



Sanchez Graells, A., & Odudu, O. (2017). The interface of EU and national tort law: Competition law. In P. Giliker (Ed.), *Research Handbook on EU Tort Law* (pp. 154-183). (Research Handbooks in European Law series). Edward Elgar Publishing. <https://www.e-elgar.com/shop/gbp/research-handbook-on-eu-tort-law-9781785365713.html>

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The interface of EU and national tort law: Competition law

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To be published in

P Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar, 2017).

Abstract

This chapter aims to assess the framework enabling private parties to enforce competition law and the implications this has both in relation to the evolution of national tort law in EU Member States, and for an incipient *acquis* of EU tort law. It considers how the law has evolved since the CJEU in *Courage v Crehan* confirmed that those able to show that they have suffered loss as a result of a competition law violation are able to recover compensatory damages, and the progress made since the adoption of Directive 2014/104/EU on antitrust damages. The chapter focuses on four selected topics: the erosion of the requirement of fault; the erosion of individual responsibility; the extension of recoverable losses; and modifications to the burden of proof arising from a presumption of damage resulting from certain types of anticompetitive behaviour. It concludes by questioning whether traditional tort law doctrines at Member State level can survive under the pressure of these EU law developments. The chapter indicates areas of uncertainty that may serve to guide future research efforts.

Keywords

Competition law, tort law, EU tort law, damages actions, Directive 2014/104/EU, objective liability, joint liability, several liability, forms of damage, causation, legal presumption, quantification of damages.

JEL Codes

K13, K21, K41.

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1. Introduction

When the Court of Justice ruled that the EU Treaties were not merely treaties in international law, enforceable only by their signatories, but created a *sui generis* legal order in which individuals can enforce EU Treaty obligations in the national courts, the rationale offered was that '[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [256 TFEU] and [257 TFEU] to the diligence of the Commission and of the Member States'.¹ The system of dual vigilance means that EU competition law may be enforced not only by the European Commission and competent public authorities in the Member States, but also by private individuals through the national courts.²

The task of enforcement has historically fallen on public authorities, in no small part due to the difficulties that private parties face in demonstrating substantive infringements of competition law without access to the significant investigative powers that public authorities hold. Extensive powers enabling public enforcement activities have been conferred on both the Commission and NCAs by both EU and national legislation.³ Whilst public enforcement was dominated initially by the European Commission, over time public enforcement has progressively been decentralised in favour of the Member States' National Competition Authorities (NCAs),⁴ their activities being coordinated through the European Competition Network (ECN).⁵

¹ *Van Gend en Loos v Administratie der Belastingen*, C-26/62, EU:C:1963:1, emphasis added. See also JHH Weiler, 'The transformation of Europe' in *The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration* (Cambridge, CUP, 1999) 20, and N Kroes, 'More private antitrust enforcement through better access to damages: an invitation for an open debate' SPEECH/06/158 (2006).

² *BRT v SABAM*, C-127/73, EU:C:1974:25, paragraph 16; *Guérin automobiles v Commission*, C-282/95 P, EU:C:1997:159, paragraphs 39-40; *Tetra Pak Rausing SA v Commission*, T-51/89, EU:T:1990:41, paragraph 42; *Kühne & Heitz*, C-453/00, EU:C:2004:17, paragraph 20; and Articles 1(1); 1(2); and 6 of Council Regulation (EC) No 1/2003 [2003] OJ L 1/1.

³ Mainly, by means of Regulation 1/2003 (n 2) and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 of the Treaty on the Functioning of the European Union], as repeatedly amended; consolidated version available at <http://data.europa.eu/eli/reg/2004/773/2015-08-06> (last accessed 29 July 2016). Usually in domestic competition acts, which are complemented by general administrative and public law provisions. On the issues that the diversity of national approaches create, see Commission Staff Working Document, *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, SWD(2014) 231/2, available at http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf (last accessed 29 July 2016).

⁴ K Cseres, 'Comparing Laws in the Enforcement of EU and National Competition Laws' (2010) 3(1) *European Journal of Legal Studies* 7.

⁵ F Cengiz, 'Multi-level governance in competition policy: The European Competition Network' (2010) 35(5) *European Law Review* 660. The coordination is not harmonisation and formally the EU and domestic public enforcement systems coexist. *Walt Wilhelm and Others v Bundeskartellamt*, C-14/68, EU:C:1969:4. The parallel existence of public enforcement regimes is emphasised in *DHL Express (Italy) and DHL Global Forwarding (Italy)*, C-428/14, EU:C:2016:27.

Alongside the shift of enforcement from Commission to NCAs that is crystallised in Regulation 1/2003 sits a desire for private parties to play their role in securing compliance with EU competition law obligations.⁶ The effort to encourage private parties to enforce EU competition law was catalysed by the judgment of the Court of Justice in *Courage and Crehan*,⁷ amplified by *Manfredi*,⁸ which makes clear that the possibility of claiming compensatory damages encourages compliance with the obligations that Articles 101 and 102 TFEU impose.⁹ Thus it is now well established that:

*‘the practical effect of the prohibition laid down in [Articles 101 and 102 TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition’.*¹⁰

It is clear that compensation for actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*) must be available.¹¹ By making it possible to recover compensatory damages private parties have an incentive to enforce competition law obligations adding to the public enforcement effort.

Whilst private parties are interested in compensation, an accepted purpose of public enforcement is to deter infringements in general and so encourage compliance.¹² What role do private parties play in the general deterrence aspect of competition law enforcement? Compensatory damages may create incentives to comply with competition law obligations by removing or reducing the benefits of non-compliance. It would seem, at least in part, that private enforcement is also intended to promote this general deterrence.¹³ When private claimants seek to demonstrate an infringement of competition law that has not previously been demonstrated by a public enforcement decision,¹⁴ the purpose of the action is closer to the system of dual vigilance mentioned above, and the action may achieve both a deterrent and a compensatory effect. Conversely, when a private claimant merely seeks damages following-on from a prior public enforcement decision, the goal of the action is solely compensatory.¹⁵

⁶ N Dunne, ‘Antitrust and the Making of European Tort Law’ (2016) 36(2) *Oxford Journal of Legal Studies* 366-399.

⁷ *Courage and Crehan*, C-453/99, EU:C:2001:465.

⁸ *Manfredi*, C-295/04, EU:C:2006:461, paragraphs 60 to 64.

⁹ *Manfredi*, EU:C:2006:461, paragraph 39.

¹⁰ *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 21.

¹¹ *Courage and Crehan*, EU:C:2001:465, paragraph 29; *Manfredi*, EU:C:2006:461, paragraphs 62, 95 and 100; and Dunne (n 6) 368.

¹² This can be seen from Articles 7 and 23(2) of Regulation 1/2003.

¹³ *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* (OJ C 167/19, 13.6.2013), para.1

¹⁴ In case of parallel private and public proceedings, Regulation 1/2003 sets out coordination mechanisms that exceed the purpose of our discussion. See also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles [101 and 102 of the Treaty on the Functioning of the European Union] [2004] OJ C 101/54.

¹⁵ To date, most private enforcement actions have been of a follow-on nature. Whilst this is unlikely to change in the future, see J Drexler, ‘Consumer Actions after the Adoption of the EU Directive on Damage Claims for Competition Law Infringements’ (2015) Max Planck Institute for Innovation and Competition Research Paper No.

However, legal developments have grouped together the rules applicable to both stand-alone and follow-on actions, which creates some complications (as discussed throughout this chapter). It is argued that the promotion of general deterrence in competition law through national tort law regimes unduly distorts the latter.

In order to flesh out the ways in which the use of tort to provide a remedy for those suffering from a competition law violation, and the specific requirements of Directive 2014/104/EU, put pressure on domestic tort law systems of the Member States, this chapter is structured as follows. It first describes how competition law infringements give rise to torts in national law (2), before turning to consider the erosion of the requirement of fault (3), the creation of special rules of causation (4), the erosion of the idea of individual responsibility (5), and the extension of recoverable losses (6). The final conclusions put these issues in the broader context of the discussion on the emergence of EU tort law (7).

2. Competition infringements giving rise to a tort in national law

Whilst public authorities have an express statutory framework setting out specific enforcement powers, no such framework exists for private individuals. Despite the adoption of Directive 2014/104/EU on competition damages actions,¹⁶ the private enforcement of EU competition law remains dependent on the existence of national remedies and procedural rules, subject only to the general requirements of the EU principles of effectiveness and equivalence.¹⁷ As a result of infringing EU competition rules, an entity may find themselves to have invalidated a contract. Actions in the national court are often brought to determine the validity of, and if valid to enforce, the contract. This type of action has been common (if not always successful) due to the explicit provision on automatic

15-10, available at <http://ssrn.com/abstract=2689521> (last accessed 1 August 2016). See however, **Case 1241/5/7/15 (T) Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others** [2016] CAT 11 and *Socrates Training Limited v The Law Society of England and Wales*: <http://catribunal.org/237-9150/1249-5-7-16-Socrates-Training-Limited.html>

¹⁶ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 L 349/1. For discussion, see S Peyer, 'The Antitrust Damages Directive – much ado about nothing?', in M Marquis and R Cisotta (eds), *Litigation and Arbitration in EU Competition Law* (Cheltenham, Edward Elgar, 2015) 33; and P van Cleynenbreugel, 'Embedding Procedural Autonomy: The Directive and National Procedural Rules', in M Bergström, M Iacovides and M Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond*, vol. 8 Swedish Studies in European Law (Oxford, Hart, 2016) 99 and ff.

¹⁷ Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules* (2004), <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> (last accessed 29 June 2016). See B J Rodger, (ed) *Competition Law: Comparative Private Enforcement and Collective Redress across the EU*, International Competition law Series no. 56 (Alphen aan den Rijn, Wolters Kluwer, 2014).

contractual voidness in Article 101(2) TFEU.¹⁸ Private enforcement may also occur through tort-based claims before the national courts of the Member States.¹⁹ A remedy is available when (i) a competition law infringement is demonstrated; and (ii) the way that the competition law infringement occurs satisfies all the elements of a recognised tort in national law. When bringing an action for (ii) as a result of (i) the national court is bound by a number of rules and presumptions that EU law imposes and which consequently modify the national tort law system. The procedure and nature of the remedy otherwise remain subject to the:

*‘detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [Union] law, provided that such rules observe the principles of equivalence and effectiveness’.*²⁰

The jurisprudence of the Court of Justice however increasingly seeks to prescribe procedural and substantive standards applicable to national tort-based mechanisms used to enforce obligations owed under EU competition law.²¹ This indirect means of remedy²²—recovery through tort—suffers when the objective of allowing private parties to enforce competition law is not aligned with the general objectives pursued by the law of torts—*ie* when general deterrence of competition infringements is added to the standard sole or paramount tort goal of compensation for those that have suffered as a result of tort.²³ This creates tension between domestic laws on torts and the demands placed on such

¹⁸ See O Odudu ‘Competition Law and Contract’ in *D Leczykiewicz and S Weatherill (eds), The Involvement of EU Law in Private Law Relationships, Studies of the Oxford Institute of European and Comparative Law* (Oxford, Hart Publishing, 2013) 395-415. For discussion of private enforcement beyond compensatory damages see S Peyer, ‘Compensation fallacy – private antitrust enforcement and the law of torts’, in J Galloway (ed), *Intersections of Antitrust: Policy and Regulations* (Oxford, OUP, forthcoming) and generally F Wilman, *Private Enforcement of EU Law before National Courts* (Cheltenham, Edward Elgar, 2015) 193 and ff.

¹⁹ See *Garden Cottage Foods Ltd v Milk Marketing Board* (1983) A.C. 130 (breach of statutory duty, Per Lord Diplock, 141, though see Lord Wilberforce at 151); *Newson Holding Limited v IMI Plc* [2013] EWCA Civ 1377 (unlawful means conspiracy) and *Air Canada & Ors v Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024 (unlawful interference with businesses by unlawful means and conspiracy to injure). Generally, see D Ashton and D Henry (eds), *Competition Damages Actions in the EU: Law and Practice* (Cheltenham, Edward Elgar, 2013); N B Gutta, *The Enforcement of EU Competition Rules by Civil Law* (Antwerpen, Maklu, 2014); and M Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (Oxford, OUP, 2015).

²⁰ *Courage and Crehan*, EU:C:2001:465, paragraph 29; *Manfredi*, EU:C:2006:461, paragraph 54.

²¹ See, for example, *Pfleiderer*, C-360/09, EU:C:2011:389; *Commission v EnBW*, C-365/12 P, EU:C:2014:112; *Kone and Others*, C-557/12, EU:C:2014:1317; *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717; *Schenker & Co. and Others*, C-681/11, EU:C:2013:404.

²² Or enforcement deficit, as discussed by M Dougan, *National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation* (Oxford, Hart Publishing, 2004) esp 386-387.

²³ Whether domestic tort law systems aim exclusively or only primarily to the provision of compensation is the object of increasing scholarly debate and an issue bound to raise in other contributions to this book. For the purpose of this contribution, our simplified position is that compensation is at least the prime or paramount goal of tort law systems and that their instrumentalisation to accommodate deterrence goals is problematic. Generally, on this issue, see J Steele, *Tort Law. Text, Cases, and Materials* (Oxford, OUP, 3rd Ed., 2014) ch 1, the contributions by Geistfeld and by Cane to J Oberdiek, *Philosophical Foundations of the Law of Torts* (Oxford, OUP, 2014); or G Schwartz, ‘Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice’ (1997) 75 *Texas Law Review* 1801.

laws by those seeking to vindicate their competition law rights—often at the expense of the internal coherence of domestic systems of tort and rules of civil procedure. National systems are left with two options: either they contain the modifications required to torts when used to vindicate rights resulting from an infringement of EU competition law (or some category of economic torts arising as a result of an infringement of EU law)—or they revise the entirety of their tort law rules in order to accommodate these needs. While the first option creates division within the domestic tort and civil law system, the second option may present a risk of denaturalisation of tort law rules. Ultimately, though, it is possible neither options is available and that the domestic tort law systems of the Member States are pushed towards a dynamic of hybridisation. These are considerations to which we return in our conclusions.

3. Eroding the fault requirement

It is a common element of the tort law rules of most Member States that tort liability depends on a requirement of fault, and strict or no-fault liability is an exception.²⁴ This is certainly the case in English law, where fault is generally required for liability in tort.²⁵ By contrast, competition law infringements may occur without fault.²⁶ Since fault is not required before a competition law infringement is established, but may be required to give rise to an actionable tort in national law, there is no remedy through tort for the competition law infringement and therefore no incentive to vindicate the right. The concern is expressed in the Commission's 2005 Green paper on competition law damages actions, noting that the need to demonstrate fault may result in an insurmountable hurdle to recovery and sought to identify ways in which this barrier might be overcome.²⁷ In its 2008 White paper on competition law damages actions the Commission made a number of proposals as to how national tort-based remedies could be recovered when an EU competition law violation was demonstrated.²⁸ The first proposal was to have an irrebuttable presumption of fault, as was already the position for some torts in some Member States.²⁹ The second proposed measure was to require an EU competition law infringement to give rise to a presumption of fault under national law and for that presumption to be rebuttable only when it is demonstrated that a reasonable person applying a high standard of

²⁴ Ashurst (n 17), comparative report, 3.

²⁵ W V Horton Rogers, 'Fault under English Law', in P Widmer (ed), *Unification of Tort Law: Fault* (The Hague, Kluwer, 2005) 65.

²⁶ See *AC-Treuhand v Commission*, EU:C:2015:717, paragraph 31, with reference to *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143, showing a passive infringement.

²⁷ European Commission, *Green Paper on Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52005DC0672> (last accessed 1 July 2016).

²⁸ European Commission, *White Paper on Damages actions for breach of the EC antitrust rules*, COM(2008) 165 final, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0165> (last accessed 1 July 2016).

²⁹ Ashurst (n 17), comparative report, 3.

care could not have been aware that the conduct restricted competition.³⁰ This second proposal was not carried forward to the 2013 proposal for a Directive on competition damages claims, and the final version of Directive 2014/104/EU does not include any rules on fault requirements.³¹

Whilst fault is not necessary to establish a substantive infringement of competition law, it is necessary in order to impose a fine. One approach to preserving the fault requirement in national law may be to presume fault only when this is established to the requisite level necessary to impose a fine. It might however be questioned whether the manner in which fault is established for the purpose of imposing a sanction would be sufficient to establish fault in a national tort-based claim. The weak sense in which fault is used for the purpose of competition law sanctions can be seen in *Schenker*, with the Court of Justice considering whether—having received legal advice that their conduct was lawful—the undertaking intentionally or negligently infringed the competition rules so that the imposition of a sanction was warranted.³² The Court of Justice considered that intention or negligence must be determined by considering whether the undertaking is aware, or could not have been unaware, of the effects that its conduct might have on competition and not by whether the undertaking is aware that its conduct infringes competition law.³³ Legality relies on a difficult distinction between anti-competitive effects and the consequences of normal competition, but expert advice does not exonerate the undertaking from sanctions when the wrong assessment is made.

The Court of Justice has recognised that it is permissible for the national remedy for a breach of EU law to be predicated on a showing of fault.³⁴ Its case law however has severely eroded the actual relevance of this requirement. Instead, because (a) a competition law infringement may arise without fault; and (b) a remedy must be made available; there is (c) pressure within national law to have a tort-based remedy that may be awarded without fault. This is achieved by presuming rather than demonstrating fault:

³⁰ Ibid, paragraph 2.4. Also K Stanton, 'New Forms of the Tort of Breach of Statutory Duty' (2004) 120 *Law Quarterly Review* 324

³¹ 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, explanatory memorandum, paragraph 3.3, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF> (last accessed 1 July 2016).

³² *Schenker & Co. and Others*, EU:C:2013:404, paragraph 31.

³³ *Schenker & Co. and Others*, EU:C:2013:404, paragraph 37.

³⁴ Commission Staff Working Paper Accompanying the White Paper Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, [168]-[179], available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf (last accessed 29 July 2016).

'intention to injure the claimant need not be proved specifically in antitrust tort proceedings. Rather, it is indisputably presumed from the fact that the anticompetitive practice specifically harm the claimant'.³⁵

The system of objective liability used in substantive competition law seems to imply the same standard of objective liability for tort-based remedies. This presumption, if not the removal of fault *stricto sensu*, dramatically reduces the role of any fault requirement. An obligation to remedy arises independent of fault.³⁶

4. Causation

The domestic tort law systems of the Member States rely on a requirement of causation in order to impose liability in tort. Causation requirements differ between Member States, and the Court of Justice has deferred to domestic rules concerning causation requirements in competition damages actions. As stressed in *Manfredi*,

'In the absence of [Union] rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules ..., including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed.'³⁷

The application of such domestic causation requirements can result in significant hurdles for the compensation of purely economic losses of a diffuse nature, such as those deriving from competition law infringements, due to unavoidable causal uncertainty.³⁸ In order to overcome that difficulty, at least in part, Article 17(2) establishes a rebuttable presumption that cartel infringements cause harm. Cartels are defined in Article 2(14) of Directive 2014/104/EU as

'an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and

³⁵ C A Banfi, 'Defining the Competition Torts as Intentional Wrongs' (2011) 70(1) *Cambridge Law Journal* 83-112, 84.

³⁶ F Pace, 'The ECJ's Judgment in Kone and Private Enforcement's "Negative Harmonization Framework": Another Brick in the Wall' (2015) 2(1) *Italian Antitrust Review* 133-143.

³⁷ *Manfredi*, EU:C:2006:461, paragraph 64.

³⁸ I Lianos, 'Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe' (2015) 34(1) *Yearbook of European Law* 170; C Lombardi, *Causation in private enforcement of competition law: a comparative analysis of divergent national approaches* (2015) PhD thesis, University of Trento, available at <http://eprints-phd.biblio.unitn.it/1445/> (last accessed 3 August 2016).

customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.'

Cartel conduct is that which is deemed most harmful and consequently universally condemned. Article 17(2) removes the need to show that a cartel has caused harm, but this should not be necessarily constructed as a final legal determination that all cartels cause harm and economic theory has shown how there are instances in which cartels may actually not be harmful.³⁹ Thus, the presumption in Article 17(2) of Directive 2014/104/EU is rebuttable. One way in which the presumption may be rebutted is by demonstrating that the conduct did not cause harm to the claimant because the claimant managed to pass that harm on down the distribution chain. The ability to make this claim however is constrained by Article 13 of Directive 2014/104/EU, which establishes that:

*'the defendant in an action for damages can invoke as a defence ... the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.'*⁴⁰

Conversely, an indirect purchaser, relying on Article 14(2) of Directive 2014/104/EU, is deemed to have proven that harm has been passed on simply by showing (i) an infringement of competition law, thus triggering 17(2) in the case of a cartel violation of Article 101(1) TFEU; (ii) that the direct purchaser has suffered harm; and (iii) the indirect purchaser has purchased goods or services that were the object of competition law infringement, or has purchased goods or services derived from or containing them. It is then for the defendant to show that the harm was not, or was not entirely, passed on to the indirect purchaser. The combined effect of these evidentiary rules is that claimants benefit from a presumption of the existence of harm, and defendants are subjected to a demanding evidentiary burden to rebut the presumption. National procedural rules on reversal of the burden of proof and persuasion are excluded.⁴¹ This makes it advantageous to describe a number of claims as competition claims.⁴²

This system of presumptions aims to strengthen the financial incentive to sue (below 6) and to promote damages actions as an effective deterrence mechanism, but it also seems to create significant pressure towards the award of damages in situations where the existing evidence would not have been sufficient to support the claim but for the presumptions, or where it would have

³⁹ FP Maier-Rigaud, C Milde and M Helm, 'Textbook Cartels versus the Real Deal: Should We Be Surprised if Some Cartels Do Not Lead to Damage?' (2015), available at <http://ssrn.com/abstract=2578317> (last accessed 3 August 2016).

⁴⁰ This is linked to the rules on disclosure of evidence in Directive 2014/104/EU (Arts 5 to 8). However, the detail of the disclosure system created by those provisions is not relevant for the purposes of our discussion.

⁴¹ Dougan (n 22) 369-373.

⁴² Below n 101.

sufficed to exonerate the defendant on the basis of a reversal of the burden of proof concerning the absence of economic harm on the claimant's position. Ultimately, the system is open to a risk of over-recovery in cases where the interplay of the presumptions allows for both the direct purchaser and the indirect purchaser to be compensated—that is, in cases involving the same facts, where the defendant is unable to demonstrate the existence of passing-on for the purposes of excluding its liability towards the direct purchaser (Art 13), but it is also unable to disprove it in order to exclude its liability towards the indirect purchaser (Art 14).⁴³ This situation of potential over-recovery is only tackled incidentally through a requirement that Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on [Art 12(5)], which is to be complemented by the future Commission's guidelines on how to carry out that calculation (Art 16).⁴⁴ This however seems insufficient to ensure absence of over-recovery where procedures are initiated in ways that do not make all claims by direct and indirect buyers susceptible of an overall assessment. The issues of identification of harm, the 'appropriability' of diffuse economic losses through 'crystallised' or 'packaged' claims supported by an extraordinary and complex set of presumptions that stack the cards against competition infringers and the ensuing creation of a risk of excessive recovery, seem more than potentially problematic if such creation of special procedural and evidentiary rules is perceived as altering the fairness of the tort law system and potentially leading to excessive litigation on the basis of the modified evidentiary requirements. This can be justified in the case of stand-alone competition actions, where there are social gains derived from these private enforcement efforts, but it can be more difficult to justify in the case of follow-on actions where deterrence objectives had already been exhausted. This can also be particularly problematic if these special rules are extended to other areas of commercial or consumer litigation.

Finally, in terms of evidentiary rules, it is also worth stressing that another of the aspects where the private enforcement of EU competition law can create significant pressures on traditional tort law mechanisms in the Member States concerns the quantification of damages.⁴⁵ It is worth noting that Directive 2014/104/EU contains some specific rules on the quantification of damages. Firstly, Article

⁴³ However, the likelihood of such development can be doubted, see E Truli, 'Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition Law Infringements' (2016) 7(5) *Journal of European Competition Law & Practice* 299, 309.

⁴⁴ This should have been completed in May 2016, but the Guidelines are not yet available at the time of writing the final version of this chapter. For further information, see <http://ec.europa.eu/competition/antitrust/actionsdamages/> (last accessed 10 November 2016).

⁴⁵ See F P Maier-Rigaud and U Schwalbe, 'Quantification of Antitrust Damages', in D Ashton and D Henry (eds), *Competition Damages Actions in the EU: Law and Practice* (Cheltenham, Edward Elgar, 2013) 210; and G Niels and R Noble, 'Quantifying Antitrust Damages – Economics and the Law', in K Hüschelrath and H Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe*, ZEW Economic Studies no 48 (Berlin, Springer, 2014) 121. See also G Notaro, 'Methods for Quantifying Antitrust Damages: The Pasta Cartel in Italy' (2014) 10(1) *Journal of Competition Law & Economics* 87.

17(1) reiterates the general requirements of the principle of effectiveness, whereby '*neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult*'. Putting this in connection with the right to full compensation enshrined in Article 3(1) of the Directive, it seems likely to contribute to the erosion of strict quantification rules in the Member States. Secondly, Article 17(1) also foresees the possibility for the domestic courts to '*estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available*'. Coupled with the presumption of harm for cartel violations in Article 17(2) (above), this means that the courts of the Member States are under a *de facto* obligation to quantify damages in every cartel case that reaches their docket, even in the absence of precise evidence to support that calculation. Diverging interpretations of when '*it is practically impossible or excessively difficult precisely to quantify the harm*' could tend to perpetuate national differences in that regard, so it would not come as a surprise if this element of the 'duty to quantify' was litigated in front of the Court of Justice sooner rather than later.

Given the difficulty of such a quantification exercise, the European Commission has adopted *soft law* to that effect, not only in the form of the *Communication on quantifying harm*,⁴⁶ but also by means of a *Practical Guide*⁴⁷ meant to offer assistance to both the national courts and to the parties involved in actions for damages by providing insights on the types of harm normally caused by anticompetitive practices and an overview of the main methods and techniques available to quantify such harm in practice. The existence of these instruments may serve to create convergence in methodological approaches to quantification of economic damage, which can then spill-over to other areas of commercial litigation such as intellectual property. Additionally, Article 17(3) of Directive 2014/104/EU foresees that Member States shall ensure that, upon request of a national court, an NCA may assist the court with respect to the determination of the quantum of damages where that NCA considers such assistance to be appropriate.⁴⁸ This may also have an impact on the way in which courts allow for *amicus curiae* interventions in tort law cases, which can also have spill-over effects in other

⁴⁶ 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 C 167/19.

⁴⁷ *Practical Guide: 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, http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (last accessed 7 July 2016).

⁴⁸ For a discussion of how these soft law instruments and cooperation mechanisms are likely to affect domestic courts' competence in this type of tort actions, see K Wright, 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive' (2016) 43(1) *Legal Issues of Economic Integration* 15, 28-31.

areas of civil litigation, particularly where there is an administrative agency with competences or expertise broadly relevant to the resolution of the dispute.

5. Erosion of the idea of individual responsibility

EU competition law infringements are committed by *undertakings*. An undertaking has been defined as an economic unit.⁴⁹ This economic unit is any entity engaged in economic activity, regardless of the legal status of the entity engaged in that activity.⁵⁰ However, a decision that the competition rules have been infringed must be addressed to one or more natural or legal persons in order that the decision may be enforced.⁵¹ Article 299 TFEU provides that acts of the Commission imposing ‘pecuniary obligations on persons other than States’ are enforceable and governed by Member State’ rules of civil procedure, which are addressed to persons.⁵² The Commission has discretion as to which legal persons within the economic unit to address the decision.⁵³ Under EU competition law the corporate legal person, its officers, and its employees comprise an economic entity *vis-à-vis* third parties and officers and employees may not themselves be the addressees of an infringement decision.⁵⁴ It is neither necessary to demonstrate that the employer authorised or even knew of the infringement.⁵⁵ Similarly, separate legal entities related by common ownership may also form the relevant economic unity and so be liable for a competition law infringement committed by any other legal entity within the grouping.⁵⁶ The principles used to attribute liability for an infringement of EU

⁴⁹ *Mo Och Domsjö AB v Commission*, T-352/94, EU:T:1998:103, paragraph 87; *General Química v Commission*, C-90/09 P, EU:C:2011:21, paragraphs 34–36 and case-law cited.

⁵⁰ *Höfner and Elser v Macrotron*, C-41/90, EU:C:1991:161, paragraph 21. See O Odudu, ‘The meaning of undertaking within 81 EC’ (2005) 7 *Cambridge Yearbook of European Legal Studies* 211-241.

⁵¹ Article 299(1) TFEU provides that decisions of (*inter alia*) the Commission that impose a pecuniary obligation on persons (other than States) shall be enforceable. On this point see Commission Decision (2003/2/EC) *Vitamins* [2003] OJ L 6/1, recital 637.

⁵² The enforceability of decisions made against natural or legal persons is supported by the other language versions of Article 299 TFEU, eg ‘personnes’ in French; ‘persone’ in Italian, and ‘personas’ in Spanish.

⁵³ *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, Joined Cases 6 and 7/73, EU:C:1974:18, paragraph 41; *BPB Industries and British Gypsum v Commission*, T-65/89, EU:T:1993:31, paragraph 154; Opinion of Advocate General Kokott in *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:262, paragraph 36.

⁵⁴ *Suiker Unie and Others v Commission*, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73, and 114/73, EU:C:1975:174, paragraph 539. This position is also adopted in the United Kingdom: *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* (Also known as *Re Supply of Ready Mixed Concrete (No.2)*) [1995] 1 AC 456. *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, at paras. 19-23 per Longmore LJ and para. 37 per Lloyd LJ.

⁵⁵ *Slovenská sporiteľňa*, C-68/12, EU:C:2013:71, paragraph 28 and *Musique Diffusion Française v Commission*, Joined Cases 100/80 to 103/80, EU:C:1983:158, at paragraph 97.

⁵⁶ *Cascades v Commission*, C-279/98 P, EU:C:2000:626, paragraph 78; *Stora Kopparbergs Bergslags v Commission*, C-286/98 P, EU:C:2000:630, paragraph 37; *KNP BT v Commission*, C-248/98 P, EU:C:2000:625, paragraph 71; *SCA Holding v Commission*, C-297/98 P, EU:C:2000:633, paragraph 27. Advocate General Kokott has explained that ‘the concept of an undertaking and the imputation of responsibility under competition law

competition law have been described as ‘obscure and confused’ or at the very least seen as ‘a shadowy area’ in EU law.⁵⁷

Pushing to take this line of case law further, in a recent case, AG Wathelet proposed the creation of a presumption of (vicarious?) liability of companies for the behaviour of their appointed agents, which would make the principal liable for competition law infringements in which the agent participated.⁵⁸ In order to rebut the presumption and escape liability, the AG proposed that it would be incumbent upon the ‘client’ undertaking to adduce sufficiently convincing evidence (i) relating to the fact that the agent (services provider) had acted outside the scope of the functions that had been entrusted to it, (ii) regarding the precautionary measures taken by the ‘client’ undertaking at the time of designation of the agent and during the monitoring of the implementation of the functions in question, and (iii) regarding the ‘client’ undertaking’s conduct upon becoming aware of prohibited behaviour. Regarding the last condition, and in connection with *Dansk Rørindustri* (above 3), the ‘client’ undertaking would need to distance itself publicly from the forbidden act, prevent its repetition or report it to the administrative authorities. It is worth stressing that the CJEU has rejected this approach and stressed that,

*‘where a service provider offers, in return for payment, services on a given market on an independent basis, that provider must be regarded, for the purpose of applying rules aimed at penalising anti-competitive conduct, as a separate undertaking from those to which it provides services and the acts of such a provider cannot automatically be attributed to one of those undertakings’.*⁵⁹

This does not exclude the possibility of establishing (vicarious) liability for the acts of the agent, but the Court has clarified that

‘an undertaking may, in principle, be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services only if one of the following conditions is met: the service provider was in fact acting under the direction or control of the undertaking concerned, or that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or that undertaking could reasonably

are two sides of the same coin’, in *Commission v Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraph 32.

⁵⁷ J Briggs and S Jordan ‘Presumed Guilty: Shareholder Liability for a Subsidiary’s Infringements of Article 81 of the EC Treaty’ (2007) 8 *Business Law International* 1. See also WPJ Wils, ‘The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons’ (2000) 25 *European Law Review*, 99-116, 101-102. See the call for clarification of in European Parliament Resolution of 9 March 2010 on the Report on Competition Policy 2008 (2009/2173(INI)), para. 50.

⁵⁸ Opinion of AG Wathelet in *VM Remonts and Others*, C-542/14, EU:C:2015:797.

⁵⁹ *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 25.

*have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed’.*⁶⁰

These conditions, and in particular the last one, may still create some uncertainty. However, they seem aligned with the CJEU’s case law on the irrelevance of fault for the purposes of the sanctioning of infringements of competition law, for which it suffices to prove that the undertaking could not have been unaware of the anticompetitive risks of a given (type of) market behaviour (see above 3).

Moving to the arena of damages actions, does the fact that a person is addressed by a finding of infringement mean that that person is responsible for any tort that the EU competition law infringement may reveal? Under national tort rules it would seem necessary to determine whether the conduct of the officers and employees can be attributed to the employer so that the employer can be held vicariously liable. Similarly, the separate legal status of the various legal entities within a single economic entity would imply limited liability.⁶¹ Similarly, an undertaking may be liable for an infringement if it aids another, but would and should that undertaking be liable also in tort?⁶²

Beyond responsibility extended by ignoring the distinction between legal persons, an undertaking is also to be held jointly and severally liable for the harm caused by all other infringing entities. This was provided for explicitly in the Commission’s 2013 proposal for the new Directive on damages claims solely on the basis that:

*‘[w]here several undertakings infringe the competition rules jointly — typically in the case of a cartel — it is appropriate that they be jointly and severally liable for the entire harm caused by the infringement’.*⁶³

This was considered by the Commission to be a justifiable reform proposal on the basis that:

*‘[d]epending on the existing legal framework in the Member States, the introduction of joint and several liability for co-infringers will entail low or no transposition costs’.*⁶⁴

⁶⁰ Ibid, paragraph 33, emphasis added.

⁶¹ See e.g. Davies, Gower, Worthington, and Micheler, *Gower and Davies’ Principles of Modern Company Law* (Sweet & Maxwell, 9th Ed., 2012), at 33-40 and *Imperial Chemical Industries v Commission*, 48/69, EU:C:1972:70, column 632, before noting the German, French, and Belgian law makes parents jointly and severally liable for conduct engaged in by subsidiaries. See also *Prest v Petrodel Resources Ltd* [2013] UKSC 34 per Sumption at para. 16.

⁶² *AC-Treuhand v Commission*, EU:C:2015:717, paragraphs 38 and 39 and C C Talbot, ‘AC-Treuhand, the Scope of Article 101 TFEU, and the Future of Actions for Antitrust Damages’ (2016) 23(1) *Commercial Law Practitioner* 9-14.

⁶³ Above (n 31), explanatory memorandum, paragraph 4.3.3.

⁶⁴ European Commission, *Impact Assessment Report on the proposed Directive on damages actions for breach of the EU antitrust rules*, SWD(2013) 203 final, 64, http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf (last accessed 1 July 2016).

However, beyond the issue of the calculation of transposition costs, for which no authority or explanation is offered, it would seem necessary to assess the impact this could have in terms of the general rules on joint liability in the Member States.⁶⁵ It is possible that joint and several liability for tort or non-contractual damages is already the default rule in most Member States. However, if this is not the case, or the interpretation of which undertakings ‘jointly infringe’ competition law is excessively broad (see below in this same section), there is a risk of unnecessary expansion of passive standing rules that may drag innocent undertakings into costly litigation, even if they end up limiting or excluding any obligation to compensate for damages or can recover them from guilty co-defendants. As we will see below, this is a major issue for small and medium enterprises (SMEs), which may face disproportionate bankruptcy risks as a result of such alteration of standing rules as an implicit effect of the expansion of joint and several liability.

In the adopted version of Directive 2014/104/EU, Article 11(1) contains a rule whereby:

‘undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated’.

This can be problematic because it seems to exclude any domestic rules that, in case of joint liability resulting in recovery judgments against a multiplicity of debtors, could still allow for an apportioning of liability between the joint infringers, as well as domestic rules on excussion benefits that could require exhausting the possibilities of claiming reimbursement from each and all joint tortfeasors before seeking recovery from a given tortfeasor beyond its share of the damages caused. The complication can also derive from the interplay between these rules and bankruptcy law, where reduced payments in the context of the liquidation of one of the tortfeasors may have unclear effects on the value of any residual claims against the rest of them.

These issues of potential distortion of general mechanisms of apportionment of the payments or reimbursements derived from joint infringements of competition law (broadly understood) can be seen in the need for an additional rule in Article 19 of Directive 2014/104/EU to deal with the effects of consensual settlements on subsequent actions for damages. According to this complex rule, in principle, consensual settlements between a claimant and a joint tortfeasor can be limited to the latter’s share of the damages caused, in which case the claim of the settling injured party is reduced by the settling co-infringer’s share of the harm that the infringement of competition law inflicted upon

⁶⁵ Indeed, joint and several liability rules and several-only liability rules diverge in terms of their enforcement costs; see L A Kornhauser, ‘Economic analysis of joint and several liability’, in J Arlen (ed), *Research Handbook on the Economics of Torts* (Cheltenham, Edward Elgar, 2013) 199 and ff.

the injured party (even if the settlement has been for a lower amount, as should be expected). This is coupled with two additional rules, whereby the settling co-infringer cannot be the object of any additional claims and non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer. However, where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer. Ultimately, then, a combined reading of the rules in Article 11(1) and 19(1) of Directive 2014/104/EU can have significant effects beyond tort law and into contract law in the Member States, particularly through the creation of a weak form of reviewability of the terms of the settlement agreement in case of (subsequent) inability to pay by joint tortfeasors—or, at the very least, a very expansive interpretation of implicit *rebus sic stantibus* clauses.

Furthermore, and in order to try to alleviate the draconian effects it could have on undertakings with lesser financial muscle amongst the pool of co-defendants in competition damages claims, the rule of (absolute) joint and several liability of all undertakings that ‘infringed competition law through joint behaviour’ [Art 11(1)] is coupled with exceptions for SMEs⁶⁶ [Art 11(2) and (3)], and for undertakings that have benefitted from immunity from fines under the relevant leniency programmes [Art 11(4)].⁶⁷ According to the first of these exceptions, SMEs are liable only to their own direct and indirect purchasers where (a) their market share in the relevant market was below 5% at any time during the infringement of competition law; and (b) the application of the normal rules of joint and several liability would irretrievably jeopardise their economic viability and cause their assets to lose all their value. But this exception does not apply where: (a) the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or (b) the SME has previously been found to have infringed competition law.

According to the second exception, undertakings that have benefitted from immunity of the fines are to be made jointly and severally liable as follows: (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law (i.e. they enjoy an excussion right). Therefore, immunity recipients are given conditional exemption from joint and several liability, which will only be lifted in case their joint tortfeasors are unable to meet their financial

⁶⁶ As defined in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L 124/36.

⁶⁷ See the various documents that regulate the European Commission’s leniency programme, available at http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html (last accessed 1 August 2016). Each NCA has its own leniency programme, for which there is an ECN model, and the CJEU has ruled that they all operate independently; *DHL Express (Italy) and DHL Global Forwarding (Italy)*, EU:C:2016:27.

obligations. Far from being a situation that can be considered exceptional, it seems clear that Directive 2014/104/EU intends to establish this conditional exemption in narrow terms, particularly by requiring that Member States ensure that any limitation period applicable to these cases is reasonable and sufficient to allow injured parties to bring such actions (which should be determined in view of the eventual existence of bankruptcy proceedings for some or all of the codefendants).

Finally, it is also worth noting that the general rule of Article 11(1) is coupled with additional rules on recovery amongst the jointly liable infringers [Art 11(5) and (6)]. As the general rule for reimbursement, the Directive establishes that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. However, the amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers (which strengthens the partial exemption from joint several liability discussed above). Moreover, to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm. This comes to establish special rules on reimbursement between jointly and severally liable codefendants in damages claims that are also bound to deviate significantly from the general rules applicable under the tort law systems of the Member States.

Overall, this set of rules on joint and several liability includes redistributive policy considerations, such as partial protection of SMEs from the risks of bankruptcy that can derive from having joint liability with potentially much larger co-infringers, as well as broader enforcement policy goals, such as the minimisation of the liability in damages to which leniency applicants are exposed. The intertwining of all these goals is bound to create problems of transposition in many Member States.

Beyond these issues of alteration of the general rules potentially applicable to claims of joint and several liability under the domestic rules of the Member States, and strictly from the perspective of the main rule of (absolute) joint and several liability in Article 11(1) of Directive 2014/104/EU, it is worth emphasising that significant uncertainty arises from the main criterion used to determine which undertakings are deemed to be jointly and severally liable because the ‘circle of relevant tortfeasors’ for these purposes is determined by the fact that they ‘*infringed competition law through joint behaviour*’. Interestingly enough, such concept of ‘joint behaviour’ is not defined in Directive 2014/104/EU and it does not easily match the scope of the prohibition in Article 101(1) TFEU, which refers to the different terms of agreements between undertakings, decisions by associations of

undertakings and concerted practices. Recital (37) of Directive 2014/104/EU not very helpfully indicates that:

‘[w]here several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement’.

In view of the cases discussed above, in a setting where the Court of Justice expands the circle of (co)infringers beyond the undertakings directly and actively engaged in the collusive practices to also include (i) those economic operators that remain passive and fail to oppose the collusion,⁶⁸ (ii) to those that advise the ‘primary’ infringers,⁶⁹ or (iii) (potentially) to those that are represented by the ‘primary’ infringers if there is a certain assumption of risk of anticompetitive effects,⁷⁰ this criterion of ‘joint behaviour’ is bound to require significant clarification by the Court of Justice and no smaller interpretive efforts by the domestic courts of the Member States, particularly those less used to similar mechanisms of joint or extended liability. It can also be problematic in cases where it is controversial whether the infringement of competition law is unilateral, or at least significantly asymmetric, despite involving a plurality of undertakings,⁷¹ and in cases where different defendants participated in different levels of intensity or during different periods of time in long-lasting continued infringements.

All of this can create tensions at the point where the EU rule needs to be coordinated with pre-existing doctrines of joint and several liability at Member State level, especially where the mechanism of joint liability is conceptualised as being limited to defendants substantially in the same position, or having contributed in an equivalent manner to the causation of the damage. It can also be perceived as pushing the conceptualisation of tortfeasor beyond its natural remit and including economic agents that have only very indirectly contributed to the generation of the damage suffered by the claimant, which may trigger difficulties in terms of requirements of proximity between tortfeasor and victim. Overall, the emergence of the rule on joint and several liability seems riddled with complexities, which make it difficult to assess its boundaries.

6. Recoverable Loss

⁶⁸ *Dansk Rørindustri and Others*, EU:C:2005:408.

⁶⁹ *AC-Treuhand v Commission*, EU:C:2015:717.

⁷⁰ *VM Remonts and Others*, EU:C:2016:578.

⁷¹ See *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, EU:C:2009:610.

Not only has the Court sought to expand the number of legal entities the behaviour for which the undertaking can be held responsible, it has also sought to expand the type of loss for which the undertaking can be held responsible.⁷² The need to expand the type of loss for which an undertaking is to be held responsible arises due to the diffuse nature of harm from anti-competitive conduct.⁷³ Competition infringements not only have economic impact on those that are contractually related or operate within the market in which the infringement occurs, but extend to impact those that do not have a contractual relationship and those not trading on that same market.⁷⁴ There is harm to those that would make certain consumption decisions in a competitive market but make different decisions in the distorted market (deadweight losses), loss of quality, loss of variety, reduced innovation, all of which are more difficult to appraise than traditional losses recognised in tort.⁷⁵

The Commission, initially at least, has been reluctant to prescribe the types of loss that may be recoverable in tort in order to provide a remedy for breach of EU competition law.⁷⁶ National torts established when competition law is infringed have provided for compensatory damages.⁷⁷ Claimants however have found it difficult to establish that they have suffered loss, particularly due to the complexities of establishing that the loss suffered has not been passed on further down the value chain when the infringement takes place on a market for intermediate goods⁷⁸ (though see now the presumption of damage, above 4). Owing to the difficulties faced when seeking to prove loss claimants have sought *inter alia* user damages (damages assessed by reference to the fair price for what has been taken from the claimant); exemplary damages (damages additional to an award which fully compensates the claimant for his loss, and which are intended to punish and deter); and restitutionary awards (an award of money assessed by reference to the wrongdoer's gain rather than by reference to the victim's loss). National courts have not proven receptive to the idea that these alternative

⁷² Along the same lines, see N Dunne, '“Umbrella Effects” and Private Antitrust Enforcement' (2014) 73(3) *Cambridge Law Journal* 510, and *ibid*, 'It never rains but it pours? Liability for “umbrella effects” under EU competition law in Kone' (2014) 51(6) *Common Market Law Review* 1813.

⁷³ F Marcos and A Sanchez-Graells, 'Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonising Tort Law through the Back Door?' (2008) 16(3) *European Review Private Law* 469, 475.

⁷⁴ T Eger and P Weise, 'Are Consumers Really the Main Victims of Price Cartels?' (2015) 32 (3/4) *Homo Oeconomicus* 375.

⁷⁵ Above (n 46) and (n 47).

⁷⁶ Commission Staff Working Paper Accompanying the White Paper Damages Actions for Breach of the EC Antitrust Rules (n 34) [194].

⁷⁷ In England, see *Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors* [2007] EWHC 2394 (Ch), at para. [19] – [22], [50]. Regarding the Spanish seminal case of the sugar cartel, see F Marcos, 'Damages claims in the Spanish sugar cartel' (2015) 3(1) *Journal of Antitrust Enforcement* 205-225.

⁷⁸ M Strand, 'Indirect Purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) *European Competition Journal* 361-386; M Siragusa, 'Private Damages Claims – Recent Developments in the Passing-On Defence', in K Hüschelrath & H Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe*, Vol. 48 ZEW Economic Studies (Berlin, Springer, 2014) 229-246.

means of remedying the tort are to be made more generally available when the tort is founded on a competition law infringement than when the tort is otherwise established. Ultimately, expanding the rules applicable when a claim in tort is founded on a breach of competition law threatens the unity of tort law and, more generally, civil law in a given jurisdiction.⁷⁹ More specifically, reasons for reticence have been that compensatory damages provide a sufficient remedy or alternative remedies will leave the claimant unjustly enriched.⁸⁰ Specifically, access to restitutionary awards has been guarded, it being noted:

‘that whatever the law ought to be, it is not (yet) the law that a restitutionary award is available in all cases of tort. In my judgment a restitutionary award is not an available remedy in an anti-trust case. If the law is to be changed, it must be done by a higher court than this one. Moreover, even where a restitutionary award is available, it is generally awarded where an award of more traditionally based compensatory damages would be inadequate to compensate the claimant for the invasion of his rights.’⁸¹

The reluctance to award anything other than compensatory damages is driven by a perception that the function of tort law is to provide compensation.⁸² Thus, when an action in tort is used to provide a remedy for an infringement of EU competition law it would seem natural—given the paramount function of tort—that the remedies available will be based on the compensation principle.⁸³ This is consistent with the task of public action being to deter competition law infringements.⁸⁴ It is also consistent with the idea that private action adds nothing to the deterrence of conduct when public

⁷⁹ M Hellwig, ‘Private damages claims and the passing on defence in horizontal price-fixing cases—An economist’s perspective’, in J Basedow (ed), *Private enforcement of EC competition law* (The Hague, Kluwer, 2007) 121, 122.

⁸⁰ *Devenish Nutrition* (n 77) at para. [24]-[32], [105] and [110]-[117] and *Manfredi*, EU:C:2006:461, paragraphs 87 and 94.

⁸¹ *Devenish Nutrition* (n 77) at para. [108]

⁸² *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, para. 43-45; Simon F Deakin, Angus C Johnston and B S Markesinis, *Markesinis and Deakin’s Tort Law* (7th, Oxford Oxford University Press, 2013) 45; and G Williams, ‘The Aims of the Law of Tort’ (1951) 4 *Current Legal Problems* 137-176.

⁸³ *Manfredi*, EU:C:2006:461, paragraphs 85 and 86, and AG Opinion, EU:C:2006:67, paragraphs 68-70, and P Nebbia, ‘Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?’, (2008) 33 *European Law Review* 23-43. CF Weidt, ‘The Directive on Actions for Antitrust Damages After Passing the European Parliament’ (2014) 35 *European Competition Law Review* 438-444; M Kuijpers and others, ‘Actions for Damages in the Netherlands, the United Kingdom, and Germany’ (2015) 6 *Journal of European Competition Law & Practice* 129-142; FP Maier-Rigaud, ‘Toward a European Directive on Damages Actions’ (2014) 10 *Journal of Competition Law and Economics* 341-360; R van den Bergh and S Keske, ‘Private Enforcement of European Competition Law: Quo Vadis?’ (2007) 3 *European Review of Contract Law* 468-486. For a US perspective see H First, ‘Lost in Conversation: The Compensatory Function of Antitrust Law’ (2010) SSRN eLibrary. For a wider understanding see C Cauffman, ‘Injunctions at the Request of Third Parties in EU Competition Law’ (2010) 17 *Maastricht Journal of European and Comparative Law* 58-86; S Peyer, ‘Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence’ (2012) 8 *Journal of Competition Law and Economics* 331-359; K Yeung, ‘Privatizing Competition Regulation’ (1998) 18 *Oxford Journal of Legal Studies* 581-616.

⁸⁴ AG Opinion in *Manfredi*, EU:C:2006:67, paragraph 64. *Devenish Nutrition* (n 77) at para. 40-55 and 115).

enforcement action has been taken against that same conduct and the same parties (see 1 above).⁸⁵ While public enforcement is meant to prevent the harm in the functioning of the (internal) market that derives from anticompetitive behaviour by imposing fines to deter, there is a view that the role of private actions is solely ‘*to repair the harm suffered because of an infringement*’, which means the remedies available are inherently limited to ‘*a right to compensation*’.⁸⁶ The claim therefore is that *the principal role to be played by private claimants ‘is corrective justice and compensation and not just deterrence’*.⁸⁷ Yet the purpose of dual vigilance—enabling private parties as well as public authorities to enforce EU competition law is not simply to enable compensation to be awarded but to deter infringement and thus secure compliance with EU competition law obligations. Dual vigilance is intended to increase the number of enforcers and the resources devoted to enforcement, so immunising the enforcement (and thus compliance) from the prevailing political support or constraints on public finances.⁸⁸

There has been a long running desire for private parties to vigorously enforce the rights conferred on them by EU competition law and thus contribute to deterring infringements/encouraging compliance.⁸⁹ In the case of stand-alone private enforcement actions, there are social benefits of this (additional) competition law enforcement (everyone benefits from a competitive market place) but the party bringing action shoulders the risk and costs of private enforcement.⁹⁰ How is the conflict between a policy designed to increase compliance through deterrence—private enforcement—and the idea that the remedies available for those enforcing through national tort law are able only to receive compensation to be resolved? Formally at least the Court of Justice recognizes that it is a matter for national law and policy to determine whether objectives other than compensation can be pursued in the national remedial system.⁹¹ There have however been attempts to increase the incentives for those bringing a private enforcement action and this will necessarily affect the conception of who is entitled to a remedy and what that remedy should entail.⁹² The Commission

⁸⁵ *Devenish Nutrition* (n 77) at para. [56]–[64].

⁸⁶ Communication from the Commission on quantifying harm (n 46).

⁸⁷ Lianos (n 38) 176. See also WPJ Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32(1) *World Competition* 3–26.

⁸⁸ *H J Banks & Co Ltd v British Coal Corporation* (Case C-128/92) [1994] ECR I-1209, at para 43, Advocate General’s Opinion and AP Komninos, ‘New prospects for private enforcement of EC competition law: *Courage v Crehan* and the Community right to damages’ [2002] 39 *CML Rev* 447, at p 458.

⁸⁹ This is one focus of the enquiry conducted by Clifford A Jones, *Private Enforcement of Antitrust Law in the Eu, Uk and USA* (Oxford: Oxford University Press, 1999) xliii, 263.

⁹⁰ *Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules*, COM(2005) 672, 19 December 2005, at paras. 38, 52, 192. *Blue Shield v McCready* 457 US 465, 472 (1982).

⁹¹ *Manfredi*, EU:C:2006:461, paragraphs 91 and 98.

⁹² One reason for allowing a claimant to retain any loss that is subsequently passed on is that to make a deduction would reduce the incentive of the party to bring an action: European Commission (2005), *Commission Staff*

makes this clear, writing:

'In designing any system for claiming antitrust damages the main objective must be the efficient and effective enforcement of the antitrust rules. Such a system would ideally be able to accommodate both the deterrence and the compensation aims to some degree. ... Given the above-mentioned complexities, it is, however, likely that a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practice) and efficiency is inevitable.

*It is suggested that the determining factor could be the effective enforcement of [Union] law. If limiting the rights of certain individuals to claim is necessary to ensure a system which is more effective in safeguarding the enforcement of Articles [101 and 102], then it is submitted that such limitations should be acceptable under [Union] law.'*⁹³

Following the national approach as to what may be recovered through tort may not provide a sufficiently great incentive for private parties to take the risk involved in privately enforcing EU competition law.⁹⁴ The Court's increasing emphasis on *effectiveness* makes it probable that what is had in mind is an effective incentive for private parties to enforce EU competition law.⁹⁵ *Kone* provides an example of the expanded nature of the harm for which the tortfeasor is seen as responsible and for which a claimant can recover where the market mechanism is distorted due to the existence of a cartel. Some do not purchase from cartel members, yet the price charged by non-cartel members is higher owing to the existence of the cartel. This overcharge can be recovered from cartel members despite the fact that the relevant transaction takes place at arm's length of the colluding infringers.⁹⁶ Whether that claim was possible under the relevant Austrian tort rules was at issue, particularly because they established that:

*'[a]ny person shall be entitled to seek compensation for injury caused by another person who caused that injury through his fault, whether the injury was caused by breach of a contractual obligation or was unrelated to a contract'.*⁹⁷

The analysis followed by the Court of Justice in this case was objective and abstract, and relied on the mechanics of market mechanisms. According to the Court:

[the] market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer its goods or

Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19 December 2005, at para 38.

⁹³ *Annex to the Green Paper* (n 92) at paras 179-180.

⁹⁴ *Ibid*, at para 38.

⁹⁵ *Ibid*, at paras 40, 121.

⁹⁶ *Kone and Others*, EU:C:2014:1317, paragraph 29.

⁹⁷ Article 1295 of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) as translated in *Kone and Others*, EU:C:2014:1317, paragraph 3.

*services. Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or to the size of the market covered by that cartel, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is, in the absence of that cartel. In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules.*⁹⁸

The Court concludes that:

*‘a loss being suffered by the customer of an undertaking not party to a cartel ... because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard’.*⁹⁹

Thus, the question is whether the ability to recover any loss personally suffered is sufficient incentive to encourage a private party to bring an action that will deter undertakings from causing harm so widely disseminated that no particular claimant suffers a cognisable loss worthy of bringing suit—which can be alleviated in the case of effective class action or collective redress mechanisms that aim to aggregate the economic value of the (class) claim so as to make litigation viable or desirable.¹⁰⁰ In any case, the better question is whether the nature of such harm is inherently unsuited to recovery by private individuals and must be left to public enforcers to deter. Is tort law an appropriate mechanism to remedy, *ex post*, all distortions in the functioning of the market mechanism, or is this primarily a matter for public enforcement to resolve? Or will domestic tort systems expand to compensate for the diffuse effects of all distorted market situations, which can be particularly sensitive in areas concerning financial markets or consumer products?¹⁰¹

Furthermore, it is important to note that the creation of such incentives for private enforcement through damages actions can also be self-defeating for the ultimate goal of ensuring the efficient and

⁹⁸ *Kone and Others*, EU:C:2014:1317, paragraph 29.

⁹⁹ *Kone and Others*, EU:C:2014:1317, paragraph 30.

¹⁰⁰ See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60. For discussion, see D Geradin, ‘Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now?’ (2015) 22(5) *George Mason Law Review* 1079-1101. For critical assessment, in relation to the US, see RH Lande, ‘Class Warfare: Why Antitrust Class Actions are Essential for Compensation and Deterrence’ (2016) 30(2) *Antitrust* 81-85.

¹⁰¹ This issue is likely to become particularly prominent in relation with the LIBOR manipulation cases. For discussion of the adequacy of competition law mechanisms to tackle this type of damage to the working of the market mechanism in regulated financial industries, see AK Pascall, ‘Tail Wagging the Dog: The Manipulation of Benchmark Rates – A Competitive Bone of Contention’ (2016) 39(2) *World Competition* 161-190.

effective (public) enforcement of the competition rules, particularly where the facilitation of private claims would increase the risk of liability of competition law infringers, which can in turn be discouraged from resorting to other mechanisms considered highly enhancing of competition law enforcement, such as leniency programmes and settlement options.¹⁰² In this case, the Commission has also expressed a clear preference towards ensuring the effectiveness of (public) competition law enforcement, but in this case by means of excluding certain procedural rules concerning access to the public file and discovery, so as to insulate to the maximum possible extent leniency applicants from liability.¹⁰³ The same rationale has been used to justify the creation of asymmetrical joint and several liability rules (see above 5). Ultimately, then, it seems that the promotion of the efficient and effective enforcement of EU competition law requires a very complex alteration of the domestic rules on entitlement to remedies and recoverable losses, sometimes in a contradictory manner, so as to accommodate diverging aspects of that same ultimate goal. The extent to which this is feasible in a way that result in foreseeable rules can be doubted.

7. Conclusions

This chapter has shown how the case law of the Court of Justice on the private enforcement of competition law and the specific rules of Directive 2014/104/EU that aim to boost its effectiveness have a significant impact on the tort law systems of the Member States. Rather than autonomous systems, a body of EU principles applicable to national tort law begins to emerge. The chapter has focused on selected issues to shed some light on areas of particular pressure for change or adaptation of domestic systems. It has aimed to stress that the instrumental use of tort law rules for the purposes of increasing the effectiveness of EU competition law through the dual vigilance mechanism creates pressure on domestic systems by trying to accommodate deterrence goals where compensation was the sole (or paramount) concern.

¹⁰² Above n 67. C Canenbley and T Steinvorth, 'Effective Enforcement of Competition Law: Is There a Solution to the Conflict between Leniency Programmes and Private Damages Actions?' (2011) 2(4) *Journal of European Competition Law & Practice* 315-326; C Cauffman, 'The Interaction of Leniency Programmes and Actions for Damages' (2011) 7(2) *Competition Law Review* 181-220; and B Nascimbene, 'Interaction between Leniency Programmes and Damages Actions in Antitrust Law: Perspectives for Collective Redress' (2013) 36(2) *World Competition* 269-283.

¹⁰³ Commission Regulation (EU) 2015/1348 of 3 August 2015 amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 of the Treaty on the Functioning of the European Union] [2015] L 208/3. See also Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 concerning the protection of leniency material in the context of civil damages actions, available at http://ec.europa.eu/competition/ecr/leniency_material_protection_en.pdf (last accessed 31 July 2016).

The erosion of traditional requirements of tort law or non-contractual responsibility systems, such as the requirement of fault (above 3) or the idea of responsibility (above 5), indicate a move towards (quasi)strict civil liability for infringements of competition law. Such (quasi)strict civil liability system is then modified to incorporate policy and redistributive concerns respectively related to the development of leniency programmes and an SME-friendly regulatory environment.

On their part, the creation of special rules on recoverable losses (above 6), and the modifications of the burden of proof via a presumption of harm for cartel offences and rather flexible quantification techniques (above 4), create significant financial incentives for private plaintiffs to engage in damages litigation against competition violators. By recognising diffused economic damage as susceptible of compensation, the developments in the area of private enforcement of EU competition law have tended to isolate, 'crystallise', 'package' and make appropriable damages claims that would otherwise probably be considered too diffuse and indirect as to grant specific rights to compensation. This is likely to result in an imbalance, at least as compared with traditional tort law rules. While these changes can be justified for stand-alone enforcement actions that create additional social benefits through deterrence, their availability for follow-on actions that only seek compensation is difficult to justify. Given that most private damages actions for breaches of EU competition law follow on previous public enforcement interventions, overall, the desirability of these legal developments is open to question.

Overall, the discussion supports the view that the development of mechanisms for the private enforcement of EU competition rules is bound to have a significant impact on the domestic tort law rules of the Member States, which could only be minimised if they decided to create special mechanisms for competition law damages actions and not extend them to other types of tort litigation. However, in the long run, it seems unlikely that such separation can be kept watertight and a certain degree of spill-over to other areas of commercial litigation can be expected. This is not necessarily a positive development at domestic level and does not ensure the emergence or consolidation of efficient rules of EU tort law. However, that assessment is better saved for another occasion.