon of justice into two main parts. On the one hand, there is the so-called universal justice which addresses the whole virtue of justice and on the other hand there is individual justice (*iustitia particularis*[165]) which refers to the individual virtue of character coordination as a part of universal justice.[166] Although there is an explanation of individual justice in chapters IV and V of the *Nicomachean Ethics* and no definition of universal

[155]Ibid IV 433e.

[156]C Schäfer, 'Gerechtigkeit' in C Schäfer (ed), *Platon-Lexikon* (Wiss Buchges 2007) 132-3.

[157]F Giglio, *The foundations of restitution for wrongs* (Hart Pub 2007) 148; E Weinrib, *The Idea of Private Law* (rev edn, OUP 2012) 56; different opinion by P Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 OJLS 203.

[158]Especially chapter V.

[159]Especially chapter III.

[160]S Salkever, 'Reading Aristotle's Nicomachean Ethics and Politics as a Single Course of Lectures: Rhetoric, Politics, and Philosophy' in S Salkever (ed), *The Cambridge Companion to Ancient Greek Political Thought* (CUP 2009) 209.

[161]Aristotle, *Nicomachean Ethics* (JAK Thomson tr, Penguin 1955) 1094a-b.

[162]Aristotle, *Politics* (H Rackham tr, Harvard University Press 1944) 1253a7-18.

[163]Aristotle, *Nicomachean Ethics* (n 161) 1129b.

[164]Ibid 1137a30.

[165]T St Aquinas, *Commentary on Aristotle's Nicomachean ethics* (R McInerny and CI Litzinger trs, Dumb Ox Books 1993).

[166]Aristotle, *Nicomachean Ethics* (n 161) V 1-2; CM Young, 'Aristotle's Justice' in R Kraut (ed), *Blackwell Guide to Aristotle's Nicomachean Ethics* (Wiley-Blackwell 2007) 181.

justice, universal justice can be seen as a collection of a number of particular virtues, including individual justice,[167] which, broadly speaking, is a justice of equality.[168]

For the purpose of a practical application of the concept of justice, it is crucial to focus on the shape of individual justice. Aristotle himself breaks up particular justice into two component parts: distributive and corrective justice. Whereas distributive justice (*iustitia distributiva*[169]) focuses on the distribution of 'honor, wealth, and other items that may be divided among those who share in a political arrangement',[170] corrective justice (*iustitia correctiva*[171]) deals with the restoration of equality between people after one party has harmed the other.[172] It is one of the main principles in Aristotle's theory that the worth of a person does not matter:

> It makes no difference whether a good man has defrauded a bad man or a bad man a good one ... the law looks only to the distinctive character of the injuries, and treats the parties as equals where one is in the wrong and the other is being wronged.[173]

Therefore, the principle of restitution only refers to one wrongdoing and to a single unequal situation. As such. it is a matter of wrongdoing if a victim of a theft reclaims his goods by stealing them from the former thief. Aristotle argues in favour of a restitution based on law and judication by courts and less of a system where the victim takes the law into his own hands.

To find a basis for the concept of a damages claim, it is obvious that the concept of corrective justice is the main principle to apply because it deals with the situation where one person has wronged another.[174] Aristotle states that the result of such a wrongdoing is the creation of an inequality between the involved people.[175] The main objective of corrective justice now is to rectify that inequality (injustice). It does so by taking away the gain of the perpetrator and restoring it to the victim.[176] By doing so, the concept of corrective justice considers the above principle, namely that the worth of a person does not matter. Therefore, it is clear that the aim of corrective justice is not geometric equality (both have the same position after the

[167]CM Young (n 166) 181; G Bien, 'Gerechtigkeit bei Aristoteles' in O Höffe (ed), *Aristoteles, Nikomachische Ethik* (2nd edn, Akademie Verlag 2006) 149 with reference to NE 1130a28-32.

[168]Aristotle, *Nicomachean Ethics* (n 161) 1130a28-32; G Bien (n 167) 149.

[169]CM Young (n 166) 184.

[170]Aristotle, *Nicomachean Ethics* (n 161) 1130b31-2.

[171]F Giglio (n 157) 150.

[172]CM Young (n 166) 185.

[173]Aristotle, *Nicomachean Ethics* (n 161) 1132a2-6.

[174]Only in claims against a public authority or other institutions distributing public goods (eg health service, education, etc) it is often not a question of corrective rather of distributive justice. See J Lord Steyn, 'Perspectives of corrective and distributive justice in tort law' (2002) 37 Irish Jurist 1.

[175]FD Miller, *Nature, Justice, and Rights in Aristotle's Politics* (OUP 1995) 71-2.

[176]CM Young (n 166) 185-6; DG Ritchie, 'Aristotle's Subdivision of Particular Justice' (1894) 8 CR 185, 186.

correction) but rather arithmetic equality (so called equality of difference[177]) in that it only mentions the difference between the positions before the infringement and after the correction and tries to adjust both differences.[178] In Aristotle's *Politics* it is described in the following way:

> They think justice is equality, and indeed it is, but not to all, only to equals, and they think inequality is justice, as it is, but not to everyone, only to the unequals; they skip the part explaining 'to whom' and judge badly.[179]

What this all amounts to is that Aristotle first divides justice into universal and individual justice. Whereas the aims of universal justice are to establish a just society in general and to allow the realisation of individual justice, individual justice itself focuses on the situation of a single individual. As part of universal justice, individual justice wants to achieve social welfare through the principle of equality in a specific situation. In one way, this can be by distributing goods in an equal manner or by restoring equality after an infringement.

That concept of individual justice as a part of a society-wide universal justice which aims to achieve a peaceful communal life has been described by the Roman philosopher, lawyer and politician Marcus Tullius Cicero. In doing so, he refined the practical application of Aristotle's theory of justice.[180]

This approach of absolute justice was first criticised by the ancient Greek philosopher Epicurus. In contrast to Aristotle, he described justice as an individual agreement or contract between individuals 'made in mutual dealings among men in whatever places at various times providing against the infliction or suffering of harm'.[181] However, even in the concept of Epicurus is the broad recognition that the damnification is congruent with injustice. Even though he does not apply a higher principle of how justice has to be (e.g. equality).

2.3.1.2 Criticism and the negation of moral justice by legal positivism

Hans Kelsen and other philosophers of legal positivism pursued an entirely different approach. Kelsen proclaimed a science of law free of ideology (*Reine Rechtslehre*) and argued that everything legal was just. He appreciated the distinction between the categories of *ought* and *being*: simply because something is, it cannot be said that it will be. As such, law falls into the ought category. Therefore, a rule of law can only be justified by other (higher) rules of law and not by a mere fact or ideology:

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[177]DG Ritchie (n 176) 186; CM Young (n 166) 185-6.

[178]JV Robert, *Routledge philosophy guidebook to Aristotle and the Politics* (Routledge 2009) 85; FD Miller (n 175) 71-2.

[179]Aristotle, *Politics* (n 162) 1280a12-15.

[180]MT Cicero, *De Officiis* (W Miller tr, Harvard University Press 1931) Sec 20.

[181]Epicurus, *Principal doctrines* (GRG Mure tr, Infomotions 1996) No 33.

> The determination of these absolute values, and in particular the definition of the idea of justice, achieved in this way, are but empty formulas by which any social order whatever may be justified as just.[182]

For Kelsen, justice is only a concept that deals with the relationship between individuals.[183] He claims that:

> Justice is primarily a possible, but not a necessary, quality of a social order regulating the mutual relations of men. Only secondarily is it a virtue of a man, since a man is just, if his behavior conforms to the norms of a social order supposed to be just.[184]

In opposition to Aristotle and in line with Epicurus, Kelsen argues that law is based on human will. Therefore, it is illogical to use a metaphysical speculation as a normative authority to justify law as human regulations.[185] Consequently, there is no objective and consistent definition of justice.[186] For Kelsen, individual and universal 'justice' as well as equality are not a question of justice but rather of logic.[187] With reference to Plato, he affirms that a picture of justice as a higher regime different from positive law is as far from the reality as the transcendental things in Plato's philosophy is on the far side of the reality.[188] He argues that if there were a principle of justice outside the law, positive law would be completely redundant.[189]

A more integrated approach is proclaimed by Jürgen Habermas. He rejects factual historical and metaphysical (e.g. law by god or rationality) justifications of law.[190] However, in contrast to the philosophers of legal positivism, he argues that law needs justification for its validity. Without any legitimation, its recipients will not accept law.[191] Positive law is not justified by itself, rather its individual configuration has to be justified.[192]

In conclusion, it can be said that a legal system has to promote individual justice as well as ensure a system of effective enforcement of individual rights of every victim guaranteed by law. This can be called universal justice.

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[182]H Kelsen, *What is justice?: justice, law, and politics in the mirror of science* (University of California Press 1957) 11.

[183]K Engliš, 'Hans Kelsens Lehre von der Gerechtigkeit: ein Beitrag zur Theorie der Gesellschaftsordnungen' (1961) 47 ARSP 301, 305.

[184]H Kelsen, *What is justice?* (n 182) 1-2.

[185]Ibid 20-1; K Engliš (n 183) 327.

[186]H Kelsen, *Pure Theory of Law* (M Knight tr, 2nd Revised and Enlarged edn, University of California Press 1967) 319; K Engliš (n 183) 329.

[187]Cf H Kelsen, *Pure Theory of Law* (n 186) 24.

[188]H Kelsen, *Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik* (1st edn, Deuticke 1934) 14.

[189]Ibid 15.

[190]J Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (W Rehg tr, Polity 1996).

[191]Ibid 23.

[192]Ibid 49.

2.3.1.3 Re-classification of justice based on the objectives of punishment as the central outcome of public law enforcement

Whereas Aristotle defines the starting point for the philosophical principle of justice and its classification, the philosophy of St Thomas Aquinas has been more influential in shaping the modern law of damages.[193] In his well-known commentary on Aristotle's *Nicomachean Ethics*,[194] he adds the principle of punishment to Aristotle's purely compensatory approach of individual justice. Aquinas argues that a person who causes damage voluntarily (in a malicious way) should be punished more severely than an accidental (or to a certain extent careless) wrongdoer. For Aquinas, punishment is a type of restitution and restitution is an act of corrective justice. Therefore, he argues that punishment would bring about justice in cases where straightforward reciprocation (compensation of damages) would not be enough.[195] Considering the outcomes of the last chapter, punishment is mainly based on the public enforcement of the law.

Building on that, punishment should be considered as a part of justice. However, in contrast to Aquinas, punishment is not only a point of corrective justice as part of individual justice. It is rather a fact in the whole system of universal justice. This fact could be brought to light by defining the central objectives of punishment. These aims are often divided into two different approaches: absolute and relative criminal justice or revenge, and prevention of breaches and deterrence.

On the one hand, the theory of absolute criminal justice or revenge is shaped by the principle of retribution.[196] This theory seeks to balance out the wrong of the perpetrator with punishment. It tries to establish justice through a compensation of culpability. While Immanuel Kant strengthened the strict principle of 'an eye for an eye and a tooth for a tooth',[197] Georg WF Hegel argued for a more flexible way of an equality of the values.[198] In its application the theory of revenge tries to achieve a metaphysical justice not based on the social being of humans in a state but rather on a transcendental philosophical concept. In consequence, Kant argued that:

> [even] if a Civil Society resolved to dissolve itself with the consent of all its members ... the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain

[193] F Giglio (n 157) 162.
[194] T St Aquinas (n 165).
[195] F Giglio (n 157) 155, 165.
[196] See J Johnson, *An Idealist Justification of Punishment – Kant, Hegel and the problem of punishment* (VDM 2008) 70 ff., 133 ff.
[197] N Potter, 'Kant on Punishment' in TE Hill (ed), *The Blackwell Guide to Kant's Ethics* (Wiley-Blackwell 2009) 179 ff.; J Johnson (n 196) 70 ff.
[198] GWF Hegel, *Hegel's Philosophy of right* (SW Dyde tr, George Bell and Sons 1896) sections 99 ff.; J Johnson (n 196) 133 ff.

> upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.[199]

Therefore, punishment is a categorical imperative, i.e. an absolute precept not bounded to a purpose.[200] Consequently, punishment has to be considered as a part of individual justice. Even though Kant argued that punishment has no purpose and is a consequence of the extensive conception of universal justice, satisfaction for a pain or suffering can be defined as the central aim of punishment. By doing this, punishment can be defined as a part of individual justice. For his part, Aquinas argued that punishment is a corrective measure for an unjust situation where pure compensation is not sufficient and so it acts as an addition to a (private) system of restitution.

On the other hand, the theory of relative criminal justice does not see punishment in general outside any objectives. The theory connects punishment with prevention or deterrence to enforce the law in an efficient way. However, it is imprecise to see the theory of relative criminal justice as one consistent approach. It can be generally divided into two main specifications. Franz von Liszt strengthened the position of special prevention, i.e. he focused on the actual dangerousness of a perpetrator.[201] Under the usage of positive sanctions (e.g. rewards) and negative sanctions (e.g. imprisonment, injury award) the theory of special prevention tries to dissuade a perpetrator from repeating his wrongdoing.[202] Beyond this, Paul JA von Feuerbach focused more on the socio-legal perspective. His theory of general preventions is geared towards the protection of the whole community and tries to strengthen confidence in the legal system.[203] Feuerbach wants to eliminate crime even before the law has been breached. He states that:

> ... [because] even [the state] has to fulfil the task of securing and protecting the rights of its citizens from injury, it must necessarily be both entitled and obliged to take coercive institutions whereby violations of law are impossible at all.[204]

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[199] I Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W Hastie tr, Clark 1887) 198.

[200] O Döring, *Feuerbachs Straftheorie und ihr Verhältnis zur Kantischen Philosophie* (Reuther & Reichard 1907) 11.

[201] F von Liszt, 'Der Zweckgedanke im Strafrecht, Marburger Universitätsprogramm 1882 ' (1883) 3 ZStW 1.

[202] F von Liszt, *Strafrechtliche Aufsätze und Vorträge*, vol 1 (de Gruyter 1970) 171; W Gropp, *Strafrecht Allgemeiner Teil* (Springer 2005) 113 ff.

[203] O Döring (n 200) 25.

[204] Translation of PJA von Feuerbach, *Lehrbuch des gemeinen, in Deutschland geltenden peinlichen Rechts* (Heyer 1801) § 8: , *Da eben dieser (der Staat) die Aufgabe zu erfüllen hat, die Rechte seiner Bürger vor Verletzungen zu sichern und zu schützen, so muss er notwendigerweise berechtigt und zugleich verpflichtet sein, Zwangsanstalten zu treffen, wodruch Rechtsverletzungen überhaupt unmöglich gemacht warden.*'

In Section 15 of his coursebook on criminal law, Feuerbach saw the main reason for punishment and public enforcement of the law in general in the need to curtail the mutual freedom of every individual in a society by the abolition of the psychological compulsion to breach the law.[205]

In summary, it can be said that punishment can be seen as a part of universal justice as well as distributive justice. Regarding the moral basis of justice, Aristotle argued in his *Politics* that the state has the obligation to provide justice; distributive justice is the equal allocation of goods; and justice can be described as a good itself. Therefore, the allocation of justice is universal and distributive justice all at once. The strict distinction between universal and distributive justice as part of individual justice as set out by Aristotle is diffuse or ambiguous.

Public enforcement of law in general, and competition law in particular, focuses on the principal of distributive and universal justice by using deterrence and punishment to evolve an undisrupted market less on individual or particular justice.[206] The central aim of public enforcement has often been portrayed as a maximisation of social welfare.[207] On the other hand, public enfocement is a complement to a (private) system of restitution in providing individual and corrective justice.

2.3.2 Individual and corrective justice as the main objectives of private enforcement

2.3.2.1 Possibility of deterrence in private enforcement

In the knowledge that public enforcement mainly deals with universal justice and tries to achieve social welfare, the question arises whether the goal of private law enforcement differs from this.

Private law enforcement has been possible since the Treaty of Rome in 1957.[208] Whereas the contribution of private enforcement of competition law is still a subject of debate, the European Court of Justice (ECJ) decided in favour of a guarantee

[205]Ibid § 15; O Döring (n 200) 26.

[206]PH Rosochowicz, 'Deterrence and the relationship between public and private enforcement of competition law' Amsterdam Center for Law & Economics, Competition & Regulation Meeting 2005, Working Papers, 1 <http://acle.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-law--economics/cr-meetings/2005/working-papers-2005/hahn-rosochowicz.pdf?1345929891801> accessed 01/03/2016.

[207]AM Polinsky, 'Private versus Public Enforcement of Fines' (1980) 9 JLS 105; RP McAfee, HM Mialon and SH Mialon, 'Private v. public antitrust enforcement: A strategic analysis' (2008) 92 JPublicEcon 1863; criticised by I Segal and M Whinston (n 3) 310.

[208]H Stakheyeva (n 152); AD Chiriţă, 'A Legal Historical Review of the EU Competition Rules' (2014) 63 ICQL 2.

to claimants in private competition law litigations.[209] Therefore, the Commission strengthened the effectiveness of private competition law enforcement.

If it is assumed that the achievement of societal goods and the maximisation of social welfare through deterrence is the main goal of competition law enforcement, there is no need of private enforcement of competition law because there are statutory agencies.[210] The ECJ stated that:

> [t]he full effectiveness of Article [101] of the Treaty ... would be put at risk if it were not open to any individual to claim damages for loss caused to him ... [A]ctions for damages ... can make a significant contribution to the maintenance of effective competition in the Community.[211]

However, it is still under debate whether private enforcement has a positive impact on the general effectiveness of enforcement and on deterrence in particular. It is certainly clear that punitive damages (as in the UK or USA) can have a deterrent effect.[212] In addition, it can be argued that even 'normal' damages claims can have such an impact because all damages can be seen as a form of punishment for the injurer.[213] This is in spite of the fact that some commentators restrict the effect to claims of class actions or collective redress mechanisms.[214] Moreover, with reference to the limited resources of public authorities and, as a consequence, the limited comprehensive monitoring and public enforcement (enforcement gap), private litigants can help to fill the gaps[215] and achieve high financial savings within the public sector.[216]

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[209]F Neumayr, H Kühnert and V Schaumburger, 'The Gordian knot of access to file: legislation will have to resolve it' (2014) 7 GCLR 185.

[210]P Behrens, 'Comments on Josef Drexl: Choosing between Supranational and International Law Principles of Enforcement' in J Drexl (ed), *The Future of Transnational Antitrust – From Comparative to Common Competition Law* (Stæmpfli 2003) 244-5; Waller, 'Towards a Constructive Public-Private Partnership to Enforce Competition Law' (2006) 29 WComp 367.

[211]Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 at 26-7; Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA* [2006] ECR I-6619 at 60.

[212]I Segal and M Whinston (n 3) 311-2.

[213]RH Lande and JP Davis, 'The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond, and Barnett' (2012) 58 Antitrust Law Bulletin 174; M Lorenz, *An Introduction to EU Competition Law* (CUP 2013) 361; B Scharaw, 'Commission proposal for a Directive on antitrust damages and recommendation on principles for collective redress – the road towards "private antitrust enforcement" in the European Union?' (2014) 35 ECLR 352, 353; A Aresu, 'Optimal contract reformation as a new approach to private antitrust damages in cartel cases' (2010) 35 ELRev 349, 352-4; T Eger and P Weise (n 152) 154.

[214]H Stakheyeva (n 152) 399.

[215]U Böge and K Ost, 'Up and Running, or Is it? Priavte Enforcement – The Stituation in Germany and Policy Perspectives' (2006) 27 ECLR 197; M Lorenz (n 213) 361; AP Komninos, 'Public and private antitrust enforcement in Europe: complement? Overlap?' (2006) 3 CompLRev 5, 9-10.

[216]RH Lande, 'Introduction: Benefits of private enforcement' in AA Foer and RM Stutz (eds), *Private Enforcement of Antitrust Law in the United States: A Handbook* (Edward Elgar 2012) 12.

On the other hand, the incentives for victims to sue for compensatory awards do not correlate with that idealistic view.[217] Often, victims do not sue for a breach of competition law if the damages will fall short of the litigation costs.[218] On the contrary, private enforcement leads to excessive amount of litigation, and in consequence deterrence if the claimed damages exceed litigation costs even if there is just a minor breach of competition law.[219] Apart from this, private enforcement of competition law cannot be as efficient as public enforcement in deterring potential lawbreakers.[220] On the one hand, victims may not even realise that they suffered any harm as they may consider more their personal rather than social benefits and so wait for other victims to share the costs and risks of the trial.[221] On the other hand, the current public enforcement already enables close-to-optimal deterrence,[222] and a lack of deterrence should be solved by reforming public enforcement mechanisms.[223] In summary, an accumulation of fines and claims for damages and, thus, a combined enforcement strategy, increases public deterrence[224] – often only as a 'socially beneficial byproduct'[225] – but it is not able to replace public law enforcement.[226]

However, the enforcement of law through private litigation is usually combined with the rights of individuals to claim compensation.[227] Its primary aim is to enforce individual's interests and rights.[228] Besides this, private litigators who sue for damages do not normally care about the deterrent effect of the lawsuit.[229] Typically, it is the potential monetary awards that motivate them.[230]

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[217] SM Shavell, 'The social versus the private incentive to bring suit in a costly legal system' (1982) 11 JLS 333; SM Shavell, *Foundations of Economic Analysis of Law* (Belknap Press 2004) part IV.

[218] SM Shavell, 'The social versus the private incentive to bring suit in a costly legal system' (n 217); SM Shavell, *Foundations of Economic Analysis of Law* (n 217) part IV.

[219] RP McAfee, HM Mialon and SH Mialon (n 207); RH Lande (n 216) 3-4; DH Ginsburg, 'Comparing Antitrust Enforcement in the United States and Europe' (2005) 1 JCL&E 427, 429.

[220] A Aresu (n 213) 359.

[221] WPJ Wils, 'The relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 WComp 3, 8.

[222] P Manzini, 'European Antitrust in Search of the Perfect Fine' (2008) 31 WComp 3, 8, 16; MP Schinkel, 'Effective Cartel Enforcement in Europe' (2007) 30 WComp 539, 555.

[223] P Buccirossia and G Spagnolo, 'Optimal Fines in the Era of Whistleblowers' in V Ghosal and J Stennek (eds), *The Political Economy of Antitrust* (Elsevier 2007) 105; A Aresu (n 213) 358-9.

[224] *Courage v Crehan* at 27; U Böge and K Ost (n 215); C Diemer, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules' (2006) 27 ECLR 309, 310-1; See from the US: *Pfizer, Inc v Government of India* [1978] 434 US 308 at 314; *American Society of Mechanical Engineers Inc v Hydrolevel Corp* [1982] 456 US 556 at 572 fn 10; *Illinois Brick Co v Illinois* [1977] 431 US 720 at 746.

[225] P Nebbia (n 152) 27; K Roach and MJ Trebilock, 'Private Enforcement of Competition Laws' (1996) 34 Osgoode Hall LJ 461, 495-6.

[226] B Scharaw (n 213) 353.

[227] H Stakheyeva (n 152) 399.

[228] U Böge and K Ost (n 215); P Nebbia (n 152) 27; B Scharaw (n 213) 353; In the US at least up to $ 19.639; RH Lande (n 216) 1.

[229] I Segal and M Whinston (n 3) 309-10.

[230] T Eger and P Weise (n 152) 154; I Segal and M Whinston (n 3) 311.

What all this amounts to is that the primary goal of private law enforcement is the compensation of victims for damages caused by competition law infringements.[231] In consequence, even if private enforcement has an impact on deterrence and universal justice, public enforcement is indispensable.[232]

2.3.2.2 Necessity of private enforcement as corrective and complement of public enforcement

Based on the outcome that public and private enforcement focus on different aims, it is necessary to define the relationship between both types of law enforcement.

From an economic point of view, the social award of competition law has been described as just one design parameter for litigation incentives of plaintiffs and the deterrence effect on violators.[233] Therefore, that single parameter cannot achieve an optimal litigation (private enforcement) and optimal deterrence (primarily public enforcement).[234] In consequence, public enforcement, especially fines, should be imposed and private enforcement, i.e. the probability of detection, should be minimised. This is what is known as the Becker-Optimum.[235] It has been argued that private litigation cannot achieve that point of deterrence[236] because competition authorities can rely on the state power and have an information advantage.[237] It is also cheaper than private litigation and is not as likely to be abused as private claims.[238]

However, the Becker-Optimum ignores the fact that private enforcement of competition law does not only have the task of achieving an effective enforcement of the law (e.g. through deterrence). The main outcome for private claims for damages is to establish corrective justice. It suffices to look to the workload of competition authorities to see that public enforcement can only be concentrated on the most damaging infractions of competition law.[239] With regard to the deterrent effect, it is just a minor weakness but, with reference to justice, it leads to a major problem. That enforcement gap or gap of justice can only be bridged through a combined law

[231]RH Lande and JP Davis (n 213); M Lorenz (n 213) 361; B Scharaw (n 213) 353; RH Lande (n 216) 1.

[232]B Scharaw (n 213) 353.

[233]GS Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 JPolEcon 169; I Segal and M Whinston (n 3) 311-2.

[234]I Segal and M Whinston (n 3) 311-2; GS Becker (n 233) 169 ff.

[235]GS Becker (n 233) 169 ff.; AM Polinsky and Y-K Che, 'Decoupling liability: optimal incentives for care and litigation' (1991) 22 RJE 562.

[236]WM Landes and RA Posner, 'The Private Enforcement of Law' (1975) 4 JLS 1; A Aresu (n 213) 354, who says that there is no need of a private enforcement if an optimal public enforcement is given.

[237]S Weishaar, *Cartels, competition and public procurement: law and economic approaches to bid rigging* (Edward Elgar 2013) 11 ff.

[238]W Möschel, 'Should private enforcement of competition law be strengthened?' (2013) 6 GCLR 1, 3-4; WPJ Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (n 31) 480-1.

[239]PH Rosochowicz 1; *Manfredi*, opinions of AG Geelhoed at 30.

enforcement with a strong private part avoiding the intervention-oriented approach of public competition law enforcement.[240]

For that reason, it is necessary to establish an efficient relationship between private and public enforcement to achieve both aims in a nearly optimal way.[241] In doing so, it is not necessary to distinguish strictly between both ways of law enforcement. The most efficient way is to combine them and to use the advantages of both approaches, for example, to use the information of public authorities in private claims through 'follow-on claims'.[242] Consequently, the mechanisms of public and private enforcement have to be fine-tuned to achieve an effective relationship.[243]

2.3.3 Conclusion

To sum up, it can be said that private enforcement of competition law is necessary to achieve access to individual justice.

Based on the basic definition of justice by Aristotle and his distinction between universal and individual justice, as well as corrective and distributive justice, it is necessary for a legal enforcement system to achieve the aims of all forms of justice. It is therefore necessary for a legal system to promote individual justice as well as ensure a system of effective enforcement of individual rights of every victim guaranteed by law to promote universal justice.

Furthermore, according to the more influential analysis of St Thomas Aquinas, universal justice and distributive justice are connected and can be achieved by an effective punishment regime, i.e. public enforcement. Regarding Aristotle's moral definition of distributive justice, he describes how it is an equal allocation of goods,

[240]WD Collins and SC Sunshine, 'Is Private Enforcement Effective Antitrust Policy?' in PJ Slot and A McDonnell (eds), *Procedure and Enforcement in EC and US Competition Law, Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law* (Sweet and Maxwell 1993) 50-2; K Roach and MJ Trebilock (n 225) 471 ff.; K Yeung, 'Private Enforcement of Competition Law' in C McCrudden (ed), *Regulation and Deregulation, Policy and Practice in the Utilities and Financial Services Industries* (Clarendon Press 1999) 40-3; WE Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' in M Andenas, M Hutchings and P Marden (eds), *Current Competition Law*, vol II (British Institute of Intl and Comparative Law 2004) 176; AP Komninos, *EC Private Antitrust Enforcement* (n 9) 10 n 46; M Monti, 'Opening Speech: Effective Private Enforcement of EC Antitrust Law' in C-D Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Pub 2003) 3 ff.; other opinion by OE Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (Macmillan 1985) who argues that a public system is more efficient than a private enforcement or combined system.

[241]AP Komninos, 'Public and private antitrust enforcement in Europe' (n 215) 9-10; S Weishaar (n 237) 11 ff.; S Bourjade (n 8) 119; H Stakheyeva (n 152) 398, 404.

[242]M Lorenz (n 213) 362; B Scharaw (n 213) 353; A Aresu (n 213) 352-4.

[243]I Segal and M Whinston (n 3) 308; U Böge and K Ost (n 215) 198 who puts more emphasis on the private law enforcement even at the cost of an effective public enforcement; A Aresu (n 213) 352-4; M Sanders et al, 'Disclosure of leniency materials in follow-on damages actions: striking "the right balance" between the interests of leniency applicants and private claimants?' (2013) 34 ECLR 174; CJS Hodges, 'European competition enforcement policy: integrating restitution and behaviour control: an integrated enforcement policy, involving public and private enforcement with ADR' (2011) 34 WComp 383, 394.

and justice can be described as a good itself and an equal allocation of justice is a way to achieve distributive justice. Therefore, the strict distinction between universal and distributive justice as part of individual justice as set out by Aristotle is diffuse or ambiguous.

On the other hand, public enforcement is a complement to a (private) system of restitution in providing individual and corrective justice. The primary goal of private law enforcement is compensation of victims for damages caused by competition law infringements. In consequence, even if private enforcement has an impact on deterrence and universal justice, public enforcement is indispensable.

Consequently, it is necessary to define the relationship between both types of law enforcement because both enforcement regimes are based on different aims. Moreover, it is necessary to establish an efficient relationship between private and public enforcement to achieve both aims in a nearly optimal way. This can only be done by combined law enforcement with a strong private part avoiding the intervention-oriented approach of public competition law enforcement.

2.4 Conclusion

In summary, it can be said that an effective relationship between public and private enforcement of European competition law is necessary.

Even if public enforcement has historically been the main enforcement mechanism of European competition law, private enforcement is necessary to achieve individual justice. Based on the long tradition of public competition law enforcement by national competition authorities and the European Commission, it is a fact that private competition law enforcement in Europe, especially with regard to damage claims based on an infringement of Art 101 TFEU, is underdeveloped. Furthermore, public enforcement can be described as an efficient enforcement proceeding.

However, the effectiveness of the European leniency programmes is a reason for weak private competition law enforcement. Although, the Commission has to trust members of cartels to apply for leniency and, therefore, to disclose a hidden infringement, i.e. cartel, the information gathering of the European Commission within public enforcement proceedings has turned its fine proceedings into an effective information gathering system and thus into an effective way of detecting and proving an infringement of European competition law, especially Art 101 TFEU. Consequently, the leniency programme has to be efficient as well and, therefore, it is necessary to provide psychological incentives to the members of the cartel to disclose the infringement. The main incentive is the immunity of fines by the European Commission and national competition authorities but this protection policy of whistle-blowers is in conflict with an effective private enforcement because the private plaintiffs have to provide evidence of an infringement. Therefore, an

effective leniency programme could lead to overprotection, especially against private damage claims.

Nevertheless, private enforcement of competition law is necessary to achieve access to individual justice. The primary goal of private law enforcement is compensation of victims for damages caused by competition law infringements. In consequence, even if private enforcement has an impact on deterrence and universal justice, its main outcome is to provide individual and corrective justice.

As a result, it is necessary to define an effective relationship between public and private enforcement of European competition law because both types of law enforcement and enforcement regimes are based on different aims. This can only be done by combined law enforcement with a strong private part avoiding the intervention-oriented approach of public competition law enforcement. The most efficient way is to combine them and to use the advantages of both approaches; for example, by using the information of public authorities in private claims through 'follow-on claims'.

3. Burden of proof as weak point of private competition law enforcement

After stressing the need for an effective relationship between public and private enforcement of competition law in the last chapter, this chapter analyses the legal realisation of damage claims for the breach of European competition law.

The chapter begins with an analysis of the factual and legal basis for burden of proof in European competition law. This necessarily includes an examination of burden of proof as an expression of fair proceeding and information asymmetry in competition cases.

The chapter then considers the developments in the European provisions on damage claims based on the breach of European competition law. This will start with the situation prior to the decision of the European Court of Justice (ECJ) in *Courage v Crehan*[244] and the considerations in establishing a right for civil damages claims based on the principle of state liability.[245] After analysing the landmark decision of the ECJ in *Courage v Crehan*, the chapter will highlight the European provisions de lege lata about civil damage claims based on the breach of Arts 101 or 102 TFEU. The focus will then turn to the recent European harmonisation leading to the Directive 2014/104/EU.

Thirdly, the section examines the classification in German law as a claim of the law of delicts and its requirements. In doing so, it firstly show up the distinction between a damage claim based on the law of contracts and the delicts. Here, the section begins by giving the main distinction between a damage claim based on contracts and on torts or delicts. Based on the ancient distinction between voluntary and involuntary contractual relationships in Aristotle's theory of justice and the

[244]Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

[245]Joined case C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357; H Smith, 'The Francovich case: state liability and the individual's right to damages' (1992) 13 ECLR 129, 132; M Hoskins, 'Garden Cottage revisited: the availability of damages in the national courts for breaches of the EEC competition rules' (1992) 13 ECLR 257, 259; criticised by E Deards, '"Curiouser and Curiouser"? The Development of Member State Liability in the Court of Justice' (1997) 3 EPL 117, 143; C Kremer, 'Liability for Breach of European Community Law – An Analysis of the New Remedy in the Light of English and German Law' (2003) 22 YEL 203, 209 with further references; S Moore and C Lewis, 'Duties, Directives and damages in European Community law' [1993] PL 151, 170; R Nazzini, 'The objective of private remedies in EU competition law' (2011) 4 GCLR 131, 137-8.

principle of the freedom of contracts as well as the separation of claims 'in rem' and 'in personam' under Roman law.

After doing so, the chapter compares the German and the English regulations on civil damage claims based on an infringement of European competition law and highlights the main differences of both jurisdictions.

3.1 Factual and legal basis for burden of proof in European competition law

3.1.1 Burden of proof as an expression of fair proceeding

The first question that arises is whether the burden of proof in civil damage claims is necessary with reference to a fair legal proceeding.

In international law, the requirements of a fair legal proceeding are regulated in various intergovernmental treaties. One of these is the European Convention on Human Rights (ECHR) in which the signatory states commit themselves to comply with the principles set out for human rights and fundamental freedoms and be subject to justice-like processes safeguarding those rights before the European Court of Human Rights (ECtHR).[246] Like every other international agreement, the ECHR only takes effect between the signatory states (*pacta tertiis nec nocent nec prosunt*).[247] However, whereas all Member States of the EU ratified the ECHR, the European Union itself as a legal entity according to international law has not ratified the Convention yet, even though a ratification is intended in Art 6(2) Treaty of the European Union (TEU). The most recent attempt at ratification was rejected by the ECJ in December 2014 with its Opinion 2/13.[248] The main reason for the rejection was the lack of clarification of the material scope of European law[249] and the lack of conformity of Art 53 ECHR and Art 53 of the European Union Charter of Fundamental Rights (EUCFR).[250] In particular, the ECJ was concerned that entities of the ECHR (e.g. ECtHR) were entitled to take binding decisions on the internal responsibility mechanisms of the European Union.[251] However, the ECJ stated that

[246] See M Herdegen, *Völkerrecht* (13th edn, CH Beck 2014) § 49 at paras 3-4.

[247] See E Klein, *Statusverträge im Völkerrecht. Rechtsfragen territorialer Sonderregime* (Springer 1980); C Tomuschat, H Neuhold and J Kropholler, *Völkerrechtlicher Vertrag und Drittstaaten* (CF Müller 1988) 9 ff.; M Herdegen (n 246) § 15 at para 19.

[248] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties* [2015] 2 CMLR 21 (ECJ).

[249] Ibid at para 186.

[250] Ibid at para 187 ff.

[251] Ibid at para 185 with refence to Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECR I-6079 and Opinion 1/00 *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECR I-3493 at para 13.

an external binding of European courts is generally permitted, especially because the Treaties already provide this.[252]

However, even without the accession of the European Union to the ECHR, Art 6(3) TEU states that the rights conferred by the ECHR are general legal principles of the law of the European Union. This corresponds to the case law of the ECJ.[253] Such a commitment of a third country to comply with an international treaty is not uncommon in international law.[254] Havin said this, all EU Member States that have had to ratify the ECHR are obliged to apply the provisions of the ECHR by the implementation of European law.[255]

Therefore, the burden of proof in a civil procedure could be an expression of the requirement of a fair proceeding with reference to Art 6 ECHR. However, this would not affect the order to be heard before an unbiased court nor the demand for equality of arms which is the fundamental requirement of the burden of proof. The decisive criterion is whether the parties are equipped with their own rights and can affect the conduct of the proceedings.[256] In particular, therefore, the counter-didactic proceeding is protected, which is intended to enable the parties to take a position on submitted evidence.[257] However, this is also possible in an inquisitorial system and so it is not necessary to organise civil law proceedings with a burden of proof regarding Art 6(1) ECHR. The fairness requirement of Art 6(1) ECHR requires that the parties shall have the opportunity to comment on evidence during the legal process.[258] However, the ECHR does not regulate the finding of facts and how the burden of proof is to be structured.[259] The ECtHR only makes an overall assessment

[252] *Opinion pursuant to Article 218(11) TFEU (2/13*) at para 182 with refence to *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty (1/91)*, *Opinion pursuant to Article 30 (6) EC (1/00*) at paras 40 and 70 as well as Opinion 1/09 *Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties* [2011] ECR I-1137 at para 13.

[253] See Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 at para 4; Case 4-73 *DEPE-J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1977] ECR 1 at para 13; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925 at para 41; Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 at para 283; Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] 2 CMLR 43 (ECJ) at para 60; Case C-617/10 REC *Åklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46 at para 44.

[254] See Art 35-6 of the Vienna Convention on the Law of Treaties (VCLT); E Klein (n 247); C Tomuschat, H Neuhold and J Kropholler (n 247) 9 ff.

[255] M Lorenz (n 213) 35.

[256] See BVerfGE 64, 133 at 145; BVerfGE 107, 395 at 408; BVerfG NJW 2007, 204 at 205.

[257] *Ruiz-Mateos v Spain* (1993) 16 EHRR 505 at 509.

[258] See J Meyer-Ladewig, *Europäische Menschenrechtskonvention* (3rd edn, Nomos 2011) Art 6 at paras 102-3, 109.

[259] See *Colak v Germany* (2009) 49 EHRR 45 at para 41.

of the proceeding, including the taking of evidence in general.[260] Furthermore, from the systematic and clear wording of Art 6 ECHR it is clear that the presumption of innocence, proclaimed by Art 6(2) ECHR, does not apply to civil proceedings.[261]

On the other hand, both juristidictions analysed in this dissertation, English and German law, apply an adversarial system in civil damage proceedings.[262] This adversarial system is the main distinction between private litigation and administrative authorities wich follow the inquisitorial system.[263] In addition to this, it is accepted as a principle of customary international law that in an adversarial system each party has the burden to prove all facts that are the basis of that party's case.[264] Thus, each party has to prove the facts necessary to the success of his claim or defence.[265]

3.1.2 Information asymmetry in competition cases

Whereas the general burden of proof in adversarial procedural systems works quite well and is a matter of fair proceeding as described in the last section, it is a reason for the weakness of private enforcement in competition law cases because the relevant evidence for a successful claim is in the possession of the defendant. This unusual situation can be described as information asymmetry about the relevant files and evidence.

As mentioned above, cartels are a form of organised crime, and it is a common phenomenon that externals find it difficult to gather evidence, especially for the infringement of the law itself and the suffered harm.[266] Furthermore, customers only have the documentation about their contracts with their direct suppliers, and they usually do not know anything about the internal cartel agreement yet this agreement is the main infringement of the competition law. As mentioned above, that is one of the reasons why whistle-blowers are needed in competition law cases. Consequently, the plaintiff can only rely on indications to establish a damage claim based on an infringement of European competition law.[267]

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[260] *Volkmer and Petersen v Germany* (2009) NJW 2002, 3087 (ECtHR) at para 4; See J Meyer-Ladewig (n 258) Art 6 at para 141.

[261] See as well J Meyer-Ladewig (n 258) Art 6 at para 211; H-J Blanke, 'EU-GRCharta Art. 48 – Unschuldsvermutung und Verteidigungsrechte' in C Calliess and M Ruffert (eds), (4th edn, CH Beck 2011) at para 1.

[262] See e.g. in detail T Rauscher, 'Einleitung' in T Rauscher and W Krüger (eds), *Münchener Kommentar zur ZPO*, vol 1 (4th edn, CH Beck 2013) at paras 310-2.

[263] See AP Komninos, *EC Private Antitrust Enforcement* (n 9) 225-6.

[264] See ALI/UNIDROIT – Principles of Transnational Civil Procedure Principle 21.1-2; R Stürner, 'Duties of Disclosure and Burden of Proof in the Private Enforcement of European Competition Law' in J Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer 2007) 183-4.

[265] JA Jolowicz, On Civil Procedure (CUP 2000) 222.

[266] See in detail under Section 3.3.2.1 for German law and 3.4.2.1 for English law.

[267] See T Wißmann, 'Decentralised Enforcement of EC Competition Law and the New Polify on Cartels: The Commission White Paper of 28th of April 1999' (2000) 23 World Competition 123, 132.

3.1.3 Conclusion

The burden of proof in civil law cases and the linked adversarial system is a central rule of German and English civil procedure rule. It must also be mentioned that it is not an outcome of Art 6 ECHR that an adversarial system has to be introduced in civil law, especially in civil damage law. However, it is generally accepted as a principle of fair proceeding that each party has the burden to prove all facts that are the basis of that party's case.

In competition law cases, this general principle leads to the problem that the relevant evidence is usually in the possession of the defendant. Therefore, it is necessary to find a mechanism to provide access to that evidence for the plaintiff whilst not bypassing the principle of the adversarial system.

3.2 Provisions about evidence under European law

After analysing the possession of relevant evidence and hence the information asymmetry in competition cases, this chapter examines the provisions under European, German and English law to find a procedural answer for the question of evidence in damage claims based on an infringement of Art 101 or 102 TFEU.

The most recent development in the field of European competition law and private enforcement is Directive 2014/104/EU which harmonises the national system of competition law damage claims. However, before analysing the provisions of Directive 2014/104/EU, this section seeks to highlight the development under European competition law enforcement, especially the provisions about private enforcement.

It is necessary to understand the history of Directive 2014/104/EU, the case law of the European courts before 2014 and the questions that arise from these. The main emphasis is on the decisions of the ECJ in *Courage v Crehan* and *Manfredi*. The last section analyses the possible impacts of the proposed Guideline of the European Commission on cartel damage claims.

3.2.1 Developments up to European Court of Justice in Courage v Crehan

Until its decision in *Courage v Crehan*, the ECJ had not had an opportunity to decide about the liability for and the basis of a European civil damage claim in competition

law.[268] However, the ECJ had earlier referred to the possibility of claiming damages under national law but without examining the legal requirements in any depth.[269]

In contrast to the provisions of the American antitrust law,[270] the European treaties had no regulations about a European based right of damage claims. At the same time, the Member States of the European Union solved the questions through the general provisions in tort or, rarely, contract law. Albeit scattered, there were some explicit regulations, for example in § 33 German Competition Act 1998,[271] Art 33 (1) Swedish Competition Act 1993[272] and Art 18a Finnish Act on Competition Restrictions 1992[273].[274]

The consideration of a European law based right to claim damages against an infringer of European competition law arose from the leading state liability decision of the ECJ, *Francovich v Italy*[275] in 1991. According to some commentators, mainly in the English legal literature,[276] the principle of state liability of a Member State that does not fulfil its obligation to implement a European regulation was transferred to a liability of individuals for direct applicable European law.[277] This reasoning is based on the grounds that there is no compelling reason to distinguish between the liability of a state for not implementing a European legislation, which is obliged to do this under Art 288 TFEU, and the liability of an individual for the breach of direct applicable European law.[278] With reference to this, the commentators argue that the liability of an offender is not bound by the identity of the perpetrator but rather an expression of the European principle of *effet utile*.[279]

Against this argumentation, the Court of First Instance decided in *Automec II*[280] that the basis of a damage claim for breach of European competition law is a

[268]AP Komninos, *EC Private Antitrust Enforcement* (n 9) 165.

[269]Case 127-73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECR 313 para 16, 22; Case C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB)* [1997] ECR I-4449 para 57; Case C-282/95 P *Guérin automobiles v Commission of the European Communities* [1997] ECR I-1503 para 39.

[270]See sec 7 of the original Sherman Antitrust Act, 26 Stat. 209, 15 USC §§ 1-7 substituted by sec 4 of the Clayton Antitrust Act, 15 USC §§ 12-27, 29 USC §§ 52-53.

[271]Gesetz gegen Wettbewerbsbeschränkungen (1998) BGBl, vol. 1, 2546.

[272]Konkurrenslag, SFS 1993:20.

[273]Kilpailulaki (480/1992).

[274]See eg C Miege, 'Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB' (Conference Organised by the Amsterdam Center for Law and Economics on Remedies and Sacntions in Competition Policy, Amsterdam, 17-18 Feb 2005); AP Komninos, *EC Private Antitrust Enforcement* (n 9) 186 fn 270; FW Bulst, *Schadensersatzansprüche der Marktgegenseite im Kartellrecht – zur Schadensabwälzung nach deutschem, europäischem und US-amerikanischem Recht* (Nomos 2006) 108 ff.

[275]Joined case C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357.

[276]C Kremer, 'Liability for Breach of European Community Law – An Analysis of the New Remedy in the Light of English and German Law' (2003) 22 YEL 203, 209 with further references.

[277]H Smith (n 245) 132; M Hoskins (n 245) 259; criticised by E Deards (n 245), 143.

[278]S Moore and C Lewis (n 245); R Nazzini (n 245) 137-8.

[279]H Smith (n 245); M Hoskins (n 245) 259.

[280]Case T-24/90 *Automec Srl v Commission of the European Communities* [1992] ECR II-2223.

problem for the national law of the Member States. Referencing the wording of Art 101 TFEU (ex-Art 85 EEC-Treaty), the CFI argued that:

> ... [among] the consequences which an infringement of [the European competition rules] may have in civil law, only one is expressly provided for in Article [101](2), namely the nullity of the agreement.[281]

Building on this, the CFI stated it was a principle of subsidiarity[282] that only the Member States had the power to establish rights in procedural and substantive law. In comparison with this, the Advocate-General van Gerven strengthened the opinion that the principle of state liability for a breach of European law was a fortiori applicable. A special regulation in the Treaty is therefore insignificant.[283] Sadly, the ECJ did not take a stand on the position of the AG. Against the opinion of the AG, the ECJ rejected the applicability of the ECSC-Treaty in the present case and, therefore, it was not necessary to take a position about the liability of the defendant.[284]

That decision encouraged the European Commission to attend to the problem. Already by 1962, the Deringer-Report (Report of the Internal Market Committee of the (first) European Parliament concerning the then-draft Regulation) of the European Parliament[285] acknowledged the need for private claims for the effective enforcement of the European competition law, and it recommended a study about the national regulations in the Member States de lege lata. The European Commission published this study in 1966.[286] In 1993 – after 30 years of silence[287] – the European Commission adopted a notice about the possibility of damages claims before national courts. However, the main provisions were about the procedural enforcement of competition law.[288] It seems that the Commission wanted

[281]Ibid para 50.

[282]Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing the European Community [1997] OJ C340/105 and Art 51 TEU.

[283]Case C-128/92 *HJ Banks & Co Ltd v British Coal Corporation* [1994] ECR I-1209, Opinion of AG van Gerven, para 37 ff., esp 40, 43.

[284]Ibid para 15 ff.

[285]A Deringer, *Rapport fait au nom de la commission du marché interieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européene par le Conseil da la Communauté économique européene sur un premier règlement d'application des articles 85 et 86 du traité de la CEE* (Document 104/1960-1961, 1961); A Deringer and C Tessin, 'Das erste Kartellgesetz des Gemeinsamen Marktes' [1962] NJW 989, 993.

[286]FG Jacobs (n 31); P Nebbia and E Szyszczak, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (2009) 20 EBLR 635, 637.

[287]Commission, *XIIIth Report on Competition Policy 1983* (Office for Official Publications of the European Communities, 1984) 135-6; V Milutinović, *The 'right to damages' under EU competition law: from Courage v. Crehan to the White Paper and beyond* (Kluwer 2010) 28.

[288]See also J-F Verstrynge, 'Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy' in BE Hawk (ed), *Antitrust and Trade Policies in International Trade* (Matthew Bender 1985) 686-7; L Hiljemark, 'Enforcement of EC Competition Law in National Courts. The Perspective of Judicial Protection' (1997) 17 YEL 83, 87 ff.

to keep the enforcement of European competition law firmly under control.[289] On the one hand, the Commission Notice was satisfied with the principle of effectiveness and adequacy, which ensures the autonomy of the Member States over the procedural proceedings.[290] On the other hand, the Commission strengthened the position that private enforcement is effective but not absolutely essential to enforce European competition law. This could be the reason why the Commission had chosen the way of a non-binding Commission Notice.[291]

This approach was continued in the 1999 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty'.[292] The Commission awarded competence to the courts of the Member States to adjudicate damages for the breach of European competition law, and the Commission accepted the private enforcement as a necessary supplement of the public (administrative) enforcement through the competition authorities.[293]

3.2.2 Courage v Crehan and Manfredi

In its decision in *Courage v Crehan* the ECJ had for the first time the opportunity to discuss whether the basis for a damage claim for the breach of European competition law was based on European or national law. In doing so, the ECJ had to decide between a traditional and a more integrating approach.[294] On the one hand, several commentators – mainly from a common law tradition – argued for the recognition of a European right of damage claims that was shaped by European

[289] So for instance A Jones and B Sufrin, *EU Competition Law – Text, Cases, and Materials* (5th edn, OUP 2014) 1306.

[290] AP Komninos, 'New Prospects for Private Enforcement of Competition Law: Courage v. Crehan and the Community Right in Damages' (2002) 39 CMLRev 447, 451-2; AP Komninos, *EC Private Antitrust Enforcement* (n 9) 163-4; FG Jacobs and T Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective' in C-D Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Pub 2003) 207.

[291] Criticised by W Meibom and U Zinsmeister, 'Verbesserung des Europäischen Wettbewerbsverfahrens' in *Schwerpunkte des Kartellrechts 1991/92, Verwaltungs- und Rechtsprechungspraxis, Referate des 20 FIW-Seminars 1992 und der 11 Brüsseler Informationstagung 1992, FIW-Schriftenreihe Heft 153* (FIW 1993) 62; R Wesseling, *The Modernisation of EC Antitrust Law* (Hart Pub 2000) 198-200; AP Komninos, *EC Private Antitrust Enforcement* (n 9) 163.

[292] [1999] OJ C132/1; 2002 (and thus after the decision of the ECJ in *Courage v Crehan*) enected as Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[293] BJ Rodger, 'The Interface Between Competition Law and Private Law – Article 81, Illegality and Unjustified Enrichment' (2002) 6 EdinLR 217, 223-4.

[294] AP Komninos, *EC Private Antitrust Enforcement* (n 9) 167.

provisions.[295] Primarily because of the structural differences between the two main legal systems,[296] mainly scholars with a civil law background endorsed a European regulation that only focused on the principle of effectiveness and adequacy, and they allocated the question of damage claims and procedural aspects to the Member States.[297]

In *Courage v Crehan* the ECJ had to decide about two questions from the Court of Appeal of England and Wales (Civil Division). The dispute before the Court of Appeal was about a claim by Mr Bernard Crehan, who ran a pub, against his lessor, the Courage brewery. In the UK, it is common for a brewery, which leases a pub to a tenant who operates it, to own the pub. The agreed rent is usually below the market average but the tenant binds himself to buy nearly all his beer from the landlord. In 1991 Mr Crehan concluded such a 20 year lease agreement with Courage Ltd. Herein, Mr Crehan agreed to buy a minimum amount of beer exclusively from Courage and, in return, Courage agreed to sell the fixed amount of beer for a price that had been agreed in advance in a pricelist. After two years of performing the contract, Mr Crehan and other tenants got into financial difficulties because Courage would sell its beer to pubs without a lease agreement ('free houses') cheaper than to its tenants. Mr Crehan alleged that this was a breach of European competition and, among other things, claimed damages.

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[295] As already postulated by AG van Gerven in *Banks v British Coal*; J Maitland-Walker, 'Editorial: A step closer to a definitive ruling on a right in damages for breach of the EC competition rules' (1992) 13 ECLR 1; RM D'Sa, *European Community Law and Civil Remedies in England and Wales* (Sweet & Maxwell 1994) 169-174; J Shaw, 'Decentralization and law enforcement in EC competition law' (1995) 15 LS 128, 138 ff.; A Winterstein, 'A community right in damages for breach of EC competition rules?' (1995) 16 ECLR 49; BPB Francis, 'Subsidiarity and Antitrust: The Enforcement of European Competition Law in the National Courts of Member States' (1995) 27 Law & PolIntBus 247, 254, 273; D Vaughan, 'EC Competition Law in National Proceedings' in G Slynn and SA Pappas (eds), *Procedural Aspects of EC Competition Law* (EIPA 1995) 27; C Lewis, *Remedies and the Enforcement of European Community Law* (Sweet & Maxwell 1996) 137-8; S Weatherill, 'Public Interest Litigation in EC Competition Law' in H-W Micklitz and N Reich (eds), *Public Interest Litigation Before European Courts* (Nomos 1996) 185; G Tickle and C Tyler, 'Community Competition Law, Recovering Damages in the English Courts' in J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (Wiley 1997); DG Anderson, 'Damages for Breach of Competition Rules' in M Andenas and F Jacobs (eds), *European Community Law in the English Courts* (OUP 1998); L Hiljemark (n 288) 126 ff.; BJ Rodger and A MacCulloch, 'Community Competition Law Enforcement, Deregulation and Re-regulation: The Commission, National Authorities and Private Enforcement' (1998) 4 ColumJEurL 579, 599-600; CS Kerse, *EC Antitrust Procedure* (4. Aufl. edn, 1998) 439 ff.; PM Taylor, *EC and UK Competition Law and Compliance* (1999) 267; R Lane, *EC Competition Law* (Longman 2000) 203-4.

[296] AP Komninos, *EC Private Antitrust Enforcement* (n 9) 167-8.

[297] L Ritter and WD Braun, *European competition law: a practitioner's guide* (3rd edn, Kluwer 2004) 926; C Nowak, *Konkurrentenschutz in der EG – Interdependenz des gemeinschaftlichen und mitgliedstaatlichen Rechtsschutzes von Konkurrenten* (Nomos 1997) 230 ff.; E-J Mestmäcker, 'The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order' (2000) 1 EBOR 401, 421 ff.; H Weyer, 'Gemeinschaftsrechtliches Verbot und nationale Zivilrechtsfolgen' (1999) 7 ZEuP 424, 437 ff.; esp for Austria: G Stillfried and P Stockenhuber, 'Schadensersatz bei Verstoß gegen das Kartellverbot des Art. 85 EG-V' [1995] WBl 345; esp for France: AP Komninos, *EC Private Antitrust Enforcement* (n 9) 167 with further references.

Because the Court of Appeal saw Mr Crehan and Courage as co-perpetrators,[298] the Court asked the ECJ about the English interpretation of Art 101 TFEU (ex Art 81 EC, ex Art 85 EEC) where the rule was only designed to protect third parties and, therefore, a party of an uncompetitive contract could not claim damages. This was an expression of the strict interpretation of the *in pari delicto*[299] principle.[300]

Based on its ruling in *Francovich v Italy*,[301] the ECJ recognised the need for the right to claim damages before a court of a Member State.[302] In favour of Mr *Crehan*, the Court decided that even a participant of a joint breach of competition law could claim damages against other offenders.[303]

The ECJ stated that the underpinning right was based on European law but the enforcement and the right of indemnity had to be formulated by the Member States albeit within the framework of European provisions.[304] The Court of Justice confirmed that it did not assign the Member States the role of creating new mechanisms to enforce European law but rather to make sure that the existing mechanisms were applicable. This represents a distinct rejection of the described opinion of AG van Gerven in *Banks*, after which the basis for a damage claim had to be constituted in European law.[305] Furthermore, the ECJ took up the position

[298] *Courage Ltd v Crehan (No.2)* [1999] UKCLR 407; H-W Micklitz, 'Anmerkung zu EuGH, Urt. v. 20.9.2001 – Rs C-453/99 (Courage Ltd.)' [2001] EWiR 1141, 1142; O Odudu and J Edelman, 'Compensatory damages for breach of Article 81' (2002) 27 ELRev 327, 328-9.

[299] In full length: *nemo auditur turpitudinem propriam (suam) allegans* or *in pari delicto est conditio defendentis* or *ex dolo malo non oritur causa.*

[300] See for English law: G Virgo, 'The Effect of Illegality on Claims for Restitution in English Law' in WJ Swadling (ed), *The Limits of Restitutionary Claims – A Comparative Analysis* (United Kingdom National Committee of Comparative Law 1997) 150 ff.

[301] Compare Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 paras 20, 26 with *Francovich and Bonifaci v Italy* para 33.

[302] *Courage v Crehan* para 27.

[303] Ibid 19 ff.; Discussed critically before the decision of the ECJ: Recommending a right: J Maitland-Walker (n 295) 3-4; Against a right: T Eilmansberger, *Die Bedeutung der Art 85 und 86 EG-V für das österreichische Zivilrecht* (Verlag der Österreichischen Akademie der Wissenschaften 1998) 139-40.

[304] *Courage v Crehan* paras 29, 32; H-W Micklitz (n 298) 1142; A Albors-Llorens, 'Courage v Crehan: judicial activism or consistent approach?' (2002) 61 CLJ 1, 40; H Weyer, 'Anmerkung zu EuGH, Urteil vom 20.9.2001 – C-453/99 Courage/Crehan-Courage Ltd ./. Bernard Crehan und Bernard Crehan ./. Courage Ltd u.a.' [2002] GRUR Int 54, 58; other opinion by C Nowak, 'Anmerkung zu EuGH, Urteil vom 20.9.2001 – Rs. C-453/99 Courage Ltd/Bernard Crehan und Bernard Crehan/Courage Ltd u.a.' [2001] EuZW 715, 718; O Odudu and J Edelman (n 298) 334; Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 para 5; K Havu, 'Horizontal Liability for Damages in EU Law – the Changing Relationship of EU and National Law' (2012) 18 ELJ 407, 409-10.

[305] See above; H Weyer, 'Anmerkung zu EuGH, Urteil vom 20.9.2001 – C-453/99 Courage/Crehan-Courage Ltd ./. Bernard Crehan und Bernard Crehan ./. Courage Ltd u.a.' (n 304) 58.

that it was sufficient to restrict the enforcement of European competition law to the principles of efficiency and adequacy.[306]

Despite the distinct recognition of the need to a right of damages,[307] the court did not decide whether third parties (or only contracting parties) could claim damages.[308] However, if it is taken into account that third parties are often the main victims, it is clear that they, a fortiori, must have a right to claim damages.[309]

Besides the uncertainty in the detail, the importance of *Courage v Crehan* is that the ECJ acknowledged the principle of damage claims for the breach of European competition law, and this became the legal basis for the development of a European right of damages.[310]

Building on that, the ECJ developed the legal framework in *Manfredi*.[311] At the same time, the ECJ dealt for the first time with a follow-on claim, i.e. a damage claim after a successful administrative proceeding.[312] Again, the court clarified that the right to claim damages was based on Art 101 TFEU (ex-Art 81 EG) and as a consequence was based on European law.[313] On the other hand, the ECJ stressed the distinction between the granting of a right and its enforcement. In addition, the

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[306] *Courage v Crehan* para 29; Already Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705 Opinions of AG Jacobs, paras 24 ff., 45; T von Danwitz, *Verwaltungsrechtliches System und europäische Integration* (Mohr Siebeck 1996) 118 ff.; T von Danwitz, 'Die Eigenverantwortung der Mitgliedsstaaten für die Durchführung von Gemeinschaftsrecht' [1998] DVBl 421, 427 ff.; Joined cases C-87/90, 88/90 and 89/90 *A Verholen and others v Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757 Opinions of GA Darmon, paras 20-1; A Cahn, 'Zwingendes EG-Recht und Verfahrensautonomie der Mitgliedstaaten' [1998] ZEuP 974, 975; N Notaro, 'Case C-188/95, Fantask A/S and Others v. Industriministeriet (Erhvervsministeriet), Judgment of 2 December 1997, [1997] ECR I-6783' (1998) 35 CMLRev 1385, 1391; criticized by H Weyer, 'Anmerkung zu EuGH, Urteil vom 20.9.2001 – C-453/99 Courage/Crehan-Courage Ltd ./. Bernard Crehan und Bernard Crehan ./. Courage Ltd u.a.' (n 304) who argues against a European harmonisation even in a strict application of the Effet utile.

[307] OLG Düsseldorf EuZW 1999, 188; OLG Hamburg EuZW 2001, 637; N Reich, 'Rechtfertigung der Festbetragsregelung durch GKV-Spitzenverbände nach Art. 86 EG?' [2000] EuZW 653.

[308] *Courage v Crehan* para 38 reffering to *Banks v British Coal* Opinions of AG van Gerven, paras 43 ff.; I Brinker, 'Overview of Damage Actions in EU – An Private Enforcement of Competition Laws' [2003] IBL 171, 173.

[309] H-W Micklitz (n 298) 1142; N Reich, 'The 'Courage ' Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?' (2005) 42 CMLRev 35, 37-8; G Mäsch, 'Private Ansprüche bei Verstößen gegen das europäische Kartellverbot – "Courage" und die Folgen' [2003] EuR 825, 837-8; other opinion by T Eilmansberger, 'Schadenersatz wegen Kartellverstoßes – Zum EuGH-Urteil Courage/Crehan' [2002] ecolex 28, 30.

[310] S Weatherill, *Cases and Materials on EU Law* (11th edn, OUP 2014) 606; J Goyder and A Albors-Llorens (n 47) 560; H Weyer, 'Anmerkung zu EuGH, Urteil vom 20.9.2001 – C-453/99 Courage/Crehan-Courage Ltd ./. Bernard Crehan und Bernard Crehan ./. Courage Ltd u.a.' (n 304) 57.

[311] Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA* [2006] ECR I-6619.

[312] T Lübbig, 'Gleichzeitiger Verstoß gegen nationales und europäisches Wettbewerbsrecht durch Kartell – Aktivlegitimation jedes Geschädigten' [2006] EuZW 529, 536.

[313] *Manfredi* para 61.

Court outlined that everybody (consequently also consumers and other third parties) had a right to compensate the losses by relying on a causal breach of European competition law.[314] The emphasis should be on the expression of everybody's right and the necessity of a causal damage.[315] To this extent, the ECJ defined the essential requirements for a damage claim. Beyond this, the court stressed the principle that as long as there was no European regulation,[316] the procedural enforcement of the European right was ceded to the Member States and had to be fleshed out by them.[317] In addition, the question about the calculation of damages and the possibility of establishing punitive damages has been left to the Member States as long as the underpinning principle of full compensation is maintained.[318]

3.2.3 Recent European harmonisation

While in the pre-*Courage* era only non-binding notices of the European Commission were published, the decision of the ECJ in *Courage v Crehan* pushed to the fore a discussion about the future of the private enforcement of European competition law. This led the European Commission to take a more pro-active course.[319] As an immediate outcome of the decisions of the European courts, the European Commission retained the international law firm Ashurst LLP which produced a legal study about the underlying conditions of private damage claims in competition law cases in the 15 Member States of the EU at the time.[320] That so-called 'Ashurst-Study' came to the predictable[321] conclusion that private enforcement was deeply, if differently, flawed.[322]

Synthesising the perceptions of the study, the European Commission published a 'Green Paper on Damages Actions for Breach of the EC Antitrust Rules'[323] on 19th December 2005 for a consultation of the stakeholders and a discussion about the right way to approach private enforcement in Europe[324] until 21st April 2006. Different to the proposed principle of full compensation and corrective justice

[314]Ibid paras 61 ff.

[315]K Havu (n 304) 414.

[316]S Drake, 'Scope of Courage and the principle of "individual liability" for damages – further development of the principle of effective judicial protection by the Court of Justice' (2006) 31 ELRev 841, 857; J Kloub, 'White Paper on Damage Actions for Breach of the EC Antitrust Rules – Plea for a More Holistic Approach to Antitrust Enforcement' (2009) 5 ECJ 515, 535.

[317]*Manfredi* para 64.

[318]M Hazelhorst, 'Private Enforcement of EU Competition Law – Why Punitive Damages Are a Step Too Far' (2010) 18 ERPL 757, 766; J Kloub (n 316) 536.

[319]AP Komninos, *EC Private Antitrust Enforcement* (n 9) 179.

[320]D Waelbroeck, D Slater and G Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst Study)' *(EC Commission Open Procedure*, 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf>.

[321]AP Komninos, *EC Private Antitrust Enforcement* (n 9) 179.

[322]D Waelbroeck, D Slater and G Even-Shoshan (n 320) 1.

[323]COM(2005) 672 final.

[324]V Milutinović (n 287) 77.

of the ECJ, the European Commission simply strengthened the principle of an effective private enforcement and did not consider the principle of compensation as a manifestation of justice.[325]

Based on the received contributions, the European Commission published a white paper on 2nd April 2008.[326] On the one hand, the white paper was already based on the assumption that the private enforcement of European competition law was widely underdeveloped.[327] On the other hand, the Commission ruled out the principle of effective enforcement of European competition law as a central aim of private damage claims and strengthened more the aim of compensation for suffered losses and harm and, therefore, the principle of justice and especially corrective justice considering the overall economic damage of the breach of competition law.[328] Deterrence was downgraded to a mere by-effect or reflex of the central aim of compensation.[329] It has been argued that this relocation of the central aim by the European Commission was based on the apprehension that the Commission wanted to introduce a US-American situation of competition law enforcement.[330] On the other hand, the European Commission perceived that it was impossible to introduce a so-called 'private attorney' in Europe and to establish private enforcement as a central mechanism of competition law enforcement.[331] Alongside these central outcomes, the Commission strengthened other parameters, e.g. access to justice and an efficient use of the justice system as aims in its Impact Assessment Test.[332] Referencing the so-called 'structural information asymmetry' between the parties, the white paper determined that 'a minimum level of disclosure inter partes for EC antitrust damages cases should be ensured' (see in detail under 6.1).[333] On the other hand, the white paper argued for a general inaccessibility of documentation of the European leniency programme, especially leniency applications (see detail

[325]Commission, 'Green Paper on Damages Actions for Breach of the EC antitrust rules' COM(2005) 672 final, 3; F Bien, 'Wozu brauchen wir die Richtlinie über private Kartellschadensersatzklagen noch?' [2013] NZKart 481.

[326]Commission, 'White Paper on Damages Actions for Breach of the EC antitrust rules' COM(2008) 165 final.

[327]J-S Ritter, 'Private Durchsetzung des Kartellrechts – Vorschläge des Weißbuchs der Europäischen Kommission' [2008] WuW 762, 764-5; K Ost, 'Private Kartellrechtsdurchsetzung – gesetzgeberische Entwicklungen in Deutschland und Europa –' in P Behrens, E Braun and C Nowak (eds), *Europäisches Wettbewerbsrecht nach der Reform: Forum Wissenschaft und Praxis zum Internationalen Wirtschaftsrecht* (Nomos 2006) 109 ff.

[328]Commission, 'White Paper on Damages Actions for Breach of the EC antitrust rules' 2, 4; Commision, 'Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules' (n 13); critically discussed by J-S Ritter (n 327) 764-5.

[329]F Bien (n 325) 483.

[330]Ibid.

[331]Ibid.

[332]Commision, 'Impact Assessment Report' 24; P Nebbia and E Szyszczak (n 286) 642-3.

[333]Commission, 'White Paper on Damages Actions for Breach of the EC antitrust rules' 5.

under 8.2.1.2, 8.2.2.2 and 8.3.2.2).[334] It is remarkable that the Council did not directly discuss the white paper and the European Commission started another round of stakeholder consultation. It seems to be that the European Commission itself was not clear about the way forward because the suggestions were rather vague and some elementary problems were delivered directly to the Member States without any effort at solving them.[335]

Almost five years later, on 11th June 2013, the European Commission finally published its draft of the proposed directive (Draft Directive).[336] Similar to the remarks in the white paper, the Commission declared the compensation of victims as the central aim of the Directive. On the other hand, the Draft Directive strengthened a guarantee of an effective enforcement of competition law as a manifestation of an optimal cooperation between public and private enforcement.[337] Based on the suggestions of the white paper, the seven main parts of the Draft Directive regulated the disclosure and access to evidence (Sec 5-8); the binding effect of decisions of the Commission and other Competition Authorities (Sec 9); prescription (Sec 10); joint and several liability (Sec 11); passing on defence and indirect purchaser rule (Sec 12, 13); assumption of damages (Sec 16); and mutual dispute resolutions (Sec 17).

After political conciliation in the Council,[338] the Draft Directive was forwarded to the European Parliament. Following intense discussions in the ECON[339] and trialogue meetings between Parliament, Commission and Council, the amendments and the report were adopted by the Committee on 9th April 2014.[340] In its plenary session on the 16th and 17th April 2014, the European Parliament adopted the amendments of the ECON by a majority.[341] Because of mistranslations, the adoption of the Council was delayed. On the 10th November 2014 the Draft Directive, including

[334]Ibid 10; G Weidenbach and M Saller, 'Das Weißbuch der Europäischen Kommission zu kartellrechtlichen Schadensersatzklagen' (2008) 20 BB 1020, 1021-2.

[335]J-S Ritter (n 327) 773.

[336]Commision, '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.

[337]Ibid 3; W Mederer, 'Richtlinienvorschlag über Schadensersatzklagen im Bereich des Wettbewerbsrechts' [2013] EuZW 847; L Fiedler, 'Der aktuelle Richtlinienvorschlag der Kommission – der große Wurf für den kartellrechtlichen Schadensersatz?' [2013] BB 2179; I Vandenborre et al, 'Actions for antitrust damages in the European Union: evaluating the Commission's Directive proposal' (2014) 7 GCLR 1.

[338]On 3rd December 2013; A MacGregor and D Boyle, 'Private antitrust litigation in the EU: levelling the playing field' (2014) 20 IntTLR 30.

[339]Economic and Monetary Affairs Committee of the European Parliament.

[340]First Report of the ECON was on 27st January 2014: A MacGregor and D Boyle (n 338).

[341]European Parliament legislative resolution of 17 April 2014 on the 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 – C7-0170/2013 – 2013/0185(COD)), P7_TA(2014)0451.

the amendments of the European Parliament, were passed by the Council.[342] Eventually, the Directive was signed into law by the European Parliament on 26th November 2014, and was published in the Official Journal of the European Union on 5th December 2014.[343] Now, the Member States have until 27th December 2016 to transpose the provisions of the Directive into national law.[344]

3.2.4 Impacts of the Communication on quantifying harm in antitrust damages actions and the Practical Guide of the Commission

In addition to Directive 2014/104/EU, the European Commission wanted to provide guidance for national courts about how to quantify the suffered harm in a damage claim based on an infringement of Art 101 or 102 TFEU.

The core document is the Communication of the European Commission on quantifying harm in antitrust damages actions.[345] The Communication set out the central principles of quantification of harm that can help the national civil courts as well as the involved parties to calculate the harm. Based on the established case law of the European courts,[346] the European Commission mainly defined the quantification of damage as a comparison of the situation of the injured parties before and after the infringement of the law.[347] This should cover actual loss (damnum emergens) and compensation for loss of profit (lucrum cessans)[348] as well as appropriate interest.[349] On the other hand, the Commission acknowledges that the question of quantification of harm, as long as it is not governed by European law, is a matter of national law, especially in relation to the question of the degree of evidence for the suffered harm and the burden of proof.[350] It is also important to emphasise that the European Commission takes the view that it is a matter of national law to introduce an appropriate calculation scheme and that it should be possible for the Member States to shift the burden of proof or to establish a

[342] Commision, *Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions* (2014).

[343] As Directive 2014/104/EU 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 [2014] OJ L349/1.

[344] Ibid Sec 21(1).

[345] 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 [2013] OJ C167/07.

[346] See above under 3.2.1-3.

[347] Communication on quantifying harm at para 6.

[348] *Manfredi* at para 95-6; Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029 at para 87.

[349] *Manfredi* at para 97 referring to Case C-271/91 *M Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367 at para 31.

[350] Communication on quantifying harm at para 8.

presumption or the possibility of estimating the damage by the court.[351] By doing so, the Communication stated that the national courts should consider the differences in claims based on an infringement of competition law in contrast to general damage claims, especially regarding the information asymmetry mentioned above.[352]

As a consequence of that Communication, the Commission published a corresponding Practical Guide.[353] Although this Guide is merely informative and not binding for the national courts or parties,[354] it offers assistance to the courts and the parties by publishing the relevant information for quantifying harm caused by an infringement of competition law.

3.3 Classification in German law as a claim of the law of delicts and its requirements

As remarked several times, there is a substantial difference between the regulation of restitution, compensation, torts or delicts in common and civil law. For the purposes of comparison, it is necessary to choose a significant example for each legal system. Because of the historical development of the civil law (Roman-Germanic) system, it can be divided roughly into three legal systems: the Romance, German and Scandinavian (or mixed[355]) legal systems.[356] Although each of the different systems has its own characteristics, this thesis focuses on the German sub-legal system as one example of civil law. Typical of the German sub-legal system is the law of the Federal Republic of Germany (German law).[357]

Before examining the requirements of a civil damage claim in each legal system, the chapter must define the general underpinning systems. Therefore, first this section highlights the distinction between a damage claim based on the law of contracts and delicts. Starting with the distinction by Aristotle between voluntary and involuntary contractual relationships, the section analyses the separation of claims 'in rem' and 'in personam' under Roman law as the basis for the modern

[351]Ibid at paras 8, 13.

[352]Ibid at para 9.

[353]See Ibid at para 10 with reference to Commision, 'Practical Guide on Quantifying Harm in Actions for Damages based on Breaches of Articles 101 or 102 of the Treaty on the Functioning of the European Union, Accompanying the 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' SWD(2013) 205.

[354]Communication on quantifying harm at para 12; Commision, 'Practical Guide on Quantifying Harm in Actions for Damages' at para 7.

[355]U Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 AJCL 5; AK Saidov, *Comparative Law* (Wildy 2003); P de Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge Cavendish 2007).

[356]K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996); See the historical overview and developments of law classification in M Siems, *Comparative Law* (CUP 2014) 76.

[357]M Siems (n 356) 43-4; 202 ff.; K Zweigert and H Kötz (n 356) 130.

classification of law. Furthermore, based on Kant's principle of the freedom of contracts, the section examines the distinction between a damage claim based on the law of contracts and delicts and argues in favour of a classification of damage claims of customers based on a breach of competition law as claims based on the law of delicts. The chapter then analyses the central requirements for a damage claim based on an infringement of competition law.

3.3.1 Distinction between a damage claim based on the law of contracts and delicts

3.3.1.1 Distinction between voluntary and involuntary contractual relationships by Aristotle

In addition to the principle of equality as justice mentioned in the last chapter, the concept of corrective justice set out by Aristotle is based on the assumption of a justice in relationships of reciprocal exchanges or contracts (synallagmatic contract[358]). In relation to real life, it is clear that our common understanding of a contract does not fit into any 'reciprocal exchanges' because Aristotle's concept includes voluntary (e.g. contracts about buying/selling, lending at or without interest or letting for hire) and involuntary contractual relationships (e.g. theft, assault, imprisonment, murder or slander). Therefore, the concept of corrective justice has to be divided again into voluntary contractual justice (*iustitia commutativa*[359]) and involuntary contractual justice.[360]

Iustitia commutativa is about voluntary acts of both parties to a contract. Due to the fact that two or more people act voluntarily within their legal power, Aristotle sees justice as a form of compensation in the event of an unlawful behaviour in that 'business relationship'.[361] Therefore, *iustitia commutativa* is for Aristotle the right of proportional retaliation.[362] Even taking into account the minor significance related to the involuntary contractual aspects (it can be noted that it is not mentioned in the final 'definition' in chapter IX[363]), the *iustitia commutativa* is sometimes called a third division of particular justice alongside distributive and corrective justice.[364]

In contrast, involuntary contractual justice is the core scope of corrective, compensatory or restorative justice. Aristotle describes this type of justice as one that can be used to deal with the human urge of pleonexia. Even if these often involve private transactions, the injured party can also be a public official[365] or the state

[358]G Bien (n 167) 152.
[359]T St Aquinas (n 165).
[360]Aristotle, *Nicomachean Ethics* (n 161) 1131a1.
[361]G Bien (n 167) 150-1.
[362]Aristotle, *Nicomachean Ethics* (n 161) 1132b31-3.
[363]Ibid 1134a1 ff.
[364]FD Miller (n 175) 70.
[365]Aristotle, *Nicomachean Ethics* (n 161) 1132b23-30.

itself.[366] The aim of justice in this situation is to restore the gap between superfluity and dearth.[367] Aristotle describes the situation as follows:

> Thus, the equal is a mean between the greater and the less, but profit and loss are more and less in opposite ways, since more of good and less of evil is a profit, and the opposite is a loss. And the equal, which we call just, is a mean. Corrective justice is thus the mean between profit and loss.[368]

From this assumption, the task of a judge is to find a way to transfer the advantage of the wrongdoer to the victim.[369] Aristotle depicts the task of the judge as a person who faces an unequal divided line, removes half of the longer part and adds it to the smaller part.[370] This ultimately provides a sort of numerical equality between the parties.[371] In contrast to Plato,[372] Aristotle does not consider a criminal penalty to punish the wrongdoer.[373]

As mentioned above, for Aristotle, humans are by nature political animals.[374] In particular, he sees human beings as uniquely endowed by nature with the ability to create the concept of justice and hence with the capacity for political cooperation.[375] Therefore, Aristotle argues that the lawgiver of a state is by nature a great benefactor and the concept of justice needs to be administrated.[376] In terms of practical politics, Aristotle calls justice the 'communal virtue' of a state.[377] Universal justice is the promotion and protection of the community's goods and particular justice is a specific sort of action concerning the common advantage in its own, distinctive way.[378] As a consequence, Aristotle argues that the concept of justice has to be implemented in the law of a just constitution.[379] However, referring to the different forms of government he identifies, he also argues that there is no unique way of regulating the concept of justice legally beyond the so-called most extreme forms of government – examples given by Aristotle are tyranny, dynasty (extreme oligarchy) and extreme democracy.[380]

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[366]Ibid 1138a12-14.
[367]G Bien (n 167) 153, 158.
[368]Aristotle, *Nicomachean Ethics* (n 161) 1132a14-19.
[369]FD Miller (n 175) 72.
[370]Aristotle, *Nicomachean Ethics* (n 161) 1132b18-22.
[371]Ibid 1131b27-1132a7; FD Miller (n 175) 71-2.
[372]Plato, *Laws* (RG Bury tr, Harvard University Press 1967) XI 933e10-934a1.
[373]RE Barnett, 'Restitution: A New Paradigm of Criminal Justice' (1977) 87 Ethics 279; RE Barnett, 'The Justice of Restitution' (1980) 25 AmJJuris 117; FD Miller (n 175) 73; therefor criticised by WFR Hardie, *Aristotle's Ethical Theory* (2nd edn, Clarendon Press 1980) 194-5.
[374]Aristotle, *Politics* (n 162) 1253a7-18.
[375]Aristotle, *Eudemian Ethics* (H Rackham tr, Harvard University Press 1961) 1241b14-15.
[376]Aristotle, *Politics* (n 162) 1253a31-9; FD Miller (n 175) 67.
[377]Aristotle, *Politics* (n 162) 1283a38-9.
[378]FD Miller (n 175) 69-70.
[379]Aristotle, *Politics* (n 162) 11290b38-91b1, 292a30-2 and 1328b5-19.
[380]Ibid 1292b5-10.

To sum up, it can be said that the whole theoretical concept of justice outlined by Aristotle is based on the idea of arithmetic equality, and the task for a judge and the state is to establish mechanisms to ensure that unequal situations can be corrected by compensation or restitution.[381]

3.3.1.2 Separation of claims 'in rem' and 'in personam' under Roman law as basis for the modern classification of law

The modern distinction between the law of torts (or delicts) and contracts is mainly based on the distinction between claims 'in rem' and 'in personam' under Roman law. Although it is obvious that German law is largely influenced by Roman civil law,[382] the modern division of the law of property, contracts, torts and unjust enrichment of English law mainly refers to the early application of the Roman principles by the judges Ranulf de Glanvill[383] and Henry de Bracton[384].[385] However, there was a massive reduction in referencing of Roman law after the time of Bracton. Even though the referencing of Roman law has always been less than in continental Europe,[386] Roman law has still had some influence on common law, for example, in the division of claims in 'in rem' and 'in personam'[387] and thus the fundament of the modern division of the law of property, contracts, torts and unjust enrichment.[388] Roman law can be described as the starting point in the history of all modern law of restitution for wrongs.[389]

Even if a direct connection between the Greek philosophy of Aristotle and the applied Roman law cannot be evidenced, Greek philosophy was an important part of Roman education and thus Roman lawyers were well versed in the theories of Aristotle and the other ancient Greek philosophers.[390] Although Roman lawyers did

[381]N Jansen, *Die Struktur des Haftungsrechts – Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz* (Mohr Siebeck 2003) 78; JV Robert (n 178) 79.

[382]F Giglio (n 157) 127.

[383]R de Glanvill, *The treatise on the laws and customs of the realm of England, commonly called Glanvill (Tractatus de legibus et consuetudinibus regni Angliae*) (GDG Hall tr, Clarendon Press 1993).

[384]H de Bracton, *Bracton on the laws and customs of England (De Legibus et Consuetudinibus Angliae*) (GE Woodbine and SE Thorne trs, Harvard University Press 1968-1977); Bracton also refers to the work of Glanvill as a primary source.

[385]U Ziegenbein, *Die Unterscheidung von Real und Personal Actions im Common Law* (Duncker & Humblot 1971) 73; P Stein, 'Continental Influences on English Legal thought, 1600-1900' in P Stein (ed), *The Character and Influence of the Roman Civil Law* (Hambledon 1988) 223 ff.

[386]RC van Caenegem, *The birth of the English common law* (2nd edn, CUP 1988) 89 ff.; P Stein (n 385) 223 ff.; U Ziegenbein (n 385) 73.

[387]Justinian, *Justinian's Institutes* (P Birks, G McLeod and K Paul trs, Duckworth 1987) 7 (introduction by P Birks and G McLeod); H de Bracton (n 384) 46 (introduction by GE Woodbine); K Güterbock, *Bracton and his relation to the Roman law: a contribution to the history of the Roman law in the middle ages* (JB Lippincott 1866) 35-8.

[388]U Ziegenbein (n 385) 73; P Stein (n 385) 223 ff.

[389]F Goodwin, *The XII tables* (Stevens 1886) 5.

[390]F Giglio (n 157) 169.

not cite philosophy in their legal opinions, they did use it to support their legal based argumentation.[391]

The Rules of the XII Tables[392] were the foundation and body of early Roman law. Even though it perhaps does not pass for a fully developed and coherent legal system, it is a crystallisation of existing customary law[393] and can be seen as the starting point of the history of law and the basis for many European legal systems.[394]

The basis for the damage regulations in the XII Tables are the rules of self-help and the law of talion or retaliation (*lex talionis*[395]). Instead of an archaic right of vengeance upon the body or property of the injuring party, the victim achieved a right to claim monetary payment that was at once retribution (punishment) and satisfaction (damages/restitution).[396] Compensation for a personal wrong rather than simply compensation for losses[397] was a central notion in early Roman law.[398] In consequence, there were also claims for damages in the XII Tables which were independent of any concrete loss (e.g. table VIII, rules 3, 4, 11 and 25[399]) and the victim could claim a fixed sum of money.[400] Here, the aim was not the compensation of damages but rather the punishment for a wrongdoing. On the other hand, the XII Tables established a general claim for restitution.[401] The key rule of restitution and compensation is found in table VIII, rule 5: 'A man who accidentally damages

[391]Ibid 168.

[392]*Lex XII Tabularum*, ca 450 BC.

[393]F Goodwin (n 389) 6.

[394]Ibid 5.

[395]The classic understanding of Lex Talionis was not only as a punishment in the form of mirroring penalty. It was rather a concept of restitution of wrongdoings by the tortfeaser or its relatives. N Jansen (n 381) 194 criticising T Mommsen, *Römisches Strafrecht* (Duncker & Humblot 1899) 496-7.

[396]M Kaser, *Das Römische Privatrecht* (2nd edn, CH Beck 1971) 611-2; R Zimmermann, *Law of Obligations: Roman Foundations of the Civilian Tradition* (Clarendon Press 1996) 918-9; F Parisi, *Liability for negligence and judicial discretion* (2nd edn, University of California at Berkeley 1992) 39-40; W Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Verlag der Bayerischen Akademie der Wissenschaften 1962) 43-4, 97 ff.; A Völkl, *Die Verfolgung von Körperverletzungen: Studien zum Verhältnis von Tötungsverbrechen und Injuriendelikt* (Böhlau 1984) 49 ff.

[397]N Jansen (n 381) 194; M Kaser, 'David Daube, Studies in Biblical Law, Cambridge, University Press, 1947' (1948) 66 ZSS 617 criticising D Daube, *Studies in Biblical Law* (Cambridge, University Press 1947).

[398]E Genzmer, 'Talion im klassischen und nachklassischen Recht?: Erwägungen über Ursprung und Grundgedanken des Edikts Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur' (1942) 62 ZSS 122, 124; AHM Jones, *The Criminal Courts of the Roman Republic and Principate* (Blackwell 1972) 38-9; D Liebs, 'Damnum, damnare und damnas: Zur Bedeutungsgeschichte einigeŕ lateinischer Rechtswörter' (1968) 85 ZSS 173, 198 ff.; D Liebs, *Die Klagenkonkurrenz im römischen Recht* (Vandenhoeck & Ruprecht 1972) 22; W Kunkel (n 396), 136 ff.; M Weber, *Max Weber on law in economy and society* (Simon & Schuster 1954) 388 ff.

[399]See the translation by F Goodwin (n 389) T VIII fr 3, 4, 11, 25.

[400]F Giglio (n 157) 133.

[401]C Sell, *Die actio de rupitiis sarciendis der XII Tafeln und ihre Aufhebung durch die Lex Aquilia* (Marcus 1877) 1, 10 ff.; different understanding by EI Bekker, *Die Aktionen des Römischen Privatrechts*, vol 1 (Vahlen 1871) 184.

property shall make compensation'.[402] There was a clear distinction between the response of accidental damages, which equated to compensation, and other (probably scienter or negligent) caused damages, which equated to punishment.

More than 150 years later the Law of Aquilius[403] was introduced, probably by the Roman tribune of the plebs Aquilius.[404] Presumably, due to numerous practical shortcomings,[405] the Law of Aquilius was adopted as a comprehensive regulation of sanctions based on damages. With reference to the legal principle of *lex posterior derogat legi priori*, the Law of Aquilius thus susperseded every older regulation about damages, including the rules of the XII Tables.[406] The damage claim of the Law of Aquilius had a dual requirement: that the unlawful harm was causally based on a positive action.[407] Unlawful harm or damage (*damnum iniuria datum*) was originally defined as any interference in property.[408] Whilst the initial definition of the Law of Aquilius concentrated on the damage to slaves (chapter 1) and objects (chapter 3), Roman jurisprudence expanded the rule to cover all Roman citizens.[409] This damage had to be based on an unlawful action (*culpa*). Unlawful here means every conscious action against law, customs and public order.[410] Furthermore, this action had to be causal – originally in the meaning of a direct effect of the physical action of a wrongdoer.[411]

The Law of Aquilius was the first general normalisation of the principle of restitution, and it is seen as the nucleus of the modern law of delicts (torts).[412] Although the way to calculate the amount of the damage (highest value of the last 30 days) has been used as an argument for a penalty character of the damage claim,[413] the choice of the period was supposed to allow an estimation of the value.[414]

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[402]See the translation by F Goodwin (n 389) T VIII fr 5.

[403]*Lex Aquilia*, ca 286 BC.

[404]Detailed analysis of the damage claim in the Lex Aqulia by N Jansen (n 381) 202 ff.

[405]C Sell (n 401) 14 ff.

[406]JC Hasse, *Die culpa des römischen Rechts: Eine civilistische Abhandlung* (Marcus 1838) 17 with reference to Ulpianus, L.I.D. ad L. Aquil.

[407]C Sell (n 401); R Zimmermann (n 398) 957; BW Frier, *A casebook on the Roman law of delict* (Scholars Press 1989).

[408]D Liebs, *Die Klagenkonkurrenz im römischen Recht* (n 398) 164; C Sell (n 401); R Zimmermann (n 398) 957.

[409]H-P Benöhr, 'Die Redaktion der Paragraphen 823 und 826 BGB' in R Zimmermann (ed), *Rechtsgeschichte und Privatrechtsdogmatik* (CF Müller 1999) 507; D Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* (7th edn, CH Beck 2007) 112.

[410]JC Hasse (n 406) 8 ff.

[411]N Jansen (n 381) 218; M Kaser and R Knütel, *Römisches Privatrecht* (19th edn, CH Beck 2008).

[412]R Zimmermann (n 398) 961, 998 ff.; N Jansen (n 381) 202 ff.

[413]H-P Benöhr, 'Die Redaktion der Paragraphen 823 und 826 BGB' (n 409) 502.

[414]A Tuhr, *Zur Schätzung des Schadens in der lex Aquilia: Rudolf von Jhering zur Feier seines fünfzigjährigen Doctorjubiläums am VI. August MDCCCXCII* (Law Faculty of the University of Basel 1892) 1 ff.

Emperor Justinian used the Law of Aquilius to formulate his *Corpus Iuris Civilis*.[415] At the beginning of the digests (Institutes, Book I) the substantial principle of justice is given:

> The precepts of law are these: to live honestly, to injure no one, [and] to give to each his own. (*Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*)[416]

In addition, the *Corpus Iuris Civilis* was shaped by the principle of a separation of punishment and restitution.[417]

In summary, it can be said that restitution or compensation has not always been the main remedy of the Roman law of delicts.[418] On the other hand, there were no tort actions (*actiones ex delicto*) in Roman law. Although Roman law ascribed responsibility for delicts (or torts), the damage claims have to be qualified as claims of unjust enrichment.[419] Even if it can be argued that the basis of a claim of unjust enrichment is based on the claim of torts,[420] the principle of Roman law is in fact based on compensation rather than on punishment.[421] Based on the philosophical concept of restitutive justice, Roman law stated that if an asset unlawfully found its way to another party then it had to be returned.[422]

3.3.1.3 Principle of the freedom of contracts

Based on the ancient distinction between voluntary and non-voluntary obligations, legal philosophy began to establish the concept of freedom of contracts. This gave the final shape to the modern distinction between the law of tort or delicts, dealing with acting against the will of one of the involved parties, and the law of contract, referring to the expression of the free will of the parties.

As a first step, Immanuel Kant transferred the jusnaturalistic approach of justice of Aristotle to a notion of rationality. He argued that, 'if Justice and Righteousness perish, human life would no longer have any value in the world'.[423]

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[415]N Jansen (n 381) 266.

[416]Institutes of Justinian, Book I, Title I, paragraph 3; See the translation in H Agylaeus, *The Civil law, including the Twelve tables : the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo*, vol 2 (SP Scott tr, The Central Trust Company 1932) 5.

[417]N Jansen (n 381) 267.

[418]F Giglio (n 157) 127.

[419]W Pika, *Ex causa furtiva condicere im klassischen römischen Recht* (Duncker & Humblot 1988) 26.

[420]M Kaser, *Das Römische Privatrecht* (n 396) 402, 627.

[421]F Giglio (n 157) 128; W Pika (n 419) 12 criticising the opinions of P Krüger, 'Ueber dare actionem und actionem competere in der justinianischen Compilation' (1895) 16 ZSS 1; R von Mayr, *Die condictio des römischen Privatrechts* (Duncker & Humblot 1900) 145.

[422]H Hausmaninger and W Selb, *Römisches Privatrecht* (9th edn, Böhlau 2001); W Pika (n 419) 19 with further references.

[423]I Kant, *The Philosophy of Law* (n 199) 196.

For Kant, the concept of practical reasoning, the autonomy of humans, was based on human liberty. Liberty itself cannot be reasonably deduced from anything. Human self-determination leads onto the principle that humans themselves are the fundamental purpose of human acting. Therefore, it is a breach of that principle to act against Kant's categorical imperative to 'act only according to the maxim whereby you can at the same time will that it should become a universal law',[424] and also to act in such a way that you treat humanity, whether in your own person or in the person of another always at the same time as an end and never simply as a means.[425]

Furthermore, Kant argues that it is a principle of equality to respect the personality and dignity of every human. In line with Aristotle, he argues that this commitment is not only an internal obligation of a person but rather an obligation in the relationship between different individuals.[426] For Kant, the practical realisation of this idea is the concept of free contractual realtionships. Concerning this, Kant frames his categorical imperative of law as follows: 'Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonized in reality with the voluntary actions of every other Person, according to a universal Law of Freedom.'[427]

This makes it clear that for Kant the idea of a voluntary contractual relationship is based on the capacities for choice of two individuals to establish rights and duties between them as an expression of their free wills.[428] Therefore, the enforcement of contracts is, in contrast to the later theories of legal promises, based on the concept of a voluntary arrangement of individual obligations between people. The enforcement of contractual law is therefore an expression of freedom itself.[429] On the other hand, it is clear that there can be no contractual relationship to harm third parties.[430] It can be concluded from this that the rights and duties that can be enforced through conctractual law can only be based on the contract itself and do not establish any metaphysical responsibility.[431]

With reference to the approach of Kant, modern legal philosophy developed a concept of contracts based on the theory of the enforcement of binding promises.[432]

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[424]I Kant, *Grounding for the Metaphysics of Morals* (3rd ed, JW Ellington tr, Hackett 1993) 421.

[425]Ibid 429.

[426]I Kant, *On the old saw: that may be right in theory but it won't work in practice* (EB Ashton tr, University of Pennsylvania Press 1974) 289.

[427]I Kant, *The Philosophy of Law* (n 199) 45; O Höffe, 'Kant's Principle of Justice as Categorical Imperative of Law' in Y Yovel (ed), *Kant's Practical Philosophy Reconsidered* (Springer 1989) 149 ff.

[428]A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 109, 111.

[429]Ibid 112.

[430]Ibid 127.

[431]Ibid 128.

[432]See eg C Fried, *Contract as Promise: A Theory of Contractual Obligations* (Harvard University Press 1981); S Shiffrin, 'The Divergence of Contracts and Promises' (2007) 120 HarvLRev 708.

In line with Kant, the Promise Theory requires voluntary agreements to establish a promise and, thus, to establish binding contracs.[433] Therefore, contractual agreements are described by Lon L Fuller as an 'autonomous way of regulating future conduct'.[434] Even though he argues that damages cannot be awarded in direct correlation to the breached duty and hence as a 'prophylaxis' to deter contractual breaches,[435] the breach of a contractual agreed obligation is still the key point.[436]

With reference to this central requirement in establishing damages in contract law, Patrick S Atiyah strengthened the distinction between voluntary obligations and obligations imposed by law and thus the distinction between contract law and the law of torts or delicts.[437] According to this distinction, it is clear that damages based on contract law can only be a remedy related to a breach of a contractual obligation agreed between both parties.[438] Every other wrongdoing is a matter of tort or delicts. This is along the same lines as the Aristotelian tradition.[439]

3.3.1.4 Distinction between a damage claim based on the law of contracts and delicts

German civil law is generally based on two historical law traditions: Roman law, especially the Pandects, and ancient German law, especially the Salian Law.[440]

The Salian Law[441] was written by order of the Merovingian King Clovis I, and is one of the oldest preserved codified books of regulations. It is the first textualisation of old oral conventions of law. As part of the Germanic tribunal laws (ancient German laws), the Salian Law (named after the Frankish tribe of Salian Franks) constituted the main part of the Frankish law governing the legal system of Frankia during the Old Frankish Period (ca. 5th to 9th century). In consequence, it had a formative influence on the modern German legal system (not only German law, see above). Originally, the right of restitution or damage was based on the pure principle of

[433]TM Scanlon, 'Promises and Contracts' in P Benson (ed), *The Theory of Contract Law* (CUP 2001).

[434]LL Fuller, 'Consideration and Form' (1941) 41 ColLRev 799, 806-10.

[435]LL Fuller and WR Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 YaleLJ 52.

[436]PS Atiyah, 'Fuller and the Theory of Contract' in PS Atiyah (ed), *Essays on Contract* (OUP 1990) 75-6.

[437]PS Atiyah, 'Contracts, Promises and the Law of Obligations' in PS Atiyah (ed), *Essays on Contract* (OUP 1990).

[438]A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart Pub 1998) 3-4.

[439]J Gordley, 'Contract Law in the Aristotelian Tradition' in P Benson (ed), *The Theory of Contract Law* (OUP 2001) 327.

[440]H Honsell, 'Einleitung zum Bürgerlichen Gesetzbuch' in H Roth (ed), *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, vol 1 (Einleitung zum BGB) (Sellier/de Gruyter 2013) para 68 ff.; K Schäfer, 'Unerlaubte Handlungen §§ 823-835' in G Beitzke et al (eds), *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, vol 5/II (Schuldverhältnisse §§ 823-835) (10th/11th edn, J Schweitzer Verlag 1975) Vorbem, para 8 ff.

[441]*Lex Salica* or *Pactus Legis Salicae*, AD 507-511.

restitutive justice of Aristotle. Over the years, the principle of making atonement for a wrongdoing was added with reference to St Thomas Aquinas.[442] Therefore, in chapter C No 2 § 2 ff., the Salian Law distinguished between the restitution of harm (*dilatura*[443]) and punishment for a wrongdoing[444] although there was no general clause of damages in the Salian Law (casuistic regulation).[445]

On the other hand, the authors of the German civil law were mainly shaped by the science of the interpretation of the Pandects (broadly speaking, the Roman civil law). Therefore, the Justinianic *Corpus Iuris Civilis* has been the main influence on the codification of the law of delicts. The proponents of the natural law approach argued for a general principle of liability for all culpably caused harm or damage.[446] As a result of that interpretation of Roman law, German law differentiates between a damage claim based on a breach of contract and a claim based on the law of delicts.

The central norm for a damage claim based on the breach of a contract is Sec 280 of the German Civil Code (BGB)[447].[448] The main distinction between the claim of Sec 280 and a claim based on the law of delicts (e.g. Sec 823 BGB) is that Sec 280 requires a contract and the breach of a contractual obligation whereas the law of delicts is based on a violation of a legally protected interest, good or right. The key point for a claim based on the law of contracts is that the damage is based on a breach of an obligation that arises from the agreed contractual duties.[449] Therefore, it is the contract that defines the obligations which can be breached.[450] The focal points are hence the central conditions about the performance of the contract[451] and the obligation not to injure the rights of the contracting parties by performing the contract.[452]

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[442]H Lange, *Schadensersatz und Privatstrafe in der mittelalterlichen Rechtstheorie* (Böhlau 1955) 111.

[443]See the original Latin version of the Lex Salica in KA Eckhardt, *Lex Salica: 100 Titel-Text* (Böhlaus 1953) No 12, 1.

[444]See the translation and commentations by H Geffcken, *Lex Salica zum akademischen Gebrauche* (Veit&Comp 1898) 109 ff. and KA Eckhardt (n 443) pactus 2 § 4, 106-7.

[445]H-P Benöhr, 'Die Redaktion der Paragraphen 823 und 826 BGB' (n 409) 507.

[446]K Schäfer (n 440) Vorbem, para 4; G Wagner, 'Unerlaubte Handlungen §§ 823-838' in M Habersack (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 5 (§§ 705-853) (6th edn, CH Beck 2013) Vorbemerkungen, para 4; H Lange (n 442) 10 ff., 69 ff.

[447]Bürgerliches Gesetzbuch (2002) BGBl, vol 1, 42, amdt (2002) BGBl, vol 1, 2909; amdt (2003) BGBl, vol. 1, 738.

[448]S Lorenz, '§ 280 BGB' in C Bamberger and H Roth (eds), *Beck'scher Online-Kommentar BGB* (34th edn, CH Beck 2015) at para 1.

[449]German Federal Parliament (Bunedstag), Document 14/6040 at 133, 135; HP Westermann, '§ 280 BGB' in HP Westermann (ed), *Erman Bürgerliches Gesetzbuch* (14th edn, Otto Schmidt 2014) at para 5; J Alpmann, '§ 280 BGB' in M Junker, RM Beckmann and H Rüßmann (eds), *juris Praxiskommentar BGB*, vol 2nd (7th edn, juris 2014) at para 2; S Lorenz, 'BeckOK § 280 BGB' (n 448) at paras 1, 3.

[450]German Federal Parliament (Bunedstag), Document 14/6040 at 134-135; R Schwarze, '§ 280 BGB' in M Löwisch (ed), *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, vol §§ 255-304 (rev edn, Sellier/de Gruyter 2014) at para C 1.

[451]W Ernst, '§ 280 BGB' in FJ Säcker and R Rixecker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 2nd (6th edn, CH Beck 2012) at para 1.

[452]R Schwarze (n 450) at para C 22; J Alpmann (n 449) at para 24.

The modern German law of delicts is based on the precept of a general compensation of damages after a wrongdoing; principally through restitution in kind (Sec 249(1) BGB) but in practice monetary restitution (Sec 249(2), 251 BGB).[453] Based on the casuistic structure of the Salian Law, German civil law developed a general clause for damage claims out of the extended application of the Salian rules.[454]

It seems to be clear that not all single harms that a legal subject suffered can be compensated.[455] Therefore, it is the task of the law of delicts to define the limits between the principle of *casum sentit dominus* (liable is where the damage is) and the liability of third persons, e.g., the perpetrator (damage externalisation or 'property rule'[456]).[457] The main outcome of the damage externalisation is the compensation of damages, less the prevention of prospective damages.[458] On the one hand, some commentators argue that this limit of liability cannot be defined as a manifestation of the philosophical concept of corrective justice[459] because a sole philosophical justification is too vague and it cannot be assumed that everybody has a general will of compensation.[460] They see the law of delicts and the principle of liability simply as a positive legal codification of the attribution of damages on the bases of culpability and endangerment.[461] However, as argued above, the principle of justice as well as the concept of liability cannot be seen as the sole positive will of the lawgiver. It is more rigorous to see the civil liability based on the principle of personal liability for personal actions (as Kant)[462] or largely influenced by the ancient concept of

[453]E Deutsch, *Haftungsrecht* (Heymann 1976) I para 17; K Larenz and C-W Canaris, *Lehrbuch des Schuldrechts*, vol II/2 (CH Beck 1994) § 75 I 2 i, 354; N Jansen (n 381) 33 ff.

[454]H-P Benöhr, 'Die Redaktion der Paragraphen 823 und 826 BGB' (n 409) 503.

[455]G Wagner, 'Haftung und Versicherung als Instrumente der Techniksteuerung' [1999] VersR 1441, 1441-2; G Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?' (2006) 206 AcP 352, 423 ff., 453 ff.; H Kötz, 'Ziele des Haftungsrechts' in JF Baur (ed), *Festschrift für Ernst Steindorff zum 70 Geburtstag am 13 März 1990* (de Gruyter 1990) 643-5; H-B Schäfer and C Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (5th ed, Springer 2012) 114.

[456]G Brüggemeier, 'Judizielle Schutzpolitik de lega lata – Zur Rekonstruktion des BGB-Deliktsrechts' [1986] JZ 969, 970.

[457]G Wagner, 'Unerlaubte Handlungen §§ 823-838' Vorbemerkungen (n 446) para 38.

[458]K Larenz and C-W Canaris (n 453) vol 1, § 27 I; G Brüggemeier, 'Gesellschaftliche Schadensverteilung und Deliktsrecht' (1982) 182 AcP 385, 386.

[459]G Wagner, 'Unerlaubte Handlungen §§ 823-838' Vorbemerkungen (n 446) para 38; other opinion: G Brüggemeier, *Haftungsrecht: Struktur, Prinzipien, Schutzbereich* (Springer 2006) 9.

[460]J Schmidt, *Schadensersatz und Strafe: Zur Rechtfertigung des Inhaltes von Schadensersatz aus Verschuldenshaftung* (H. Lang 1973) 26.

[461]K Larenz and C-W Canaris (n 453) § 75 I 2, S. 351 ff.

[462]H Stoll, 'Fleming: The Law of Torts, 3. Aufl.' (1966) 166 AcP 380, 383; H Kötz, 'Haftung für besondere Gefahr' (1970) 170 AcP 1, 3-4; K Larenz, *Allgemeiner Teil des deutschen Bürgerlichen Rechts* (7th edn, CH Beck 1989); JG Fleming, *Fleming's The law of torts* (10th edn, Thomson Reuters 2011).

corrective justice[463] even though it is clear that single philosophical concepts cannot define every single detail of the civil liability clauses.

Here, the law of delicts or damages is regulated in Sec 823 ff. BGB and, as a special law for the breach of competition law, in Sec 33(3) GWB.

3.3.1.5 Damage claims of customers based on a breach of competition law as a claim based on the law of delicts

To classify a damage claim based on a breach of competition law as a claim based on contracts or delicts, it is necessary to focus on the analysed key differences.

As described above, the first requirement of a claim based on contracts is the existence of a contract between the plaintiff and the defendant. Although it is difficult to establish a contractual relationship between the customer and manufacturer through a supply chain, it is clear that there is a direct contractual relationship between the company breaching competition law and its purchasers. That contract is also not void with reference to Art 101(2) TFEU because the regulation about invalidity in Art 101(2) TFEU only refers to the cartel agreement, i.e. the contract establishing the cartel.[464]

However, in focusing on the second key principle of a damage claim based on Sec 280 BGB, i.e. that the breached obligation has to be based on the agreed duties in the contract, it is clear that a member of a cartel usually has not breached any contractual relationship but rather a statutory provision. Therefore, the damage claim based on the breach of competition law has to be classified as a claim based on the law of delicts.[465] That is the reason why the German law-givers designed the regulation in Sec 33 GWB to be analogous to Sec 823 BGB, the central provision of the German law of delicts.

3.3.1.6 Conclusion

In summary, a damage claim based on an infringement of competition law can be classified as a claim based on the law of delicts.

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[463] H Coing, *Die obersten Grundsätze des Rechts: ein Versuch zur Neugründung des Naturrechts* (Schneider 1947) 29-30; See for non German law but within the German legal system: R Feenstra, 'Das Deliktsrecht bei Grotius' in R Feenstra and R Zimmermann (eds), *Das römisch-holländische Recht* (Duncker & Humblot 1992) 429 ff.; K Oftinger and EW Stark, *Schweizerisches Haftpflichtrecht*, vol 1 (5th edn, Schulthess 1995).

[464] See 319-82 *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co KG* [1983] ECR 4173 at para 11; S Nagel, *Schweizerisches Kartellprivatrecht im internationalen Vergleich* (Dike 2007) 37 with further references; H Weyer, 'Zivilrechtsfolgen, Art 81 EG' in H Glassen et al (eds), *Frankfurter Kommentar zum Kartellrecht* (80th (May 2014) edn, Dr Otto Schmidt 2000 ff.) at para 142.

[465] V Emmerich, '§ 33 GWB, Unterlassungsanspruch, Schadensersatzpflicht' in U Immenga and E-J Mestmäcker (eds), *Wettbewerbsrecht*, vol 2 (5th edn, CH Beck 2014) at para 47; E Rehbinder, '§ 33 GWB, Unterlassungsanspruch, Schadensersatzpflicht' in U Loewenheim, KM Meessen and A Riesenkampff (eds), *Kartellrecht* (2nd edn, 2009) at para 31.

Based on the distinction between voluntary and involuntary contractual relationships by Aristotle, Roman law first established a separation between claims 'in rem' and 'in personam'. Although Roman law had no actions in tort (actiones ex delicto), it put in place the main principle of restitution and in so doing created the basis for the modern classification of damage law.

With reference to the Kantian principle of the freedom of contracts and Kant's idea of a voluntary contractual relationship based on the capacities for choice of two individuals to establish rights and duties between them as an expression of their free wills, modern law distinguishes between the law of contracts which deals with such voluntary contracts and its performance and the law of delicts. The English legal scholar Atiyah developed the idea and stated that damages based on contract law can only be a remedy related to a breach of a contractual obligation agreed between both parties and every other wrongdoing is a matter of tort or delicts. This is also in the Aristotelian tradition.

Therefore, the key point for a claim based on the law of contracts in German civil law is that the damage is based on an infringement of an obligation that arises from the agreed contractual duties between free-willing parties. Therefore, it is the contract that defines the obligations that can be breached. On the other hand, a breach of Art 101 TFEU or some other competition law is not based on an infringement of a contractual agreed obligation. On the contrary, it is the performance of a contract with an illegal purpose to breach a statutory provision. Consequently, damage claims based on an infringement of competition law must be classified under German law as a claim based on the law of delicts.

3.3.2 Damage claims of customers based on a breach of competition law as a claim based on the law of delicts

After classifying the civil damage claim for the breach of European competition law as a claim based on the law of delicts, this chapter focuses on the specific requirements for such a claim under German law.

Although Sec 33(3) GWB establishes a specific damage claim for the breach of competition law, the central regulation for the German law of delicts is Sec 823 BGB. In its paragraphs, the section regulates a breach of specific legal or personal goods or interests (Sec 823(1)) and a breach of statutory duties (Sec 823(2)).[466] Before the reformation of the GWB in 2005, the old regulation did not consider breaches of European competition law and, therefore, Sec 823 BGB was directly applicable.

[466] See G Spindler, '§ 823 BGB – Schadensersatzpflicht' in HG Bamberger and H Roth (eds), *Beck'scher Online-Kommentar BGB* (34th edn, CH Beck 2013) at para 1.

Even if now Sec 33(3) GWB is lex specialis and hence replaces Sec 823 BGB,[467] the established legal practice is still applicable.[468]

In general, the requirements for a successful claim based on Sec 823 can be separated into three parts: an illegal infringement of protected rights or interests as well as a breach of statutory duties (3.3.2.1); damages causally based on the infringement (3.3.2.2); and the culpability of the infringer (3.3.2.3).[469]

3.3.2.1 Illegal Infringement of protected rights or interests

The crucial point in a claim based on the law of delicts is the identifying of an infringement of a scope of a legally protected interest/right or the breach of a statutory duty.[470]

The legally protected rights and interests of Sec 823(1) BGB are life, body, health, freedom, property and as a general clause another right of another person.[471]

The first possibly affected right is the property of the victims. Property is in Sec 903 BGB legally defined as the comprehensive right of the owner of a thing to deal with the thing at his discretion and to exclude others from every influence. Therefore, the possible infringements of the property are (a) the withdrawal or burden of property rights, (b) acting with a harmfull physical effect on the thing and (c) disturbances of the usability of the thing.[472] On the other hand, the definition of Sec 903 BGB only involve physical things but not legal titles or other assets.[473]

Usually an infringement of Art 101 or 102 TFEU does not cause a physical damage on the things of the victims. More often, the caused damages are pure financial interests. However, those financial interests are not part of the property definition of Sec 903 BGB and are, therefore, outside the scope of Sec 823(1) BGB.

[467]See P Stockenhuber, 'Art 81 EGV / Art 101 AEUV' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union*, vol 1 (53rd (May 2014) edn, CH Beck 2010 ff.) at paras 242 ff.; W Jaeger, 'Art. 81 EG' in U Loewenheim, KM Meessen and A Riesenkampff (eds), *Kartellrecht* (2nd edn, CH Beck 2005) at para 37; E Rehbinder (n 465) at para 2.

[468]K Schmidt, 'Anhang 2: Privatrechtliche Durchsetzung – Materielles Recht' in U Immenga and E-J Mestmäcker (eds), *EU-Wettbewerbsrecht*, vol 1 (5th edn, CH Beck 2012) at para 15; DJ Zimmer and H Logemann, 'Unterliegen "Altfälle" der verschärften Schadensersatzhaftung nach § 33 GWB? Die versteckte Rückwirkung im Kartellprivatrecht' [2006] WuW 982; E Rehbinder (n 465) at para 31.

[469]See G Spindler (n 466) at para 2.

[470]G Wagner, 'Unerlaubte Handlungen §§ 823-838' (n 446) § 823 at para 52.

[471]See Sec 3 for the moral basis of the damage claim.

[472]G Wagner, 'Unerlaubte Handlungen §§ 823-838' (n 446) § 823 at para 164.

[473]Ibid § 823 at para 165; OLG Karlsruhe NJW 1996, 200 at 201; K Meier and A Wehlau, 'Die zivilrechtliche Haftung für Datenlöschung, Datenverlust und Datenzerstörung' [1998] NJW 1585, 1588.

On the other hand, Sec 823(2) BGB protects pure financial interests as part of the assets of the victims.[474] The regulation is on of the ways the BGB includeds the valuations of other fields of law.[475] It is therefore a way of private enforcement of administrative regulations.[476] The first requirement of Sec 823(2) BGB is the breach of statutory duty that protects individual rights or interests.

As mentioned above, before the reformation of the GWB in 2005, Sec 823(2) BGB was directly applicable in competition law cases. Since that reform, Sec 33(3) GWB is lex speicales and replaces Sec 823(2) BGB. But the central considerations of the principle and structure of Sec 33(3) GWB is based on Sec 823(2) BGB.

The relevant statutory duty is a breach of Art 101 or 102 TFEU (or the equivalent regulation of Sec 1 or Secs 19-21 GWB). Sec 33(3) GWB does not make any considerations about the requirements of the infringement of competition law and is therefore only applicable in conjunction with the requirements of Art 101 or 102 TFEU. Consequently, the requirements as well as the limits (e.g. the application of the group exceptions or commission's decisions) of Art 101 or 102 TFEU have to be considered to assess if a damage claim can be successful.[477]

3.3.2.2 Damages causally based on the infringement

Besides an infringement of a protected right or interest, German law of delicts requires damages which are causally based on the stated infringement. The issue that needs to be determined is what can be qualified as damages in such a claim. To do this, this section analyses the distinction between restitution in kind and in money to find a common understanding of what damages are, how they can be compensated under German law of delicts and how they are allocated. The section then examines the specific problem of passing-on damages through a supply chain and the legal concept of shared benefits behind this factual problem. Alongside the damages directly suffered by the infringement, indirect damages can arise, especially if a claim takes a long time. Therefore, the central problem of interest has to be considered in the analysis of damages. Finally, the section deals with the problem of evidence related to the amount of damages and its solution by the legal concept of estimating the losses under German Civil Procedure Law.

[474]RGZ 91, 72 at 76; BGHZ 66, 388 at 390-1; BGHZ 125, 366 at 374; C-W Canaris, 'Schutzgesetze – Verkehrspflichten – Schutzpflichten' in C-W Canaris and U Diederichsen (eds), *Festschrift für Karl Larenz zum 80 Geburtstag am 23 April 1983* (CH Beck 1983) 58 ff.; K Larenz and C-W Canaris (n 453) 431-2.

[475]BGHZ 122, 1 (*Ballettschule*) at 8; E Deutsch, 'Entwicklung und Entwicklungsfunktion der Deliktstatbestände. Ein Beitrag zur Abgrenzung der rechtsetzenden von der rechtsprechenden Gewalt im Zivilrecht' [1963] JZ 385, 389; G Brüggemeier, *Deliktsrecht – ein Hand- und Lehrbuch* (Nomos 1986) at para 791.

[476]G Wagner, 'Unerlaubte Handlungen §§ 823-838' (n 446) § 823 at para 384.

[477]K Schmidt, 'Anhang 2: Privatrechtliche Durchsetzung' (n 468) at para 16.

3.3.2.2.1 Distinction between restitution in kind or money and the allocation of damages

To build a common understanding of what can be compensated by the German law of delicts, it is first necessary to highlight the main distinction between restitution in kind and restitution in money based on the German law of delicts.

In contrast to English law,[478] the general principle of restitution under German law is restitution in kind (Sec 249(1) BGB). Only in three cases does German law allow restitution in money. The first is regulated in Sec 249(2) BGB and covers the restitution based on a violation of a person or an injury of a thing.[479] However, in a case based on an infringement of competition law, both variants are usually not relevant. The second exception of the general rule is based on the general obligation of the infringer to compensate the damage in kind. Sec 250 BGB states that if the infringer is not able or willing to compensate the damage in kind after a deadline set by the victim, the victim can claim directly damages from the infringer and does not have to wait for a restitution in kind.

The most relevant exception in competition cases is Sec 251 BGB. The section rules that a victim can claim money without setting a deadline if restitution in kind is impossible, insufficient or disproportionally expensive. This is usually given in cases based on an infringement on competition law. Whereas the old case law of the German Federal Court of Justice recognised restitution in kind in cases of an obligation to perform a contract,[480] modern case law regards this obligation as part of a positive injunctive relief[481] and hence it is uncontroversial that restitution in kind is obsolete in competition law cases.[482] Therefore, the main kind of restitution in German competition law is restitution in money.

To allocate the amount of damages, German courts use the difference hypothesis, that is, the calculation of damages is done by comparing the financial situation with and without the law infringement.[483] The thinking behind this is to compensate the actual loss suffered because of a price increase and possible losses because of a reduction in the number of requests of customers.[484] Therefore, the German Civil Code distinguishes between material damages or financial losses

[478] See under 3.4.2.2.

[479] See e.g. C Schubert, '§ 249 Art und Umfang des Schadensersatzes' in C Bamberger and H Roth (eds), *Beck'scher Online-Kommentar BGB* (34th edn, CH Beck 2011) at para 188.

[480] See e.g. BGHZ 36, 91 (*Gummistrümpfe*) at 100; LG Karlsruhe NJW-RR 1986, 1250; OLG Karlsruhe NJW-RR 1991, 944; H Oetker, '§ 249 BGB – Art und Umfang des Schadensersatzes' in FJ Säcker and R Rixecker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 2 (6th edn, CH Beck 2012) at para 338; J Bornkamm, '§ 33 GWB – Unterlassungsanspruch, Schadensersatzpflicht' in E Langen and H-J Bunte (eds), *Kartellrecht*, vol 1 (12th edn, Lucherhand 2014) at para 100.

[481] E Rehbinder (n 465) at para 31.

[482] See e.g. Ibid at para 37.

[483] J Bornkamm, '§ 33 GWB' (n 480) at para 99.

[484] E Rehbinder (n 465) at para 37 with reference to Sec 252 BGB.

(Secs 249, 252 BGB) and immaterial damages (Sec 253 BGB). In so doing, the German Civil Code in Sec 252 BGB accepts that the loss of profits, besides the suffered financial harm, are part of financial losses.

3.3.2.2.2 Passing-on defence and the concept of shared benefits

One key problem in estimating the losses is the situation when the victim resells the goods at an increased price and so "passes on" the price increase to its own customers (the so-called passing-on defence). This defence is based on the US Supreme Court decisions in *Hanover Shoe*[485] and *Illinois Brick*[486] where it was stated that it is not possible to argue in a case that the overcharge has been passed on to indirect purchasers and these have no right to claim damages. Under German law, a passing-on defence has been discussed and applied under the concepts of benefit sharing and the difference hypothesis.[487] After the 7th reform of the German Competition Act, sentence 2 of Sec 33(3) GWB has been amended so that a claim of a direct purchaser is not denied because it passed on the price increase to its customers. However, this only affects the existence of damage and not its value.[488] By defining the value of damage, German law applies a concept of benefit sharing. Therefore, it is possible that the damage calculated in a pure differential hypothesis will be reduced by the price increase of the plaintiff. The only fact that is not affected is the reduction in customer demand.[489]

Although the German lawgivers did not ultimately come to the decision that the principle of shared benefits was illegal, they assumed that the leading opinion in case law and literature was that this principle was not compatible with the sense

[485] *Hanover Shoe v United Shoe Machinery Corp* [1968] 392 US 481.

[486] *Illinois Brick Co v Illinois* [1977] 431 US 720.

[487] OLG Karlsruhe NJW 2004, 2243 (*Vitamin*); J Beninca, 'Schadensersatzansprüche von Kunden eines Kartells?' [2004] WuW 604; T Lübbig, 'Die zivilprozessuale Durchsetzung etwaiger Schadensansprüche durch die Abnehmer eines kartellbefangenen Produktes' [2004] WRP 1254; M Schütt, 'Individualrechtsschutz nach der 7. GWB-Novelle. Anmerkung zum Regierungsentwurf vom 12.08.2004' [2004] WuW 1124, 1129; FW Bulst, 'Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht' [2004] EWS 403; other opinion in LG Dortmund WuW/E DE-R 2004, 1352 (*Vitaminpreise in Dortmund*) at 1353-4; H Köhler, 'Kartellverbot und Schadensersatz' [2004] GRUR 99, 103; R Hempel, 'Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle' [2004] WuW 362, 369; R Bechtold, 'Grundlegende Umgestaltung des Kartellrechts: Zum Referentenentwurf der 7. GWB-Novelle' [2004] DB 235, 239; T Lettl, 'Der Schadensersatzanspruch gemäß § 823 Abs. 2 BGB i.V. mit Art. 81 Abs. 1 EG' (2003) 167 ZHR 473, 487.

[488] LG Dortmund WuW/E DE-R 2004, 1352 (*Vitaminpreise in Dortmund*); E Rehbinder (n 465) at para 39; FW Bulst, 'Private Kartellrechtsdurchsetzung durch die Marktgegenseite: deutsche Gerichte auf Kollisionskurs zum EuGH' [2004] NJW 2201, 2201-2; GM Berrisch and M Burianski, 'Kartellrechtliche Schadensersatzansprüche nach der 7. GWB-Novelle. Eine Einschätzung der Zukunft privater Kartellrechtsdurchsetzung mittels Schadensersatzklagen in Deutschland' [2005] WuW 878, 885.

[489] Commission, 'White Paper on Damages Actions for Breach of the EC antitrust rules' 9; M Schütt (n 487) 1129; V Emmerich (n 465) at paras 58-9; FW Bulst, *Schadensersatzansprüche der Marktgegenseite im Kartellrecht* (n 465) 126 ff., 321 ff., 345 ff.

of Sec 33 GWB.[490] The question that arises from this is that if damages have not been passed on through a supply chain, the damages of the direct victims have to be reduced with reference to Sec 254 BGB. This states that a victim is obliged to reduce its own damages as far as reasonably possible. Therefore, the central question is whether it is appropriate for a victim to pass on the suffered harm, i.e. a price increase, to its own customers. The German Civil Code itself does not say anything in detail and it is thus a matter for case law.[491] The crucial ruling is the decision of the Federal Court of Justice of Germany in *ORWI*.[492] In that case, the court had to decide about a damage claim by the printing company ORWI against a producer of non-carbon paper. The defendant was part of a cartel of ten undertakings in Europe between 1992 and 1995. In 2001, the European Commission uncovered the cartel and imposed fines on the affected undertakings.[493] The controversial point of the claim was that ORWI was not a direct customer of the defendant. It was in fact a reseller that had passed on the price increase of the defendant to ORWI, and ORWI thus claimed that it suffered a harm based on the infringement of European competition law. In its ruling, the Federal Court of Justice of Germany agreed that ORWI had the right to claim damages from an indirect infringer. With reference to Sec 254(2) BGB, the court stated that even if a victim was not obliged to engage in a specific behaviour to reduce the damage, it was possible for an indirect purchaser to claim the right to seek damages. On the other hand, the court said that benefit sharing was not possible in a case when a victim was not obliged to act in a specific manner related to Sec 254(2) BGB. It can be argued that this ruling implies that a victim is not obliged to pass on the damage, i.e. price increase, to its own customers. However, the court did not directly reject the concept of benefit sharing in competition law and so left the door open concerning the question of an obligation in passing-on damages.

Therefore, the general rulings of Sec 254(2) BGB are applicable. In general, it can be said that the obligation of damage reduction should be analysed in each specific case and it is not possible to make a general determination on it.[494] On the one hand,

[490]Gesetzentwurf der Bundesregierung: Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen [2004] BT-Drs 15/3640 at 35; Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Arbeit zu dem Gesetzentwurf der Bundesregierung – Drucksache 15/3640 – Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen [2005] BT-Drs 15/5049 at 48; J Bornkamm, '§ 33 GWB' (n 480) at para 104; E Rehbinder (n 465) at para 39; criticised by M Lutz, 'Schwerpunkte der 7 GWB-Novelle' [2005] WuW 718, 728.

[491]G Schiemann, 'BGB § 254 Mitverschulden' in M Martinek (ed), *Staudinger, Bürgerliches Gesetzbuch*, vol 2 (Sellier/de Gruyter 2005) at 80.

[492]BGH NJW 2012, 928 (*ORWI*).

[493]See *Carbonless paper* (COMP/E-1/36212) Commission Decision number 2004/337/EC [2004] OJ L115/1; Joined cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG (C-322/07 P), Bolloré SA (C-327/07 P) and Distribuidora Vizcaína de Papeles SL (C-338/07 P) v Commission of the European Communities.* [2009] OJ I-7191.

[494]BGHZ 62, 103 at 106-7.

it is accepted that a victim of an uncompetitive foreclosure that wants to claim lost profits has to show that it made a real effort to make profits in another market or get into the market in another way.[495] However, this cannot be transplanted to the question of passing-on a price increase. An acceptance of benefit sharing is not compatible with the intent and purpose of Sec 33 GWB and Art 101 TFEU.[496] The purpose of Art 101 TFEU is to prevent anticompetitive behaviour in the market but an application of Sec 254(2) BGB would lead to the conclusion that a reseller could pass the price increase on to its own customers and hence intensify the infringement of competition law because more victims on different market levels were involved. On the other hand, these indirect victims – usually consumers – are not in a position to claim damages effectively because individually they only suffered a small sum of damages and are not in the financial and structural position to collect and provide enough evidence for a civil damage claim. Furthermore, a passing-on defence would prevent resellers from claiming damages based on an infringement of competition law and is thus not compatible with Sec 33 GWB.[497]

If *ORWI* is read with this understanding of the passing-on defence and shared benefits in mind, the conclusion is that the German Federal Court of Justice would support the inapplicability of the passing-on defence as well as the inapplicability of Sec 254(2) BGB. However, Article 13 of European Directive 2014/104/EU requires that the Member States shall ensure that the passing-on defence is applicable but this is something that goes against the established German law and the mentioned ruling of the German Federal Court of Justice. Consequently, it is necessary for the German lawgivers to interact and to provide a statutory ruling that entertains the possibility of the passing-on defence.

3.3.2.2.3 Regulations about interest

The second relevant part of damage calculations are indirect damages. This is especially important if a claim takes a long time and so the question of interest arises. However, it is debatable whether interest is a justifiable way to receive compensation for a suffered damage or simply a means of enriching oneself at the expense of the infringer.[498] From the case law and literature, it is clear that interest is a valid means of restitution of damages.[499] Therefore, the best way of interpreting the aim

[495] H-W Krüger, *Öffentliche und private Durchsetzung des Kartellverbots gemäß Art. 81 EG – eine rechtsökonomische Analyse* (Dt Univ-Verl 2007) 118.

[496] See as well J Mohr, 'Normativer Schadensbegriff und Berechnung des Schadensersatzes ' (2010) 32 JURA 645, 651.

[497] See as well J Topel, '§ 50 Zivilrechtliche Sanktionen' in G Wiedemann (ed), *Kartellrecht* (2nd edn, CH Beck 2008) at para 33.

[498] J Basedow, 'Die Aufgabe der Verzugszinsen in Recht und Wirtschaft. Bemerkungen zu § 288 BGB und § 352 HGB' (1979) 143 ZHR 317, 322-3; F Peters, 'Der Zinssatz des § 288 I 1 BGB' [1980] ZRP 90.

[499] BGH NJW 1979, 540; F Peters (n 498); J Basedow (n 498) 324; Bv Maydell, *Geldschuld und Geldwert – Die Bedeutung von Änderungen d. Geldwertes für d. Geldschulden* (CH Beck 1974) 140.

of interest is to consider that it provides both compensation for damages and a means of enrichment.[500] Although Sec 246 BGB, which is the central regulation on interest in German civil law, does not regulate interest, it is, nevertheless, widely accepted.[501]

The first issue that needs to be determined is the starting point for interest calculation. The general regulation which addresses interest in German civil law is Sec 288 BGB read in conjunction with Sec 286 BGB. It states that a debtor must pay interest if he does not pay his debts by a deadline set by the creditor after a reminder of the due date. It is important to state here that in the German law of delicts an infringer has an obligation to pay damages even if the victim has not requested it. Therefore, between the victim and infringer there is a relationship based on an obligation which is that the infringer has to pay damages to the victim. Naturally, there is no agreed due date to such an obligation relationship in the law of delicts. Consequently, the general rule of Sec 271 BGB applies and the victim can remind the infringer and set a deadline immediately. The only exception to this rule in the BGB is Sec 291 which sets the starting point for the commencement of proceedings. However, in competition law, sentence 4 and 5 of Sec 33(3) GWB shifts the starting point of the calculation of interest to the point when the damage occurs. This is so that the infringer should not have an incentive to delay the claim or the fine proceeding.

The second central issue is how to fix the interest rate. In German civil law, many divergent rules regulate interest rates between an inflexible 4% up to 8% over the base interest rate. The central norm is Sec 246 BGB which sets out an inflexible interest rate of 4%. This regulation is a lex generalis that is subsidiary to other regulations of specific areas of law.[502] The problem about the regulation in Sec 246 BGB is that a fixed interest rate does not take account of the economic reality and rate of inflation especially if the regulation has been unchanged since 1900 as is the case in the BGB.[503]

The first and most important lex specialis for interest rates is Sec 288 BGB which regulates the interest at the time of default. This correlates directly with the regulation of default in Sec 271 BGB as mentioned above. With reference to sentence 5 of Sec 33(3) GWB, Sec 288 BGB and therefore the regulation about interest at the time of default is applicable to a damage claim based on an

[500] See as well S Grundmann, '§ 246 Gesetzlicher Zinssatz' in FJ Säcker and R Rixecker (eds), *Münchener Kommentar zum BGB*, vol 2 (6th edn, CH Beck 2012) para 11.

[501] See Ibid paras 11 and 33.

[502] Ibid para 33.

[503] See F Peters (n 498) 91; A Roll, 'Die Höhe der Verzugszinsen' [1973] DRiZ 339, 341-2; P Kindler, *Gesetzliche Zinsansprüche im Zivil- und Handelsrecht – Plädoyer für einen kreditmarktorientierten Fälligkeitszins* (Mohr 1996) 205-8, 303-4; D Medicus, 'Vorschläge zur Überarbeitung des Schuldrechts – Das allgemeine Recht der Leistungsstörungen' [1992] NJW 2384, 2386.

infringement of competition law with the difference that, as mentioned above, the time of default begins with the infringement.[504] Therefore, since the amendment of the BGB in 2002,[505] the interest rate at the time of default and hence for damages based on Sec 33(3) GWB is 5%[506] or if no consumer is involved in the claim then 8%[507] over the basic rate of interest.[508] This basic rate of interest is regulated in Sec 247(1) BGB and is a variable reference interest rate announced by the German Federal Bank (Deutsche Bundesbank) twice a year. The current basic interest rate is 3.62% (1st January 2015). Therefore, the interest rate for damages based on the infringement of competition law is 8.62%, respectively 11.62%.

Furthermore, Sec 248 BGB prohibits compound interest (*usurae usurarum*). The aim of Sec 248 is not the limitation of the interest burden.[509] On the contrary, the only aim of the prohibition of compound interest is to allow the foreseeability of the interest by the debtor and hence to provide legal clarity.[510]

3.3.2.2.4 Estimation of losses under German Civil Procedure Law

Due to the fact that calculation of damages is based on a comparison between the situation with and without the infringement of competition law and because the analysis of the situation without the infringement is purely hypothetical, German law allows for an estimation of the suffered harm (Sec 33(3) s 3 and 4 GWB with reference to Sec 287 ZPO[511]).[512]

Although Sec 287 ZPO allows for the estimation of every kind of damages,[513] the estimation does not include the factual basis of the damage claim and the causality between the acting and the breach of law.[514] Furthermore, estimation with reference to Sec 287 ZPO requires coherent presentation of evidence for the factual

[504]See sentence 4 and 5 of Sec 33(3) GWB.

[505]See S Grundmann, '§ 246 Gesetzlicher Zinssatz' (n 500) paras 2, 33-8with further references; S Grundmann, '§ 247 Basiszinssatz' at para 3; German Federal Parliament (Bunedstag), Document 14/6040 at 126.

[506]Sec 288(1) BGB.

[507]Sec 288(2) BGB.

[508]V Emmerich (n 465) at para 76.

[509]U Reifner, 'Das Zinseszinsverbot im Verbraucherkredit' [1992] NJW 337, 339; Cf S Grundmann, '§ 248 Zinseszinsen' at para 1.

[510]OLG Köln OLGZ 1992, 472; K Schmidt, 'Das "Zinseszinsverbot". Sinnwandel, Geltungsanspruch und Geltungsgrenzen' [1982] JZ 829, 831; S Schaub, '§ 248 BGB Zinseszinsen' in HP Westermann (ed), *Erman Bürgerliches Gesetzbuch* (14th edn, Otto Schmidt 2014); Cf T Bezzenberger, 'Das Verbot des Zinseszinses' (2002) 32 WM 1617, 1621-2, 1626; C Grüneberg, '§ 248 Zinseszinsen' in O Palandt (ed), *Bürgerliches Gesetzbuch* (74th edn, CH Beck 2015) at para 1.

[511]German Federal Parliament (Bunedstag), Document 14/6040 at p 126.

[512]Civil procedure code of Germany [2005] BGBl I-3202; See 6.4.2.

[513]BGHZ 29, 95 at 99-100; BGHZ 29, 217; I Saenger, *Zivilprozessordnung* (6th edn, Nomos 2015) § 287 at para 2; H Prütting, '§ 287 Schadensermittlung; Höhe der Forderung' in T Rauscher and W Krüger (eds), *Münchener Kommentar zur ZPO*, vol 1 (4th edn, CH Beck 2013) at para 5.

[514]H Prütting (n 513) at para 14.

basis of the estimation.[515] However, with reference to the information asymmetry of evidence in competition law cases, the courts do not impose high requirements on the presentation of evidence.[516] Therefore, Sec 287 ZPO requires a decision of the court based on an overwhelming likelihood and not as in Sec 286 ZPO the complete conviction of the judge.[517] Usually, that estimation is based on average of its value.[518] This estimation mechanism of German law is in line with the regulation in the European Directive 2014/104/EU.[519]

3.3.2.3 Culpability of the infringer

Although culpability is meanly a legal term in German criminal law, German civil law requires a specific link between the infringement and the perpetrator.[520] Therefore, this section analyses the necessity and general principles of culpability and the requirements of culpability under the German law of delicts.

3.3.2.3.1 Necessity and general principles of culpability

To understand the requirements of culpability under the German law of delicts, it is first necessary to analyse the necessity and general principles of culpability. With reference to the moral analyses of Aquinas,[521] with damage claims having the task of achieving restitution and punishment, it is necessary for there to be a personal link between the infringement, i.e. the reason why a person should be punished, and the infringer, the person that should be punished. Therefore, the German law of delicts is based on the principle of culpability in order to establish such a link.[522] Culpability is hence defined as an act of intention or negligence.[523]

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[515] See e.g. BGH 1988, 3016; BGHZ 91, 243 at 256; BGH NJW 1987, 909 at 909-10; K Bacher, '§ 287 Schadensermittlung; Höhe der Forderung' in V Vorwerk and C Wolf (eds), *Beck'scher Online-Kommentar ZPO* (16th edn, CH Beck 2015) at para 17.

[516] BGH NJW 1992, 2753 (Tchibo/Rolex II); See in general BGH NJW 1998, 1633; H Prütting (n 513) 14.

[517] BGH NJW 2008, 2910 at para 18.

[518] K Bacher (n 515) at para 18.

[519] See Article 17(1) Directive 2014/104/EU.

[520] BGHZ 92, 357 at 358; BGHZ 127, 195; E Deutsch, *Allgemeines Haftungsrecht* (n 520) at paras 439 ff.

[521] See above under 2.3.1.3.

[522] H-P Benöhr, 'Die Entscheidung des BGB für das Verschuldensprinzip' (1978) 46 TvR 1 with further references; See G Schiemann, 'Vorbemerkung' in HP Westermann (ed), *Erman Bürgerliches Gesetzbuch* (14th edn, Otto Schmidt 2014) at para 4; E Deutsch, *Allgemeines Haftungsrecht* (n 520) at paras 5 ff., 376; C Katzenmeier, 'Vorbemerkung zu §§ 823 ff' in B Dauner-Lieb and W Langen (eds), *BGB | Schuldrecht* (2nd edn, Nomos 2012) at para 18, 20; See as well the analysis of R v. Jhering, *Das Schuldmoment im römischen Privatrecht* (Brühl 1867) that builds the theoretical basis of the regulation of the BGB, *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das deutsche Reich. Amtliche Ausgabe*, vol 1 (J Guttentag 1888) at 281.

[523] C Katzenmeier (n 522) at 18.

In this way, the principle of culpability is an outflow of the concept of individual responsibility for wilful, careless and damaging conduct.[524] Furthermore, culpability restricts the general liability of individuals for their behaviour.[525] Because culpability requires at least negligence, an individual that cannot, in all conscience, foresee the damaging impact of their conduct is not liable for the damages. Otherwise, every individual would face an unforeseeable amount of possible damages.[526] In doing so, the principle of culpability is also a result of the principle of general freedom of action and the freedom of contracts as its specific outflow.[527] That is based on the idea of the autonomous personality and a corresponding social image in German law.[528]

Consequently, the link between the amount of damages and the infringement of a right, interest or statutory duty requires no culpability because the amount of damages is not linked to the conduct of an individual.[529] Therefore, the infringer must 'know' that he infringed a right, interest or statutory duty but does not have to know that damages arise and to what extent.[530] The link between the damage and the infringement is thus based on the principle of causation.[531] In contrast to German criminal law, civil law causation is not fully described by the legal phrase *conditio sine qua non*.[532] In addition, civil law causation requires adequacy. This means that an outcome is only based causally on conduct if the conduct usually and only under specific extremely singular or unlikely conditions submits to such an outcome.[533] Therefore, the conduct has to be adapted to this outcome[534] or at least significantly increase the probability of the outcome.[535] Consequently, the criterion of adequacy only excepts injuries completely outside the anticipatory process from individual liability.[536]

3.3.2.3.2 Requirements of culpability under German law of delicts and

[524]E Deutsch, *Allgemeines Haftungsrecht* (n 520) at paras 5 ff., 376; S Meder, *Schuld, Zufall, Risiko – Untersuchungen struktureller Probleme privatrechtlicher Zurechnung* (Klostermann 1993) 274 ff.

[525]C Katzenmeier (n 522) at 19.

[526]E Deutsch, *Allgemeines Haftungsrecht* (n 520) at para 368.

[527]D Medicus and S Lorenz, *Schuldrecht I: Allgemeiner Teil; ein Studienbuch* (20th edn, CH Beck 2012) at para 357.

[528]R Schulze, '§ 276 Verantwortlichkeit des Schuldners' in R Schulze (ed), *Bürgerliches Gesetzbuch* (8th edn, CH Beck 2014) at para 2.

[529]BGHZ 75, 328 (Haareziehen) at 329; E Deutsch, *Allgemeines Haftungsrecht* (n 520) at paras 47, 52.

[530]G Spindler (n 466) at para 2.

[531]C-W Canaris (n 474) at paras 27, 33.

[532]C Schubert (n 479) at paras 50-2.

[533]BGHZ 59, 139; BGH NJW 1976, 1143 at 1144; BGH NJW 2002, 2232 at 2233.

[534]BGHZ 26, 69 at 76; BGH NJW 1990, 2882 at 2883.

[535]BGHZ 57, 245 at 255.

[536]See e.g. BGH NJW 2002, 2232 at 2233; C Schubert (n 479) at para 51.

Transferred to the regulation of Sec 823 BGB, the infringement of a right or interest (Sec 823(1) BGB) or the scope of a protection act, i.e. statutory duty (Sec 823(2) BGB) is required. With regard to an infringement of a statutory duty, Sec 823(2) BGB requires culpability even if the protection act itself does not.[537] On the other hand, the lex specialis Sec 33 GWB is analogously formulated and requires also a culpable conduct.

The requirements of culpability itself are regulated in Sec 276 BGB. The section regulates the culpability consistently for the whole German Civil Code. Culpability itself is not defined in the German Civil Code but its meaning can be ascertained by reference to the legislative history[538] and the structure of the law[539] where culpability is the generic term for both forms of conduct in sentence 1 of Sec 276(1) BGB: intention and negligence.[540] On the other hand, culpability is defined by legal scholars as an unlegal conduct in breach of one's duty that is subjectively reproachable.[541]

Therefore, the first requirement is that the conduct is considered unlegal.[542] This is defined as any conduct that infringes legally protected rights or interests without justification.[543] This is implied by the legal infringement.

Secondly, it is necessary for the infringer to be legally sane and criminally liable because the establishment of culpability is the imputation of an unlegal conduct.[544] With reference to sentence 2 of Sec 276(1) BGB, the rulings of Secs 827 and 828 BGB are applicable and, even without expressly naming it, Sec 829 BGB.[545] In competition law cases, the legal debate over the applicability of Sec 829 BGB is almost irrelevant and it is not necessary to analyse it in any depth.

After analysing the possibility of establishing a link based on the culpability of the infringer, one of the kinds of culpability of sentence 1 of Sec 276(1) BGB has to be proved. The law does not define the first possibility, that of intention.[546] Legal scholars and the case law have defined it for civil law as a sophisticated, i.e. with

[537]See e.g. BGH NJW 2008, 3565 (*Clone-CD*) at para 25.

[538]See , *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das deutsche Reich. Amtliche Ausgabe* at 281.

[539]See German Federal Parliament (Bunedstag), Document 14/6040 at 131.

[540]R Schulze (n 528) at para 3; A Stadler, '§ 276 Verantwortlichkeit des Schuldners' in R Stürner (ed), *Jauernig, Kommentar zum BGB* (14th edn, CH Beck 2014) at para 10.

[541]C Grüneberg, '§ 276 Verantwortlichkeit des Schuldners' at para 5; A Stadler, '§ 276 Verantwortlichkeit des Schuldners' (n 540) at para 10.

[542]HP Westermann, '§ 276 BGB Verantwortlichkeit des Schuldners' at para 4; A Stadler, '§ 276 Verantwortlichkeit des Schuldners' (n 540) at para 13.

[543]R Schulze (n 528) at para 4.

[544]S Lorenz, '§ 276 BGB' at para 5.

[545]R Schulze (n 528) at para 5 with reference to [1982] NJW 1150 (Federal Court of Justice of Germany); S Grundmann, '§ 276 Verantwortlichkeit des Schuldners' at para 166; C Grüneberg, '§ 276 Verantwortlichkeit des Schuldners' (n 541) at para 6; Cf E Böhmer, 'Anwendung von § 829 BGB bei außerdeliktischen Schadensersatzfällen' [1967] NJW 865; A Stadler, '§ 276 Verantwortlichkeit des Schuldners' (n 540) at para 12; S Lorenz, '§ 276 BGB' (n 544) at para 5.

[546]R Schulze (n 528) at para 6.

the knowledge of wrongdoing, and voluntative, i.e. the willingness of wrongdoing, expression of free conduct to achieve the goal, i.e. the infringement of the law.[547] At least, this is given if the infringer foresees the infringement as possible and approves it eventually (*dolus eventualis*).[548] This awareness is missing if the infringer has deluded itself based on a legal or factual basis, e.g. if the infringer does not know all the necessary facts that lead to the infringement of the law or if the infringer reasonably thinks that the infringement is legal.[549]

On the other hand, the more relevant idea of sentence 1 of Sec 276(1) BGB is culpability based on negligence.[550] Negligence in German civil law is defined in Sec 276(2) BGB. A person acts negligently if he fails to exercise reasonable care. In doing so, negligence requires foreseeability and preventability of the infringement.[551] These criteria can also be described as a sophisticated, i.e. foreseeable, and voluntative, i.e. preventable,[552] element of negligence. The standard for negligence is an objective care level of care,[553] adjusted to the relevant sector of the public.[554] What this all amounts to is that culpability requires at least negligence and hence the foreseeability and preventability of an infringement based on a conduct that is not justified.

3.3.2.4 Conclusion

In summary, it can be said that Sec 33(3) GWB is the central regulation about civil damage claims based on an infringement of European as well as national competition law under German law. Although Sec 33(3) GWB is lex specialis, the established legal practice of Sec 823 BGB – the general norm on damage claims in the German law of delicts – is still applicable. This is all the more so because Sec 823(2) BGB was directly applicable to claims based on an infringement of European competition law until 2005.

Besides an infringement of Art 101 or 102 TFEU (or the equivalent regulation of Sec 1 or Secs 19-21 GWB), Sec 33(3) GWB requires the proof of damages to be causally based on the infringement and the culpability of the infringer.

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[547]BGHZ 115, 299; HP Westermann, '§ 276 BGB Verantwortlichkeit des Schuldners' (n 542) at paras 8-9; R Schulze (n 528) at para 6; A Stadler, '§ 276 Verantwortlichkeit des Schuldners' (n 540) at para 15; See as well in detail S Grundmann, '§ 276 Verantwortlichkeit des Schuldners' (n 545) at paras 150-63.

[548]BGHZ 117, 363; A Stadler, '§ 276 Verantwortlichkeit des Schuldners' (n 540) at paras 18, 24.

[549]R Schulze (n 528) at paras 7, 12.

[550]S Grundmann, '§ 276 Verantwortlichkeit des Schuldners' (n 545) at para 50.

[551]R Schulze (n 528) at para 10.

[552]See e.g. BGHZ NJW-RR 1996, 981; F-C Schroeder, 'Die Fahrlässigkeit als Erkennbarkeit der Tatbestandsverwirklichung' (1989) 17 JZ 776.

[553]BGH NJW 2001, 1786; BGH NJW-RR 1996, 981.

[554]See e.g. BGHZ 92, 296 at 402; BGHZ 31, 367; S Grundmann, '§ 276 Verantwortlichkeit des Schuldners' (n 545) at paras 57-9; R Schulze (n 528) at para 14.

In contrast to English law, although the general principle of restitution under German law is the restitution in kind, the main kind of restitution in German competition law is the restitution in money. Furthermore, the general opinion in the legal scholarship of Germany is that the principle of shared benefits by calculating the amount of damages is illegal even if the German lawgivers did not come to a final decision on this. Moreover, the *ORWI* decision of the Federal Court of Justice of Germany leads to the conclusion that they would support the inapplicability of the passing-on defence as well as the in-applicability of Sec 254(2) BGB. On the other hand, Sec 287 ZPO allows the estimation of damages by the court and, with reference to the information asymmetry of evidence in competition law cases, the courts do not impose high requirements on the presentation of evidence as a basis for the estimation.

In conclusion, the German law of delicts and hence Sec 33(3) GWB requires the culpability, i.e. at least negligence and an unjustified conduct, of the infringer. This is necessary because the principle of culpability is an outflow of the concept of individual responsibility for wilful, careless and damaging conduct. In doing so, culpability restricts the general liability of individuals for their behaviour.

Therefore, the link between the amount of damages and the infringement of a right, interest or statutory duty requires no culpability because the amount of damages is not linked to the conduct of an individual. The link between the damage and the infringement is thus based on the principle of causation.

3.4 Classification of damage claims based on the breach of competition law in English law and its requirements

After analysing the legal requirements for a successful damage claim based on an infringement of European competition law under the German law of delicts, this section highlighted the corresponding regulations under English law.

Firstly, it examined the distinction between damage claims based on unjust enrichment, the law of torts and the law of contracts. With reference to the concept of contractual freedom and an underpinning concept of justice, the first section showed, on the one hand, the legal and theoretical differences between the legal concepts and, on the other hand, it defined the purpose of tort law as a central mechanism of restitution under English law.

Secondly, the section argued in favour of a damage claim based on an infringement of Art 101 or 102 TFEU as a claim based on the law of torts, especially as a claim based on a breach of statutory duties. This was done by setting out the requirements for a successful claim, especially the requirement of a liable breach

of a statutory provision and the degree of fault in a tort law claim based on an infringement of European competition law in contrast to a common tort law claim. Finally, the section highlighted, in comparison with the German law, the classification of damages and restitution under the English law of torts, and analysed the principles of estimation of losses and presumption of damage as a shift in the burden of proof to the defendant and as a different system to the estimation system under German law.

3.4.1 Distinction between damage claims based on unjust enrichment, torts and contract

In contrast to civil law, common law is characterised by no major codification[555] and no coherent system of damage claims.[556] The whole legal system is shaped by case law and deals more with practical considerations of justice in particular cases and less with a coherent system of principles and mechanisms. Slightly different to the normal principle of legal precedent, in tort law the courts are more easily content not to refer to previous cases in only slightly different situations and establish a system of chased claims.[557]

Just as with the civil law system, the common law system is not used consistently across all common law countries.[558] Therefore, it is also necessary to choose one country as an object of analysis. English law, as the first common law country in the world, seems particularly suited to this purpose. Based on the Norman conquest of England in 1066,[559] the English legal system has been delineated as a common law system since 1189.[560]

Notwithstanding the advanced development of common law in the 12th and 13th centuries, the rediscovery of Roman law has had some influence on English law. However, this has been much less so than in continental Europe.[561] Early judges, such as Ranulf de Glanvill (1112-1190)[562] and Henry de Bracton (1210-1268),[563] had been educated in Roman law and especially in Justinian's *Corpus Iuris Civilis* (see 3.3.1

[555]K Schmidt, 'Anhang 2' in U Immenga and E-J Mestmäcker (eds), *Wettbewerbsrecht*, vol 1 (5th edn, CH Beck 2012) at para 28.

[556]M Siems (n 356) 44 ff., 65; AWB Simpson, *Leading Cases in the Common Law* (Clarendon Press 1996) 195 ff. with further references; N Jansen (n 381) 185; JG Fleming (n 462) 7-8; Approach of a coherent system by R Zimmermann (n 398) 913-4; P Cane, *The anatomy of tort law* (n 556) 21-2.

[557]See the concept of liability things which escape from one's land regardless of culpability that is in contrast to the usual concept of liability under English law: S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2012) 18 ff.; JG Fleming (n 462) 7-8; AWB Simpson (n 556) 195 ff.

[558]R Zimmermann (n 398) 913-4.

[559]M Siems (n 356) 43-4; 65, 202 ff.

[560]RC van Caenegem (n 386).

[561]Ibid 89 ff.; P Stein (n 385) 223 ff.

[562]U Ziegenbein (n 385) 73.

[563]R de Glanvill (n 383); Bracton also refers to the work of Glanvill as a primary source.

at the end).[564] Even if there was a massive reduction in the referencing of Roman law after the time of Bracton, Roman law has still had some influence on common law.[565]

Whereas unjust enrichment, tort and contracts are legal events, restitution is the attached legal response.[566] Therefore, restitution and unjust enrichment, torts as well as contracts (restitution for wrongs) are not synonymous.[567] In the law of competition, a wrongdoing – where the law of contracts or law of torts regulates the claim – is usually connected with an unjust enrichment. Therefore, it is not uncommon that both claims – restitution for unjust enrichment and for contracts or torts – are possible although contracts and torts have multiple, heterogenous responses, for example, compensation, restitution and punishment.[568] On the one hand, the law of contracts regulates damages referring to the performance or non-performance of a contractual agreement. Considering the concept of justice, the law of contracts is rather a manifestation of the Roman principle of *pacta sunt servanda* and a claim is related to the breach of this principle. Therefore, the claim is rather linked to Aristotle's concept of voluntary contractual justice (*iustitia commutativa*) and is comparable with §§ 280 ff. of the German Civil Code. On the other hand, the law of torts deals generally with the injury of rights and interests – contractual as well as non-contractual – and is slightly comparable with §§ 823 ff. of the German Civil Code.[569] Although there is no general clause,[570] the law of torts can be linked to the whole concept of corrective justice with voluntary as well as non-voluntary contractual justice as different approaches of corrective justice.[571]

Moreover, with reference to the concept of contractual freedom, common law lawyers in particular distinguish between contract law and law of torts in terms of the voluntariness of the relevant obligations. Obligations imposed by law are generally a matter of tort law whereas voluntarily agreed obligations constitute the law of contract.[572] In modern times, the law of torts is complemented by the law of quasi-contracts or of restitution.

On the other hand, tort law concerns the freedom to act. It is argued that the general aim of tort law is to find a balance between the freedom of the injurer to act

[564]H de Bracton (n 384); Justinian (n 387); H de Bracton (n 384) 46 (introduction by GE Woodbine).
[565]K Güterbock (n 387), 35-8; U Ziegenbein (n 385) 73.
[566]P Stein (n 385) 223 ff.
[567]P Birks, 'Equity in the Modern Law: an Exercise in Taxonomy' (1996) 26 UWAustlLRev 1, 17-20.
[568]F Giglio (n 157) 15 with further references.
[569]See above unter 3.3.2.
[570]P Birks (n 567) 17-20.
[571]See above under 3.1.2.
[572]J Lord Steyn (n 174) 4.

and the freedom of the victim from the acting of an injurer.[573] The claims are built up around the principles of compensation for losses, disgorgement of gains, expression of disapproval and punishment, and special and general deterrence.[574] Given the influence of Roman law, the question arises whether there is an underpinning concept of justice in tort law to solve this task (based on Roman law and Greek philosophy):

> Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility?[575]

After the decision of *Donoghue v Stevenson*[576] it seems to be clear that tort law adopts human ethical principles to organise and interpret social life:[577]

> The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions, which any moral code would censure, cannot in the practical world be treated so as to give a right to every person injured by them to demand relief ... The rule that you are to love your neighbour becomes in law: You must not injure your neighbour ...[578]

The discussion is usually between the two extremes of essentialists, those who say that the existence and concept of tort law can only be justified by the principle that people should not wrong others by their actions,[579] and those who see the justification of tort law in a so-called 'economic efficiency' (defined as allocation of scarce recources to their most productive use).[580] It is unnecessary to rule on the question of which approach is preferable because both opinions are based on the same ethical principles of compensation, retribution and deterrence.[581] Therefore, tort law has two purposes: compensation of victims who have suffered loss as a result of civil wrongs and control of wrongdoing and supplement to criminal law (the latter is sometimes seen as the central function of tort law).[582]

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[573]PS Atiyah, 'Contracts, Promises and the Law of Obligations' (n 437) 10.

[574]P Cane, *The anatomy of tort law* (n 556) 14-5.

[575]Ibid 206-7.

[576][1932] AC 562.

[577]RFV Heuston and RA Buckley, *Salmond and Heuston on the law of torts* (21st edn, Sweet & Maxwell 1996) 8-9.

[578]P Cane, *The anatomy of tort law* (n 556) 21-2, 24.

[579]*Donoghue v Stevenson* [1932] AC 562 at 580 by Atkin LJ.

[580]E Weinrib (n 157) 4.

[581]P Cane, *The anatomy of tort law* (n 556) 210.

[582]B Chapman, 'Ethical Issues in the Law of Tort' in MD Bayles and B Chapman (eds), *Justice, Rights, and Tort Law* (Reidel 1983) 13 ff.; J Lord Steyn (n 174) 3; *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82 by Steyn LJ; Keren-Paz, Tsachi, Torts, egalitarianism, and distributive justice (Ashgate 2007) p 5 ff.; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309; [2003] 3 WLR 1091; [2003] 4 All ER 987 at para 4; slightly critisied by J Gardner, 'What is tort law for? Part 1: the place of corrective justice' (2011) 30 Law Philos 1, 5 who sees corrective and distributive justice equally and J Lord Steyn (n 174) 4-5.

3.4.2 Competition damage claim as a tortious action related to a breach of statutory duty

Notwithstanding that contractual as well as non-contractual based claims can arise related to a breach of competition law, the key aspect of a civil damage claim based in competition law is the breach of competition law. In *Garden Cottage Foods Ltd v Milk Marketing Board*[583] the House of Lords decided unambiguously that a claim based on a breach of European competition law has to be characterised as a claim based on torts and especially on a breach of statutory duty.

The statutory duty itself can be seen directly in Art 101 or 102 TFEU and with reference to the case law of the ECJ which imposes direct effects of EU competition law[584] or in section 2(1) European Communities Act 1972 which regulates the direct effect in the English legal system.

Different to the normal damage claim based on the breach of a statutory duty under English tort law, the claim based on a breach of competition law (national and European) can be brought before the High Court of Justice (Chancery Division) and the Competition Appeal Tribunal (CAT) which was established by the Competition Act 1998. Since the amendments of the Competition Act 1998 by the Enterprise Act 2002, the CAT is entitled to award damages after the English competition authority, the Office of Fair Trading (OFT) or the European Commission has declared an infringement.[585]

Therefore, this section analyses the requirements for a successful tort law claim based on a breach of statutory duties. After highlighting the central provisions about the breach of the statutory provision, the section classifies the damages and the possibility of restitution under English law. After doing so, the section analyses whether there is a provision about estimation of damages and culpability in English civil procedure law and whether it is possible and necessary to transfer the German provision into English law through the implementation of the European Directive 2014/104/EU or if the proposed English law is more convincing.

3.4.2.1 Requirement of a liable breach of a statutory provision

In its decision *X and Others v Bedfordshire County Council*[586] the House of Lords held that a claim based on a breach of a statutory provision has to show that the infringer is liable for the infringement. For that liability, the House of Lords developed four categories of a breach of statutory provision: firstly, strict liability, i.e. the liability for a breach irrespective of carelessness of the infringer; secondly, the

[583] [1984] 1 AC 130 by Diplock LJ. Before that decision, the natur of the claim was sometimes suggested as being 'unjust enrichment'.

[584] T Keren-Paz (n 582) 5 ff.; applied by *BRT v SABAM*; *Courage v Crehan*.

[585] See Sec 47A Competition Act 1998.

[586] *X (Minors) v Bedfordshire CC* [1995] 2 AC 633.

careless performance of a duty imposed by a statutory provision if there is no other right of action; thirdly, the liability because of a duty of care in common law arising from an imposition of duty by a statutory provision; and finally, liability because of a misfeasance in public office.

Furthermore, the House of Lords decided that a private law cause of action based on strict liability only arises when the relevant statutory provision protects the particular class of claimant and provides a private remedy.[587] It is necessary for the provisions not only to confer a general public benefit but also to create individual rights for the party.[588]

Such a statutory provision can be seen in Art 101 and 102 TFEU. Therefore, it is necessary that the duty protects the plaintiff's class of persons. With reference to the interpretation of Art 101 and 102 TFEU by the European Court,[589] Art 101 and 102 TFEU protects every individual because they create directly effective rights for all individuals.[590]

3.4.2.2 Degree of fault in a tort law claim based on an infringement of European competition law

As well as looking at the duty imposed by a statutory provision and the class of protected individuals, it is necessary to analyse the degree of fault required to establish a breach of the imposed duty. This has to be argued with reference to the statutory provision. For this purpose, it is necessary to distinguish between regulations imposing absolute duties and qualified duties.[591] Absolute duties are obligations which can be breached without any fault. It is, therefore, not necessary for the infringer to act negligently or carelessly.[592] On the other hand, qualified duties require a fault similar to that of negligence.[593]

Transferred to European competition law, Art 101 TFEU requires no fault of a breach.[594] The wording of Art 101(1) TFEU requires that the act has the infringement of the provision as its object or effect. Therefore, English tort law

[587] *Island Records Ltd v Corkindale* [1978] Ch 122.

[588] *Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173; C Elliott and F Quinn, *Tort law* (8th edn, Longman 2011) 196.

[589] See e.g. *BRT v SABAM*; applied by *Courage v Crehan*; *Crehan v Inntrepreneur Pub Company* [2003] EWHC 1510 (Chancery Division).and above under 3.2.

[590] See *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; Sec 2(1) European Communities Act 1972; See Commission, *Executive summary and overview of the national report for the United Kingdom* (<http://eceuropaeu/competition/antitrust/actionsdamages/executive_summaries/united_kingdom_enpdf> accessed 01/03/2016).

[591] C Elliott and F Quinn, *Tort law*, 200.

[592] See *Galashiels Gas Co Ltd v Millar* [1949] AC 275.

[593] See *McCarthy v Coldair* [1951] 2 TLR 1226 (Court of Appeal).

[594] Case T-34/92 *Fiatagri UK Ltd and New Holland Ford Ltd v Commission of the European Communities* [1994] ECR II-905 at para 49; *IFTRA rules for producers of virgin aluminium* (IV/27000) Commission Decision number 75/497/EEC [1975] OJ L228/3 at 8.

applies the strict liability of the infringer to the breach of Art 101 TFEU and requires no additional fault.

On the other hand, the loss and damage of the claimant has to be covered by the infringed statute.[595] This general rule is suspended in a claim based on the infringement of European competition law. The requirement to prove that the damage is in the scope of Art 101 or 102 TFEU is against the concept of effet utile and therefore against European law.[596]

Therefore, the English law on causation is applicable, and it is thus necessary to prove a causal link between the infringement of the statutory provision and the claimed damage.[597] This is a significant simplification for the claimant in competition law cases. Futhermore, the High Court decided that the causal link is given unless there is evidence about an autonomous intervention of the claimant.[598]

3.4.2.3 Classification of damages and restitution under English law of torts

Under the English law of torts, the main awarded remedies are damages, account of profits as well as specific performance and rectification of contract. To quantify the suffered harm, the courts apply the established common law rules. This is especially if it requires remoteness, i.e. foreseeability of the suffered harm by the infringer. Furthermore, the claim of actual loss, including the loss of profit as well as the reduction in value of a business has to be supported by cogent expert evidence.[599]

Furthermore, the courts are entitled to grant interim remedies, especially interim and freezing injunctions as well as preservation or search orders. The basic test for these interim measures is whether the case has a real prospect of success and the consideration between the situations where an injunction has been granted and the claim failed and where an injunction has not been granted and the claim succeeded in trial.[600]

On the other hand, in contrast to German law, it is not yet decided whether a passing-on defence is permitted under the English law of torts or a part of the

[595] *Gorris v Scott* [1873-74] LR 9 Ex 125.

[596] See e.g. *Crehan v Inntrepreneur Pub Co (CPC)* [2004] EWCA Civ 637 (on appeal to the House of Lords).

[597] See in detail M Gray et al, *EU competition law – procedures and remedies* (OUP 2006) at para 918 with further references.

[598] *Yesheskel Arkin v Borchard Lines Ltd & Others* [2003] EuLR 287 (High Court) by Coleman J (obiter); M Gray et al, *EU competition law*, at para 536.

[599] See e.g. the synopsis in Commission, *Executive summary and overview of the national report for the United Kingdom.*

[600] *Simon Carves v Ensus UK* [2011] EWHC 657 (TCC) by Edward-Stuart J; *American Cyanamid Co v Ethicon Ltd (No. 1)* [1975] AC 396 by Diplock LJ.

quantification of loss.[601] Although the CAT marked this topic as a 'novel and important issue',[602] there is no established case law on it.[603]

3.4.2.4 Estimation of losses and presumption of damage as shifting the burden of proof

Although damages can be fairly predictably calculated under English law based on existing guidelines for pain and suffering,[604] the lack of a rebuttable presumption under English law of torts or the possibility of estimation of losses leads to a disincentive for victims to litigate against cartelists.[605]

A regulation about a rebuttable presumption reduces the necessity of providing extensive economic evidence about the suffered harm and hence reduces the cost and time as well as encourages the possibility to provide the evidence, especially for small and medium sized victims usually near the end of a distribution chain, e.g. consumers.[606] On the other hand, a presumption of damage shifts the burden of proof to the defendant. That would be a logical consequence of the information asymmetry mentioned above.[607] It is also an interpretation of the burden of proof itself. As mentioned above, it is a general principle in an adversary system that the party has to prove the facts that are beneficial to its claim. However, this ruling is built on the understanding that the claimant is in possession of the relevant evidence.[608] Therefore, in a case of information asymmetry it can be justified to shift the burden of proof to the defendant.[609]

Whereas the German Civil Procedure Law relies on an estimation of damages by the court,[610] the English lawgivers endorse a presumption of damages.[611] The main distinction between the proposed English law and the German law is that under German law the claimant has to provide evidence for the factual basis of the

[601] D Sheehan, 'Passing On, Indirect Purchasers and Loss Allocation between Claimants' [2012] LMCLQ 261.

[602] *CL Old Co Ltd v Aventis SA (Security for Costs)* [2005] CAT 2.

[603] The claim has been settled prior to the substantive hearing of the CAT and therefore the CAT did not rule on it; See as well BIS, *Private Actions in Competition Law: A Consultation on Options for Reform* (2012) 25 (<https://wwwgovuk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation pdf> accessed 01/03/2016).

[604] See the overview in Commission, *Executive summary and overview of the national report for the United Kingdom.*

[605] BIS 24.

[606] See Ibid.

[607] See above under 3.1.2.

[608] See above under 3.1.1.

[609] BIS 24.

[610] See above under 3.3.2.2.4.

[611] See BIS 24.

damage and the court itself only estimates the value of the damage based on the evidence and does not estimate the existence of the damage itself.[612]

The English lawgivers, on the other hand, want to introduce a rebuttable presumption of loss. It is proposed that such a regulation could be a presumption that a cartel had increased its prices by a fixed amount, e.g. 20%.[613] Although it is obvious that damage caused by an infringement of competition law varies from case to case, the economic literature suggests that 20% is the average minimum price increase based on a cartel.[614]

3.4.2.5 Conclusion

In summary, it can be said that a damage claim based on an infringement of Art 101 or 102 TFEU has to be classified as a claim based on the law of torts, especially on a breach of statutory duties. With reference to the case law of the House of Lords, it is clear that Art 101 and 102 TFEU are provisions that create individual rights and are hence a possible basis for such a claim. Furthermore, Art 101 and 102 TFEU protects every individual and, thus, every individual is entitled to bring a claim to the court and to enforce European competition law through private litigations.

Although the requirement to provide a link between the infringement and the damage is a significant simplification for the claimant in competition law cases, it is still necessary to bring evidence about a causal link between the infringement of Art 101 or 102 TFEU and the suffered damage. For the quantification of the damage, the English lawgivers want to introduce a rebuttable presumption of loss based on a presumption that a cartel had increased its prices by a fixed amount. With reference to the Communication on the quantification of harm by the European Commission, that solution could help to improve private enforcement of European competition law.

3.5 Conclusion

It would seem that German and English law found a way to handle the information asymmetry in competition law cases regarding the burden of proof in civil damage claims based on an infringement of Art 101 and 102 TFEU. Although both jurisdictions classify the claim as a tortious claim and so based on the German

[612] See Sec 287 ZPO; H Prütting (n 513) at para 14; BGH NJW 1988, 3016; BGHZ 91, 243 at 256; BGH NJW 1987, 909 at 909-10; K Bacher (n 515) at para 17.

[613] BIS 24.

[614] AP Komninos (ed) *Quantifying antitrust damages – Towards non-binding guidance for courts* (Publications Office of the European Union 2009): increase between 20 and 35 per cent; JM Connor and RH Lande, 'The Size of Cartel Overcharges: Implications for US and EU Fining Policies' (2006) 51 Antitrust Bull 983: increase between 28 and 54 per cent in the EU and 18 to 37 per cent in the US.

law of delicts or the English law of torts, the requirements for a successful damage claim differ.

Firstly, the burden of proof itself as an expression of fair proceeding is a central rule of German and English civil procedure. However, this adversarial system and the chosen burden of proof is not an outcome of Art 6 ECHR but it is generally accepted as a principle of fair proceeding that each party has the burden to prove all facts that are the basis of that party's case. That can be justified because it is the claimant that is usually in possession of the relevant evidence.

One central problem of this burden of proof is the quantification of damage and the need for evidence for it. Under German law, Sec 287 ZPO allows the estimation of damages by the court. Moreover, with reference to the information asymmetry of evidence in competition law cases, the courts do not impose high requirements on the presentation of evidence as a basis for the estimation. On the other hand, the *ORWI* decision of the Federal Court of Justice of Germany leads to the conclusion that it would support the inapplicability of the passing-on defence under German law. Whereas the first is compatible with the Directive 2014/104/EU and also recognises the Communication and Practical Guide of the European Commission on quantification of harm, the latter has to be amended with reference to the adverse Art 13 or Directive 2014/104/EU which requires that the Member States shall ensure that the passing-on defence is applicable.

Under English law, the claimant has to provide evidence for a causal link between the infringement and the damage. For the quantification of the damage itself, the English lawgivers want to introduce a rebuttable presumption of loss based on the presumption that a cartel had increased its prices by a fixed amount. With reference to the Communication on the quantification of harm by the European Commission, that solution could help to improve private enforcement of European competition law.

4. Follow-on claims and access to files as central mechanisms to fine-tune the relationship between public and private enforcement of competition law

The last chapter made it clear that burden of proof is the crucial element in attempts to fine-tune the relationship between private and public enforcement of European competition law. The success of a private claim based on an infringement of European competition law depends directly on the capability of the claimant to provide relevant evidence.[615] Therefore, pre-action access to this evidence is the main obstacle to establishing effective competition law enforcement.

With reference to this, the European Union has stressed the need to improve the ability of claimants to gain access to relevant information. However, it is also apprehensive about the negative effects, especially the possibility of overly-broad and burdensome disclosure obligations, including the risk of abuse and interference in the European leniency regime.[616] Furthermore, as Stakheyeva argues, the law has to consider the general principle of protection of confidential business information.[617]

Besides the possibility of gaining access to files in the possession of the defendant, it should be considered that much evidence of an infringement of competition law can be found in the files that underpin the infringement decision of the competition authority. Therefore, a private claimant would benefit from gaining access to these files to support its damages claim. However, the competition authorities have to consider issues of confidentiality related to leniency applications in order to provide an effective public enforcement of competition law.

With reference to the different legal evaluations and practicability, there are two main categories of disclosure: the pre-action disclosure of files in the possession of the defendant, and access to the files of the competition authorities.

It is possible to claim damages based on an infringement of competition law either as a stand-alone or as a follow-on claim under both English and German law.

[615] See as well H Stakheyeva (n 152) 403.

[616] See European Commission, 'White paper on damages actions for breach of the EC antitrust rules' COM(2008) 165 final at para 2.2.

[617] H Stakheyeva (n 152) 403.

For a stand-alone claim, it is necessary for the claimant to prove an infringement of competition law on its own because there has been no proceedings involving a national competition authority or the European Commission.

Under English law, this claim can be brought before the High Court and from October 2015 before the CAT. It can be mentioned that the High Court will look to refer these cases to the CAT from 1st October 2015 to streamline actions. Under German law, stand-alone cases are normal civil damage claims. The default rule is that a civil damage claim has to be brought to the *Amtsgericht* or the *Landgericht*. With reference to Section 23 GVG,[618] the *Amtsgericht* is competent to hear damage claims up to €5,000 if there is no special competence in one of the two courts. Section 87 GWB rules that the *Landgericht* has the exclusive jurisdiction to decide on all civil claims based on an infringement of Art 101 or 102 TFEU or the national competition regulations without any restriction on the amount of the dispute.

However, if a national competition authority or the Commission has already proved an infringement of competition law (follow-on claim), the claimant is able to use this finding for its own civil damage claim. This relates to the question of the effect of competition authorities' decisions in follow-on claims. If it has a binding effect, there is no need for the claimant to prove again an infringement of competition law – something which is quite attractive to claimants and produces a lower adverse costs risk. Under English law, the case can be brought before the High Court or the CAT and under German law before the *Landgericht*. However, in both types of cases, the claimant has to prove the loss and causation.

This chapter will show that no direct, applicable European law exists that regulates access to files that are in the possession of the defendant and that only the accessibility of files in the possession of the European Commission is regulated by European law. As such, this chapter deals with the access to documents of the European Commission of the preliminary public proceeding by referring to Art 27(2) Regulation (EC) 1/2003,[619] Art 15 Regulation (EC) 773/2004[620] and Regulation (EC) 1049/2001,[621] as well as the impact of Directive 2014/104/EU on national laws about access to files of the competition authorities.

One aim of this section is to show that parties to the administrative action have access to documents under Regulation (EC) 1/2003 and Regulation (EC) 773/2004 but not victims and, thus, plaintiffs in civil damage claims. In addition, there is no right to access documents about business secrets or other confidential information. Another aim is to analyse the provisions in Regulation (EC) 1049/2001. These allow

[618] Courts Constitution Act 1975 (Gerichtsverfassungsgesetz [1975] BGBl I-1077).

[619] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[620] Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.

[621] Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

every EU citizen to access documents of the European institutions and illustrate the exceptions of the general provision in Art 4(2) Regulation (EC) 1049/2001.

Another crucial point in examining the scope of access to Commission files is to determine whether the files of a leniency application are accessible for plaintiffs or if they fall under an exception. To do this, the section critically examines the position of the Commission which is that public access to leniency applications compromises public and private interests, e.g. the protection and purpose of dawn raids. Furthermore, the chapter outlines the recent decisions of the ECJ in *Commission v EnBW*[622] in relation to access to documents in the Commission's leniency regime.[623]

Furthermore, the chapter will consider the fact that, on a national level, German and English law place different emphases on access to files in the possession of the competition authority and the defendant. Whereas German law focuses on follow-on claims and the access to files in the possession of the competition authorities, English law focuses on access to files in the possession of the defendant. However, the chapter will highlight that Directive 2014/104/EU requires the implementation of national regulations to both forms of gaining access to files. Therefore, the chapter will argue that both jurisdictions have to change their national regulations to implement the ruling of Directive 2014/104/EU.

In addition, the section deals with the question of protecting leniency applicants and the fine-tuning of an effective relationship between private and public enforcement of European competition law. In doing so, it specifically deals with the decisions of the ECJ in *Pfleiderer v Bundeskartellamt*[624] and *Bundeswettbewerbsbehörde v Donau Chemie*[625] which established a balancing test that is also applicable in relation to files in the possession of the European Commission (4.3.1) and in the possession of the defendant (4.1).

Based on the approach in Directive 2014/104/EU and the existing national regulations in Section 47A(7) and (8) of the Competition Act 1998 which was subsequently amended by the Enterprise Act 2002 and the corresponding German regulation in Section 33(4) GWB, the first section outlines the benefits of follow-on claims and highlights the principles of the binding effect of decisions of public authorities on civil claims. After defining follow-on claims and their impact on the effectiveness of private enforcement, the section considers the decision of the ECJ in

[622]Case C-365/12 P *European Commission v EnBW Energie Baden-Württemberg AG* [2014] 4 CMLR 30 (ECJ).

[623]Case T-181/10 *Reagens SpA v European Commission* [2014] 4 CMLR 28 (EGC); Case T-534/11 *Schenker AG v European Commission* ECLI:EU:T:2014:854; Case C-280/11 *Council of the European Union v Access Info Europe* [2014] 2 CMLR 6 (ECJ).

[624]Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

[625]Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] 5 CMLR 19 (ECJ).

Masterfoods v HB[626] and its impact on the topic. In addition, the first part highlights the cooperation mechanism of Art 15 and 16 of the EU Regulation 1/2003 and the provisions in Directive 2014/104/EU. The section will also analyse the influences of European human rights on the topic as well as the European regulations on the implementation of Directive 2014/104/EU into national law.

After defining the European requirements in the first section, the second and third sections will analyse the implementation under English and German law. Both sections will highlight the different emphases that English and German law place on gaining access to files in the possession of the defendant (English law) and the competition authority (German law).[627] In the end, each section demonstrates the need to implement a general right of access to files in the possession of a national competition authority and a general rule of pre-action disclosure of files in the possession of the defendant under national law de lege ferenda.

Finally, the chapter argues that follow-on claims can be seen as the most effective approach to civil proceedings and that there is a need to strengthen the effectiveness and the implementation of Directive 2014/104/EU into national law.

4.1 European Regulations

4.1.1 Access to files of the competition authorities

4.1.1.1 Access to documents in the possession of the European Commission and the protection of applicants of the European leniency programme

Although a claimant in a civil damage claim based on an infringement of Art 101 or 102 TFEU can obviously use whatever information the European Commission makes public and the published version of the infringement decision may provide useful information, it often needs further information about the infringement and the parties.[628] This is because the Commission only publishes non-confidential versions of its decisions as it has to consider 'the legitimate interest of undertakings in the protection of their business secrets'.[629] In addition to the confidential version of the infringement decision, the European Commission is usually in possession of many documents that can support a claimant in a private civil damage claim.

4.1.1.1.1 Access to files of the European Commission under

[626] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.

[627] See the overview by H Stakheyeva (n 152) 403.

[628] See N Dunleavy (n 56) 704 at para 3.

[629] Article 30(2) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

Regulation (EC) 773/2004

One way of gaining access to the files of the Commission is to receive a non-confidential version of the Statement of Objections and other files under Art 6(1) and 15(1) of Regulation (EC) 773/2004. However, this is only possible for claimants that have been a party in the Commission's case and neither is the claimant able to access business secrets or confidential information of third parties.[630] Having said this, with reference to Art 8 and 15(4) of Regulation (EC) 773/2004, the received document can be used as evidence in a civil damage claim based on an infringement of Art 101 or 102 TFEU.

4.1.1.1.2 Access to files of the European Commission under Regulation (EC) 1049/2001 (Transparency Regulation)

An application to gain access to files of the European Commission can be based on Regulation (EC) 1049/2001, the so-called Transparency Regulation. This regulation provides the rules that govern the right of every EU citizen to gain access to documents in the possession of EU institutions. Although the main objective is to enable public access to documents,[631] Regulation (EC) 1049/2001 provides a number of exceptions for when the application can be refused. In Art 4(2), the Regulation rules that an institution, e.g. the European Commission, can refuse an application if commercial interests of a natural or legal person; court proceedings or legal advice; or the purpose of inspections, investigations and audits would be jeopardised. Furthermore, the case law of the ECJ has established that it is not sufficient for refusal of access to documents to be based on the fact that the document is part of the proceedings mentioned in Art 4(2). It is necessary for the Commission or any other European institution to show the impairment of the protected interests of Art 4(2) in concrete terms.[632]

The possibility to refuse an application by referring to commercial interests is mostly relevant in competition cases because the definition of commercial interest is wider than the concept of business secrets, which the European Commission is not entitled to disclose.[633] However, in *Verein für Konsumenteninformation*

[630] European Commission, 'Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council regulation (EC) No 139/2004' [2005] OJ C325/7, para 31; N Dunleavy (n 56) 704 at para 4.

[631] Joined cases T-391/03 and T-70/04 *Yves Franchet and Daniel Byk v Commission of the European Communities* [2006] ECR II-2023 at para 83; See as well N Dunleavy (n 56) 704 at para 5.

[632] See Case C-612/13 P *ClientEarth v European Commission* [2015] NVwZ 1273 with further references.

[633] See Case T-353/94 *Postbank v Commission* [1996] ECR II-921, [1997] 4 CMLR 33; See N Dunleavy (n 56) 704 at para 6.

v Commission[634], the General Court (EGC) stated that the exceptions ruled in Art 4(2) of Regulation 1049/2001 have to be applied restrictively and the European Commission has to consider for each requested document whether a specific and foreseeable risk to jeopardise a legally protected interest of Art 4(2) would occur if it was disclosed[635] and whether it is possible to allow partial access to the applicant.[636]

The case centred on a request based on Regulation (EC) 1049/2001 by a consumer organisation that was pursuing a civil damage claim against members of the Austrian Banks Cartel in order to gain access to the files in the possession of the European Commission. The Commission had refused the application because as far as it was concerned it would be disproportionate for them to be required to examine each individual document, overall about 47,000 pages. However, the EGC annulled the decision because the Commission erred in law.

Based upon this, the EGC clarified in *Éditions Odile Jacob SAS v Commission*[637] that it was necessary to provide a concrete and individual examination of each requested document before refusing the application.[638] On the other hand, in the case of a third-party document, the Commission must consult the relevant third party to determine whether the document should be disclosed or not.[639] The applicant, Éditions Odile Jacob SAS, asked the Commission, pursuant to the Transparency Regulation, for access to a number of documents related to the administrative procedure, and this led to the adoption of a merger decision of the Commission to support its own merger action which was pending before the EGC. The Commission partly refused the application because of the general possibility that it would jeopardise an administrative proceeding if documents of a merger control proceeding were disclosed.[640]

On this point, the ECJ decided in *Sweden v MyTravel and Commission*[641] that the European Commission had to explain in detail why a document jeopardised its decision-making or administrative proceeding. Subsequently, in *Commission v Agrofert Holding*[642] the ECJ stated that there is a general presumption that the

[634]Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

[635]See Joined cases T-391/03 and T-70/04 *Yves Franchet and Daniel Byk v Commission of the European Communities* [2006] ECR II-2023; Case T-36/04 *Association de la presse internationale ASBL (API) v Commission of the European Communities* [2007] ECR II-3201.

[636]Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121 at para 92.

[637]Case T-237/05 *Éditions Odile Jacob SAS v Commission* [2010] ECR II-2245 (on appeal, Case C-404/10 P *Commission v Éditions Jacob* [2012] 5 CMLR 8 (ECJ)).

[638]Case T-237/05 *Éditions Odile Jacob SAS v Commission* [2010] ECR II-2245 at para 123; See as Case C-365/12 P *European Commission v EnBW Energie Baden-Württemberg AG* [2014] 4 CMLR 30 (ECJ) at para 93; De Stefano G, 'Access of damage claimants to evidence arising out of EU cartel investigations: a fast evolving scenario' [2012] 5(3) GCLR 95 [97-8].

[639]Case T-237/05 *Éditions Odile Jacob SAS v Commission* [2010] ECR II-2245 at para 126.

[640]See Case T-237/05 *Éditions Odile Jacob SAS v Commission* [2010] ECR II-2245 at para 8.

[641]Case C-506/08 P *Kingdom of Sweden v European Commission and MyTravel Group plc* [2011] ECR I-6237.

[642]Case C-477/10 P *European Commission v Agrofert Holding a.s.* [2012] 5 CMLR 9.

scheme instituted by the European merger control regime would be undermined if persons other than those authorised to access the file by the merger control legislation gained access based on Regulation 1049/2001.[643] Furthermore, those exceptions in the Transparency Regulation apply for a minimum period of 30 years.[644] However, this presumption does not exclude the possiblilty of demonstrating that a specific document is not covered by it or that there is a higher public interest of disclosure.[645] In *Strack v Commission*[646] the ECJ refined its position by stating that the party applying for disclosure must prove this higher public interest.[647] However, it is not enough for the Commission to explain that a document is in connection to a specific administrative proceeding. In *ClientEarth v Commission,*[648] the ECJ stated that the Commission has to show how the given document jeopardises that specific proceeding.

Furthermore, if the European Commission refused an application which sought access to documents on one of the exceptions under Regulation 1049/2001, the applicant can appeal before the EGC and the ECJ under Art 263 TFEU.[649] However, even if this is a way to request documents in the possession of the European Commission, the Commission has shown a reluctance to provide documents to a potential claimant under this provision.[650]

4.1.1.1.3 Access to files of the European Commission under Regulation (EC) 1/2003

A national civil court has the right to ask the European Commission for documents under Art 15 of Regulation (EC) 1/2003. The regulation rules that any national court, not only a civil court, can request documents in the possession of the European Commission.[651] The ECJ clarified that this includes details of the status of a pending case as well as all 'economic and legal information'.[652] However, this possibility does not avoid any reference being made to Art 267 AEUV which entitles a national court that is also a competition authority to request relevant information from

[643]Case C-477/10 P *European Commission v Agrofert Holding a.s.* [2012] 5 CMLR 9 at paras 63-4; Case C-139/07 P *European Commission v Technische Glaswerke Ilmenau GmbH* [2010] ECR I-5885 at para 61.

[644]Case C-477/10 P *European Commission v Agrofert Holding a.s.* [2012] 5 CMLR 9 at para 67.

[645]Case C-477/10 P *European Commission v Agrofert Holding a.s.* [2012] 5 CMLR 9 at para 68; C-139/07 P *European Commission v Technische Glaswerke Ilmenau GmbH* [2010] ECR I-5885 at para 62.

[646]Case C-127/13 P *Guido Strack v European Commission* [2015] 1 WLR 2649 (ECJ).

[647]Case C-127/13 P *Guido Strack v European Commission* [2015] 1 WLR 2649 (ECJ) at para 128.

[648]Case C-612/13 P *ClientEarth v European Commission* [2015] NVwZ 1273.

[649]N Dunleavy (n 56) 704 at para 9.

[650]N Dunleavy (n 56) 703.

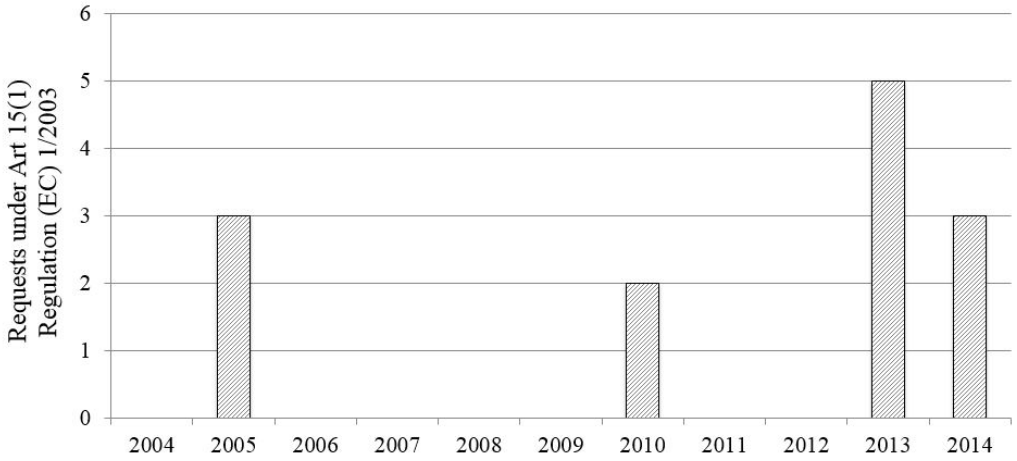
[651]Art 15(1) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[652]Joined cases C-319/93, 40/94 and 224/94 *Dijkstra v Friesland (Frico Domo) Coöperatie BA* [1995] ECR I-4471 at para 34.

the Commission.[653] This is especially relevant for the CAT in the UK which is a competition authority and a court that deals with civil damage claims.

However, there have only been a small number of cases where a national court of a Member State requested files from the Commission under Art 15(1) of Regulation (EC) 1/2003. In the annual Reports on Competition Policy, the European Commission has recorded the requests under Art 15(1). Since enacting Regulation (EC) 1/2003 in May 2004, the Commission has received 13 applications by national courts requesting information in its possession.[654]

Figure: 6: Requests under Art 15(1) Regulation (EC) 1/2003 between 2004 and 2014



[653]D Dalheimer, 'Art. 15 Zusammenarbeit mit Gerichten der Mitgliedstaaten' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (40th edn, CH Beck 2009) at para 3.

[654]European Commission, *XXXIVth Report on Competition Policy, 2004*, vol. 1 (Brussels/ Luxembourg, 2005) at para 112; European Commission, *XXXVth Report on Competition Policy* (n 110) at para 219; European Commission, *XXXVIth Report on Competition Policy, 2006* (Brussels/Luxembourg, 2007) at para 70; European Commission, *XXXVIIth Report on Competition Policy, 2007* (Brussels/Luxembourg, 2008) at para 90; European Commission, *XXXVIIIth Report on Competition Policy, 2008* (Brussels/Luxembourg, 2009) at para 115; European Commission, *XXXIXth Report on Competition Policy, 2009* (Brussels/Luxembourg, 2010) at para 162; European Commission, *XXXXth Report on Competition Policy, 2010* (Brussels/Luxembourg, 2011) at para 146; as well as European Commission, 'Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy 2010' COM(2011) 328 final at para 401; European Commission, 'Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy 2011' COM(2012) 253 final at 17-8; European Commission, 'Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy 2012' COM(2013) 257 final at 15-6; European Commission, 'Commission Staff Working Document accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee for the Regions on Competition Policy 2013' COM(2014) 249 final at 24; European Commission, 'Commission Staff Working Document accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee for the Regions on Competition Policy 2014' COM(2015) 247 final at 29.

At least 10 of the 13 applications were made by the courts of three countries: Spain, Belgium and the United Kingdom.[655] These include all applications in 2010, 2013 and 2014. It can be noted that the Commission did not publish the countries of the courts that applied the three times in 2005.[656]

With reference to the small number of applications, the Ombudsman of the EU argued in favour of allowing the parties in the national court proceedings to apply directly for access to the Commission's files under Art 15(1) Regulation (EC) 1/2003 in civil damage claims.[657] However, it is doubtful whether a claimant can apply directly under this regulation for access to documents.[658] The ruling about cooperation between the national courts and the European Commission only applies to matters of public interests and does not produce individual rights.[659] Therefore, the ruling is only applicable between courts and the corresponding competition authorities, the European Commission or national competition authorities of the Member States. Art 15(1) Regulation (EC) 1/2003 does not provide any possibility for direct application by the parties in a national proceeding. However, it is an expression of the principle of effectiveness in enforcing Art 101 and 102 TFEU that the national courts have to at least closely consider using Art 15(1) Regulation (EC) 1/2003 to request files in the possession of the European Commission to aid a claimant in exercising its rights under Art 101 or 102 TFEU.[660]

In addition, the court has to consider the right of the defendant to protect its professional and business secrecy and the defendant could have a right to oppose the application.[661] Therefore, the next issue is what files or information must the Commission disclose to the national court. Although the Commission is obliged to cooperate with national courts by handing over files related to an administrative investigation under Art 4 TEU,[662] it has to ensure that the confidentiality of

[655]European Commission, *XXXXth Report on Competition Policy* (n 654) at para 146; as well as European Commission, 'Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy 2010' COM(2011) 328 final at para 401; European Commission, 'Commission Staff Working Paper accompanying the Report from the Commission on Competition Policy 2011' COM(2012) 253 final at 17-8; European Commission, 'Commission Staff Working Document accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee for the Regions on Competition Policy 2013' COM(2014) 249 final at 24; European Commission, 'Commission Staff Working Document accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee for the Regions on Competition Policy 2014' COM(2015) 247 final at 29.

[656]See European Commission, *XXXVth Report on Competition Policy* (n 110) at para 219.

[657]See Decision of the European Ombudsman closing his inquiry into complaints 3699/2006/ELB against the European Commission (6 April 2010).

[658]See N Dunleavy (n 56) 703.

[659]See Becker R, 'VO (EG) 1/2003 Artikel 15 Zusammenarbeit mit Gerichten der Mitgliedstaaten' in H von der Groeben, J Schwarze and A Hatje (eds), *Europäisches Unionsrecht* (7th edn, CH Beck 2015) at para 20.

[660]N Dunleavy (n 56) 706 at para 12.

[661]See Case T-353/94 *Postbank v Commission* [1996] ECR II-921 at para 89.

[662]Case C-2/88 Imm *J. J. Zwartveld and Others* [1990] ECR I-3365 at paras 22-5; Case T-353/94 *Postbank v Commission* [1996] ECR II-921 at para 75.

business and professional secrets is respected according to Art 339 TFEU.[663] The Commission is caught between encouraging private enforcement on the one hand, and not jeopardising public enforcement by undermining the public leniency regime on the other. Although a national court would usually never order the discovery of leniency corporate statements and settlement submissions,[664] court statistics show that some courts use the mechanism of gaining access to files in the possession of the Commission to use in their national cases. In this situation, the Commission has to use the balancing test established by the ECJ in *Pfleiderer v Bundeskartellamt*.[665] This case deals with the question of gaining access to files of national competition authorities and is discussed under 4.3.2.1. However, in its Cooperation Notice related to this, the European Commission stated that it would only disclose files of leniency proceedings with the permission of the leniency applicant.[666] Furthermore, the Commission has to establish that the national court has the capacity and is willing to protect the security of the given information.[667]

4.1.1.1.4 Conclusion

In summary, it can be said that a claimant in a civil damage claim based on an infringement of Art 101 or 102 TFEU has, besides the usage of public information of the European Commission, only limited rights to gaining access to files in the possession of the Commission.

Under Art 15(1) of Regulation 1/2003, the claimant is not entitled to apply directly for discovery of files in the possession of the Commission. The ruling is only applicable between courts and the corresponding competition authorities, the European Commission or national competition authorities of the Member States. Although it is an expression of the principle of effectiveness in enforcing Art 101 and 102 TFEU that the national courts have at least to closely consider using Art 15(1) Regulation (EC) 1/2003 to request files in the possession of the European Commission to aid a claimant in exercising its rights under Art 101 or 102 TFEU, there have only been a number of cases where a national court of a Member State requested files from the Commission under Art 15(1) of Regulation (EC) 1/2003. The Commission received 13 applications from national courts requesting information in the possession of the European Commission.

An application by the parties in a national proceeding can only be based on rights set out under Regulation (EC) 773/2004 or Regulation (EC) 1049/2001 (so-called

[663]Commission Cooperation Notice [2004] OJ C101/54 at para 25; See as well Case T-353/94 *Postbank v Commission* [1996] ECR II-921 at paras 86-7 and 90-3; G Miersch (n 66) at para 12.

[664]See F Murphy, 'EU Commission proposes new measures re private actions for damages and collective actions' (2014) 35(5) ECLR 223, 224-5.

[665]Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

[666]Commission Cooperation Notice [2004] OJ C101/54 at para 26.

[667]Commission Cooperation Notice [2004] OJ C101/54 at para 25 with further references.

Transparency Regulation). It is only possible for claimants that have been a party in the Commission's case to apply for discovery under Regulation (EC) 773/2004. In addition, these claimants are unable to get access to business secrets or confidential information of third parties. An application under Regulation (EC) 1049/2001 can be refused as it provides a number of exceptions. Although the EGC clarified that the European Commission has to provide a concrete and individual examination for each requested document before refusing the application, the Commission has shown reluctance to provide documents to claimants under this provision.

4.1.1.2 European regulations about access to files of national competition authorities under Directive 2014/104/EU and the protection of leniency applicants

Before Directive 2014/104/EU came into force, there had been no European regulation and only a few European cases about access to files of national competition authorities.

One of these cases was the landmark decision in *Pfleiderer v Bundeskartellamt*[668] where the ECJ was asked for the first time to determine the balance between public enforcement which supported the policy of the European Commission on incentivising cartelists and the protection of leniency applicants and to ensure the effectiveness of private enforcement and the ability of victims to claim compensation for harm based on an infringement of Art 101 or 102 TFEU.[669] The case was about the refusal by the German national competition authority, the Bundeskartellamt, to allow a claimant access to leniency related files for the possibility to litigate for damages based on the findings of the Bundeskartellamt. The ECJ, i.e. the Grand Chamber of the court, stated that in the absence of relevant EU legislation – which was the situation before Directive 2014/104/EU came into force – national courts of Member States are generally entitled to even request leniency files and the Member States have to ensure that they implement mechanisms for securing access to the relevant documentation. It is also a matter of national law to draft the procedural regulations,[670] and these must recognise the principle of effectiveness and ensure the general possibility of private enforcement as well as not undermining the effective public enforcement of Art 101 or 102 TFEU on a case-by-case basis. In this test, the national court has to balance the interests of third party claimants, i.e. claimants not involved in the infringement, who are seeking damages against the need to protect the effectiveness of the leniency regime. As a core outcome, the ECJ stated

[668] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

[669] See A Wood, 'The disclosure of leniency related materials supplied during competition enforcement proceedings: battle lines drawn by the ECJ' (2013) 18(1) CovLJ 112, 114.

[670] See I Vandenborre and T Goetz, 'EU Competition Law Procedural Issues' (2013) 4(6) JECL&P 506, 507.

that there is no pre-determined hierarchy of importance between public and private enforcement.

The national courts therefore have to conduct a 'weighing exercise' where they have to weigh the 'respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'.[671]

With reference to the possibility that leniency applicants could become easy targets for civil damage claims because it is easier to get access to the relevant files, the Commission was concerned that the effectiveness of the leniency regimes would be undermined because national courts in different Member States might act unpredictably when applying the balancing test.[672]

Based upon this, the ECJ ruled in *Bundeswettbewerbsbehörde v Donau Chemie*[673] that national law has to allow national courts in general to exercise the balancing test on a case-by-case basis.[674] This case was based in Austria and the Austrian Law on Cartels (Kartellgesetz) stated that national courts were not entitled to order a disclosure of cartel proceeding files including any leniency materials without the permission of the parties subject to those proceedings. The Verband Druck & Medientechnik (VDMT), a potential claimant for damages not involved in the infringement of competition law, applied for access to files used in the administrative proceedings for its potential civil damage claim against the cartelists. Based on the ruling in the Law on Cartels and the missing permission of the cartelists, the Austrian Cartel Court at the Higher Regional Court of Vienna (Kartellgericht beim Oberlandesgericht Wien) should have refused the application. However, it doubted its compatibility with European lawand given the decision in *Pfleiderer* it and sought a preliminary ruling under Art 267 TFEU.

Based upon this case law, Directive 2014/104/EU states in Art 6(1) that the disclosure rule which is laid down in Art 5(1) is applicable for files in the possession of the national competition authority. Therefore:

> Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order [a competition authority] to disclose relevant evidence which lies in [its] control, subject to the conditions set out in this Chapter.

[671]Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161 at paras 30-1.

[672]See A Wood (n 669) 114.

[673]Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] 5 CMLR 19 (ECJ).

[674]Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161 at paras 23; See I Vandenborre and T Goetz (n 670) 506.

> Member States shall ensure that national courts are able, upon request of the defendant, to order [a competition authority] to disclose relevant evidence.[675]

Art 6 of Directive 2014/104/EU is based on the informal trilogy negotiaions between the Commission, the Council and the European Parliament.[676] Although the ruling for disclosure of files in the possession of a competition authority refers to the disclosure of files in the possession of the defendant or other third party, the rules in Art 6 are stricter. Therefore, it is possible to argue that the priority for disclosure are for those files in the possession of the involved undertakings.[677]

This means that the national court has to apply the balancing test laid down in Art 5(3) of Directive 2014/104/EU, which is a codification of the balancing test based on the case law of the European courts. The central distinction between Art 5 and Art 6 is the protection of files mentioned on the Grey List in Art 6(5) and the Black List in Art 6(6). Whereas the protection of disclosure of the files on the Grey List only applies when the proceedings of the competition authorities are pending, the protection of the Black List is much more stringent. Therefore, it is possible to gain access to files drawn up by natural or legal persons or by the competition authority specifically for administrative proceedings and settlement submissions that have been withdrawn.[678] On the other hand, disclosure is generally prohibited for leniency statements and settlement submissions.[679]

With regard to the ruling of the ECJ in *Bundeswettbewerbsbehörde v Donau Chemie*, it is doubtful whether this protection of the Black List is compatible with the effective enforcement of European competition law. Some authors argue that the provision in Art 6(6) of Directive 2014/104/EU contradicts this ruling of the ECJ.[680] However, the ECJ only decided under the permission that no uniform European regulation is in force. A harmonised European system of disclosure is generally valid

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[675] Art 5(1) in the meaning of Art 6(1) of Directive 2014/104/EU.

[676] Proposal for a Directive on actions for damages for infringements of competition law, Analysis of the final compromise text, March 24, 2014, 8088/14, p. 5; Weidt CF, 'The Directive on actions for antitrust damages after passing the European Parliament' (2014) 35(9) ECLR 438, 439.

[677] Weidt CF (n 676) 439.

[678] Art 6(5) of Directive 2014/104/EU.

[679] Art 6(6) of Directive 2014/104/EU.

[680] T Kapp, 'Grundsatz der Einzelabwägung sticht Gesetzgebungskompetenz aus' [2013] BB 1556; K Kersting, 'Kronzeugenregelung und Akteneinsicht Dritter im Kartellverfahren' [2013] JZ 737, 739; H Schweitzer, 'Die Richtlinie zur privaten Durchsetzung von Schadensersatzansprüchen aus Wettbewerbsverstößen', Speech on International Forum on EU Competition Law (Brussels, April 2014) <https://www.studienvereinigung-kartellrecht.de/downloads/forum-kartellrecht/2014_prof-dr-heike-schweitzer.pdf> accessed 01/03/2016; S Dworschak and L Maritzen, 'Einsicht – der erste Schritt zur Besserung? Zur Akteneinsicht in Kronzeugendokumente nach dem Donau Chemie-Urteil des EuGH' [2013] WuW 839; P Gussone and L Maritzen, 'Anmerkung zur Entscheidung des EuGH vom 6.6.2013 (C-536/11, EWS 2013, 288) – Zum Akteneinsichtsrecht Dritter im Kartellverfahren' [2013] EWS 292, 293; R Hempel, 'Anmerkung zur Entscheidung des EuGH vom 06.06.2013 (C-536/11; EuZW 2013, 586) – Zur Frage des Akteneinsichtsrechts durch Schadenersatzkläger im kartellrechtlichen Verfahren' [2013] EuZW 589, 590.

for all Member States.[681] Therefore, the European legislators used the invitation of the ECJ to produce a unified European regulation.[682]

It can therefore be said that the Member States have to provide a national regulation about disclosure which entitles national courts to order a disclosure of files in the possession of the national competition authority on a case-by-case basis and by applying a balancing test. In addition, the Member States must ensure that leniency statements and settlement submissions are protected from disclosure.

4.1.1.3 Binding effect of competition authorities' decisions in follow-on claims

The binding effect of competition authorities' decisions are an outcome of the problem that in a civil damage claim the claimant has to prove the existence of an infringement of European or national competition law.[683] Civil damage proceedings would benefit from any kind of binding effect as it would save resources[684] and strengthen the effectiveness of the claim.[685] On the other hand, it is established European law that a decision of the European Courts concerning the interpretation of Community law is binding on the courts of all Member States and that Community law has primacy over national law. In the UK, this is explicitly set out in Sections 2(1) and 3(1) and (2) of the European Communities Act 1971.[686] However, this only relates to matter of laws in order to avoid different interpretations of European regulations. In competition law cases, the problem is often a matter of facts and it is necessary to establish a binding effect on these in order to avoid conflicting decisions.[687]

With reference to the different legal regulation, it is necessary to differentiate between the question of a binding effect of national competition authorities and the European Commission. Whereas the binding effect of infringement decisions of the European Commission is established through case law and EU Regulations, the European Directive 2014/104/EU was the first to establish a European regulation on the binding effect of infringement decisions of national competition authorities.

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[681] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161 at paras 20-3; L Fiedler (n 337) 2184; C Palzer, 'Unvereinbarkeit der österreichischen Regelung zur Akteneinsicht Kartellgeschädigter mit EU-Recht' [2013] NZKart 324, 326; C Vollrath, 'Das Maßnahmepaket der Kommission zum wettbewerbsrechtlichen Schadenersatzrecht' [2013] NZKart 434, 446; CF Weidt (n 676) 439-40.

[682] L Fiedler (n 337) 2184; C Palzer (n 681) 326; C Vollrath (n 681) 446; CF Weidt (n 676) 439-40.

[683] See H Köhler, 'EU-Kartellgeldbußen gegen Mutter- und Tochtergesellschaft: Gesamtschuldnerische Haftung und Ausgleich im Innenverhältnis' [2011] WRP 277, 279.

[684] See M Brealey and N Green, *Competition Litigation, UK Practice and Procedure* (OUP 2010) at para 11.05.

[685] See M Brealey and N Green (n 684) at para 11.04.

[686] Case 61-79 *Amministrazione delle finanze dello Stato v Denkavit italiana Srl* [1980] ECR 1205 at para 16; See as well M Brealey and N Green (n 684) at paras 11.15-7.

[687] See M Brealey and N Green (n 684) at para 11.03.

4.1.1.3.1 Binding effect of infringement decisions of the European Commission

Under European law, based on its decision in *Delmitis v Henninger Bräu*,[688] the ECJ developed the principle that a decision of a national civil court must not run contrary to a legal evaluation of the European Commission.[689] Since the decision of the ECJ in *Masterfoods v HB*[690], it is also obvious that an existing decision of a national civil court can be reversed by a formal infringement decision of the European Commission. In *Masterfoods v HB*, the ECJ had to rule on a decision based on a submission regarding Art 267 TFEU of the Irish Supreme Court. The Irish Supreme Court asked the ECJ whether a decision of the High Court had to be overruled because the High Court had denied there was an infringement of European competition law but the European Commission affirmed an infringement in a positive infringement decision[691] after the decision of the High Court had been published. Based on this, the ECJ ruled that:

> ... in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 85(1) and 86 of the Treaty. The Commission is therefore entitled to adopt at any time individual decisions under Articles 85 and 86 of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.[692]

With this, the ECJ stated clearly the hierarchy between the European level, represented by the European Commission as European competition authority, and the national level, represented by the civil courts of the Member States. It is therefore just a logical step to say that national institutions are not allowed to interfere in decisions of the European institutions. The ECJ also stated that:

> [it] is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.[693]

In *IP v Brosana*[694], the ECJ also ruled that a decision of the European Commission is absolutely binding for national competition authorities and civil

[688] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] I-935.
[689] V Milutinović (n 287) 243 at para 47.
[690] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.
[691] Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities* [2003] ECR II-4653.
[692] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369 at para 48.
[693] Ibid at para 49.
[694] Case C-2/97 *Società italiana petroli SpA (IP) v Borsana Srl* [1998] ECR I-8597 at para 26.

courts. It makes no difference, therefore, if the decision of the European Commission had been approved by the European courts or not as long as the decision had been officially published. As a consequence, national civil courts are bound by infringement decisions of the European Commission and it can even overrule valid decisions of national courts.[695]

In this respect, Art 16(1) Regulation (EC) 1/2003 is consistent with this as it standardises the general principle of the ECJ case law on the binding effect of Commission decisions[696] on the one hand, and extends this binding effect to proceedings of the Commission in which no decision has yet been issued on the other.[697] In doing so, Art 16(1) EU Regulation 1/2003 states that the national proceeding has to be stayed until the Commission comes to a decision.

When Art 16(1) Regulation (EC) 1/2003 speaks about Decisions of the Commission, it is not clear which formal decisions of the Commission are meant and hence which are binding for the national civil courts. There is no problem with this in cases of positive infringement decisions of the European Commission with reference to Art 7 Regulation (EC) 1/2003[698] (Positive Binding Effect). On the other hand, a transfer of the binding effect to interim injunctions according to Art 8 Regulation (EC) 1/2003 has to be refused. With reference to the necessary time limitation of the measure under Art 8(2) Regulation (EC) 1/2003 and the possibility of interim injunctions only based on serious doubts about the comparability of a company's acting with the competition law,[699] even if a summary examination does not confirm the infringement of competition law,[700] the establishment of a binding effect of interim injunctions is not appropriate. However, on the other hand, interim injunctions exercise a kind of Negative Binding Effect on national civil courts because the courts of the Member States are not entitled to issue decisions that can jeopardise measures of the European Commission. However, this is, for example, given if a contract potentially infringes European competition law and the European Commission issued an interim injunction to suspend the contract and, on the other hand, a national civil court decided to perform the contract or pay damages because of the non-performance of the contract.[701] In the reverse case, the national civil

[695]See V Milutinović (n 287) 252.

[696]Ibid, 254.

[697]See already C Gaitanides, 'Art 220 EGV [Aufgabe]' in H von der Groeben und J Schwarze, *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (6th edn, 2003) at para 21.

[698]See Arts 7, 8 and 10 Regulation (EC) 1/2003; R Wainwright, 'The Relationship between the national judge and the European Commission in applying articles 81 and 82 of the EC treaty' (2005) 5(1) ERA Forum 84, 88; Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369 at para 49.

[699]Case T-23/90 *Automobiles Peugeot SA and Peugeot SA v Commission of the European Communities* [1991] ECR II-653 at para 63.

[700]See Case T-44/90 *La Cinq SA v Commission of the European Communities* [1992] ECR II-1 at paras 61-1.

[701]See V Milutinović (n 287) 257-8.

court is not inhibited from issuing interim injunctions itself even if the European Commission stopped short of issuing such a measure.[702]

Furthermore, Commitments under Art 9(1) Regulation (EC) 1/2003 are also formal decisions of the European Commission.[703] However, in the recitals of Regulation (EC) 1/2003, the Council of the European Union[704] set out that those decisions under Art 9(1) (Commitments) are explicitly not binding for national civil courts and competition authorities.[705] This is consequent because acceptance of a Commitment is not a decision about whether a company's action is an infringement of European competition law or not. On the contrary, Commitments prevent prophylactically an infringement of competition law.[706] In fact, the requirement for the acceptance of a Commitment is that the European Commission at least intended to issue a decision under Art 7 Regulation (EC) 1/2003. Therefore, it could be read that the acceptance of a Commitment indirectly implies that the European Commission assumes an infringement of European competition law.[707] Nevertheless, the concerns of the European Commission are only based on a preliminary evaluation and the Commitment can go beyond what is necessary to act in accordance with the regulations of European competition law.[708] As a consequence, it is not possible to extrapolate from a Commitment an infringement of European competition law[709] even though the observance of an accepted Commitment clarifies that there is no infringement of European competition law[710] and is thus binding for the national civil courts in the way that there is no infringement of the law (Negative Binding Effect). Such a Negative Binding Effect leads to the consequence that in a civil damage claim, a court of a Member State is not entitled to assume an infringement

[702]KL Ritter, 'Art. 16. Einheitliche Anwendung des gemeinschaftsrechtlichen Wettbewerbsrechts' in U Immenga and E-J Mestmäcker, *Wettbewerbsrecht*, vol 1 (5th edn, CH Beck 2012) at para 3.

[703]See E De Smijter and A Sinclair (eds), *The Enforcement System under Regulation 1/2003* (3rd edn, OUP 2014) at paras 2.116-7.

[704]Legal basis for Regulation (EC) 1/2003 is article 203 TFEU (ex-article 83 EC), which rules that the Regulation was decided by the Council and only in consultation of the European Parliament.

[705]Recital 22 of Regulation (EC) 1/2003.

[706]See e.g. *Coca-Cola* (Case COMP/A.39.116/B2) Commission Decision number 2005/670/EG [2005] OJ L253/21.

[707]So e.g. F Montag and A Rosenfeld, 'A solution to the problems? Regulation 1/2003 and the Modernization of competition procedure' [2003] ZWeR 107, 132.

[708]KL Ritter (n 702) at para 3.

[709]Also the view of M Busse and A Leopold, 'Entscheidungen über Verpflichtungszusagen nach Art. 9 VO (EG) Nr. 1/2003' [2005] WuW 146, 151; K Schmidt, 'Umdenken im Kartellverfahrensrecht! Gedanken zur Europäischen VO Nr. 1/2003' [2003] BB 1237, 1242; TT Hennig, *Settlements im Europäischen Kartellverfahren – Eine rechtsvergleichende Untersuchung konsensualer Verfahrensbeendigungsmechanismen unter besonderer Berücksichtigung der Verpflichtungszusageentscheidung* (Nomos 2010) 263; D Dalheimer, 'Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (40th edn, CH Beck 2009) at para 7; A Zuber, 'VO 1/2003/EG Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' in U Loewenheim, KM Meessen and A Riesenkampff, *Kartellrecht* (2nd edn, CH Beck 2009) at para 8; KL Ritter (n 702) at para 3.

[710]Recital 13 of Regulation (EC) 1/2003; Left open by E De Smijter and A Sinclair (eds) (n 703) at paras 2.118-9.

of European competition law. Rather, it is obliged to deny an infringement and to refuse the civil damage claim.

Moreover, decisions of the European Commission about the Inapplicability of European competition law in accordance with Art 10 Regulation (EC) 1/2003 express such a Negative Binding Effect.[711] Some voices in the legal literature express that such a Negative Binding Effect is against the direct applicability of Art 101 and 102 TFEU because a company's action that is not an infringement of Art 101 and 102 TFEU is, in fact, not immediately legal. Negative Decisions of the European Commission are hence no more than Negative Tests in the sense of Regulation (EC) 17/1962.[712] However, these opinions do not consider that the binding effect of the Commission's decisions only covers the infringement of European competition law, especially an infringement of Art 101 and 102 TFEU and that there is no binding effect for infringements of other legal regulations. Therefore, it is still possible for a national civil court to establish a case based on legal regulation other than European competition law if the European Commission rejects an infringement of Art 101 or 102 TFEU. On the other hand, as mentioned above, a denial of a Negative Binding Effect would allow national civil courts to jeopardise decisions of the European Commission which would be against the regulations in Regulation (EC) 1/2003 and European case law.[713] Therefore, also the representatives of a equalisation with Negative Tests according to Regulation (EC) 17/1962 assume a factual binding effect of Negative Decisions of the European Commission.[714] Such a factual binding effect is also assumed in cases where the Finding of Inapplicability by the Commission under Art 10 Regulation (EC) 1/2003 could lead to a Positive Binding Effect. This is the case when a decision of the European Commission finds an infringement of competition but no breach of Art 101 or 102 TFEU only because there is a lack of an inter-state clause. It is argued that even if there is no legal binding effect, it is still possible for the decision of the Commission to have a factual binding effect on a national damage claim based on infringements other than European competition law (e.g. national

[711] See V Milutinović (n 287) 259.

[712] A Röhling, 'Die Zukunft des Kartellverbots in Deutschland nach In-Kraft-Treten der neuen EU-Verfahrensrechtsordnung' [2003] GRUR 1019 (1023); Doubting K Schmidt, 'Umdenken im Kartellverfahrensrecht' (n 709) 1242.

[713] Also the view of E De Smijter and A Sinclair (eds) (n 703) at paras 2.145 ff.; A Zuber, 'VO 1/2003/EG Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' (n 709) at para 9; D Dalheimer, 'Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' (n 709) at para 7; Hossenfelder S and Lutz M, 'Die neue Durchführungsverordnung zu den Artikeln 81 und 82 EG-Vertrag' [2003] WuW 118, 123; Hirsch G, 'Anwendung der Kartellverfahrensordnung (EG) Nr. 1/2003 durch nationale Gerichte' [2003] ZWeR 233, 251; Doubting K Schmidt, K Schmidt, 'Umdenken im Kartellverfahrensrecht' (n 709) 1242.

[714] A Röhling (n 712) 1023; K Schmidt, 'Umdenken im Kartellverfahrensrecht' (n 709) 1242; For the binding effect of negative clearance, see Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641 at paras 57-8.

competition law). However, it is misguided to subsume it under the term of a binding effect because it is, rather, a question of access to files of the European Commission. The individual finding of an infringement of the law by the national civil courts cannot be avoided by establishing a factual Positive Binding Effect.[715]

Furthermore, it is widely accepted that the part of the Commission's decision is binding that infringes[716] or protects[717] the interests of the parties.[718] This part is usually the operative part of the judgment which directly refers to the facts of the case.[719] Therefore, the operative part of the judgment only establishes a binding effect if the national civil damage claim is based on the same facts as the infringement decision of the European Commission. There is therefore no binding effect if the civil damage claim and the infringement decision refer to different periods,[720] acts of infringement or different actors. However, if the facts of the cases are congruent, the national civil court is bound by the factual as well as legal evaluation of the case by the infringement decision of the European Commission.

With reference to the binding effect of the legal evaluation of the infringement decision of the European Commission, and whether the facts of the case are an infringement of Art 101 or 102 TFEU, sentence 4 of Art 16(1) Regulation (EC) 1/2003 rules that in accordance with Art 243 EC (now Art 267 TFEU), a national civil court is not barred from asking the ECJ for an interpretation of European law.[721] However, this is only relevant for decisions that have not already been reviewed by the ECJ. In addition to this, a national civil proceeding has to be put on hold until the pending case at the ECJ has been decided.[722] In *TWD v Bundesrepublik Deutschland*[723], the ECJ stated further that the national court was not entitled to call the ECJ when the injured parties of the infringement decision of the European Commission had not appealed to the EGC within the deadline.[724] On the other hand, it is not automatically against Art 16(1) Regulation (EC) 1/2003 if a national court dismisses a civil damage claim even if

[715]See Case T-138/89 *Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken v Commission of the European Communities* [1992] ECR II-2181 at para 33; Criticised by V Milutinović (n 287) 260-1.

[716]Decisions based on Art 7 EU Regulation 1/2003.

[717]Decisions based on Art 10 EU Regulation 1/2003.

[718]See V Milutinović (n 287) 262.

[719]See A Zuber, 'VO 1/2003/EG Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' (n 709) at para 13 with reference to the Commission's reasoning to article 16 of Regulation (EC) 1/2003.

[720]Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, Opinion of AG Cosmas, paras 17-8.

[721]See A Zuber, 'VO 1/2003/EG Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' (n 709) at para 16.

[722]See e.g. D Dalheimer, 'Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' (n 709) at para 10.

[723]Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833.

[724]Ibid; See GM Berrisch and M Burianski (n 488) 882.

the European Commission proved an infringement of European competition law[725] because the infringement of competition law is only one part of a civil damage claim and the binding effect is limited to that infringement.[726]

4.1.1.3.2 Binding effect of infringement decisions of national competition authorities

There was no European regulation about the binding effect of infringement decisions of the national competition authorities prior to Directive 2014/104/EU. However, there had been some scattered regulations in national competition laws (e.g. Sec 33(4) GWB). The Rapporteur for the European Parliament for the directive, Mr Andreas Schwab, outlined the intention of European lawgivers to extend the harmonisation and to strengthen follow-on claims to safeguard them from the feared negative influences of US private competition law enforcement, e.g. through extending class actions.[727]

Whereas the Commission's draft of the Directive provided a general binding effect for decisions of national competition authorities, the adopted version fundamentally distinguishes in Art 9 between decisions of the competition authority of the same country in which the civil proceeding takes place and decisions of competition authorities of other Member States. The reason for this differentiation are the three-way negotiations between the Commission, the European Council and the European Parliament.[728]

The central regulation that gives binding effect to the infringement decisions of the national competition authorities in the same Member State in which the civil proceeding is placed is Art 9(1) Directive 2014/104/EU. This regulation lays down the principle of the Commission's draft that infringement decisions of national competition authorities have an irrefutable binding effect. This is because, in contrast to the reason for the binding effect of Commission decisions in Regulation (EC) 1/2003, it is not possible to argue with reference to the principle of the pro-European behaviour and the principle of effectiveness; the Directive stated in recital 34 that harmonisation of binding effects of infringement decisions of national

[725] See LG Mainz, NJW-RR 2004, 478, 479; Bornkamm J, 'Die Masterfoods-Entscheidung des EuGH: Bindung der Zivilgerichte an Kommissionsentscheidungen. Lehren für das neue Kartellverfahren?' [2003] ZWeR 75, 83; Zuber A, *Die EG-Kommission als amicus curiae – Die Zusammenarbeit der Kommission und der Zivilgerichte der Mitgliedstaaten bei der Anwendung der Wettbewerbsregeln des EG-Vertrages* (Heymann 2001) 67-8.

[726] See European Commission, 'Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules SEC' (2008) 404 at 46-7; LG Mannheim, GRUR 2004, 182, 183 – *Vitaminkartell*; Köhler H, 'Kartellverbot und Schadensersatz' [2004] GRUR 99 (100-1); A Zuber, 'VO 1/2003/EG Art. 16 Einheitliche Anwendung des gemeinschaftlichen Wettbewerbsrechts' (n 709) at par 17.

[727] European Parliament, 'Protocol of the debates of the plenary session 16th to 17th April 2014 in Strasbourg' PE 533.923, P7_TA(2014)0451, CRE 16/04/2014-19.

[728] European Council, Document 8088/14 RC 6 JUSTCIV 76 CODEC 885 (24th March 2014) at 7-8.

competition authorities across Europe is in the interests of legal certainty and to avoid inconsistencies in the application of Art 101 and 102 TFEU. In addition, the regulation raises the issue of procedural efficiency of civil damage claims and the functioning of the Common Market.

The wording of Art 9(1) Directive 2014/104/EU seems to be ambiguous because it mentions Art 101 and 102 TFEU as well as national competition law as possible objects of the infringement decision. However, such an extension of the binding effect on national competition law in general would be a transgression of the area of competence of European law-givers. The wording 'national competition law' in Art 9(1) has to be read in conjunction with the legal definition of Art 2 fig 3 of the Directive:

> 'national competition law' means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced.

Therefore, Art 2 fig 3 regulates that only this national competition law is relevant as it is congruent with Art 101 and 102 TFEU. This reference leads to the conclusion that harmonisation only applies if national competition law is applicable because of an applicability of European competition law and both regulations lead to the same result.[729] Consequently, it is not possible to apply a binding effect (based on European law) of infringement decisions of national competition authorities merely based on pure national competition law (e.g. because of a lack of influence on the Common Market). In addition, the ruling of Directive 2014/104/EU establishes only binding effect for positive infringement decisions[730] and excludes pending proceedings[731].

With regard to the scope of the binding effect, the Directive refers in recital 34 to the established standards of Regulation (EC) 1/2003 where it states that the binding effect captures the factual, personal, temporal and local dimensions of the infringement decisions.

Conclusively, Art 9(3) Directive 2014/104/EU rules that: '[this] Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU'.

[729] See A Zuber, 'VO 1/2003/EG Art. 3 Verhältnis zwischen den Artikeln 81 und 82 des Vertrags und dem einzelstaatlichen Wettbewerbsrecht' (n 709) at paras 3-4; D Dalheimer, 'Art. 3 Verhältnis zwischen den Artikeln 81 und 82 des Vertrags und dem einzelstaatlichen Wettbewerbsrecht' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (40th edn, CH Beck 2009) at paras 3 ff.; See as well recital 34 of Directive 2014/104/EU.

[730] See legal definition in Art 2 fig 11 Directive 2014/104/EU.

[731] See legal definition in Art 2 fig 12 Directive 2014/104/EU.

With regard to the recitals of the Directive, it is doubtful whether this reference contains infringement decisions of the competition authority of the Member State in which the civil proceeding is pending. On the one hand, Art 9(3) Directive 2014/104/EU rules that 'this Article' is without prejudice and therefore involves paragraph 1 as well as paragraph 2 as it includes the binding effect of infringement decisions of foreign national competition authorities. However, on the other hand, the capacity to proceed before the European Courts is only mentioned in recital 35 as it contains only the binding effect of infringement decisions of the competition authority of the Member State in which the civil proceeding is pending. In the corresponding recital 34 for the binding effect of infringement decisions of foreign national competition authorities, the ruling of Art 9(3) is not mentioned. However, as mentioned above, the Commission did not distinguish in its draft between the two kinds of infringement decisions and hence the recital 25 of the Commission's draft[732] refers to Art 267 TFEU and contains therefore both types of infringement decisions. Although, the wording of recital 25 of the draft has been adopted unchanged despite the distinction in the adopted version, it seems to be a mere editorial mistake. The wording of Art 9(3) Directive 2014/104/EU itself supports this view because it refers unambiguously to the whole of Article 9. Therefore, also in cases of Art 9(1) the binding effect is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

In contradistinction to the infringement decisions of the competition authority of the Member State in which the civil proceeding is pending, decisions of foreign national competition authorities only work as *prima facie* evidence in a civil proceeding according to Art 9(2) Directive 2014/104/EU. As mentioned above, this distinction is based on the three-way negotiations between the Council, Commission and European Parliament.[733] Regarding the scope of the binding effect, there is no difference to Art 9(1) Directive 2014/104/EU. This is especially the case as this includes that only infringement decisions of national competition authorities are binding which apply national competition law parallel to Art 101 or 102 TFEU, according to Art 3(1) Regulation (EC) 1/2003.[734] However, the wording of recital 35 of Directive 2014/104/EU states that the infringement decisions of foreign national competition authorities has to be used 'at least' as prima facie evidence. This suggests that Art 9(2) is only a minimal harmonisation and it is possible for the national law-giver, by implementing the Directive in national law, to choose a wider binding effect. This is especially relevant for German law where

[732]European Commission, '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.

[733]See European Council, Document 8088/14 RC 6 JUSTCIV 76 CODEC 885 (24th March 2014) at 7-8.

[734]See Art 2 fig 3 Directive 2014/104/EU.

Sec 33(4) GWB contains a full binding effect for infringement decisions of foreign national competition authorities.

4.1.1.3.3 Binding effect and contradictory procedure rule of Art 6 ECHR

The assumption of such a binding effect of infringement decisions of national competition authorities or the European Commission could challenge the fundamental judicial principles and human rights of Art 6 of the European Convention on Human Rights (ECHR) and Arts 47-50 of the Charter of Fundamental Rights of the European Union (CFR).

The ECHR is an international contract in which the signatory countries agree to satisfy the adopted fundamental rights and freedoms and submit to the established safety mechanisms in judicial proceedings, i.e. the European Court of Human Rights.[735] In the manner of any other international contract, the ECHR only takes effect on the signatory countries (*pacta tertiis nec nocent nec prosunt*).[736] Although all Member States of the European Union ratified the ECHR, the EU itself as a legal entity did not despite the fact that Art 6(2) TEU provides the possibility to ratify the ECHR. The most recent attempt to join the ECHR was in December 2014 but this was rejected by the ECJ with its Opinion 2/13.[737] The deciding reason for refusing was the lack of certainty of the scope of European law[738] and the requirement to harmonise with Art 53 ECHR and Art 53 CFR.[739] The ECJ stated especially that a ratification of the ECHR by the EU must not lead to the situation that organs of the ECHR (e.g. European Court of Human Rights) are entitled to decide on binding internal mechanisms of competence of the European Union.[740] The ECJ

[735]See M Herdegen (n 246) § 49 at paras 3-4.

[736]See E Klein (n 247); C Tomuschat, H Neuhold and J Kropholler (n 247) 9 ff.; M Herdegen (n 246) § 15 at para 19.

[737]Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties* [2015] 2 CMLR 21 (ECJ).

[738]Ibid at para 186.

[739]Ibid at paras 187 ff.

[740]Ibid at para 185 with reference to Opinion 1/91, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECR I-6079 at paras 30 ff. and Opinion 1/00, *Opinion pursuant to Article 300(6) EC – Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECR I-3493 at para 13.

clarified that it is legally possible for the European Courts to be bound by external decisions, especially if this is designated in the Treaties.[741]

However, even without a ratification of the ECHR by the EU, Art 6(3) TFEU stated that the fundamental rights of the ECHR are, as general principles, part of European law. This is also underlined by the constant case law of the ECJ.[742] Such self-commitment by a third country to an international treaty does not contradict with the principles of international law.[743] On the other hand, all Member States of the European Union – which have all ratified the ECHR as mentioned above – are committed to the fundamental rights of the ECHR and do so by transposing European law (especially Directives) into national law.[744]

Regarding the binding effect of infringement decisions of the European Commission and other national competition authorities of the Member States, especially the right of a fair proceeding in front of an independent and impartial civil court according to the first alternative of the first sentence of Art 6(1) ECHR, the binding of a national civil court on an administrative infringement decision of a competition authority could breach this fundamental right. The crucial criterion of Art 6(1) ECHR is whether the parties of a proceeding have their own rights to influence the proceeding.[745] Furthermore, especially as the adversarial proceeding is protected, what allows the parties to take a stand on the evidence of the other party.[746] In particular, this is not given if a court is absolutely bound by a foreign administrative decision on a matter of facts. On the other hand, the possibility of

[741]Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties* [2015] 2 CMLR 21 (ECJ) at para 182 with reference to Opinion 1/91, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECR I-6079 at paras 40, 70 and Opinion 1/00, *Opinion pursuant to Article 300(6) EC – Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECR I-3493 at para 13.

[742]See Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 at para 4; Case 4-73 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491 at para 41; Case 3-73 *Hessische Mehlindustrie Karl Schöttler KG v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1973] ECR 745 at para 13; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925 at para 41; Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 at para 283; Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] 2 CMLR 43 (ECJ) at para 60; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46 at para 44.

[743]See Art 35-6 VCLT (*Vienna Convention on the Law of Treaties from 23th May 1969*); E Klein (n 247); C Tomuschat, H Neuhold and J Kropholler (n 247) 9 ff.

[744]M Lorenz (n 213) 35.

[745]See BVerfGE 64, 133 at 145; BVerfGE 107, 395 at 408; BVerfG NJW 2007, 204 at 205.

[746]*Ruiz-Mateos v Spain* [1993] 16 EHRR 505.

using an infringement decision of a competition authority as prima facie evidence is not a point of Art 6(1) ECHR.

To begin with, Art 6(1) ECHR requires that a decision in a civil proceeding is made by an independent court, i.e. a court that is not bound by instructions of the parties or the executive branch.[747] The binding effect of other acts of the judicial branch is, however, extraneous because the principle of legal certainty as a characteristic of Art 6(1) ECHR requires the acceptance of the legal effect of a judgment.[748] As long as there are no valid reasons for a reconsideration of the case, the enforceable decision of a court in administrative fine proceedings has to be accepted and shall not be jeopradised by a different interpretation of the matter of facts by a civil court that reconsiders the case.[749]

The principle of procedural fairness of Art 6(1) ECHR requires parties to a legal proceeding to have the right to express themselves to the evidence.[750] However, the ECHR does not predetermine what can be used and what is necessary as evidence or how the burden of proof has to be defined.[751] The European Court of Human Rights only evaluates the whole proceeding in general, including the regulations about evidence.[752]

Although the European Commission and the national competition authorities are part of the executive branch, there is no absolute binding effect of decisions of this branch, even if there is a binding effect on decisions of the competition authorities. This is because the decisions of the European Commission and the national competition authorities are still reviewable by the European Courts and only the view on the matter of law of the ECJ and EGC is binding for the national civil courts. With regard to the matter of facts, the binding effect falls under the privilege of the signatory countries to define the proceeding about evidence explained above. Furthermore, the civil courts are entitled and sometimes obliged to ask the ECJ as judicial instance. Whereas the mere failure to comply with the duty to ask the ECJ according to Art 267 TFEU is not a violation of Art 6(1) ECHR, the deliberate refusal of a ask to the ECJ is an infringement of the principle of procedural fairness.[753] Even if the European Court of Human Rights is not entitled to control the proceedings of the ECJ, the Court assumes that the European Courts protect the same rights as adopted in the ECHR.[754]

[747] J Meyer-Ladewig (n 258) Art 6 at para 68.

[748] Ibid Art 6 at paras 90 and 164.

[749] See *Pravednaya v Russia* (Application No 69529/01) (ECtHR) at paras 25-31; *Nikitin v Russia* [2005] 41 EHRR 10 at para 56 with reference to J Meyer-Ladewig (n 258) Art 6 at para 165.

[750] J Meyer-Ladewig (n 258) Art 6 at paras 102-3; *Goktepe v Belgium* (Application No 50372/99) (ECtHR) at para 25.

[751] See *Colak v Germany* [2009] 49 EHRR 45 at para 41.

[752] *Volkmer and Petersen v Germany* [2002] NJW 3087 (ECtHR) at para 4; J Meyer-Ladewig (n 258) Art 6 at para 141.

[753] *John v Germany* [2007] 45 EHRR SE4; *Herma v Germany* [2010] NJW 3207 (ECtHR).

[754] *Cooperative Produzentenorganisatie v Netherlands* [2010] NJOZ 1914 (ECtHR).

In contradiction of this, the CFR is put on the level of European primary law by Art 6(1) TEU. The corresponding Art 47 CFR is therefore also applicable to infringement proceedings of the European Commission and the European Courts.[755] On the other hand, the systematics and the clear wording of Art 6 ECHR and Arts 47-50 CFR imply that the presumption of innocence of Art 6(2) ECHR and Art 48 CFR is not applicable in civil proceedings.[756] In summary it can be said that the binding effect adopted in Directive 2014/104/EU is in conformity with Art 6(1) ECHR and Art 47 CFR.

4.1.1.3.4 Conclusion

Follow-on claims are an effective way of harmonising cooperation between public and private enforcement of European competition law. The central element of the effectiveness of follow-on claims and its advantage over stand-alone cases is the binding effect of the administrative decisions of the competition authorities and the cessation of the burden to prove that infringement.

However, even if Art 16(1) Regulation (EC) 1/2003 stated that decisions of the European Commission have a binding effect for national civil courts, not all possible decisions in Regulation (EC) 1/2003 establish this binding effect. A Positive Binding Effect is only given by positive infringement decisions of the Commission with reference to Art 7 Regulation (EC) 1/2003.

Furthermore, Negative Binding Effects are established by the acceptance of Commitments under Art 9(1) and decisions of the European Commission about the Inapplicability of European competition law in accordance with Art 10 Regulation (EC) 1/2003. Such a Negative Binding Effect leads to the consequence that in a civil damage claim, a national civil court is not entitled to assume an infringement of Art 101 or 102 TFEU. It is, rather, obliged to deny an infringement and to refuse the civil damage claim.

With reference to Art 267 TEU, sentence 4 of Art 16(1) Regulation 1/2003 rules that a national civil court is not prevented from requesting from the ECJ an interpretation of European law, even if it is bound by the legal evaluation of the infringement decision of the European Commission, on whether the facts of the case are an infringement of Art 101 or 102 TFEU. However, this is not applicable if the ECJ has had the possibility to uphold the infringement decisions in an administrative review proceeding.

On the other hand, prior to Directive 2014/104/EU there was no regulation about the binding effect of infringement decisions of national competition authorities of the Member States. With reference to the ruling in Directive 2014/104/EU, this question

[755] See M Lorenz (n 213) 35.

[756] J Meyer-Ladewig (n 258) Art 6 at para 211; H-J Blanke (n 261), *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (4th edn, CH Beck 2011) at para 1.

has to be distinguished in decisions of the competition authority in the same Member State in which the civil proceeding is placed and national competition authorities of other Member States. The central regulation for the binding effect of infringement decisions of the national competition authorities in the same Member State in which the civil proceeding is placed is Art 9(1) of Directive 2014/104/EU. That regulation lays down the principle of the Commission's draft that infringement decisions of national competition authorities have an irrefutable binding effect. However, Art 2 fig 3 of Directive 2014/104/EU regulates that only a national competition law is relevant which is congruent with Art 101 and 102 TFEU. This reference leads to the conclusion that harmonisation only applies if national competition law is applicable because of an applicability of European Competition law and both regulations lead to the same result. Consequently, it is not possible to apply a binding effect (based on European law) of infringement decisions of national competition authorities merely based on pure national competition law (e.g. because of a lack of influence on the Common Market). On the other hand, the ruling of Directive 2014/104/EU establishes only a binding effect of positive infringement decisions and excludes pending proceedings.

In contradistinction to the infringement decisions of the competition authority of the Member State in which the civil proceeding is pending, decisions of foreign national competition authorities only work as prima facie evidence in a civil proceeding as per Art 9(2) Directive 2014/104/EU. However, the wording of recital 35 of the Directive 2014/104/EU which states that the infringement decisions of foreign national competition authorities have to be used 'at least' as prima facie evidence, this suggests that Art 9(2) only sets out a minimal amount of harmonisation and it is possible for the national law-giver, by implementing the Directive in national law, to choose a wider binding effect. This is especially relevant for German law where Sec 33(4) GWB contains a full binding effect for infringement decisions of foreign national competition authorities.

Furthermore, only the part of the Commission's decision is binding which infringes or protects the interests of the parties. This part is usually the operative part of the judgment which directly refers to the facts of the case. Therefore, the operative part of the judgment only establishes a binding effect if the national civil damage claim is based on the same facts as the infringement decision of the European Commission or national competition authority. There is, therefore, no binding effect if the civil damage claim and the infringement decision refer to different periods, acts of infringement or different actors. On the other hand, if the facts of the cases are congruent, the national civil court is bound by the factual as well as legal evaluation of the case. However, it is not automatically an infringement of the binding effect if a national court dismisses a civil damage claim even if the European Commission or a national competition authority proved an infringement of Art 101 or 102 TFEU.

This is because the infringement of competition law is only one part of a civil damage claim and the binding effect is limited to that infringement. This binding effect is, therefore, in conformity with Art 6(1) ECHR and Art 47 CFR and the underpinning fundamental judicial principles and human rights.

4.1.1.4 Conclusion

Even if follow-on claims are an effective way of harmonising cooperation between public and private enforcement of European competition law, there are only limited rights to gaining access to files in the possession of the Commission for a claimant in a civil damage claim on an infringement of Art 101 or 102 TFEU.

The key element of the effectiveness of follow-on claims and its advantage over stand-alone cases is the binding effect of the administrative decisions of the competition authorities and the cessation of the burden to prove that infringement. Decisions of the European Commission first bind national civil courts with reference to Art 16 of Regulation 1/2003. However, there was no regulation about the binding effect of infringement decisions of national competition authorities of the Member States before Directive 2014/104/EU. Moreover, with reference to its ruling, infringement decisions of national competition authorities of the same Member States in which the civil proceeding is located have an irrefutable binding effect according to Art 9(1) of Directive 2014/104/EU. In addition, infringement decisions of other Member States just work as prima facie evidence in a civil proceeding according to Art 9(2) of Directive 2014/104/EU. However, the regulation only sets out a minimal amount of harmonisation and it is possible for the Member States to choose a wider binding effect (see e.g. Sec 33(4) of the German Competition Act, GWB).

Claimants only have the right to gain access to documents in the possession of the European Commission based on the so-called Transparency Regulation (EC) 1049/2001. Even if the main principle is to gain public access to documents, Regulation (EC) 1049/2001 provides a number of exceptions for when the application can be refused. Although the EGC clarified that the European Commission has to provide a concrete and individual examination for each requested document before refusing the application, the Commission has shown reluctance to provide documents for a possible claimant under this provision. Furthermore, Member States have to provide a national regulation about disclosure where the national courts shall be entitled to order a disclosure of files in the possession of the national competition authority on a case-by-case basis and by applying a balancing test according to Directive 2014/104/EU. However, the Member States have to ensure that leniency statements and settlement submissions are secured for disclosure.

4.1.2 Disclosure of files in the possession of the defendant

4.1.2.1 Regulations of Directive 2014/104/EU

Before the adoption of Directive 2014/104/EU, there had been no European regulations about disclosure in the case law of the European courts. In Art 5, Directive 2014/104/EU rules on general rules of disclosure of evidence in civil damage proceedings based on an infringement of European competition law. It states that, in general, a victim of a cartel can gain access to files that are relevant as evidence in his claim. This requires that facts sufficient to support the plausibility of the claim are reasonably available, that it is possible to pinpoint or narrow the evidence, and that a court considers the application of disclosure as proportionate to the expense of the obliged party.[757]

Regarding the individual conditions, the requirement of Plausibility seems to be the most complex. Although it will be an essential part for national courts to decide on an application, the Directive itself does not provide any specification or example. However, it can be argued that the presumption of harm in Art 16(2)(a) Directive 2014/104/EU leads to the view that a purchaser of a product influenced by a price cartel has a sufficient amount of plausibility to make a claim.[758] However, a final infringement decision of the European Commission or another national competition authority of a Member State is required to create plausibility for a claim a claim. The proceedings of a competition authority or parallel behaviour alone are insufficient.[759] Furthermore, the fact that damage claims are already possible before a final infringement decision of a competition authority does not lead to the conclusion that a proceeding is sufficient because the right to claim is independent of the right to apply for discovery. If a claimant is able to provide evidence about an infringement and harm before an infringement decision, it is still entitled to file a lawsuit but is not entitled to apply for discovery.[760]

Although the description of the sought files has to be as precise as possible in the application, the national civil courts of the Member States shall interpret the formulation 'as precise as possible' in a way that a private litigant shall not demand a detailed description and requires only a minimum description, e.g. as 'sales documents'.[761] This is because of the problems private litigants have in narrowing down the definition of the files that they are looking for.[762]

[757] CF Weidt (n 676) 438.

[758] Similar RM Babirad, 'The Commission's proposal for a Directive on damages for anti-competitive infringements: an increase in evidentiary accessibility, disclosure and legal certainty for private litigants' [2013] GCLR 155, 156; CF Weidt (n 676) 438.

[759] CF Weidt (n 676) 439.

[760] See under 4.2.1 for the distinction between follow-on and stand-alone damage claims.

[761] CF Weidt (n 676) 439.

[762] RM Babirad (n 758) 157.

Finally, the question of limitation of the scope of disclosure is up to the national courts and is not regulated in Directive 2014/104/EU. The courts have to decide with reference to the proportionality of the application and consider the interests of all parties. That has to be in a formal hearing process according to Art 5(5)(a). Even if Art 5(4) Directive 2014/104/EU states directly that the mere interest to avoid private actions for damages is not legally protected, the court has to consider the financial aspects and burdens of disclosure. Furthermore, the court has to consider the protection of confidential information. In Art 5(4), the Directive rules that files are disclosable even if they contain confidential information and the national civil court has the duty to protect the legal interest of those involved or third parties, e.g. by blacking parts of the files not relevant to the case.[763]

4.1.2.2 Conclusion: Implementation of a general right of disclosure under national law de lege ferenda

In concluding the outcomes of the last chapter, Directive 2014/104/EU requires the implementation of a general right of disclosure of files in the possession of the defendant or other party to the proceeding in national law.

Recent EU law requires the implementation of a disclosure proceeding based on the principles of plausibility and proportionality. In effect, this requires that facts that are sufficient to support the plausibility of the claim are reasonably available, that it is possible to pinpoint or narrow the evidence and that a court considers the application of disclosure as proportionate to the expense of the obliged party. However, Directive 2014/104/EU and other EU law do not regulate the question of a limitation of the scope of disclosure. This is, therefore, up to the national courts and law-givers. In Art 5(4), the Directive rules that files are disclosable even if they contain confidential information and the national civil court has the duty to protect the legal interests of the involved or third parties, e.g. by blacking parts of the files not relevant for the case.

4.1.3 Conclusion

What this all amounts to is that member states must improve claimants' access to files in the possession of competition authorities as well as the defendant.

The target is that a claimant shall have the right to get all needed information for a successful damage claim and, even if, the national civil courts are bound by the infringement decisions of the European Commission and national competition authorities (or use foreign decisions as prima facie evidence), the claimants have to prove further points, e.g. the suffered harm. Therefore, Directive 2014/104/EU obliges the Member States to implement regulations about access to files in the

[763] Similar CF Weidt (n 676) 439.

possession of the national competition authority as well as in the possession of the defendant. Thus, national courts are entitled to order the disclosure of files in the possession of the national competition authority on a case-by-case basis and apply a balancing test according to Directive 2014/104/EU.

Furthermore, this recent EU law requires the implementation of a disclosure proceeding based on the principles of plausibility and proportionality. This requires that facts sufficient to support the plausibility of the claim be made reasonably available, that it is possible to pinpoint or narrow the evidence and that a court considers the application of disclosure as proportionate to the expense of the obliged party. Furthermore, Art 5(4) of Directive 2014/104/EU rules that files are disclosable even if they contain confidential information and the national civil court has the duty to protect the legal interests of the involved or third parties, e.g. by blacking parts of the files not relevant for the case.

4.2 English Law

4.2.1 Disclosure of files in the possession of the defendant

English law, as an example of common law, uses codified law and established case law for pre-action disclosure in civil proceedings. Reference should be made to part 31 Civil Procedure Rules (CPR) where a separate proceeding of disclosure is regulated. The section indicates the general legal duty to reveal all documents relevant for the trial after substantiating the pleading of the plaintiff.[764] It also mentions the obligation to search for documents to a reasonable extent[765] and the possibility of interviews as part of a deposition.[766]

4.2.1.1 General rule of pre-action disclosure in civil proceedings

In contrast to disclosure at the conclusion of a contract,[767] English law provides wide-ranging information and disclosure rights in civil proceedings. The standard regulation about disclosure under English law is Rule 31.6 CPR. This standard rule applies in civil damage claims based on an infringement of competition law in the High Court and covers the disclosure proceedings of files on which a party (usually

[764]Rule 16.4(1)(a) and 18.1-2 CPR; *Brophy v Dunphys Chartered Surveyors* [1998] All ER (D) 85; [1998] EG 37 (CS); (1998) 95(16) LSG 23; (1998) 142 SJLB 109, CA (Civ Div).

[765]Rule 31.7(1) CPR; *Rondel v Worsley* [1967] 1 QB 443; [1966] 3 WLR 950; [1966] 3 All ER 657; (1966) 110 SJ 810; I Grainger, M Fealy and M Spencer, *The Civil Procedure Rules in Action* (2nd edn, Cavendish 2000) 89.

[766]Rule 34.8-12 CPR.

[767]See *Bell v Lever Bros* [1932] UKHL 2; [1932] AC 161; *Norwich Union Life Insurance Co Ltd v Quershi; Aldrich v Norwich Union Life Insurance Co Ltd* [1999] 2 All ER (Comm) 707; [1999] CLC 1963, CA (Civ Div); *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265; [2000] 1 WLR 1888 (Ch), at para 1905.

the claimant) relies and that have an adverse effect on the case.[768] The Competition Appeal Tribunal (CAT) also has the power to order a disclosure but that is regulated in its own procedural law.

The first provisions about pre-action disclosure were based on the landmark case by the Court of Appeal in *Compagnie Financière du Pacifique v Peruvian Guano Company*.[769] A passage that is often referred to in this is where Brett LJ stated that a party has to disclose the existence of any document in a civil proceeding even if they were of the most peripheral apparent relevance for the claim.[770] Brett LJ defined this as documents that it was reasonable to suppose contained:

> ... information which may enable the party [applying for discovery] either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.[771]

Therefore, if there is a document that could undermine the case, it has to be disclosed to the other party. In doing so, it is not relevant if the document can be used itself as evidence to prove any fact. It is sufficient that the documents can lead the opposing party on a fruitful track.[772] Disclosure or discovery means a three-stage process of disclosure in a narrow sense, and inspection and production of documents. Disclosure in a narrow sense is the service on the other party of a list that indicates the relevant documents and inspection the possibility of the opposing party to inspect the documents. In the last step, the possessor has to produce the documents to the other party or the court.[773]

By introducing disclosure proceedings as a statutory provision – derived from section 33(2) of the Senior Courts Act 1981 which became part of the modern Civil Procedure Rules in 1999 especially Rule 31.16 – the codified law refers to the established case law.[774] The landmark case on the requirements of pre-action disclosure under the CPR Rules is *Black v Sumitomo*.[775] The case was an appeal about an ordered pre-action disclosure. Regarding a heavy prospective litigation concerning a possible claim for unlawful conspiracy of market manipulation, the prospective claimant of a damage claim, Mr Black, applied for pre-action disclosure against the defendant Sumitomo. Rix LJ stated that the wording 'likely to be a party' of the CPR means 'may well' and that the purpose of this wording is to

[768] See N Dunleavy (n 56) 689, 694.
[769] (1882) 11 QBD 55.
[770] *Compagnie Financière du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55 at para 62-3.
[771] *Compagnie Financière du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55 at para 63.
[772] C Foster, T Wynn and N Ainley, *Disclosure and Confidentiality: A Practitioner's Guide* (1st edn, Pearson 1996) 4.
[773] C Foster, T Wynn and N Ainley (n 772) 237.
[774] See M Brealey and N Green (n 684) at para 9.04.
[775] [2001] EWCA Civ 1819, [2002] 1 WLR 1562.

contrast 'party' with 'witness'. Usually, such an application for disclosure is made after the close of pleadings.[776]

4.2.1.2 Application for pre-action disclosure in competition law

Especially for civil damage claims based on an infringement of competition law, the High Court decided in *Hutchison 3G UK Ltd v O2 (UK) Ltd*[777] in favour of the applicability of pre-action disclosure proceedings. In this case, the claimant was a mobile phone network provider which applied for a wide-ranging pre-action discovery against its competitors O2, Vodafone, Orange and T-Mobile because it assumed an infringement of Art 101 and 102 TFEU due to significant barriers established by the Mobile Number Portability system (MNP) in operation in the UK.[778] The High Court refused the disclosure because the application by Hutchison 3G was too wide-ranging and it was not possible for the claimant to identify specific documents or groups or classes of documents. Steel J stated that the claimant had to show that the documents it sought were within the scope of the standard disclosure rules.[779] Therefore, even though the request failed because of a lack of specificity, it is important that the Court accepted the application of standard disclosure rules in competition law cases.[780]

However, even if an applicant is successful in claiming a pre-action disclosure, it is merely a costly procedural mechanism because the applicant has to pay the costs of the respondent.[781] For example, in the *H3G* case, one reason for refusal was the cost of approximately £1 million.[782]

On the other hand, the rules of the CAT state that the CAT can give directions 'for the disclosure between, or the production by, the parties of documents or classes of documents'.[783] However, the CAT had up until that point usually issued a disclosure in regulatory appeals or judicial review proceedings[784] rather than in private actions, especially actions seeking damages for a breach of competition law.[785]

[776] M Brealey and N Green (n 684) at para 9.03.
[777] [2008] EWHC 55 (Comm), [2008] UKCLR 83.
[778] N Dunleavy (n 56) 695.
[779] *Hutchison 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm), [2008] UKCLR 83, para 44.
[780] See N Dunleavy (n 56) 695; The Directive itself does not provide any specification or example forthat a court considers the application as proportionate.
[781] When considering costs in applications for pre-action disclosure under CPR, r 31.16, the court must have regard to CPR, r 48.1 which provides that the party against whom the application is made will normally be entitled to its costs of the application and the costs of complying with any order made on the application (CPR r 48(1)(2)). CPR r 38(1)(3) provides, however, that the court may make a different order having regard to all the circumstances including: (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and (b) whether the parties to the application have complied with any relevant pre-action protocol. See, eg, *SES Contracting Ltd and ors v UK Coal plc and ors* [2007] EWCA Civ 791.
[782] See M Brealey and N Green (n 684) at para 9.08.
[783] Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 19(2)(k).
[784] See e.g., *Durkan Holdings v Office of Fair Trading* [2010] CAT 12.
[785] N Dunleavy (n 56) 696.

Although the rules of disclosure of the High Court and the CAT are basically the same, the practice of the CAT is slightly different.[786] Even so, in *Argos and Littlewoods v OFT*[787] the CAT stated that:

> ... the general presumption before the Tribunal is in favour of disclosure unless the contrary is shown[788]

This general approach is codified in Rule 19(2)(k) of the CAT Rules[789] which states that:

> [the] Tribunal may give directions for the disclosure between, or the production by, the parties of documents or classes of documents.

This regulation seems to be quite brief and non-specific regarding the regulation of the High Court. This lack of specificity can be explained by the fact that proceedings in front of the CAT are mostly appellate or judicial review proceedings and the duty of disclosure has to be applied differently to civil damage claims.[790] It therefore gives the CAT more flexibility to react to the different types of legal proceedings. Although there is no specific section in the CAT Guide that deals with disclosure, the case law of the CAT shows the importance of disclosure proceedings.[791]

Based on this case law, for a successful disclosure application the CAT requires that the requested documents are clearly identified[792] and the sought after information must be necessary, relevant and proportionate to determine the issues.[793] This is especially the case where the information concerned is commercially confidential and belongs to a direct competitor of the party seeking access to it.[794] On the other hand, the CAT has to ask whether the disclosure would cause significant harm to the undertaking to which it relates and if the interests that are trying to be protected are legitimate.[795]

On the question of significant harm and legitimate business interest, the CAT ruled that, as a presumption,[796] market shares, revenues, costs and information

[786] M Brealey and N Green (n 684) at para 9.02.
[787] [2004] CAT 5.
[788] *Argos and Littlewoods v OFT* [2004] CAT 5 at para 67.
[789] The Competition Appeal Tribunal Rules 2003 (SI 2003/1372). Both the CAT Rules and the CAT Guide are available on the CAT website <http://www.catribunal.org.uk>.
[790] M Brealey and N Green (n 684) at para 9.39-40.
[791] See e.g. *Umbro Holdings ltd v OFT* [2003] CAT 26, [2004] Comp AR 217 at para 33.
[792] *Albion Water v OFWAT* [2008] CAT 3 at para 41.
[793] *Claymore Dairies v OFT* [2004] CAT 16 at paras 108, 113; *Cityhook v OFT* [2006] CAT 32 at para 25.
[794] *Claymore Dairies v OFT* [2004] CAT 16 at paras 108, 114.
[795] *Aberdeen Journals v DGFT* [2003] CAT 14 at para 3.
[796] *Umbro Holdings Ltd v OFT* [2004] CAT 3 at para 33.

regarding yields of various kinds which were over three years old;[797] turnover figures that were more than two years old;[798] and other commercial information that was two and a half years old[799] should not be regarded as causing significant harm or being contrary to legitimate interests.

4.2.1.3 Protection of whistle-blowers in pre-action disclosure in civil proceedings based on a breach of European competition law

Regarding civil proceedings based on a breach of competition law, one highly coveted document is the confidential version of the infringement decision of the European Commission (or any other national competition authority of a Member State) because this version of the infringement decision includes, in contrast to the published version, extracts of the leniency application.[800]

This was the case in the landmark decision of the High Court in *National Grid Electricity Transmissions v ABB Ltd.*[801] The claimant, National Grid, claimed damages against members of a cartel of gas-insulated switchgears (GIS) and applied for disclosure of the confidential infringement decision by the Commission[802] from ABB. The High Court decided that the principles of the ECJ's decision in *Pfleiderer v Bundeskartellamt*,[803] which dealt with access to leniency documents in the possession of the Commission, had to be applied in a case of disclosure between two private parties. Therefore, the court has to take a decision on a case-by-case basis to protect the legally protected interests of the leniency applicants. But, on the other hand, it refuses a general refusal of a disclosure application if a leniency applicant is involved. Here, the High Court decided that it was not proportionate for National Grid to acquire the information from somewhere else. Instead, the court examined the relevance of the documents for the proceeding by inspecting each document by the judges of the court.[804]

4.2.1.4 Conclusion

In summary, it can be stated that in contrast to disclosure at the conclusion of a contract, English law provides wide-ranging information and disclosure rights in civil proceedings. The standard regulation about disclosure under English law applies in civil damage claims based on an infringement of competition law in the High Court

[797] *Aberdeen Journals v DGFT* [2003] CAT 14 at para 4.
[798] Umbro President's order of 18 November 2003 at para 20.
[799] *Argos and Littlewoods Ltd v OFT* [2004] CAT 5 at para 61.
[800] S Peyer, 'Die private Durchsetzung von kartellrechtlichen Ansprüchen – Status Quo in Eng-land und Wales' [2012] EuZW 617, 619.
[801] [2012] EWHC 869 (Ch).
[802] *Gas Insulated Switchgear* (Case COMP/38.899) Commission Decision number C(2006) 6762 final [2008] OJ C5/7.
[803] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.
[804] See S Peyer, 'Die private Durchsetzung von kartellrechtlichen Ansprüchen' (n 800) 619.

and covers the disclosure proceeding of files on which a party (usually the claimant) relies and that have an adverse effect on the case. On the other hand, the CAT also has the power to order a disclosure but that is regulated in its own procedural law.

However, even though an applicant is successful in claiming pre-action disclosure, it is nothing more than a costly procedural mechanism because the applicant has to pay the costs of the respondent.

Finally, the English courts have accepted the need to protect whistle-blowers and apply the European Regluations set out in the landmark decision of the ECJ in *Pfleiderer v Bundeskartellamt*. Due to this, the courts have to take a decision on a case-by-case basis to protect the legally protected interests of the leniency applicants.

4.2.2 Access to files of the competition authorities

4.2.2.1 Regulations of English law about access to files in the possession of the Competition and Markets Authority and the Competition Appeal Tribunal

Under English law, the regulations that are applicable to the gaining of access to files of the Competition and Markets Authority (CMA) and the Competition Appeal Tribunal (CAT) are generally the same that are applicable to disclosure of files in the possession of the other parties. Therefore, for proceedings in front of the High Court, the usual CPR disclosure rules apply.[805]

Even for the CAT, the general disclosure rules apply. However, it is unclear how the CAT will exercise its broad power to order disclosure. In *Umbro Holdings Ltd v OFT (2004)*,[806] the CAT decided that it is possible to order disclosure of files withheld in an administrative procedure. The test is whether the disclosure would or might harm the legitimate business interests of the affected party; whether the information is relevant to the appeal; and whether any harm that might be caused to the affected party is outweighed by the interests of justice.[807] Consequently, the disclosure request has to be relevant, proportionate and necessary in order to be granted.[808] In general, requests for internal CMA materials do not fulfil these criteria.[809] Whereas the disclosure of unredacted witness statements as part of the leniency application and related documents submitted by the OFT can be considered necessary to allow appellants to exercise their right of appeal,[810] it is usually not necessary to disclose underlying documents.[811] Furthermore, the CAT doubted whether a defendant has a legitimate interest to protect confidentiality

[805] See above under 4.1.2.
[806] [2004] CAT 3 at paras 5-55.
[807] *Umbro Holdings Ltd v OFT* [2004] CAT 3 at para 34.
[808] See *Claymore Dairies v OFT* [2003] CAT 12 at 7.
[809] *Cityhook v OFT* [2006] CAT 32 at para 26.
[810] *Claymore Dairies v OFT* [2003] CAT 12 at 5.
[811] *Claymore Dairies v OFT* [2003] CAT 12 at 7.

of a note of meeting where it was admitted that an illegal price fixing agreement was made.[812] Also, it is doubtful whether the affected undertaking has a legitimate interest in maintaining confidentiality over files of a failed leniency application.[813]

However, based on the mentioned decision of the High Court in *National Grid Electricity Transmission v ABB Ltd*,[814] it seems to be that the CAT also has to apply the balancing test of the ECJ in *Pfleiderer v Bundeskartellamt*[815] and the rules based on Directive 2014/104/EU.

4.2.2.2 Conclusion: Implementation of a general right of access to files in the possession of a national competition authority under national law de lege ferenda

Under English law, the regulations that are applicable in order to gain access to the files of the CMA and the CAT are generally the same as are applicable for disclosure of files in the possession of the other parties. Therefore, reference will be made to the conclusion of chapter 4.1 and the potential need to produce a direct ruling of the refusal grounds even if it is not doubtful that the English courts will use the regulation in Directive 2014/104/EU as a means of interpreting the given disclosure regulation according to case law practice.

4.3 German Law

4.3.1 Access to files of the competition authorities

4.3.1.1 Regulations under German Law about access to files in the possession of the Bundeskartellamt

Under German law, it might be possible to get access to files of the national competition authority, the Bundeskartellamt, under Sections 142 to 144 of the Code of Civil Procedure (ZPO) and/or Section 406E of the Code of Criminal Procedure (StPO).

The ruling under Sections 142 to 144 ZPO refers to the general possibility of access to files in the possession of the defendant or another third party. As mentioned above, under 4.1.1, the case law of the German courts ruled very clearly that Sections 142 to 144 ZPO are not a matter of discovery and this only restricts the burden of proof. The claimant has to refer directly to a document in the possession of the defendant. Therefore, the claimant has to know about the existence of the document and not just that it is in its possession, and it is not possible to interpret

[812] *Umbro Holdings Ltd v OFT* [2004] CAT 3 at para 35.
[813] *Umbro Holdings Ltd v OFT* [2003] CAT 26 at para 41.
[814] *National Grid Electricity Transmission Plc v ABB Ltd and others* [2012] EWHC 869 (Ch).
[815] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

the regulations of Sections 142 to 144 ZPO in the sense of a right of discovery or a general pre-action discovery proceeding. On the other hand, an analogous application of Sections 142 to 144 ZPO fails because the legal gap of a missing pre-action discovery proceeding is not contrary to the intention of the German legislator and hence it is not possible to establish a regulation of pre-action discovery based on the principle of Good Faith under Section 242 BGB. Furthermore, for access to files in the possession of a third party, e.g. the Bundeskartellamt, Section 142(2) ZPO rules a specific right to refuse to give evidence. However, Section 142(2) ZPO only refers to the rights; they are specifically mentioned in Sections 383 and 384 ZPO. Firstly, Section 383(1) No 6 ZPO allows a witness to refuse to testify if it is a person:

> ... to whom facts are entrusted, by virtue of [its] office, profession or status, the nature of which mandates [its] confidentiality, or the confidentiality of which is mandated by law, where [its] testimony would concern facts to which the confidentiality obligation refers.

With reference to this, the witness has to be obliged by law to keep information and files secret that it receives, especially by virtue of his office. Such an obligation can arise out of Section 203 of the Criminal Code (StGB).[816] Here, public officials are specifically mentioned in Section 203(2) No 1 StGB as persons who are obliged under threat of punishment to hold information secret. With reference to Section 11(1) No 2 StGB, public officials are civil servants or judges or persons who otherwise carry out public functions or who have otherwise been appointed to serve with a public authority or other agency or have been commissioned to perform public administrative services regardless of the organisational form chosen to fulfil such duties. The members of the Bundeskartellamt are at least civil servants and carry out public functions. Therefore, they are public officials and hence obliged to protect secrets, especially business secrets.[817] Although Section 384 No 3 ZPO protects secrets as well, the Bundeskartellamt would not usually be able to base a refusal upon this because Section 384 No 3 ZPO is not applicable regarding secrets of the proceeding parties.[818] It can be concluded, therefore, that the regulations found in Sections 142 to 144 ZPO are not suitable for gaining access to the files of the Bundeskartellamt.

Secondly, a claim to gain access to files of the Bundeskartellamt can be based on Section 406E stop (in conjunction with Sec 46 OWiG[819]). A public proceeding

[816] See J Damrau, 'ZPO § 383 Zeugnisverweigerung aus persönlichen Gründen' in T Rauscher and W Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, vol 2 (4th edn, CH Beck 2013) at para 31; S Scheuch, '§ 383 Zeugnisverweigerung aus persönlichen Gründen' in V Vorwerk and C Wolf, *Beck'scher Online-Kommentar ZPO* (19th edn CH Beck 2015) at para 21.1.

[817] See e.g. BVerfGE 115, 205 at 230; BGH GRUR 2003, 356 at 358 – *Präzisionsmessgeräte*; BGH GRUR 2009, 603 at para 13 – *Versicherungsuntervertreter*.

[818] J Damrau (n 816) at para 13.

[819] Law on misdemeanours, *Gesetzes über Ordnungswidrigkeiten* (OWiG).

in front of a competition authority constitutes a criminal case in its wider sense. As a consequence, the regulations of the StPO come into effect. According to Section 406E(1) StPO, the aggrieved party of the cartel has a right of access to the documents of the competition authority as long as he is able to claim a legitimate interest. For example, that could arise from Section 33(3) GWB.

However, Section 406E(2) StPO regulates a right to refuse the claim. In its first two sentences, the paragraph states that:

> Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation, also in another criminal proceeding, appears to be jeopardised.

Therefore, a claim can be refused if another criminal proceeding, here especially, an investigation or infringement proceeding of the Bundeskartellamt, appears to be jeopardised.[820] Furthermore, it is possible to allow partial access to files.[821] In its decision in *Pfleiderer v Bundeskartellamt II*,[822] the Regional Court of Bonn (*Amtsgericht Bonn*) stated that the right of a victim to get access to the information to examine its chances of success in a proceeding does not mean that the claimant has to have the right to gain access to all files.[823] Even here, it is necessary to find a balance between the interests of information of the victim and the rights of the defendant to protect its own secrets and especially the right to data protection.[824] In particular, the optional mentions in the leniency application which are produced by and incriminate the leniency applicant.[825] Also, with reference to the privilege against self-incrimination (*nemo tenetur* principle) and the reliance on the confidentiality of the submitted files, it will only be possible to allow access to files other than the files of leniency applications.[826] Furthermore, in its balancing test, the Regional Court of Bonn decided that it was necessary to protect the files of the leniency application in order to uphold the attractiveness and acceptance of the leniency programme. Therefore, the court refused the application to disclose leniency files, referred to the refusal-clause of sentence 2 of Sec 406e(2) StPO and put the wording into the concrete terms of a risk of interference in the fact-finding.[827]

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[820] See H Dück, A Eufinger and M Schultes, 'Das Spannungsverhältnis zwischen kartellrechtlicher Kronzeugenregelung und Akteneinsichtsanspruch nach § 406e StPO' [2012] EuZW 418, 420.

[821] H Dück, A Eufinger and M Schultes (n 820) 420; A Zabeck, 'stopp § 406e [Akteneinsicht]' in R Hannich, *Karlsruher Kommentar zur Strafprozessordnung* (7th edn, CH Beck 2013) at para 2.

[822] AG Bonn, NJW 2012, 937 – *Pfleiderer II*.

[823] Ibid.

[824] Esp. AG Bonn, NJW 2012, 937 – *Pfleiderer II*; See as well A Zabeck (n 821) at para 6.

[825] AG Bonn, NJW 2012, 937 – *Pfleiderer II*.

[826] So auch H Dück, A Eufinger and M Schultes (n 820) (420-1) und AG Bonn, GRUR-RR 2012, 178 – *Pfleiderer*.

[827] AG Bonn, GRUR-RR 2012, 178 – *Pfleiderer*; C Seitz, 'Public over Private Enforcement of Competition Law?' (n 95) 138.

According to the wording of Section 406e(1) StPO as a facultative provision (*shall be refused*, not *has to be refused*), the competition authority has to decide about an application to gain access to files on dutifully discretion.[828] This opinion is reflected by the ruling of Directive 2014/2014/EU. Therefore, it is not necessary to find a different solution or regulation on the possibility of gaining access to files in the possession of the national competition authority. However, with reference to the principle of effectiveness, it would be recommended to specify the reasons for a refusal in competition law cases based on the regulations in Directive 2014/104/EU. However, even if it will not be regulated, the wording of Section 406e(1) StPO has to be read in relation to Directive 2014/104/EU, and it is therefore necessary to uphold the decision of *Pfleiderer v Bundeskartellamt II* and the refusal of access to leniency files.

4.3.1.2 Conclusion: Implementation of a general right of access to files in the possession of a national competition authority under national law de lege ferenda

Under German law, the wording of Section 406e(1) StPO allows an application under the scope of Directive 2014/104/EU. Therefore, it is not necessary to find a different solution or regulation on the possibility of gaining access to files in the possession of the national competition authority. However, with reference to the principle of effectiveness, it would be recommended to specify the reasons for a refusal in competition law cases based on the regulations in Directive 2014/104/EU. However, even if it will not be regulated, the wording of Section 406e(1) StPO has to be read in relation to Directive 2014/104/EU, and it is therefore necessary to uphold the decision of *Pfleiderer v Bundeskartellamt II* and the refusal of access to leniency files.

4.3.2 Pre-action disclosure of files in the possession of the defendant under German law

4.3.2.1 No general rule of pre-action disclosure of files in the possession of the defendant

In general, there is no regulation on pre-trial discovery under German law.[829] Only in special law regulations are claimants entitled to gain access to files in the possession of the defendant or other third parties. That includes regulations, e.g. in

[828] A Zabeck (n 821) at para 5.

[829] W-H Roth, 'Private Enforcement of European Competition Law – Recommendations Flowing from the German Experience' in J Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer 2007) 77-8 with reference to Sec 20(5) GWB; C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195 para 29; H Weyer, 'Gemeinschaftsrechtliche Vergaben für das nationale Zivilverfahren' [2000] EuR 145.

copyright law (Sec 101a UrhG[830]), trademark law (Sec 19 MarkenG[831]) and patent law (Sec 140b PatG[832]) as well as property law (Sec 809 BGB). However, there is no regulation about pre-action disclosure for competition law cases.

Nevertheless, it could be possible to establish a regulation of pre-action discovery based on the principle of good faith under Section 242 BGB by applying the given regulations by analogy on civil proceedings based on an infringement of competition law. This requires that a gap in the regulation is present and that this legal gap is against the intention of the law-giver. A legal gap exists where there is no explicit regulation or an existing regulation cannot be interpreted as applicable to the given case. On the one hand, there is no explicit or interpretable regulation in the German competition law regulation, the GWB.[833] On the other hand, the general regulations about civil proceedings and access to files of the other party in court and during civil proceedings, Sections 142 to 144 ZPO,[834] could be interpreted as extending the right of access to files and discovery in court and pre-action.[835]

Section 142(1) ZPO states that:

> [the] court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference. The court may set a deadline in this regard and may direct that the material so produced remain with the court registry for a period to be determined by the court.

In addition to this, Section 144(1) ZPO says that:

> [the] court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report. For this purpose, it may direct that a party to the proceedings or a third party produce an object in its possession, and may set a corresponding deadline therefor. The court may also direct that a party is to tolerate a measure taken under the first sentence hereof, unless this measure concerns a residence.

Both regulations together can be read as a distinct disclosure regulation for civil proceedings that directly apply to applications for disclosure during a trial. Only referencing to the wording of both sections, it is not clear whether the

[830]German Copyright Act, *Gesetz über Urheberrecht und verwandte Schutzrechte* (Urheberrechtsgesetz – UrhG).

[831]German Trade Mark Act, *Gesetz über den Schutz von Marken und sonstigen Kennzeichen* (Markengesetz – MarkenG).

[832]German Patents Act, *Patentgesetz* (PatG).

[833]German Act Against Restraints of Competition, *Gesetz gegen Wettbewerbsbeschränkungen* (GWB).

[834]Civil procedure code of Germany, *Zivilprozessordnung* (ZPO).

[835]GM Beckhaus, *Die Bewältigung von Informationsdefiziten bei der Sachverhaltsaufklärung – Die Enforcement-Richtlinie als Ausgangspunkt für die Einführung einer allgemeinen Informationsleistungspflicht in das deutsche Zivilrecht* (Mohr Siebeck 2010).

regulations about producing evidence by the defendant under Section 142 ZPO (and Section 143 ZPO) and the possibility of assessment of evidence by the claimant or third parties under Section 144 ZPO are solely applicable to applications in trial and not pre-action. However, the case law of the German courts ruled very clearly that Sections 142 to 144 ZPO are not a matter of discovery and only restrict the burden of proof.[836] It is still necessary for the claimant to substantiate its pleading.[837] The court itself has to choose whether it believes the claimant or whether it wants to see further documents about the pleading of the claimant from the defendant. The claimant has the right to order the production of evidence by the defendant.[838] Furthermore, the claimant has to refer directly to a document in the possession of the defendant.[839] Therefore, the claimant has to know about the existence of the document and not just that it is in its possession. Therefore, it is not possible to interpret the regulations of Sections 142 to 144 ZPO in the sense of a right of discovery or a general pre-action discovery proceeding.

This indicates that there is a legal gap because there is no explicit regulation about pre-action disclosure under the German law of civil proceedings or competition law in particular, and existing regulations about in-trial disclosure cannot be applied to a pre-trial action. Furthermore, an analogous application requires that the legal gap is contrary to the concept adopted by the law-giver and, thus, the law-giver would regulate the issue in the proposed manner.

With reference to the existing regulations in copyright law (Sec 101a UrhG), trademark law (Sec 19 MarkenG), patent law (Sec 140b PatG) and property law (Sec 809 BGB), the lawgiver has recognised the lack of regulation and has shown

[836]Clearly expressed by BGH NJW 2007, 2989 at 2992 as well as BGH WM 2010, 1448 at 1451; G Rühl, 'Die Begrenzung des § 142 ZPO durch das Anwaltsprivileg' [2012] ZZP 25, 33; See e.g. BGH WM 1995, 341; BGH NJW 2007, 155; BGH NJW-RR 2007, 1393; BGH WM 2014, 1379; OLG Stuttgart NJW 2007, 2989 at 2991.; I Saenger, 'Grundfragen und aktuelle Probleme des Beweisrechts aus deutscher Sicht' (2008) 121 ZZP 139, 146 ff.; J Zekoll and J Bolt, 'Die Pflicht zur Vorlage von Urkunden im Zivilprozeß – Amerikanische Verhältnisse in Deutschland?' [2002] NJW 3129, 3130; R Greger, 'Ein Beitrag des Prozessrechts zur Versachlichung der fiktiven Reparaturkostenabrechnung' [2002] NJW 1477, 1478; G Wagner, 'Urkundenedition durch Prozeßparteien – Auskunftspflicht und Weigerungsrechte' [2007] JZ 706, 712; A Stadler, 'ZPO § 142 Anordnung der Urkundenvorlegung' in H-J Musielak and W Voit, *Zivilprozessordnung, Kommentar* (12th edn, Vahlen 2015) at para 1; Cf Steuer S, 'Justizreform – von außen betrachtet' [2000] WM 1889; Oberheim R, 'ZPO-Reform Update 1: Grundzüge' [2002] JA 408, 412; Konrad S, 'Der Schutz der Vertrauenssphäre zwischen Rechtsanwalt und Mandant im Zivilprozess' [2004] NJW 710; Kraayvanger J and Hilgard MC, 'Urkundenvorlegung im Zivilprozess. Annäherung an das amerikanische "discovery"-Verfahren?' [2003] NJ 572, 573.

[837]BGH NJW 2007, 2989; BGH WM 2014, 1379; BGH WM 2010, 1448; BGH WM 1995, 341; H Wöstmann, 'ZPO § 144 Augenschein; Sachverständige' in I Saenger, *Zivilprozessordnung* (n 513) at para 1-2.

[838]BGH NJW 2007, 155; H Wöstmann, 'ZPO § 142 Anordnung der Urkundenvorlegung' in I Saenger, *Zivilprozessordnung* (n 513) at para 1.

[839]A Stadler, 'ZPO § 142 Anordnung der Urkundenvorlegung' (n 836) in H-J Musielak and W Voit, *Zivilprozessordnung, Kommentar* (12th edn, Vahlen 2015) at para 4; Reichold K, '§ 142 Anordnung der Urkundenvorlegung' in H Thomas and H Putzo, *Zivilprozessordnung, Kommentar* (36th edn, CH Beck 2015) at para 1; H Wöstmann, 'ZPO § 142 Anordnung der Urkundenvorlegung' (n 838) at para 4.

a willingness to regulate the matter of disclosure. Further, there is no indication that the lawgiver has not recognised the matter in competition law. It seems more likely that the lawgiver did not want to regulate disclosure in competition law as it is regulated in the mentioned laws.

Therefore, the analogous application of the pre-action discovery rules fails because the legal gap is not contrary to the intention of the German legislator and hence it is not possible to establish a regulation of pre-action discovery based on the principle of good faith under Section 242+BGB.

4.3.2.2 Conclusion

Under German law, the requirement to transpose the European ruling in Directive 2014/104/EU is made more difficulty because, as mentioned above, there is no possibility of pre-trial disclosure de lege lata. Therefore, it is necessary to implement the ruling of Art 5 Directive 2014/104/EU in the national competition regulation in the GWB. Regarding the existing regulations of pre-trial disclosure in copyright law (Sec 101a UrhG), trade-mark law (Sec 19 MarkenG), patent law (Sec 140b PatG) and property law (Sec 809 BGB), it is necessary to provide a detailed regulation about pre-trial disclosure for civil damage claims based on an infringement of European competition law. Therefore, the German law-giver should produce a regulation like Section 89B GWB under the chapter Civil Claims of the title Proceedings where it rules a pre-trial disclosure regulation according to Directive 2014/104/EU.

4.4 Conclusion: Follow-on claims as the most effective approach to civil proceedings and the implementation of Directive 2014/104/EU into national law

Considering the problems in establishing a general law of disclosure to get access to information or documents in the possession of the defendant, it is possible that a proceeding or decisions of the European Commission or other national competition authorities of the Member States have the effect of a civil damage proceeding. Based on the approach in Regulation 1/2003, these claims are known as follow-on claims in contrast to stand-alone cases without any proceeding of the competition authorities.

In summary, it can be stated that the effectiveness of private enforcement of European competition law is based on effective access to pre-trial information and the possibility to use files in the possession of the defendant or the competition authority to establish a case. Regarding this, European law stresses the necessity

to improve the possibility for claimants to gain access to relevant files. However, on the other hand, it is apprehensive about negative effects, especially the possibility of overly-broad and burdensome disclosure obligations, including the risk of abuse and interference in the European leniency regime. Furthermore, the law has to consider the general principle of protection of confidential business information.

Regarding the possibility of pre-action disclosure and access to files in the possession of the defendant, European law, and especially the recent Directive 2014/104/EU, requires the implementation of a general right of disclosure of files in the possession of the defendant or other party of the proceeding in national law. Although this proceeding has to be based on the principles of plausibility and proportionality, EU law does not regulate the question of limitation of the scope of disclosure. The Directive rules that files are disclosable even if they contain confidential information and the national civil court has the duty to protect the legal interest of the involved or third parties, e.g. by blacking parts of the files not relevant for the case. Under English law, the transposition is quite easy because the law in force allows a wide pre-trial disclosure and recognises the EU case law. However, with reference to the principle of effectiveness it is recommended to specify the reasons for a refusal in competition law cases based on the regulations in Directive 2014/104/EU. Under German law, it is necessary to create a new regulation about pre-trial disclosure in the GWB that is analogous to copyright law, trademark law, patent law and property law.

In addition, the chapter showed that follow-on claims seem to be the most efficient way of claiming damages based on an infringement of competition law because it is not necessary to prove an infringement if a national competition authority or the European Commission already adopted an infringement decision. The focal point is the binding effect of the infringement decision. Since Directive 2014/104/EU not only decisions of the European Commission are binding, but also decisions of the national competition authority in which the civil damage claim proceeds. However, infringement decisions of the competition authority of the Member State in which the civil proceeding is pending and decisions of foreign national competition authorities only work as prima facie evidence.

However, the national civil courts are only bound in the question of an infringement of competition law, not for damages or causality. Therefore, it is still necessary for the claimant to get access to files relevant to prove these points. The law in force rules on access to documents in the possession of the European Commission and the protection of applicants of the European leniency programme under EU secondary law. Besides the possibility of the claimant using the public information of the Commission, the claimant is also entitled to apply for pre-trial discovery mainly under Regulation (EC) 1049/2001 (Transparency Regulation). This regulation provides the rules that govern the rights of every EU citizen to gain access

to documents in the possession of any EU institution. Although the main principle is to gain public access to documents, Regulation (EC) 1049/2001 provides a number of exceptions when the application can be refused. Although the ECJ clarified that the European Commission has to provide a concrete and individual examination for each requested document before refusing the application, the Commission has shown a reluctance to provide documents for a possible claimant under this provision.

However, the ruling of European law under Directive 2014/104/EU states that the Member States have to provide a national regulation about disclosure of files in the possession of the national competition authority. Here, the courts have to decide on a case-by-case basis and apply a balancing test. The Member States have to ensure that leniency statements and settlement submissions are secured for disclosure. In contrast to the disclosure of files in the possession of the defendant, in Section 406E(1) StPO German law already allows access to files in the possession of the competition authority and protects the files of leniency applicants according to the ruling under Directive 2014/104/EU. Therefore, it is not necessary to find a different solution or regulation to make it possible to gain access to files in the possession of the national competition authority. However, with reference to the principle of effectiveness it is recommended that the reasons for a refusal in competition law cases are specified based on the regulations in Directive 2014/104/EU. Even if it is not regulated, the wording of Section 406e(1) StPO has to be read in relation to Directive 2014/104/EU, and it is therefore necessary to uphold the decision of *Pfleiderer v Bundeskartellamt II* and the refusal of access to leniency files. Under English law, the regulations that are applicable for gaining access to files of the CMA and the CAT are generally the same as those that apply to disclosure of files in the possession of the other parties; it is only necessary to clarify the refusal grounds according to Directive 2014/104/EU which are slightly different to files in the possession of the defendant.

5. Conclusion

In summary, it can be said, firstly, that private enforcement of European competition law is underdeveloped, but still necessary as access to individual justice.

With reference to a purely quantitative analysis, the number of cases of damage claims is marginal in relation to the number of fine decisions by the Commission and they are more in relation to the number of imposed undertakings. This is based on the history of competition law in Europe. However, with reference to the basis of European competition law in the antitrust law of the US, the strong position of the European Commission (and the other national competition authorities) in public enforcement is the key difference to US competition law which is largely based on private enforcement because it lacks public enforcement authorities.

Furthermore, the effectiveness of the European leniency programmes is a reason for weak private competition law enforcement. The information gathering of competition authorities within public enforcement proceedings is based on a procedural and institutional inquisitorial system. The given rights of the European Commission make its fine proceedings an effective information gathering system and thus an effective way of detecting and proving an infringement of European competition law, especially Art 101 TFEU. Moreover, the Commission has to rely on members of cartels to apply for leniency and therefore to disclose a hidden infringement, i.e. cartel. On the other hand, the leniency programme is efficient because it gives psychological incentives to the members of the cartel to disclose the infringement and to obtain fine immunity. This psychological phenomenon is based on the so-called Prisoners Dilemma of the Game Theory. Therefore, an efficient leniency programme has to offer effective protection to its whistle-blowers. However, this protection policy is in conflict with an effective private enforcement because the private plaintiffs have to provide evidence of an infringement.

That goes against the general burden of proof in civil damage claims. Under German law, Sec 33(3) GWB – the core regulation about civil damage claims based on an infringement of competition law – requires the proof of damages to be causally based on the infringement and the culpability of the infringer besides an infringement of Art 101 or 102 TFEU (or the equivalent regulation of Sec 1 or Secs 19-21 GWB). In addition, English law requires a link between the infringement and the damage. Although the requirement to provide a link between the infringement and the damage

is a significant simplification for the claimant in competition law cases, it is still necessary to bring evidence about a causal link between the infringement of Art 101 or 102 TFEU and the suffered damage. For the quantification of the damage, the English lawgivers want to introduce a rebuttable presumption of loss based on a presumption that a cartel had increased its prices by a fixed amount.

On the other hand, private enforcement and especially civil damage necessary to achieve access to individual justice. Based on the basic definition of justice by Aristotle and his distinction between universal and individual justice, as well as corrective and distributive justice, it is necessary for a legal enforcement system to achieve the aims of all forms of justice. It is therefore necessary for a legal system to promote individual justice as well as ensure a system of effective enforcement of individual rights of every victim guaranteed by law to promote universal justice. Furthermore, universal justice and distributive justice are connected and can be achieved by an effective punishment regime, i.e. public enforcement. Regarding Aristotle's moral definition of distributive justice, he describes how it is an equal allocation of goods, and justice can be described as a good itself and an equal allocation of justice is a way to achieve distributive justice. Therefore, the strict distinction between universal and distributive justice as part of individual justice as set out by Aristotle is diffuse or ambiguous. Therefore, public enforcement is a complement to a (private) system of restitution in providing individual and corrective justice. The primary goal of private law enforcement is compensation of victims for damages caused by competition law infringements. In consequence, even if private enforcement has an impact on deterrence and universal justice, public enforcement is indispensable.

Secondly, because of the underdevelopment, it is necessary to implement a general right of pre-action disclosure and access to files in the possession of the competition authorities to improve the effectiveness of private enforcement of European competition law.

Whereas the general burden of proof in adversarial procedural systems works quite well and is a matter of fair proceeding, it is a reason for the weakness of private enforcement in competition law cases because the relevant evidence for a successful claim is in the possession of the defendant. As mentioned above, cartels are a form of organised crime, and it is a common phenomenon that externals find it difficult to gather evidence, especially for the infringement of the law itself and the suffered harm. Furthermore, customers only have the documentation about their contracts with their direct suppliers, and they usually do not know anything about the internal cartel agreement yet this agreement is the main infringement of the competition law. Therefore, it is necessary to find a mechanism to provide access to that evidence for the plaintiff whilst not bypassing the principle of the adversarial system.

It would seem that German and English law found a way to handle the information asymmetry in competition law cases regarding the burden of proof in civil damage claims based on an infringement of Art 101 and 102 TFEU. Under German law, Sec 287 ZPO allows the estimation of damages by the court. Moreover, with reference to the information asymmetry of evidence in competition law cases, the courts do not impose high requirements on the presentation of evidence as a basis for the estimation. On the other hand, the ORWI decision of the Federal Court of Justice of Germany leads to the conclusion that it would support the inapplicability of the passing-on defence under German law. Whereas the first is compatible with the Directive 2014/104/EU and also recognises the Communication and Practical Guide of the European Commission on quantification of harm, the latter has to be amended with reference to the adverse Art 13 of Directive 2014/104/EU which requires that the Member States shall ensure that the passing-on defence is applicable. Under English law, the claimant has to provide evidence for a causal link between the infringement and the damage. For the quantification of the damage itself, the English lawgivers want to introduce a rebuttable presumption of loss based on the presumption that a cartel had increased its prices by a fixed amount. With reference to the Communication on the quantification of harm by the European Commission, that solution could help to improve private enforcement of European competition law.

Furthermore, follow-on claims are an effective way of harmonising cooperation between public and private enforcement of European competition law. The central element of the effectiveness of follow-on claims and its advantage over stand-alone cases is the binding effect of the administrative decisions of the competition authorities and the cessation of the burden to prove that infringement. Although, if the facts of the cases are congruent, the national civil court is bound by the factual as well as legal evaluation of the case, it is not automatically an infringement of the binding effect if a national court dismisses a civil damage claim even if the European Commission or a national competition authority proved an infringement of Art 101 or 102 TFEU. This is because the infringement of competition law is only one part of a civil damage claim and the binding effect is limited to that infringement.

Beside this, prior to Directive 2014/104/EU there was no regulation about the binding effect of infringement decisions of national competition authorities of the Member States. With reference to the ruling in Directive 2014/104/EU, this question has to be distinguished in decisions of the competition authority in the same Member State in which the civil proceeding is placed and national competition authorities of other Member States. Art 9(1) of Directive 2014/104/EU rules that of infringement decisions of the national competition authorities in the same Member State in which the civil proceeding is placed have an irrefutable binding effect. On the other

hand, decisions of foreign national competition authorities only work as prima facie evidence in a civil proceeding as per Art 9(2) Directive 2014/104/EU.

To allow an effective claim and to provide evidence for the facts that are not part of the binding effect, European law emphasises on access rights for the claimant to files in the possession of the competition authority and the defendant. Therefore, Directive 2014/104/EU obliges the Member States to implement regulations about access to files in the possession of the national competition authority as well as in the possession of the defendant. Thus, national courts are, on the one hand, entitled to order the disclosure of files in the possession of the national competition authority on a case-by-case basis and apply a balancing test according to Directive 2014/104/EU. On the other hand, this recent EU law requires the implementation of a disclosure proceeding based on the principles of plausibility and proportionality. This requires that facts sufficient to support the plausibility of the claim be made reasonably available, that it is possible to pinpoint or narrow the evidence and that a court considers the application of disclosure as proportionate to the expense of the obliged party. Furthermore, Art 5(4) of Directive 2014/104/EU rules that files are disclosable even if they contain confidential information and the national civil court has the duty to protect the legal interests of the involved or third parties, e.g. by blacking parts of the files not relevant for the case.

Under English law, the emphasis of providing information is pre-action disclosure of files in the possession of the defendant. The standard regulation about disclosure under English law applies in civil damage claims based on an infringement of competition law in the High Court and covers the disclosure proceeding of files on which a party (usually the claimant) relies and that have an adverse effect on the case. On the other hand, the CAT also has the power to order a disclosure but that is regulated in its own procedural law. On the other hand, the regulations that are applicable in order to gain access to the files of the CMA and the CAT are generally the same as are applicable for disclosure of files in the possession of the other parties.

In opposition to this, German law puts the emphasis on access to files in the possession of the competition authorities. Under German law, the wording of Section 406e(1) StPO allows an application under the scope of Directive 2014/104/EU. Therefore, it is not necessary to find a different solution or regulation on the possibility of gaining access to files in the possession of the national competition authority. However, with reference to the principle of effectiveness, it would be recommended to specify the reasons for a refusal in competition law cases based on the regulations in Directive 2014/104/EU. On the other hand, the requirement to transpose the European ruling in Directive 2014/104/EU is made more difficulty because there is no possibility of pre-trial disclosure de lege lata. Therefore, it is necessary to implement the ruling of Art 5 Directive 2014/104/EU in the national competition regulation in the GWB.

Regarding the existing regulations of pre-trial disclosure in copyright law (Sec 101a UrhG), trademark law (Sec 19 MarkenG), patent law (Sec 140b PatG) and property law (Sec 809 BGB), it is necessary to provide a detailed regulation about pre-trial disclosure for civil damage claims based on an infringement of European competition law. Therefore, the German lawgiver should produce a regulation like Section 89B GWB under the chapter Civil Claims of the title Proceedings where it rules a pre-trial disclosure regulation according to Directive 2014/104/EU.

In summary, it can be stated that the effectiveness of private enforcement of European competition law is based on effective access to pre-trial information and the possibility to use files in the possession of the defendant or the competition authority to establish a case. Regarding this, European law stresses the necessity to improve the possibility for claimants to gain access to relevant files.

Finally, it is necessary to protect the documents provided by the leniency regimes to uphold the effectiveness of public enforcement and to streamline the overall effectiveness of enforcement of European competition law.

This is necessary because both forms of enforcement are necessary and have different aims. The primary goal of private law enforcement is the compensation of victims for damages caused by competition law infringements. The main outcome for private claims for damages is to establish corrective justice. Therefore, even if private enforcement has an impact on deterrence and universal justice, public enforcement is indispensable. On the other hand, it suffices to look to the workload of competition authorities to see that public enforcement can only be concentrated on the most damaging infractions of competition law. With regard to the deterrent effect, it is just a minor weakness but, with reference to justice, it leads to a major problem. That enforcement gap or gap of justice can only be bridged through a combined law enforcement with a strong private part avoiding the intervention-oriented approach of public competition law enforcement.

Regarding the effectiveness of public enforcement, an effective leniency regime is the key point of information gathering for the competition authorities. Although the Commission has the right to investigate a breach of Art 101 or 102 TFEU, in practice it is quite difficult to recognise a breach of competition law and to find evidence for it. With reference to the proceedings of the European Commission from September 2006 to June 2014, approximately every fine proceeding is based on a leniency application. Transferring the situation from the so-called Prisoners Dilemma of Game Theory to a competition law scenario, the decision making of the members of a cartel is affected by the possibility of immunity or the reduction of fines if they confess and cooperate with the competition authorities to help to uncover and collect evidence of the breach of competition law. In a competition law context, it is therefore always preferable for a member of a cartel to co-operate with the competition authorities and to apply for a leniency programme. Besides

the investigation effect, leniency regimes have a deterrent effect too. If a member of cartel cannot be sure that the other members of the cartel are not cooperating with the competition authorities, they are less likely to join a cartel.

Therefore, it is necessary to protect leniency documents provided by members of the cartel to ensure the effectiveness of the leniency program. With reference to the landmark decision of the ECJ in *Pfleiderer v Bundeskartellamt*, English and German courts have accepted the need to protect whistle-blowers. Due to this, the courts have to take a decision on a case-by-case basis to protect the legally protected interests of the leniency applicants. However, the ruling of European law under Directive 2014/104/EU states that the Member States have to provide a national regulation about disclosure of files in the possession of the national competition authority. Here, the courts have to decide on a case-by-case basis and apply a balancing test. The Member States have to ensure that leniency statements and settlement submissions are secured for disclosure. In contrast to the disclosure of files in the possession of the defendant, in Section 406E(1) StPO German law already allows access to files in the possession of the competition authority and protects the files of leniency applicants according to the ruling under Directive 2014/104/EU. Therefore, it is not necessary to find a different solution or regulation to make it possible to gain access to files in the possession of the national competition authority. However, with reference to the principle of effectiveness it is recommended that the reasons for a refusal in competition law cases are specified based on the regulations in Directive 2014/104/EU. Even if it is not regulated, the wording of Section 406e(1) StPO has to be read in relation to Directive 2014/104/EU, and it is therefore necessary to refuse access to leniency files. Under English law, the regulations that are applicable for gaining access to files of the CMA and the CAT are generally the same as those that apply to disclosure of files in the possession of the other parties; it is only necessary to clarify the refusal grounds according to Directive 2014/104/EU which are slightly different to files in the possession of the defendant.

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